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FINDING COMMON GROUND ACROSS RACE AND RELIGION:
JUDICIAL CONCEPTIONS OF POLITICAL COMMUNITY
IN PUBLIC SCHOOLS

Stuart Chinn *

Abstract

This article opens with a brief discussion of the recent controversies over race, inclusion, and community on American college campuses, focusing on the events at Yale University during the 2015 fall semester. Yale's controversy is fascinating as one of the most recent, high-profile events that invites a discussion of a deep and persistent issue in American society: how do we construct and maintain a stable political community characterized by enduring differences? I use the Yale example as my jumping-off point for interrogating this question in the context of Supreme Court cases on race and public education, and religion/ideology and public education.

My focus on judicial opinions dealing with public education is motivated by several considerations: elementary and secondary public schools, in particular, constitute perhaps the most direct point of contact between most American children and the state. Thus, these institutions have the opportunity to shape future participants in the American political community and to impart the particular values that will help constitute that community. Relatedly, my focus on judicial conceptions of political community in the public school context provides the key attraction of hearing major national political actors discuss these themes within the illuminating format of principle-based judicial opinions. Given this, and given the centrality of public education, racial identity, and religious identity in American society, I am presuming that the dynamics that these judicial opinions illuminate will illuminate the dynamics present within other types of communities in America.

In this article, I make three primary claims. First, within the judicial opinions that grapple with racial and religious/ideological difference in the context of public education, one might glean a set of judicial beliefs common to both regarding the adhesive force of public education in creating and maintaining political community. More precisely, I will claim that judges have seen public schools as a cultural adhesive force across both types of plurality. The specific manner in

* © 2017 Stuart Chinn. Associate Dean for Programs and Research, Associate Professor, Kenneth J. O'Connell Senior Fellow, James O. and Alfred T. Goodwin Senior Fellow, University of Oregon School of Law. Thanks to Maggie Carlson for excellent research assistance.

which public schools bind students together is by virtue of the physical proximity of students to one another, and their observation in, participation in, and creation of a common culture.

However, this doctrinal comparison yields a key difference too, and this constitutes my second claim: in the race and public education context, the central problem that has appeared in the doctrine—and the main problem that has animated judicial conceptions of community in that context—has been the problem of community-creation. Judges have largely pondered the justifications and limits upon the state’s authority to create racial plurality in public schools. Such arguments proceed from background assumptions of minimal racial plurality absent the contemplated state actions. In contrast, in the religion/ideology and public education context, the major cases and judicial arguments on plurality within public schools are preoccupied with the problems of community-maintenance. Judges have pondered the justifications and limits upon state actions toward maintaining stable communities in public schools in the face of individual claims of religious freedom and competing state claims favoring uniformity. The background presumption in these cases is one of inevitable religious/ideological plurality in public schools, even absent the contemplated state actions.

Finally, I offer a third and final claim: for community-builders, maintenance problems are easier than creation problems. This point, in turn, suggests that, while plurality may be inevitable, plurality within a communal structure holds greater hope for lines of division to be overcome. This is because the culture intrinsic to a community can serve as an adhesive across lines of division. Thus, to the extent that one finds the goals of community and unity to be worthwhile, at least some of the time, this observation implies that mechanisms that situate plurality within community are often preferable to letting plurality persist between distinct communities.

In recent months, much commentary has been written on student activism and engagement in racial issues on university campuses. These events intersect with some of the deepest and most important themes in American law and politics. Among those themes are three in particular, which are the focus of this article: uniformity, diversity, and community. Consider the events at Yale University, one of the most discussed recent instances of campus debate.¹ As has been detailed in a

¹ See, e.g., Jelani Cobb, *Race and the Free Speech Diversion*, NEW YORKER (Nov. 11, 2015), <http://www.newyorker.com/news/news-desk/race-and-the-free-speech-diversion> [<https://perma.cc/7GN8-LCVB>] (discussing the unrest that occurred at Yale University); Jelani Cobb, *What Divides Us?: An Interview with Yale College Dean Jonathan Holloway*, NEW YORKER (Nov. 15, 2015), <http://www.newyorker.com/news/news-desk/what-divides-us-an-interview-with-yale-college-dean-jonathan-holloway> [<https://perma.cc/SN3C-4S98>]

number of publications, an initial email by the Yale Intercultural Affairs Committee in late October 2015 urged students to be sensitive and judicious in their choice of Halloween costumes. The email stated:

Yale is a community that values free expression as well as inclusivity. And while students, undergraduate and graduate, definitely have a right to express themselves, we would hope that people would actively avoid those circumstances that threaten our sense of community or disrespects, alienates or ridicules segments of our population based on race, nationality, religious belief or gender expression.²

(discussing an interview the Dean of Yale College); David Cole, *Yale: The Power of Speech*, N.Y. REV. BOOKS (Nov. 18, 2015), <http://www.nybooks.com/daily/2015/11/18/yale-power-of-speech/> [<https://perma.cc/WH5D-R4HA>] (discussing the controversy surrounding Yale protests and similar controversies on other college campuses); Conor Friedersdorf, *The New Intolerance of Student Activism*, THE ATLANTIC (Nov. 9, 2015), <https://www.theatlantic.com/politics/archive/2015/11/the-new-intolerance-of-student-activism-at-yale/414810/> [<https://perma.cc/D2TY-GLXB>] (discussing the nature of modern-day student activism); Todd Gitlin, *Why Are Student Protesters So Fearful?*, N.Y. TIMES: THE OPINION PAGES (Nov. 21, 2015), https://www.nytimes.com/2015/11/22/opinion/sunday/why-are-student-protesters-so-fearful.html?_r=0 [<https://perma.cc/4BMG-VG67>] (discussing the message students convey in response to Yale events); Nicholas Kristof, *Mizzou, Yale and Free Speech*, N.Y. TIMES: THE OPINION PAGES (Nov. 11, 2015), <https://www.nytimes.com/2015/11/12/opinion/mizzou-yale-and-free-speech.html> [<https://perma.cc/4HTN-TCBH>] (discussing students across the nation speaking about racial tensions in universities, specifically University of Missouri and Yale); Suzanne Nossel, Opinion Editorial, *Who Is Entitled to Be Heard?*, N.Y. TIMES: THE OPINION PAGES (Nov. 12, 2015), <https://www.nytimes.com/2015/11/12/opinion/who-is-entitled-to-be-heard.html> [<https://perma.cc/6TYB-QHZW>] (discussing racial tensions at Yale and consequent protests); Meghan O'Rourke, *Yale's Unsafe Spaces*, NEW YORKER: CULTURAL COMMENT (Nov. 13, 2015), <http://www.newyorker.com/culture/cultural-comment/yales-unsafe-spaces> [<https://perma.cc/6TRQ-RTB7>] (discussing the rights and reasonable "expectations" of students at Yale); George Packer, *A Hard Rain at Mizzou and Yale*, NEW YORKER: DAILY COMMENT (Nov. 14, 2015), <http://www.newyorker.com/news/daily-comment/the-struggles-at-mizzou-and-yale> [<https://perma.cc/X9AF-N9AY>] (discussing students at Yale and University of Missouri protesting racial oppression); Liam Stack, *Yale's Halloween Advice Stokes a Racially Charged Debate*, N.Y. TIMES (Nov. 8, 2015), <https://www.nytimes.com/2015/11/09/nyregion/yale-culturally-insensitive-halloween-costumes-free-speech.html> [<https://perma.cc/JV8P-59NV>] (discussing racial tension at Yale); Rachel L. Swarns, *Yale College Dean Torn by Racial Protests*, N.Y. TIMES (Nov. 15, 2015), <https://www.nytimes.com/2015/11/16/nyregion/yale-college-dean-torn-by-racial-protests.html> [<https://perma.cc/76A8-CGRD>] (discussing the struggles of the Dean of Yale College over student protests).

² FIRE, *Email from the Intercultural Affairs Committee*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Oct. 27, 2015), <https://www.thefire.org/email-from-intercultural-affairs/> [<https://perma.cc/R6Y6-2XYL>].

Following this, Erika Christakis, the associate master of Silliman College (one of Yale's residential colleges), sent an email to the students in that college expressing qualms about the Intercultural Affairs Committee's email for being somewhat paternalistic. As her email stated in part:

I don't wish to trivialize genuine concerns about cultural and personal representation, and other challenges to our lived experience in a plural community. I know that many decent people have proposed guidelines on Halloween costumes from a spirit of avoiding hurt and offense. I laud those goals, in theory, as most of us do. But in practice, I wonder if we should reflect more transparently, as a community, on the consequences of an institutional (which is to say: bureaucratic and administrative) exercise of implied control over college students.³

Christakis's email, however, prompted a strong negative reaction from at least a portion of the student body,⁴ and many quickly linked the email to broader concerns about race at Yale. Among other items, related topics included the underrepresentation of racial minorities in the faculty⁵ and the visible legacy of slavery on campus—most notably in the form of a residential college being named for John C. Calhoun.⁶ A video of Nicholas Christakis—the spouse of Erika Christakis and the master of Silliman College—engaging in a heated discussion with a visibly upset student in the aftermath of the email exchange went viral and helped to elevate this debate in the public consciousness.⁷

Some individuals articulated their views in detail in an “Open Letter to Associate Master Christakis” by “Concerned Yale Students, Alumni, Family, Faculty, and Staff.” As the letter concluded:

To be a student of color on Yale's campus is to exist in a space that was not created for you. From the Eurocentric courses, to the lack of diversity in the faculty, to the names of slave owners and traders that adorn most of the buildings on campus—all are reminders that Yale's history is one of exclusion. An exclusion that was based on the same stereotypes and

³ FIRE, *Email from Erika Christakis: “Dressing Yourself,” email to Silliman College (Yale) Students on Halloween Costumes*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Oct. 30, 2015), <https://www.thefire.org/email-from-erika-christakis-dressing-yourself-email-to-silliman-college-yale-students-on-halloween-costumes/> [https://perma.cc/8VEJ-RT23].

⁴ Cole, *supra* note 1; Stack, *supra* note 1; Swarns, *supra* note 1.

⁵ Cole, *supra* note 1.

⁶ Noah Remnick, *Yale Grapples with Ties to Slavery in Debate over a College's Name*, N.Y. TIMES (Sept. 11, 2015), <https://www.nytimes.com/2015/09/12/nyregion/yale-in-debate-over-calhoun-college-grapples-with-ties-to-slavery.html> [https://perma.cc/SV3L-7SSG]; Stack, *supra* note 1.

⁷ Cole, *supra* note 1; Stack, *supra* note 1.

incorrect beliefs that students now seek to wear as costumes. Stereotypes that many students still face to this day when navigating the university. The purpose of blackface, yellowface, and practices like these were meant to alienate, denigrate, and to portray people of color as something inferior and unwelcome in society. To see that replicated on college campuses only reinforces the idea that this is a space in which we do not belong.⁸

Continued engagement between students and the Yale administration subsequently led to the articulation of a broader plan for campus diversity by university president Peter Salovey. In the opening paragraphs of his message, Salovey states:

I have heard the expressions of those who do not feel fully included at Yale, many of whom have described experiences of isolation, and even of hostility, during their time here. It is clear that we need to make significant changes so that all members of our community truly feel welcome and can participate equally in the activities of the university, and to reaffirm and reinforce our commitment to a campus where hatred and discrimination are never tolerated.

We begin this work by laying to rest the claim that it conflicts with our commitment to free speech, which is unshakeable. The very purpose of our gathering together into a university community is to engage in teaching, learning, and research — to study and think together, sometimes to argue with and challenge one another, even at the risk of discord, but always to take care to preserve our ability to learn from one another.⁹

⁸ Ryan Wilson, *Open Letter to Associate Master Christakis*, DOWN MAG. (Oct. 31, 2015), <http://downat Yale.com/post.php?id=430> [<https://perma.cc/VA2Y-WBEU>].

⁹ Peter Salovey, *Statement from President Salovey: Toward a Better Yale*, YALENEWS (Nov. 17, 2015), <http://news.yale.edu/2015/11/17/statement-president-salovey-toward-better-yale> [<https://perma.cc/7VCK-SNUY>].

As noted above, a number of important questions on racial identity, racial equality, and free speech underlie these disagreements. But most pertinent for this Article is the underlying presumption of “community” in all of these quoted statements. All of the statements invoke an ideal vision of community characterized by a form of unity or commonality—whether that might be an equality of concern and respect for all members, equal inclusion, or equal opportunity to speak (and to be disagreed with). At the same time, each statement contemplates the notion of an ideal community characterized by difference—whether that might be racial, cultural, or ethnic difference, or difference characterized by divergent viewpoints and sensibilities.

Of course, as far as major political disagreements in American history go, the case of Yale in 2015 offers a relatively mild example. Aside from the fact that Yale is a privileged institution,¹⁰ one suspects that there is a limit beyond which political disagreements will never escalate, if only because its students, faculty, and staff are thrown together into a community that is characterized by a degree of intimacy, geographic proximity, and transience that while common to many university communities, may be quite uncommon in comparison to other sectors of American life. Still, even if the Yale example may have limited relevance for other contexts—at least in certain respects—its invocation of the notion of community speaks strongly to the timeliness of inquiries about community at present. The Yale case serves to remind us that such debates over community, commonality, and difference are persistent in our society.

Indeed, references to “culture wars” have long been a staple in American social and political life.¹¹ Such debates have often raised the specter of enduring differences in America, but at times have carried much less optimism than some of the Yale speakers about a broader community being capable of overcoming differences.¹² In this regard, consider two quotations referencing the debate within

¹⁰ Phoebe Maltz Bovy, *Who’s Afraid of Yale Student Privilege?*, NEW REPUBLIC (Nov. 16, 2015), <https://newrepublic.com/article/123912/whos-afraid-of-yale-student-privilege> [<https://perma.cc/T4S4-STBG>].

¹¹ Probably the most recent version of these debates, prior to those in the present, were in the 1990s. *See generally* JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991) (discussing the culture war surrounding education); ARTHUR M. SCHLESINGER, JR., *THE DISUNITING OF AMERICA: REFLECTIONS ON A MULTICULTURAL SOCIETY* (1992) (discussing studies on different cultures present in society); Diane Ravitch, *Multiculturalism: E Pluribus Plures*, 59 AM. SCHOLAR 337 (1990) (discussing how race, ethnicity, and religion have always been a source of conflict in American education).

¹² *See, e.g.*, John Higham’s prominent study of activism in American history. Nativism is defined by historian John Higham as follows:

the Supreme Court over mandatory flag salutes in public schools in the 1940s. In defense of the mandatory flag salute in *Minersville v. Gobitis*,¹³ Justice Frankfurter stated:

The ultimate foundation of a free society is the binding tie of cohesive sentiment. Such a sentiment is fostered by all those agencies of the mind and spirit which may serve to gather up the traditions of a people, transmit them from generation to generation, and thereby create that continuity of a treasured common life which constitutes a civilization. 'We live by symbols.' The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution.¹⁴

However, in later overruling *Gobitis* in the subsequent case of *West Virginia State Board of Education v. Barnette*,¹⁵ Justice Jackson stated for the Court that:

Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.¹⁶

Whether the nativist was a workingman or a Protestant evangelist, a southern conservative or a northern reformer, he stood for a certain kind of nationalism. He believed—whether he was trembling at a Catholic menace to American liberty, fearing an invasion of pauper labor, or simply rioting against the great English actor William Macready—that some influence originating abroad threatened the very life of the nation from within. Nativism, therefore, should be defined as intense opposition to an internal minority on the ground of its foreign (i.e., “un-American”) connections While drawing on much broader cultural antipathies and ethnocentric judgments, nativism translates them into a zeal to destroy the enemies of a distinctively American way of life.

JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860–1925* 4 (2008).

¹³ 310 U.S. 586 (1940).

¹⁴ *Id.* at 596.

¹⁵ 319 U.S. 624 (1943).

¹⁶ *Id.* at 641.

The exchange between Frankfurter and Jackson hints at perhaps the fundamental problem of American political community: in a society that will always be marked by some degree of pluralism, diversity must be accommodated if stability is to be maintained. Yet, even if Frankfurter's position may seem far out of line with modern sentiments, it does hint at a question that continues to occupy us: is there a point at which a community cannot and should not accommodate pluralism in the name of unity?¹⁷ On the one hand, a society or community characterized by too much plurality will have little within it to provide a common ground for bridging differences and binding community members together across the major lines of division. Yet, as Jackson notes,¹⁸ too much of an emphasis on unity by the state or majorities—as a means to contain or remedy those societal differences—opens the door for equally worrisome concerns about the coercion of individuals and repression of differences.

I. INTRODUCTION

This article attempts to probe at these questions of unity and difference in the American political community by examining judicial rulings on public education—specifically judicial rulings dealing with race and public education, and judicial rulings dealing with religiously-based or ideologically-based differences and public education.¹⁹ There are obviously a number of potentially fruitful avenues for interrogating these questions. But the focus of this inquiry on judicial opinions dealing with public education possesses some obvious attractions. For example, because elementary and secondary public schools perhaps constitute the most direct point of contact between most American children and the state, these institutions have the opportunity to shape future participants in the American political community and to impart the particular values that will help constitute

¹⁷ Rawls opens the exploration of his theory of “political liberalism” by asking this fundamental question: “how is it possible for there to exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?” JOHN RAWLS, *POLITICAL LIBERALISM* xxvii (1996).

¹⁸ See *infra* Part III.

¹⁹ Among the cases I discuss that touch on religiously-based and ideologically-based plurality in public schools, the focus of most is on religion. Still, I will alternately refer to these cases as dealing with “religion” or “religion/ideology.” Judges and scholars have attempted to articulate how and why religiously-based beliefs should be treated differently from nonreligious beliefs. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1231–36 (4th ed. 2011) (discussing religion and the Constitution). Yet, I largely treat the two similarly because the commonly-noted distinctions matter less for my purposes. In my argument, both are juxtaposed to race-based plurality, and within this comparison, the issues surrounding religiously-based and ideologically-based plurality overlap with each other to a much greater extent than either overlaps with race-based plurality in public schools.

that community. Not surprisingly then, the topic of education has drawn the sustained attention of scholars focused on some of the deepest questions of American democracy and society.²⁰

Relatedly, my focus on *judicial* conceptions of political community in the public school context provides the key attraction of hearing governing actors examine these questions in the very fruitful context of judicial opinions. Within this form of political communication, we see judges discuss themes such as the pivotal role public schools play in shaping future American citizens, what binds Americans together into a political community, and what points of divergence may be desirable, acceptable, undesirable, or prohibited under the law. And importantly, judges have often discussed these themes, at times, in the language of abstract political, legal, and ethical principles. Thus, even if judicial conceptions of political community may only reflect beliefs specific to a subset of Americans, they have often been stated with admirable clarity, and they have likely been representative of some of the most influential conceptions of political community.

Beyond this focus on education and the judiciary, why focus specifically on racial and religious differences? First, race and religion have historically constituted two of the most significant dimensions of cleavage or segmentation in American society. This history commends these two doctrinal areas as attractive contexts for interrogating judicial thoughts on unity and difference. One suspects that judicial consideration of questions of unity and difference in these cases is aided and enriched by, for example, the weighty background of Jim Crow school segregation,²¹ or the extended history of Catholic-Protestant conflict in the context of elementary and secondary education.²² Second, the comparison of race and religion seems ripe for drawing out some key differences between these two contexts as well. With the former, we are dealing with a dimension of identity that is largely treated in constitutional doctrine as central and immutable to individuals. Religion, on the other hand, while also commonly recognized as central and somewhat intergenerational, is not an immutable dimension of identity and thus diverges in some respects from how many view matters of race, gender, and sexual

²⁰ See, e.g., EAMONN CALLAN, CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY 2–7 (1997) (discussing what gets excluded from political debate about education); AMY GUTMANN, DEMOCRATIC EDUCATION 11–13 (1987) (discussing the goals of a democratic education); MEIRA LEVINSON, THE DEMANDS OF LIBERAL EDUCATION 132–70 (1999) (discussing education policy); MORAL AND POLITICAL EDUCATION 1–19 (Stephen Macedo & Yael Tamir eds., 2002) (discussing education in a liberal democracy); STEPHEN MACEDO, DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY 231–54 (2000) (discussing civic purposes and public schools).

²¹ See *infra* Section II.A.

²² MACEDO, *supra* note 20, at 41; DAVID TYACK, SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY 23–24 (2003).

orientation.²³ Exploring how the Court articulates its vision of political community across two similar but distinct forms of individual identity thus presents opportunities to analyze and contrast them.

In this article, I make three primary claims. First, when we examine the key cases on race and public education, and religion/ideology and public education, we see similar language from the Supreme Court emphasizing the crucial role of public schools in serving as an adhesive force in American society across both racial and religious difference. I further assert that the Court has viewed public schools as crucial in helping to forge a *common culture* across racial and religious lines. Second, these key cases also demonstrate a crucial point of divergence. While the judiciary has primarily been concerned with problems of political community-*creation* in the race context, it has primarily been concerned with problems of political community-*maintenance* in the religion/ideological context. Finally, for community-builders confronting stubborn lines of division, problems of maintenance are generally preferable to problems of community-creation.

A. Adhesive Structures in American Society and Cultural Commonality

Before elaborating on my primary claims, however, let me first clarify some preliminary concepts. Much of what follows in this article will be a discussion of racial and religious/ideological plurality, but some discussion is warranted up front regarding the opposing force in these questions: the adhesive or cohesive mechanisms that function to bind members of the American political community together. In this vein, consider first John Higham's delineation of three forms of unity, or three types of "cohesive structures" that, he argued, have historically

²³ In *Reynolds v. United States*, the Supreme Court affirmed the indictment of George Reynolds for engaging in bigamy in violation of federal law. Consider this statement by the Court on the difference between religiously-motivated conduct versus religious belief—thereby drawing a sharp outer limit to how far it would respect religious identity, and underscoring the dimensions of both "conduct" and "status" for religious identity:

This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

98 U.S. 145, 166 (1878).

helped constitute American society to different degrees.²⁴ These cohesive structures include (a) “primordial unity,” which Higham defined as “a corporate feeling of oneness that infuses a particular, concrete, unquestioned set of inherited relationships.”²⁵ Within this category, Higham has in mind very localized, specific interpersonal connections firmly rooted within a community defined by location and/or a complex web of family, extended family, neighbor, and friendship relations.²⁶ Next there is (b) “ideological unity,” which Higham defined as “explicit systems of general beliefs that give large bodies of people a common identity and purpose, a common program of action, and a standard for self-criticism.”²⁷ Of interest for Higham in this regard were two ideologies in particular: American Protestantism and American nationalism.²⁸ Finally, perhaps of least relevance for our purposes, Higham also discussed (c) “technical unity,” which he defined as “a reordering of human relations by rational procedures designed to maximize efficiency. Technical unity connects people by occupation function rather than ideological faith.”²⁹

Higham acknowledged that these three forms of unity were hardly exhaustive of all cohesive structures in American history.³⁰ Indeed, while they are quite useful in understanding a range of contexts and historical eras, none seems to fully speak to the kind of unity or adhesive force that would be capable of binding a large, pluralistic society together in the face of racially-based or religiously-based plurality. For example, primordial forms of unity would seem to have little relevance in larger social units. Technical forms of unity would seem to have little relevance beyond clearly defined, collective endeavors in the commercial context. Of the three, perhaps ideological forms of unity come closest to having relevance for our purposes. Yet even ideology—at least if it is understood as an appeal to abstract principles such as, say, liberty or equality—still seems insufficient on its own to explain large-scale American societal cohesion across racial or religious lines. My skepticism stems from two concerns: First, given that abstract concepts such as liberty or equality have broad international, if not near-universal appeal, it is not obvious why such concepts would be central in binding Americans, specifically, together within an American political community. That is, why would a strong commitment to these ideals between two or more individuals necessarily

²⁴ I have previously discussed Higham and several of the other authors in this section in the context of examining judicial and scholarly arguments about abortion rights alongside debates over American political community. Stuart Chinn, *Universal Arguments and Particular Arguments on Abortion Rights*, 75 MD. L. REV. 247, 267–69 (2015).

²⁵ JOHN HIGHAM, HANGING TOGETHER: UNITY AND DIVERSITY IN AMERICAN CULTURE 5 (Carl J. Guarneri ed., 2001).

²⁶ *Id.* at 5–7.

²⁷ *Id.* at 7–8. The emphasis on ideology as a cornerstone of American political identity is a common theme in the literature.

²⁸ HIGHAM, *supra* note 25, at 8–14.

²⁹ *Id.* at 14.

³⁰ *Id.* at 5.

identify each to the other as American, or create an expectation that they would find a shared connection around their national identity?

Second, and relatedly, given the abstractness of these ideals, they are by definition open to interpretation and sometimes wildly different applications. It is questionable then how strong a foundation such ideals could provide for forging connections between members of a political community—particularly if strong, political disagreements lurk in the background. This is not to deny that there may be stability-promoting or adhesive benefits to common societal acceptance of vague, but attractive, political ideals. Vague and contestable conceptions of equality and liberty, for example, have likely contributed, at times, to the stability of the American governmental system in providing conceptual space for competing political parties and competing constituencies to continue dialoging with each other. Still, such benefits of ambiguity seem much more likely to characterize political communities already structured by other, more fundamental adhesive forces. That is to say, abstract ideals could be a supplementary cohesive force, but it is not clear that on their own they could provide much sense of deep belonging and connection.

Others have elaborated on the ideological theme and focused on political narratives as crucial in providing cohesion to American society.³¹ Such arguments

³¹ David Hollinger emphasizes the importance of civic nationalism as a cohesive force for Americans, hinting at a nationalism based in ideology and in culture (though the emphasis seems to be more on the former). Hollinger, however, does not elaborate in much detail on the content of this civic nationalism, since his focus is more on developing a “postethnic” ideal in the context of individual identity. DAVID HOLLINGER, *POSTETHNIC AMERICA: BEYOND MULTICULTURALISM* 134, 140, 215–16 (Rev. ed. 2005). Similar to Hollinger, Kenneth Karst also emphasizes “civic culture” as the primary adhesive force in American society. Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 361–77 (1986). In a somewhat different vein, consider arguments put forth by Rogers Smith and Gary Gerstle. Smith has emphasized “stories of peoplehood” as a crucial adhesive structure in creating and maintaining political community. In this regard, Smith emphasizes the importance of three kinds or types of stories of peoplehood: economic stories, political power stories, and ethically constitutive stories. ROGERS M. SMITH, *STORIES OF PEOPLEHOOD: THE POLITICS AND MORALS OF POLITICAL MEMBERSHIP* 60 (2003). Of particular interest for our purposes, Smith defines ethically constitutive stories as follows: “Such stories proclaim that members’ culture, religion, language, race, ethnicity, ancestry, history, or other such factors are constitutive of their very identities as persons, in ways that both affirm their worth and delineate their obligations.” *Id.* at 64–65. Relatedly, Gary Gerstle has written on the existence of a civic nationalist narrative in American politics that has coexisted with a racial nationalist narrative—focusing in particular on the twentieth century. See GARY GERSTLE, *AMERICAN CRUCIBLE: RACE AND NATION IN THE TWENTIETH CENTURY* 5–13 (2002). To the extent that Smith and Gerstle are read to be in support of more ideologically-based adhesive structures, I would offer the same critiques to their arguments that are mentioned above. If, however, Smith and Gerstle’s theories are open to the notion of more culturally-based

often address the first concern noted above in emphasizing how certain abstract principles—when situated within a historical narrative specific to events and individuals in American history—could provide bonds of community that are peculiarly American. And yet, I remain skeptical that even historically grounded ideological narratives can entirely explain why Americans would necessarily feel bound to one another in a lasting, substantive way. More likely, such civic narratives would often seem to function more symbolically as representative of communal bonds that already exist. That is, they are more likely an unthinking point of reference to symbolize and concretize such bonds. For any American self-consciously reflecting on why they feel a sense of connection with another American, however, it strikes me as questionable that foremost in their mind would be a replay of high school civics or a reference to distant historical figures.

I would tentatively propose that at least in the context of society-wide connections in America that are not primarily constituted by other types of relationships (geographic, professional, economic, personal, etc.), a crucial adhesive force is ultimately cultural. Such cultural influences can be partly ideological in nature, and may be partly dependent upon abstract notions of equality, liberty and/or more historically grounded ideological narratives. But more centrally, I use the term “culture” to refer to a connection or bond that is rooted in experience and interaction—something more grounded rather than abstract. My references to “culture” below thus refer to a set of common experiences, common cultural reference points, everyday norms, traditions, and spatial references (such as buildings, streets, and landmarks) that two or more individuals may feel a connection to by virtue of having been in the same kinds of places at the same moments in time (or at the same stages in life). In short, these are markers of community and belongingness that are not the high-minded points of commonality that one necessarily invokes in speeches about America. Rather, these are the items that constitute everyday experiences that may largely exist in the background, and that may only come into focus when individuals find themselves in a context where suddenly certain items are not taken for granted as common.

I should note that for these aspects of culture to serve as an adhesive structure across community, what is crucial is not whether such experiences actually are common to all members. Rather, the adhesive function of culture as I define it stems more from the plausible *perception* of commonality.³² Thus, this notion of a

forms of adhesion, as I define them in the main text, my argument may indeed align with their emphasis on the importance of narratives in structuring political community.

³² One of the more prominent arguments in defense of the notion that culture constitutes the core of American political identity is MICHAEL LIND, *THE NEXT AMERICAN NATION: THE NEW NATIONALISM AND THE FOURTH AMERICAN REVOLUTION* 5–15 (1995). As he states, “[a] real nation is a concrete historical community, defined primarily by a common language, common folkways, and a common vernacular culture.” *Id.* at 5. Lind’s belief that there actually is a common culture defined by common norms and experiences is distinct from what I am suggesting here. There may be such a common ground as an empirical matter, though I am skeptical. The common culture that I refer to above is

cultural adhesive force that is rooted in perception builds upon Benedict Anderson's famous description of national political communities as, in part, "imagined communities" of individuals who would never know or meet each other.³³ Speaking directly to the notion of shared experiences (or perceived shared experiences) creating cohesion within the national political community, Anderson states the following in discussing the cohesive force of newspapers, specifically:

The obsolescence of the newspaper on the morrow of its printing . . . nonetheless, for just this reason, creates this extraordinary mass ceremony: the almost precisely simultaneous consumption ("imagining") of the newspaper-as-fiction. We know that particular morning and evening editions will overwhelmingly be consumed between this hour and that, only on this day, not that . . . The significance of this mass ceremony . . . is paradoxical. It is performed in silent privacy, in the lair of the skull. Yet each communicant is well aware that the ceremony he performs is being replicated simultaneously by thousands (or millions) of others of whose existence he is confident, yet of whose identity he has not the slightest notion. Furthermore, this ceremony is incessantly repeated at daily or half-daily intervals throughout the calendar. What more vivid figure for the secular, historically clocked, imagined community can be envisioned?³⁴

Recognizing the crucial role of perceptions in binding Americans together implies that these bonds may be frayed if individuals perceive that their experiences are widely divergent from certain segments of Americans. The role of cultural perceptions also indicates that the state has a potentially useful role to play in cultivating societal cohesion by facilitating the perception of common experiences, and indeed, such a role aligns with how judges and theorists of American society have viewed public education over time.

B. Judicial Conceptions of Community in Public Schools

Having articulated some preliminary thoughts on American political community and some of the forces at work in binding community members together, let me conclude this part by beginning to flesh out what will be the focus of this Article: plurality within the American political community. As an initial point, it is worth emphasizing that political community in America is obviously not

premised in part upon actual conditions in American life *and* individual perceptions of American life. In many cases, I suspect, the perception is more crucial in binding Americans together than the reality.

³³ BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6–7 (rev. ed. 1991).

³⁴ *Id.* at 35, 42–45 (citations omitted).

a monolithic entity. More accurately, and as suggested by Higham's comments quoted above, American society is characterized by multiple forms of community and multiple lines of division. My focus here is on conceptions of political community in public schools, where the primary concerns are racial and religious differences. The dynamics I will discuss may be different to greater or lesser degrees in other contexts of American community-building. Still, given the centrality of public education, racial identity, and religious identity, I am presuming that the dynamics discussed here will partially illuminate other types of community in America as well.

In examining the community-building role of public schools in the context of both racial and religious/ideological difference, I find that a comparison of these two doctrinal areas ultimately yields three key findings. The first is a point of similarity across the racial and religious contexts that I examine in Part II. Within the judiciary's opinions that grapple with racial and religious/ideological difference in the context of public education, one might glean a set of judicial beliefs common to both contexts on the adhesive force of public education in creating and maintaining political community. Judges see public schools as a unifying force across both types of plurality. More precisely, and in line with preceding comments, I will claim that judges have, at least implicitly, seen public schools as providing a *cultural* adhesive influence. Public schools bind members together via the physical proximity of students to one another and their observation in, participation in, and creation of a common culture.

My focus on culture in this context underscores the point that, at least as judges have discussed the functions of public schools in these cases, they have not viewed the cohesiveness of political community (as represented by the public school) as being merely ideological in nature. If that were the case, presumably political community could be cultivated by the teaching of common ideals in a variety of schools separated by race and/or religion. The desire for physical proximity between students of different races and religions implied in these cases would seem unnecessary. The fact that students' physical exposure to plurality *is* a concern for judges speaks to the importance the latter have often placed on the adhesive benefits of culture. That is, what we glean from these cases is a judicial belief in how ideals grounded in discrete experiences can bind students together.

If both the race and religion/ideology cases overlap in demonstrating a common judicial belief in how public schools can nurture a cohesive common culture, they also overlap in another sense: these cases also set forth clearly demarcated limits on the ability of the state to utilize public schools toward these cohesive ends. While the particular limits differ across the race and religious/ideological contexts, judges have viewed these limits as a constraint upon the community-building functions that public schools may perform in either context.

This doctrinal comparison between race and religion/ideology yields a key difference too, and this constitutes my second primary claim that I flesh out in Part III: in the race and public education context, the central problem that has appeared in the doctrine—and the main problem that has animated judicial conceptions of

community in that context—has been the problem of *community-creation*. Judges have largely pondered the justifications and limits upon the state’s authority to create racial plurality in public schools. Such arguments proceed from background assumptions of minimal racial plurality absent the contemplated state actions.

In contrast, in the religion/ideology and public education context, the major cases and judicial arguments on plurality within public schools are preoccupied with the problems of *community-maintenance*. Judges have pondered the justifications and limits upon state actions to maintain stable communities in public schools in the face of individual claims of religious freedom and competing state claims favoring uniformity. In contrast to the racial context, the background presumption here is inevitable religious/ideological plurality in public schools, even absent the contemplated state actions. This in turn, however, leads to the problem of maintenance: we see the judiciary in this context grappling with the problem of how best to fashion stable community out of inescapably disparate parts.

Finally, in Part IV, I return to the example of Yale University and offer my third and final claim: for community-builders, maintenance problems are easier than creation problems. This point, in turn, suggests that while plurality may be inevitable, plurality *within* a communal structure holds greater hope for lines of division to be overcome. This is because the culture intrinsic to a community can potentially serve as an adhesive across lines of division. Thus, to the extent that one finds the goals of community and unity to be worthwhile, this observation implies that mechanisms that situate plurality within community are often preferable to those that let plurality persist between distinct communities.

II. CULTURAL COMMONALITY IN PUBLIC SCHOOLS

In this Part and the next, I explore a limited but significant subset of cases that deal with racial and religious/ideological differences in American public education. More precisely, I focus on cases—which are all Supreme Court cases with one notable exception—that are commonly recognized as pivotal in their respective doctrinal contexts. In addition, I focus only on those cases where the opinions explicitly contemplate and grapple with the problem of plurality and political community-building within public schools. Thus, for example, I devote much attention to the prominent free exercise case of *Mozert v. Hawkins*³⁵ below because in that case the judges of the Sixth Circuit had to confront a conflict between a school district’s choice of curriculum and the religious beliefs of some children and their parents.³⁶

³⁵ 827 F.2d 1058 (6th Cir. 1987).

³⁶ In contrast, I have very little discussion on some of the pivotal cases in the Court’s Establishment Clause jurisprudence regarding state aid to private, religious schools. Such cases do intersect with themes of religious plurality and public education, and as such, they do figure into some of the scholarly debates discussed in both Parts II and III. Still, these

Using some significant cases that fall within the above noted parameters as the focal point of our discussion, I will proceed to make a set of claims about how the judiciary views the problems and possibilities of political community-building in public schools across the racial and religious/ideological contexts. The focus in this Part will be on the first claim noted above: judges have seen public schools as an adhesive force in American society across racial and religious lines by virtue of their role in bringing diverse groups of students into close contact with one another—thereby creating a common culture. The test for whether my claims seem plausible relies, in part, upon whether my choice of cases can be seen as fairly representative of the broader doctrinal themes in both of these contexts.

A. Race and Public Education: Adhesive Structures

In *Brown v. Board of Education*,³⁷ Chief Justice Warren's opinion for the Court emphasized the importance of public education with this memorable comment:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.³⁸

Within this passage, Warren mentioned that elementary and secondary schools fulfill three key social functions, two of which clearly speak to the role of public schools in facilitating a cohesive political community. The first theme was the notion of public schools preparing students for citizenship and its future responsibilities. The second theme, which may be seen as either a corollary to the citizenship theme or an idea somewhat distinct from it, was that schools impart

cases depart from our focus in that they deal with religious plurality beyond the confines of a public educational institution, and speak to a more systemic plurality. *See, e.g.,* *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (allowing transportation expenses of parents sending their children to religious schools to be reimbursed by the state). *See generally* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 288–89 (2001) (summarizing the history of modern Establishment Clause cases).

³⁷ 347 U.S. 483 (1954).

³⁸ *Id.* at 493.

certain core norms and values to students.³⁹ The third theme, which perhaps has fewer implications for political community-building, was the notion that schools are crucial in aiding the professional training and development of students.⁴⁰

Warren was not articulating this view of public education purely in the abstract. The background context was the Court's dismantling of Jim Crow segregated schooling. Thus, in order for elementary and secondary public educational institutions to serve these functions, racial segregation could not be allowed. As Warren stated in a memorable line: "To separate them [African-American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁴¹ Warren's famous conclusion in *Brown* was that the physical separation of African-American and white students in public schools was inherently unequal.⁴² Unlike its earlier rulings in the context of higher public education, the Court made it clear in *Brown* that segregated public educational institutions, even with equal resources, would never meet the requirements of the Equal Protection Clause.⁴³

Much commentary has been written subsequently—and continues to be written—on the precise harm the Court meant to rectify in prohibiting segregated public schools in *Brown*. Was Warren's inclusive vision of public education undermined by the legally-mandated nature of racial separation between African-American and white students? Or was Warren's vision primarily undermined by the fact or existence of racial separation between African-American and white students?⁴⁴

Regardless of whether *de jure* or *de facto* segregation was the primary harm that *Brown* was meant to address, it was quite clear that the actual, stark physical separation of African-American and white students was, at the least, a significant point of concern for the *Brown* Court. This, in turn, suggests that the role of public schools in imparting or inculcating the duties of citizenship or other core norms

³⁹ See *Plyler v. Doe*, 457 U.S. 202, 221 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 113–15 (1973) (Marshall, J., dissenting).

⁴⁰ See *Plyler*, 457 U.S. at 221–22.

⁴¹ *Brown*, 347 U.S. at 494.

⁴² *Id.* at 495.

⁴³ *Id.* at 491–92, 494–95. The Court had declined to directly overrule *Plessy v. Ferguson*, 163 U.S. 537 (1896), and its allowance for segregated education, four years prior to *Brown* in the case of *Sweatt v. Painter*, 339 U.S. 629, 635–36 (1950). In the same vein, see also, *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 642 (1950).

⁴⁴ To use the terms commonly employed in the literature, some believe *Brown* stands for the prohibition of racial classifications in the law, or an anticlassification principle. Others, however, believe *Brown* stands for a principle of antisubordination: it supports the prohibition of laws that function to subordinate racial minorities (regardless of whether those laws employ racial classifications or not). STUART L. CHINN, *RECALIBRATING REFORM: THE LIMITS OF POLITICAL CHANGE* 153 (2014). My own view is that both principles can be plausibly linked to the *Brown* ruling. *Id.* at 176–77.

was, to some extent, undermined by a system of schools that physically separated white students from minority students. Even if such values could be imparted to white and African-American children in “separate but equal” schools, this would still be a constitutionally insufficient discharge of the duties of these institutions. Implied within *Brown* then was recognition of the fact that public schools more precisely serve a function of educating students within racially pluralistic public schools. I would suggest that the function of schools that Warren hints at, if only implicitly, is a function of creating common cultural bonds between students of different races.

We see this judicial concern with “plurality in practice,” within the *Brown* Court’s notable—and disappointing for some—discussion of the remedy, where it would allow desegregation to take place “with all deliberate speed.”⁴⁵ Such language, and the judicial concerns regarding implementation underlying it,⁴⁶ indicated an awareness by the Court that actual, physical integration on a significant scale was a desired (eventual) implication of its original ruling in *Brown*. Similarly, in subsequent cases, the Supreme Court emphasized the importance of actual integration when it confronted specific instances of school districts attempting to desegregate. For example, in *Green v. County Board of New Kent City*,⁴⁷ the Court unanimously agreed that the school district’s attempt to desegregate its public schools through a freedom-of-choice plan was insufficient.⁴⁸ As Justice Brennan stated, underscoring the importance of actual integration: “The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work *now*.”⁴⁹ Brennan was responding to a finding that subsequent to the school district’s implementation of the freedom-of-choice plan, the statistics on public school attendance had not demonstrated much change in terms of racial integration in actual practice.⁵⁰ Two years later in the case of *Swann v. Charlotte-Mecklenberg Board of Education*,⁵¹ the Court unanimously approved a desegregation plan proposed by the federal district court that involved a number of actions—including bussing—that aimed to encourage actual integration.⁵²

Contained within these opinions is a view by the Justices of what is required for public schools to serve their various social functions—including their adhesive functions. For public schools to adequately serve and discharge their goals of shaping citizens, imparting core values, and aiding students in their professional development, at least some degree of physical interaction between African-American and white students would be necessary (though the question of how

⁴⁵ *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*).

⁴⁶ RICHARD KLUGER, *SIMPLE JUSTICE* 742–49 (2004).

⁴⁷ 391 U.S. 430 (1968).

⁴⁸ *Id.* at 441–42.

⁴⁹ *Id.* at 439.

⁵⁰ *Id.* at 441.

⁵¹ 402 U.S. 1 (1971).

⁵² *Id.* at 22, 31.

much interaction might be constitutionally required or allowed was a separate one, as I discuss below).⁵³

Consider next what the judiciary has said in the context of race and public higher education, where some of the above noted themes recur, but in a different form. Here again, the Court has articulated how public educational institutions can promote political community through cultural mechanisms. The most prominent of these judicial arguments have emphasized “diversity.”⁵⁴ The underlying implication of diversity arguments is that political community can be promoted among a racially diverse cohort of students by virtue of an institution bringing them together and facilitating their interaction. Consistent with the judicial decisions on integration in the context of elementary and secondary schools, judicial opinions here hint at a belief that “diversity” in higher education facilitates communal cohesion by letting students engage with each other in close physical proximity—thereby creating, I would argue, a common culture.

Justice Powell memorably mentioned diversity in *Regents of the University of California v. Bakke*⁵⁵ where, in his opinion for a divided Court, he focused on “diversity” as a compelling justification for affirmative action sufficient to pass constitutional muster under a strict scrutiny/equal protection analysis.⁵⁶ While also rejecting several other potential justifications for affirmative action as not compelling,⁵⁷ Powell stated that diversity did qualify.⁵⁸

⁵³ To be sure, one might critique the preceding argument by questioning whether the goals of citizenship, values inculcation, or individual development were viewed by judges as inherently connected to the physical exposure of African-American and white students to each other—and flowed from the creation of a common culture—or were just incidental to that interaction. Indeed, to the latter point, one might argue that the Court’s rulings facilitated these benefits of public education for African-Americans not necessarily by the mandated physical interaction of African-American and white students with each other, but rather by allowing African-American students access to the better quality of education that existed in predominately or uniformly white schools. That is, the Court’s preoccupation with integration was perhaps seen by the Justices as more instrumental rather than as a desirable end in itself. Perhaps this is true, though if we take the above noted quotation by Warren at face value, his *Brown* opinion suggests otherwise.

⁵⁴ See *infra* pp. 27–30.

⁵⁵ 438 U.S. 265 (1978).

⁵⁶ *Id.* at 314–15.

⁵⁷ *Id.* at 305–11 (1978). The four justifications for affirmative action the Court considered were:

(i) “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession”; (ii) countering the effects of societal discrimination; (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification. *Id.* at 306 (citations omitted).

The atmosphere of “speculation, experiment and creation”—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body. As the Court noted in *Keyishian*, it is not too much to say that the “nation’s future depends upon leaders trained through wide exposure” to the ideas and mores of students as diverse as this Nation of many peoples.⁵⁹

Justice O’Connor further elaborated on the diversity rationale in writing for a five-vote majority in *Grutter v. Bollinger*,⁶⁰ where the Court upheld the Michigan Law School’s affirmative action program.⁶¹ O’Connor reaffirmed the diversity goal as a justification for affirmative action.⁶² She likewise spoke to how diversity in public higher education could both aid the professional development of students exposed to it and contribute to the creation of a national political community by facilitating a more inclusive national culture. As O’Connor stated:

These benefits are substantial. As the District Court emphasized, the Law School’s admissions policy promotes “cross-racial understanding,” helps to break down racial stereotypes, and “enables [students] to better understand persons of different races.” These benefits are “important and laudable,” because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting” when the students have “the greatest possible variety of backgrounds.”

The Law School’s claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes, and “better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.”⁶³

On the preceding point, O’Connor emphasized the strong support for affirmative action from representatives of these various sectors of society that was registered in amicus briefs. These sources attested to the tangible benefits they saw from the promotion of racial diversity:

⁵⁸ *Id.* at 314–15.

⁵⁹ *Id.* at 312–13 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

⁶⁰ 539 U.S. 306 (2003).

⁶¹ *Id.* at 343–44.

⁶² *Id.* at 325, 328.

⁶³ *Id.* at 330 (citations omitted).

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "based on their decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." . . . To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, *and* it must train and educate a highly qualified, racially diverse officer corps in a racially diverse setting." We agree that "it requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."⁶⁴

Finally, beyond the benefits of diversity for the students exposed to it, and for future employers and coworkers of these students, O'Connor voiced one other benefit: the symbolic legitimacy that higher education diversity provided for elite sectors of American society.⁶⁵ The physical proximity of a more racially diverse cast of future leaders in these higher educational institutions carried cohesive benefits that were systemic:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.⁶⁶

Thus, much like the Court's earlier cases on elementary and secondary education, the diversity rationale in the context of higher education affirmative action sets forth a judicial belief that benefits flow from the physical interaction between students of different races. To be sure, some of what the Justices refer to

⁶⁴ *Id.* at 330–31 (citations omitted). O'Connor also nods to a defense of affirmative action because of its benefits to citizenship development. *Id.* at 331–32.

⁶⁵ *Id.* at 332–33.

⁶⁶ *Id.* (citation omitted).

in the above quotations are benefits to student professional development stemming from this exposure to diversity.⁶⁷ But also present in these comments are some benefits of diversity that are less narrowly instrumental: building “cross-racial understanding,” building empathy, and, ultimately, discovering similarities with other students and cultivating shared experiences. By emphasizing the significance of physical interaction across diverse students, these judicial arguments ultimately endorse a view of communal cohesiveness premised upon cultural bonds.

B. Race and Public Education: Limits

If the preceding cases all contain statements on the adhesive benefits of facilitating diverse racial communities within public schools, judges have also offered a number of statements that have clarified some limits upon this community-building function. For one thing, as noted above, race-based affirmative action is not constitutionally required.⁶⁸ But beyond this preliminary point, at least two key limits have emerged in the doctrine spelling out judicial beliefs on how the goals of integration and diversity must be qualified in the face of competing rights and institutions.

The first qualification is tied to the Court’s ruling in *Milliken v. Bradley*⁶⁹ in 1974, where the Court emphasized one crucial limit upon its vision of integrated schooling: its aversion to racial balancing (or racial quotas) as a goal in itself.⁷⁰ In making the point, the Court established the requirement of prior intentional discrimination by the state before aggressive desegregation remedies, like interschool district bussing, could be employed.⁷¹ In this case, the federal district court had set forth an interschool district desegregation remedy in response to a problem of *de jure* segregation in the Detroit city schools. The proposed remedy would bus African-American students to surrounding Detroit suburbs—and bus white students from those suburbs into the Detroit city schools—in order to achieve better racial balances (due to the fact that there simply were not enough white students left in the Detroit city school district to allow for a Detroit-only remedy).⁷² The Supreme Court ruled against this remedy.⁷³ Justice Burger wrote for the Court and clarified that he saw racial integration as a constitutionally required goal only when pursued as a targeted response to prior, clearly defined

⁶⁷ Notably, however, O’Connor does briefly discuss and notes some key race and elementary/secondary education cases in mentioning the citizenship and norms-inculcating functions of public schools. *Id.* at 331–32.

⁶⁸ The Court has not found higher education affirmative action programs to be constitutionally required. *See, e.g.,* Schuette v. BAMN, 134 S.Ct. 1623, 1627 (2014) (describing earlier holdings).

⁶⁹ 418 U.S. 717 (1974).

⁷⁰ *Id.* at 749.

⁷¹ *Id.* at 744–45.

⁷² *Id.* at 725–36.

⁷³ *Id.* at 752–53.

state acts of intentional segregation.⁷⁴ The judicial pursuit of racial balancing for its own sake, absent prior state discriminatory acts, was deemed unconstitutional.⁷⁵

The *Milliken* Court's stated aversion to racial balancing and racial quotas would be a much-emphasized theme in subsequent affirmative action cases as well. For example, Powell in *Bakke* noted that the U.C. Davis medical school program at issue in that case was a preferential racial quota, and emphasized this as a reason for why it fell short of constitutional requirements.⁷⁶ Likewise, O'Connor's opinion in *Grutter* emphasized that the Michigan Law School's affirmative action program was *not* a racial quota in ultimately concluding that it passed constitutional muster.⁷⁷

This aversion to racial quotas and the requirement of prior discrimination for integrationist remedies suggests, in a broader sense, a crucial doctrinal limitation upon any judicial commitment to political community-building across racial lines in public schools. These cases suggest a judicial aversion to political community-building with too much of an emphasis on racial identity. Underscoring the point, O'Connor offered a notable comment on this in the non education-related voting rights case of *Shaw v. Reno*,⁷⁸ where she stated:

Racial classifications of any sort pose the risk of lasting harm to our society. They reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin. Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire. It is for these reasons that race-based districting by our state legislatures demands close judicial scrutiny.⁷⁹

Accordingly, in her *Grutter* opinion, O'Connor offered the following concluding comment qualifying her ruling:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years

⁷⁴ *Id.* at 744–46.

⁷⁵ *Id.* at 740–41, 749.

⁷⁶ *Regents of the University of California v. Bakke*, 438 U.S. 265, 315–20 (1978).

⁷⁷ *Grutter v. Bollinger*, 539 U.S. 306, 334–39 (2003). This conclusion had also been reached in the prior case of *Swann v. Charlotte-Mecklenberg Bd. of Educ.*, 402 U.S. 1, 28, 32 (1971), and repeated in *Bakke*, 438 U.S. at 307.

⁷⁸ 509 U.S. 630 (1993).

⁷⁹ *Id.* at 657.

from now, the use of racial preferences will no longer be necessary to further the interest approved today.⁸⁰

Similarly, in his opinion for the Court in *Parents Involved in Community Schools v. Seattle School District No. 1*,⁸¹ Justice Roberts was even more pointed on this concern in striking down certain types of student assignment plans that were based in part upon the race of students:

Before *Brown*, schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way “to achieve a system of determining admission to the public schools on a nonracial basis,” is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.⁸²

Beyond its aversion to racial balancing absent prior acts of discrimination, a second limit can be discerned in the doctrine upon state efforts to build racially pluralistic communities in public schools: from judicial reticenses to preserving local governmental authority over elementary and secondary education. For example, as previously noted, the Court opposed the inter-district remedy at issue in *Milliken*.⁸³ Relevant to its analysis, and pressing against the proposed remedy, was the Court’s acknowledgment of the limits of judicial power.⁸⁴ Relatedly, it also acknowledged the importance of deferring to local governmental authority in the context of elementary and secondary education:

No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. Thus, in *San Antonio School District v. Rodriguez*, we observed that local control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of

⁸⁰ *Grutter*, 539 U.S. at 343.

⁸¹ 551 U.S. 701 (2007).

⁸² *Id.* at 730–33, 747–48, 759 (Thomas, J., concurring) (citations omitted); *id.* at 797–98 (Kennedy, J., concurring in part and concurring in the judgment).

⁸³ *Milliken v. Bradley*, 418 U.S. 717, 751–53 (1974).

⁸⁴ *Id.* at 742.

school programs to fit local needs, and encourages “experimentation, innovation, and a healthy competition for educational excellence.”

The Michigan educational structure involved in this case, in common with most States, provides for a large measure of local control, and a review of the scope and character of these local powers indicates the extent to which the interdistrict remedy approved by the two courts could disrupt and alter the structure of public education in Michigan.⁸⁵

In sum then, the judicial vision of political community that emerges from these several cases on race and public education certainly acknowledges the appeal of racial diversity in schools. Common to both the public elementary/secondary educational context and the public higher educational context, there is a judicial recognition of how the physical exposure of students to those of different races carries a number of benefits—some of which encompass adhesive, cultural benefits in facilitating community both within the school itself and broader society. Yet, this vision of racial diversity is qualified by judicial anxieties about racial quotas, and by a judicial fear of its own institutional overreach.

C. Religion/Ideology and Public Schools: Adhesive Structures

In some ways, the Court’s rulings on public education in the context of religion and ideological conflict are even more explicit in identifying the social functions fulfilled by schools.⁸⁶ First, in line with Warren’s comments in *Brown*, the Court has emphasized the importance of public schools in shaping future citizens.⁸⁷ Specifically, the Court has noted that one of the functions of public schools is imparting and instilling certain core values that are needed for good citizenship and the maintenance of the American polity.⁸⁸ Consider, for example, this comment by the Court in the case of *Ambach v. Norwick*:⁸⁹

Other authorities have perceived public schools as an “assimilative force” by which diverse and conflicting elements in our society are brought together on a broad but common ground. These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.

⁸⁵ *Id.* at 741–43 (citations omitted). See also *San Antonio Indep. Sch. Dist., v. Rodriguez*, 411 U.S. 1, 49–50 (1973).

⁸⁶ See Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 188 n.239 (1995), though I categorize these functions somewhat differently than she does.

⁸⁷ See *Ambach v. Norwick*, 441 U.S. 68, 77–78 (1979).

⁸⁸ *Id.*

⁸⁹ *Id.*

Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society.⁹⁰

Second, and related to the preceding point, certain values have been emphasized by the Court as crucial to either good citizenship or to the maintenance of the polity. Two of these values have been toleration and critical thinking. While the Court has emphasized toleration and critical thinking in different contexts, the two concepts have also overlapped in the Court's opinions.⁹¹

In a similar vein, the Court has likewise emphasized the importance of state neutrality (between religions, or between religion and nonreligion) and related concepts in its Establishment Clause cases dealing with public education.⁹² Though somewhat less articulate in clarifying the array of goals and purposes that public education is meant to pursue (compared to some of the other cases discussed in more detail below), these Establishment Clause cases also contain an implicit vision of political community and public education. Ultimately, what ties all of these values together—toleration, critical thinking, and state neutrality with regard to religion—is their common opposition to religious fundamentalism. These cases all recognize in varying degrees and in different ways the potentially destabilizing force of fundamentalism upon the cohesiveness of a pluralistic political

⁹⁰ *Id.* (citations omitted); see also *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982); *Ambach*, 441 U.S. at 76–80; *Wisconsin v. Yoder*, 406 U.S. 205, 221, 233 (1972); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943); *Minersville v. Gobitis*, 310 U.S. 586, 595–600 (1940).

⁹¹ See, e.g., this comment by Brennan in the higher-education case of *Keyishian v. Board of Regents*:

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection.”

Keyishian, 385 U.S. 589, 603 (1967) (citations omitted); see also *Fraser*, 478 U.S. at 681–83 (1986); *Pico*, 457 U.S. at 868 (1982); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511–13 (1969); *McCullum v. Bd. of Educ.*, 333 U.S. 203, 216–17 (1948) (Frankfurter, J., concurring); *Barnette*, 319 U.S. at 637 (1943); *Mozert v. Hawkins*, 827 F.2d 1058, 1068 (6th Cir. 1987).

⁹² See *Lee v. Weisman*, 505 U.S. 577, 587–88, 592–97 (1992); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987); *Wallace v. Jeffree*, 472 U.S. 38, 55–56 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 104, 106–09 (1968); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222, 225 (1963); *Engel v. Vitale*, 370 U.S. 421, 431–32 (1961); *McCullum*, 333 U.S. at 210–12 (1948); see also *Jeffries & Ryan*, *supra* note 36, at 290.

community—whether that fundamentalism may emerge from the state or portions of the citizenry.

Third, and related to the preceding point on values, some judicial opinions have also lumped “good character” or character molding as another component of the values that public schools impart to students. For example, in the case of *Bethel School District No. 403 v. Fraser*,⁹³ the Court stated:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.⁹⁴

Finally, and in line with Warren’s opinion in *Brown*, the Court has also emphasized the importance of public schools in aiding the development of students toward becoming economically self-sufficient adults in the religion/ideology cases.⁹⁵

Much like the cases dealing with racial plurality and public education, the judiciary has likewise noted with approval the cohesive force of public schools in overcoming religious/ideological plurality toward building political community. Once again, the roots of this cohesiveness must be understood as cultural, because underlying this community-building vision of public schools is the judicial contemplation of religious/ideological plurality existing *within* the public school. If there are to be common bonds across religious/ideological difference, the “assimilative force” of public schools does not merely reside in the values taught. Rather the opinions implicitly presume that the cohesive force of public schools stems in part from those values being taught, observed, and applied within a religiously/ideologically diverse context. Community flows from the actual practice of certain norms within diverse public schools.

By way of illustrating these points more concretely, let me discuss the case of *Mozert v. Hawkins*⁹⁶ in greater detail. *Mozert*, while not a Supreme Court case, may be fairly taken as representative of some of the core themes and questions that underlie the topic of religious/ideological plurality in public schools. Accordingly, as discussed more in Part IV, it has garnered outsized attention in the scholarly literature on religious freedom and public schools.

In *Mozert*, a group of Christian parents in Hawkins County, Tennessee, raised a religious free exercise claim in opposition to some mandatory class reading

⁹³ 478 U.S. 675 (1986).

⁹⁴ *Id.* at 683; *see also Yoder*, 406 U.S. at 233 (1972).

⁹⁵ *Yoder*, 406 U.S. at 221.

⁹⁶ 827 F.2d 1058 (6th Cir. 1987).

materials in the public school's curriculum.⁹⁷ The adopted materials employed a variety of stories, and the objecting parents claimed that elements of these stories were objectionable to the religious faith they were trying to instill in their children.⁹⁸ The parents claimed that because the material in these readers undermined their religious faith, the religious beliefs of the students (their children) were violated, and the religious beliefs of the parents would also be violated if they permitted their children to read these books.⁹⁹ As to what precisely was objectionable to the religious beliefs of the parents, Judge Lively stated the following in his opinion for the court regarding Vicki Frost, the most visible member of the plaintiff-parents:

Mrs. Frost testified that the word of God as found in the Christian Bible "is the totality of my beliefs." There was evidence that other members of their churches, and even their pastors, do not agree with their position in this case.

Mrs. Frost testified that she had spent more than 200 hours reviewing the Holt series and had found numerous passages that offended her religious beliefs. She stated that the offending materials fell into seventeen categories which she listed. These ranged from such familiar concerns of fundamentalist Christians as evolution and "secular humanism" to less familiar themes such as "futuristic supernaturalism," pacifism, magic and false views of death.

In her lengthy testimony Mrs. Frost identified passages from stories and poems used in the Holt series that fell into each category. Illustrative is her first category, futuristic supernaturalism, which she defined as teaching "Man As God." Passages that she found offensive described Leonardo da Vinci as the human with a creative mind that "came closest to the divine touch." Similarly, she felt that a passage entitled "Seeing Beneath the Surface" related to an occult theme, by describing the use of imagination as a vehicle for seeing things not discernible through our physical eyes. She interpreted a poem, "Look at Anything," as presenting the idea that by using imagination a child can become part of anything and thus understand it better. Mrs. Frost testified that it is an "occult practice" for children to use imagination beyond the limitation of scriptural authority.¹⁰⁰

⁹⁷ *Id.* at 1059–60.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1060–61.

¹⁰⁰ *Id.* at 1061–62; *see generally* STEPHEN BATES, *BATTLEGROUND: ONE MOTHER'S CRUSADE, THE RELIGIOUS RIGHT, AND THE STRUGGLE FOR CONTROL OF OUR CLASSROOMS* (1993) (providing background coverage of the litigation in *Mozert*).

Notably, the parents were not demanding a remedy of having the course readers removed for all students and having the schools adopt course readers that aligned with the dissenting parents' faith.¹⁰¹ As Judge Lively and Judge Boggs noted in their respective opinions, such a remedy would have run afoul of the Establishment Clause.¹⁰² Rather, the parents demanded the option for their children to opt out of class when the readers were being studied and to receive alternative instruction from nonobjectionable readers.¹⁰³ Indeed, this is the type of remedy that the district court mentioned in ruling for the plaintiff-parents.¹⁰⁴

The Sixth Circuit, however, ultimately disagreed with the plaintiff-parents, and while all three judges on the panel converged on the same result, they had some divergence in their preferred rationales.¹⁰⁵ Lively, writing for the court, argued that the mere exposure of the children to the ideas in the reader could not constitute a burden on their religion since the children were not asked to agree with or otherwise affirm their belief in the ideas purported to be in the reader:

The requirement that students read the assigned materials and attend reading classes, in the absence of a showing that this participation entailed affirmation or denial of a religious belief, or performance or non-performance of a religious exercise or practice, does not place an unconstitutional burden on the students' free exercise of religion.¹⁰⁶

Given this, and given the crucial role of the school in exposing these children—and all children—to norms of toleration for others' religious beliefs,¹⁰⁷ Lively concluded that the plaintiff-parents lost on their claim, and thus were not entitled to the benefit of an opt-out for their children.¹⁰⁸

Judge Kennedy concurred in the ruling and took an even stronger position in defense of the school district.¹⁰⁹ Kennedy agreed that there was no religious burden being imposed on the dissenting parents and their children here.¹¹⁰ Still, she went on to argue that even if there were a religious burden in this case, the state should still win given that it had compelling interests at stake: its interests in teaching the children critical thinking and civility, and avoiding religious divisiveness.¹¹¹ Kennedy thus offered the strongest opinion among the three judges on the role of the public schools in facilitating cohesion across religious difference. Finally,

¹⁰¹ *Mozert*, 827 F.2d at 1064.

¹⁰² *Id.* at 1074 (Boggs, J., concurring).

¹⁰³ BATES, *supra* note 100, at 37.

¹⁰⁴ *Mozert*, 827 F.2d at 1063.

¹⁰⁵ *Id.* at 1070–81 (Kennedy, J., concurring) (Boggs, J., concurring).

¹⁰⁶ *Id.* at 1065.

¹⁰⁷ *Id.* at 1069.

¹⁰⁸ *Id.* at 1068–70.

¹⁰⁹ *Id.* at 1070–73 (Kennedy, J., concurring).

¹¹⁰ *Id.* at 1070.

¹¹¹ *Id.* at 1070–73 (Kennedy, J., concurring).

Judge Boggs concurred in the result, but reached this conclusion through quite a different route compared to the other two judges.¹¹² He thought that there was a kind of religious “burden” imposed on the dissenting parents and their children, and that the exposure of these children to certain ideas was not insignificant but instead the imposition of a genuine cost to them:

The plaintiffs provided voluminous testimony of the conflict (in their view) between reading the Holt readers and their religious beliefs, including extensive Scriptural references. The district court found that “plaintiffs’ religious beliefs compel them to refrain from exposure to the Holt series.” I would think it could hardly be clearer that they believe their religion commands, not merely suggests, their course of action.¹¹³

That said, he also thought that the burden suffered by the plaintiffs did not constitute a constitutional burden.¹¹⁴ Boggs instead ruled for the school district based upon his strong presumption of judicial deference to local school boards on such decisions of curriculum; ultimately, this was an argument based on democratic and local grounds. As he stated:

It is a substantial imposition on the schools to *require* them to justify each instance of not dealing with students’ individual, religiously compelled, objections (as opposed to *permitting* a local, rough and ready, adjustment), and I do not see that the Supreme Court has authorized us to make such a requirement.¹¹⁵

D. Religion/Ideology and Public Schools: Limits

All three of the Sixth Circuit judges involved in *Mozert*, in their own ways, nodded to or offered their approval of public schools serving a cohesive function in the face of religious/ideological plurality.¹¹⁶ Boggs’ opinion offered the least support for this view, but even he, in the end, ruled in favor of Hawkins County and in favor of the authority of local communities to shape their public school curricula as they saw fit.¹¹⁷ If he was not as sympathetic as Kennedy to the notion of a compelling state interest in teaching children critical thinking, he was

¹¹² *Id.* at 1075–80 (Boggs, J., concurring) (arguing that this decision would impose a “religious burden” on certain students, but rather than dissenting in the opinion, would rather defer to the Supreme Court).

¹¹³ *Id.* at 1076.

¹¹⁴ *Id.* at 1079.

¹¹⁵ *Id.* at 1080 (citations omitted).

¹¹⁶ *See generally id.* (offering their approval of the function of public schools and their role in providing a unifying function in settings with a diversity of religious and ideological beliefs).

¹¹⁷ *Id.* at 1079–81 (Boggs, J., concurring).

sympathetic to the choice of Hawkins County to emphasize critical thinking in its curriculum.

Yet, consider two significant limitations upon the authority of the state to build religiously pluralistic communities in public schools, as recognized in the doctrine. The first lies at the heart of the plaintiff-parents' claims in *Mozert*: the religious free exercise of students and their parents.¹¹⁸ Though the plaintiff-parents were ultimately unsuccessful in *Mozert*, such claims were present in another major religious freedom case where a group of dissenting parents of school children found elements of the state's vision of public education to be in conflict with their beliefs.¹¹⁹ In contrast to the parents in *Mozert*, however, these parents actually prevailed on their claims, and individual religious freedom ultimately trumped the demands of the state.¹²⁰

In *Wisconsin v. Yoder*,¹²¹ the Supreme Court confronted a group of dissenting parents making a free exercise claim against Wisconsin's mandatory school attendance law, which required children to attend private or public school until the age of sixteen.¹²² These parents were Amish and had declined to have their children attend public school after the eighth grade.¹²³ They claimed that the exposure of their children to public school after the eighth grade threatened their salvation, their good standing in the religious community, the salvation of their children, and, ultimately, threatened the survival of their religious community.¹²⁴

The Court sided with the parents, emphasizing in part the distinctiveness of the Amish community:

The record shows that the respondents' religious beliefs and attitude toward life, family, and home have remained constant—perhaps some would say static—in a period of unparalleled progress in human knowledge generally and great changes in education. The respondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call “life style” have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and “worldly” influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform. Their rejection of telephones, automobiles, radios, and television, their mode of dress, of speech, their habits of manual work do

¹¹⁸ *Id.* at 1060–61.

¹¹⁹ *Wisconsin v. Yoder*, 406 U.S. 205, 207–09 (1972).

¹²⁰ *Id.* at 234 (“[T]he First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16.”).

¹²¹ *Id.*

¹²² *Id.* at 207.

¹²³ *See id.*

¹²⁴ *See id.* at 209–12.

indeed set them apart from much of contemporary society; these customs are both symbolic and practical.¹²⁵

Indeed, the distinctiveness of the Amish community was a point made by Lively in distinguishing the parents in the *Mozert* case from the parents involved in *Yoder*.¹²⁶

Very closely related to the preceding point, a second doctrinal limitation to the judicial sympathy for community-building in schools in the religious/ideological context has been the doctrine's very established protection of certain parental rights to control the education of their children—including the preservation of a private school option.¹²⁷ The Court's allowance for private schools thus permits an opt-out for those parents dissatisfied with public school institutions, and who possess the means to pay private school tuition. *Pierce v. Society of the Sisters*¹²⁸ was the pivotal case in this regard, where the Court struck down an Oregon state law that sought to ban private school instruction for children between the ages of eight and sixteen (i.e., it required their attendance in public schools).¹²⁹ Two years earlier, in *Meyer v. Nebraska*,¹³⁰ the Court likewise struck down a Nebraska state law that sought to prohibit foreign language instruction prior to the eighth grade, in any private or public school.¹³¹

These two cases stand out in the development of substantive due process and as strong statements of judicial sympathy for parental authority over the education of their children—a theme also discussed in *Yoder*.¹³² But the upshot of these cases for our purposes is that they indicate clear limits upon a judicial vision emphasizing the adhesive force of public education; in essence, the preservation of a private school option allows children and their parents the potential to opt out of the plurality and values being inculcated in elementary and secondary public schools. Elements of these parental rights norms also underlie, to some extent, the Court's Establishment Clause cases dealing with the constitutionally permissible limits of state aid to religious schools.¹³³ And in more recent years, these same norms have been implicated in the legal debates over school choice and homeschooling options.¹³⁴

¹²⁵ *Id.* at 216–17, 235–36.

¹²⁶ The following is Lively's comment on *Yoder*: “However, *Yoder* rested on such a singular set of facts that we do not believe it can be held to announce a general rule that exposure without compulsion to act, believe, affirm or deny creates an unconstitutional burden.” *Mozert v. Hawkins*, 827 F.2d 1058, 1067 (6th Cir. 1987).

¹²⁷ *See id.*

¹²⁸ 268 U.S. 510 (1925).

¹²⁹ *Id.* at 535–36.

¹³⁰ 262 U.S. 390 (1923).

¹³¹ *Id.* at 403.

¹³² *See Wisconsin v. Yoder*, 406 U.S. 205, 213–14, 231–34 (1972).

¹³³ *See Jeffries & Ryan*, *supra* note 36, at 288–89.

¹³⁴ *See infra* Part III.

In sum, though the specific doctrinal limits may be different in the racial and religious/ideological contexts, a basic similarity emerges in the Court's approach to both forms of plurality in public schools: a recognition of the beneficial cohesive function served by public schools in cultivating elements of a common culture, and a recognition of certain limits upon this cohesive function.¹³⁵

III. CREATION AND MAINTENANCE OF POLITICAL COMMUNITY IN PUBLIC SCHOOLS

Pivotal cases I cite in the preceding Part—such as *Brown*, *Milliken*, *Grutter*, *Gobitis*, *Barnette*, *Yoder*, and *Mozert*—each command outsized attention within their respective doctrinal areas. Part of the significance of these cases stems from the specific rulings reached by their respective Courts. Relatedly, their significance also stems from the broader social and legal problems presented within these cases as well. With *Brown* and *Milliken*, for example, we have the two notable bookends to the Court's mid-twentieth century effort to desegregate elementary and secondary public schools. In *Grutter*, we have the Court's most recent, definitive statement on higher educational race-based affirmative action, which is perhaps the most visible, remaining controversy left over from the civil rights era.¹³⁶ And in *Gobitis*, *Barnette*, *Yoder*, and *Mozert* we have a set of cases—spanning decades—that illustrate the multifaceted tension between individual religious freedom and the authority of the state in structuring public education.

That these different issues—school desegregation, affirmative action, religious freedom—have figured so prominently in the respective doctrinal areas of race and religion/ideology in public education points to a notable divergence in the very manner in which the judiciary has conceptualized political community in these two contexts. Specifically, the fact that school integration and affirmative action have been so central to the race and public education context suggests that the problems of political *community-creation* have been central to the judicial considerations and arguments there. Hence, there is a judicial focus in those cases

¹³⁵ Recall that in the race context, the Court recognized the significance of local governmental control as a limitation upon state efforts at community-building across racial lines. That is, local governmental control was seen as a force that facilitated segmentation. The importance of local governmental control also appears in the religion context, though in a different posture. In the latter context, local governmental actions have typically appeared in the case law as promoting uniformity in a school community. Hence, far from being a check on state actions encouraging community-building and uniformity, any judicial anxieties about local governmental control in the religious context center on how they may encourage a repressive uniformity. See *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 596–600 (1940) *overruled by* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 647–53, 665–71 (1953) (Frankfurter, J., dissenting); Tyll van Geel, *Citizenship Education and the Free Exercise of Religion*, 34 AKRON L. REV. 293, 301–03 (2000).

¹³⁶ See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

on the scope and limits of state power in creating *new* racially integrated public school communities through aggressive desegregation remedies at the elementary and secondary level, or through race-based affirmative action at the higher education level.

In contrast, the controversies over state authority to control student behavior, control the curriculum, and compel attendance in public schools in the face of religious/ideological plurality suggests a relatively greater judicial preoccupation with political *community-maintenance* in those cases. That is, unlike the racial context, there is a built-in judicial presumption of religious/ideological plurality existing in public schools.¹³⁷ As the judges have conceptualized it, the problem confronting those who wish to build political community across religious/ideological lines in public schools is not how to bring about pluralistic communities, but how best to manage an already existing plurality—or how best to maintain political community.

In the sections below, I will proceed by fleshing out the relatively greater judicial focus on creation in the racial context, and maintenance in the religious/ideological context. Similar to Part II, the discussion of these doctrinal areas will not be comprehensive, but will instead focus on those cases that have figured prominently in questions of racial or religious/ideological plurality in public schools. The test of whether or not my case selection is representative of the various, primary concerns in these doctrinal areas will, as in Part II, rest upon the plausibility of my claims.

Yet, unlike the upshot of Part II where I highlighted similarities in the judicial arguments on racial and religious/ideological plurality in public schools, this Part will be focused on the above noted divergence. Specifically, I will aim to illuminate this distinction between a judicial focus on creation in the racial context and maintenance in the religious/ideological context by elaborating upon the various concerns articulated by proponents of community-building (who I will refer to as “community-advocates”) and those more skeptical of community-building actions by the state (who I will refer to as “skeptics”) in each body of doctrine.¹³⁸ Illuminating these concerns in more detail will underscore the

¹³⁷ See George W. Dent, Jr., *Religious Children, Secular Schools*, 61 S. CAL. L. REV. 871–73 (1988).

¹³⁸ I should mention two notes about my choice of terminology here. First, I use the term “community-advocates” instead of “communitarianism,” simply because the latter has too much conceptual baggage from debates in political theory, some of which are not relevant to my concerns here. For a brief and concise summary of the various claims of communitarian political theorists, see WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 199–237 (2002). Second, my labels of “community-advocate” and “skeptic” are intended only to mark out distinct positions on specific issues. Thus, when I label Justice Jackson’s opinion in *West Virginia State Board of Education vs. Barnette*, 319 U.S. 624 (1943) as a “skeptical” argument on community below, this is not to imply an evaluation of Jackson’s larger philosophy on political community. It is merely to indicate that on the particular issue of the mandatory flag salute, at issue in that case,

divergent background presumptions behind them—namely, that in the racial context, a pluralistic community is not presumed in our public schools, while in the religious/ideological context, such a community is presumed.

A. Race and Community-Creation in Public Schools

Among those judges and scholars who have favored facilitating more racially diverse communities in public schools, one persistent concern has been the pernicious effect of enduring racial isolation and segmentation in the absence of aggressive desegregation remedies at the elementary and secondary level, or affirmative action at the higher education level. The judicial posture among those seeking to facilitate racial plurality is one of community-creation, because absent judicial approval of the state actions involved—desegregation measures or higher education affirmative action—the background presumption is that there would be minimal racial plurality occurring in public educational institutions.

Consider in this regard some of the dissents in the *Milliken* opinion. In evaluating the majority's disapproval of the city-suburban desegregation remedy, Justice Douglas stated the following on the background condition of residential segregation in Detroit:

The inner core of Detroit is now rather solidly black; and the blacks, we know, in many instances are likely to be poorer, just as were the Chicanos in *San Antonio School District v. Rodriguez*. By that decision the poorer school districts must pay their own way. It is therefore a foregone conclusion that we have now given the States a formula whereby the poor must pay their own way.¹³⁹

Similarly, Justice Marshall stated the following:

Under a Detroit-only decree, Detroit's schools will clearly remain racially identifiable in comparison with neighboring schools in the metropolitan community. Schools with 65% and more Negro students will stand in sharp and obvious contrast to schools in neighboring districts with less than 2% Negro enrollment. Negro students will continue to perceive their schools as segregated educational facilities and

Justice Jackson's opinion relative to Justice Frankfurter's was the position more skeptical of or relatively less concerned with, facilitating community-building in public schools.

¹³⁹ *Milliken v. Bradley*, 418 U.S. 717, 759–60 (1974) (Douglas, J., dissenting) (citations omitted).

this perception will only be increased when whites react to a Detroit-only decree by fleeing to the suburbs to avoid integration.¹⁴⁰

There is no mistaking the background presumption—at least among these dissenting Justices—that the default *status quo* condition in Detroit is one of minimal racial plurality in these public schools. And in the post-*Brown* era, the absence of greater integration in public schools underscores the strong suspicion that the default societal condition—absent integrationist measures by the state during and since the civil rights era—would be one of even more limited racial plurality.¹⁴¹

Similarly, in the higher educational context, proponents of affirmative action argue that such measures are crucial in aiding racial plurality.¹⁴² Some evidence does suggest significant costs to racial plurality without affirmative action measures in place.¹⁴³ Certainly in the context of law schools, advocates and critics of affirmative action both largely concede the importance of affirmative action in aiding the racial diversity of selective law schools.¹⁴⁴ Thus, the prevailing background assumption of limited racial plurality—absent the state actions under discussion in the desegregation and affirmative action cases—is what places the judiciary in a posture of either creating or not creating racially pluralistic communities in these cases.

Community-advocates have put forth the preceding arguments, but similar background presumptions are apparent in the arguments of community-skeptics as well.¹⁴⁵ The latter likewise proceed from a shared understanding with their opponents that the judicial role in these cases is one of either creating or not

¹⁴⁰ *Id.* at 804. (Marshall, J., dissenting) (citations omitted); *see also id.* at 814–15. For a more recent reference to these themes, see *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 838–43 (2007) (Breyer, J., dissenting).

¹⁴¹ See Gary Orfield et al., *The Resurgence of School Segregation*, 60 EDUCATIONAL LEADERSHIP 16, 18–19 (2002).

¹⁴² See, e.g., Orfield et al., *supra* note 141, at 19–20 (explaining the relationship between racial and poverty composition of schools and test scores).

¹⁴³ THOMAS J. EPENSHADE & ALEXANDRIA WALTON RADFORD, NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE 346–48 (2009).

¹⁴⁴ Richard Sander, a critic of affirmative action, states, “[t]he most obvious disadvantage of [law schools ending their use of racial preferences] is that the most elite law schools would have very few black students—probably in the range of 1% to 2% of overall student bodies.” Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 483 (2004). Not surprisingly, David L. Chambers, Timothy T. Clydesdale, William C. Kidder, and Richard O. Lempert and other supporters of affirmative action reach the same conclusions even more emphatically. David L. Chambers et al., *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander’s Study*, 57 STAN. L. REV. 1855, 1891–97 (2005).

¹⁴⁵ KYMLICKA, *supra* note 138, at 199–237.

creating racially pluralistic communities.¹⁴⁶ And the best evidence of this shared understanding lies in the *categorical* nature of the critiques by skeptics.¹⁴⁷ Hence for those more skeptical of community-building in the race and public educational context, the primary argument has, for the most part, *not* been a debate over better or worse ways for the state to balance the goal of state promotion of racially pluralistic schools versus other state goals—a question that goes to community management.¹⁴⁸ Rather, the perspective of many skeptics has been more oriented to questioning the very legitimacy of a state interest in promoting racial plurality in public schools at all.¹⁴⁹

Admittedly, this argumentative posture could imply one of two possible positions by skeptics, depending upon their presumptions of default conditions in public schools: (a) the skeptical position may be that since there is already sufficient racial plurality in America's public schools as a default matter, the

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ There are three notable exceptions, however, where members of the Court articulated reservations regarding affirmative action that were not categorical. These critiques were thus articulated alongside defenses of affirmative action: Powell's opinion for the Court in *Regents of University of California v. Bakke* 438 U.S. 265, 305–24 (1978) (striking down the U.C. Davis Medical School affirmative action program, while upholding the use of race as “plus” factor in higher education admissions); O'Connor's opinion for the Court in *Grutter v. Bollinger*, 539 U.S. 306, 334–37 (2003) (following Powell's opinion in *Bakke* in upholding a limited use of race in higher education admissions); and Kennedy's concurrence in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 788–89 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (recognizing a qualified interest of local authorities to promote integration in public schools). As Kennedy stated:

This Nation has a moral and ethical obligation to fulfill its historic commitment to creating an integrated society that ensures equal opportunity for all of its children. A compelling interest exists in avoiding racial isolation, an interest that a school district, in its discretion and expertise, may choose to pursue. Likewise, a district may consider it a compelling interest to achieve a diverse student population. Race may be one component of that diversity, but other demographic factors, plus special talents and needs, should also be considered. What the government is not permitted to do, absent a showing of necessity not made here, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits valued and traded according to one school's supply and another's demand.

Id. at 797–98. It is telling that each of these opinions constituted, in a sense, the sentiments of the swing vote on each of these very sharply divided courts. This suggests that such middle-ground reservations have hardly been the norm over the course of the Supreme Court's race and public education jurisprudence.

¹⁴⁹ KYMLICKA, *supra* note 138, at 199–237.

state's nonintervention in this context would not undermine the existence of racially pluralistic schools; or (b) the skeptical position may be that since robust, racially pluralistic public schools will largely not exist absent state intervention, and since the state interest in actively promoting racially pluralistic schools is illegitimate, the existence of racially pluralistic schools should be sacrificed for other state interests. Given the stark demographic realities discussed in the preceding cases, however, and given that the skeptical judicial opinions in these cases are hardly dependent upon strong claims of a robust, default racial plurality existing in public schools absent state intervention, I tend to think the second argument better describes the position contained in some of the key skeptical judicial opinions on desegregation and affirmative action. As such, when these opinions critique state interventions in the form of desegregation remedies or higher education affirmative action, they ultimately question in a more categorical way whether the judiciary should even allow for racially pluralistic communities in these schools or not. In other words, these skeptical arguments question the judiciary's role in community-creation.

Consider then some arguments that question the legitimacy of state actions to promote racial plurality in public schools. For example, there is the often-made critique of community-skeptics that race-conscious, or "benign," state actions are inherently harmful to broader society in segmenting individuals by race—an argument I noted above in Part II.¹⁵⁰ Approaching race-conscious remedies at the elementary and secondary or higher educational levels with such a presumption implies a view of state actions as highly problematic and irregular acts of state engineering. The presence of so little concession to the state's goal of cultivating cohesive pluralistic communities in these arguments conveys the significance these skeptics attribute to the Court's rulings in these matters. Further, it suggests a belief that the costs of such social engineering are so great that dramatic acts of community-building, such as desegregation measures and affirmative action, should generally not be undertaken (or, at least, not unless there has been a prior state action of discrimination).

Beyond these potential concerns of race segmentation, other skeptics have noted different costs flowing from state actions aimed at community-building across race.¹⁵¹ At the elementary and secondary level, white parents of school children critiqued federal judicially-mandated desegregation measures—such as bussing—decades ago with concerns about their children being forced to attend inferior schools.¹⁵² Such concerns have carried over to the present day, where the prospect of an active state role in creating greater racial plurality in the public

¹⁵⁰ See *supra* Part II.

¹⁵¹ See, e.g., James E. Ryan, *Schools, Race, and Money*, 109 YALE L. J. 249, 256–57 (1999) (indicating that racially isolate schools that are primarily composed of minority student are costlier to run because poor students typically have greater needs).

¹⁵² MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* 9 (2006).

schools through measures such as bussing is politically implausible.¹⁵³ Hence James Ryan stated in 1999 that:

It seems unfashionable these days, if not atavistic, to talk seriously about ways to increase racial integration. To be sure, one still encounters attempts to spark conversations about improving race relations and promoting integration, but a strong sense of fatigue seems to accompany such attempts.¹⁵⁴

And at the higher education level, critics of affirmative action, such as Richard Sander, have claimed that such programs “mismatch” affirmative action beneficiaries with law schools that teach and have their students compete at levels beyond the ability of these beneficiaries.¹⁵⁵ He argues that this ultimately imposes costs to affirmative action beneficiaries with respect to bar exam passage and/or with respect to the job market.¹⁵⁶ Justice Thomas has also given voice to this critique, stating in his *Grutter* dissent:

The Law School tantalizes unprepared students with the promise of a University of Michigan degree and all of the opportunities that it offers. These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition. And this mismatch crisis is not restricted to elite institutions. Indeed, to cover the tracks of the aestheticists, this cruel farce of racial discrimination must continue—in selection for the Michigan Law Review, and in hiring at law firms and

¹⁵³ Ryan, *supra* note 151, at 257; *see also* Dale Russakoff, *Schooled*, THE NEW YORKER (May 19, 2014), <http://www.newyorker.com/magazine/2014/05/19/schooled> [<https://perma.cc/8HLE-NZHN>] (providing an in-depth examination of the various reform strategies that public school reformers have recently tried in Newark, none of which involved bussing with surrounding suburbs of course).

¹⁵⁴ Ryan, *supra* note 151, at 251. Hence, Ryan focuses on different forms of school choice as a more plausible path toward encouraging greater racial diversity in schools. *Id.* at 310–15.

¹⁵⁵ Sander *supra* note 144, at 449–50, 452.

¹⁵⁶ *Id.* at 440–42, 445–54, 466–68, 474–75, 478–80. Sander’s argument has garnered extensive criticism, both with respect to his methodology and with respect to his larger substantive claims. *See* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers*, 57 STAN. L. REV. 1807, 1808–10 (2005); Chambers et al., *supra* note 144, at 1856–57; Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 YALE L.J. 1997, 1997–98 (2005); *see also* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 275–90 (1998) (offering a broad data-driven defense of affirmative action); Richard O. Lempert et al., *Michigan’s Minority Graduates in Practice: The River Runs Through Law School*, 25 LAW & SOC. INQUIRY 395, 494–504 (2000) (offering another broad data-driven defense of affirmative action).

for judicial clerkships—until the “beneficiaries” are no longer tolerated. While these students may graduate with law degrees, there is no evidence that they have received a qualitatively better legal education (or become better lawyers) than if they had gone to a less “elite” law school for which they were better prepared. And the aestheticists will never address the real problems facing “underrepresented minorities,” instead continuing their social experiments on other people’s children.¹⁵⁷

In sum then, the concerns raised by critics of race-conscious community-building measures speak less to the question of how state actions to aid racial plurality can be accommodated with competing concerns and more to the question of whether public educational communities constituted by race consciousness should exist at all. These concerns by skeptics—combined with a background condition likely apparent to skeptics that significant racial plurality in public schools relies upon integrationist actions by the state¹⁵⁸—underscores that the dominant legal question here is one of community-creation. That is, should the state create or not create these racially diverse communities? By way of further fleshing out this point, let me now turn to the religious/ideological doctrinal context, so we might compare and contrast the various concerns articulated there with those that we have just surveyed in the context of race.

B. Religion/Ideology and Maintenance in Public Schools

The problems of political community-building in the religious/ideological context are conspicuously different from the problems discussed in the racial context in at least one key respect: in the former context, the central concerns take place against a background assumption of religious plurality existing in public schools. Distinct from the worries of segmentation and isolation the dissenting Justices voiced in *Milliken*,¹⁵⁹ judges and scholars who focus on religious/ideological plurality take as their starting point—and take as their primary problem in some ways—the *inescapable* fact of religious plurality.¹⁶⁰ The reasons for the existence of such plurality in public schools stems from at least three interrelated conditions: compulsory school attendance laws,¹⁶¹ a locality-

¹⁵⁷ *Grutter v. Bollinger*, 539 U.S. 306, 372 (2003) (Thomas, J., dissenting) (citations omitted).

¹⁵⁸ Orfield et al., *supra* note 141, at 17–19.

¹⁵⁹ *Milliken v. Bradley*, 418 U.S. 717, 764 (1974) (White, J., dissenting).

¹⁶⁰ *Minersville Sch. Dist. v. Gobitis* 310 U.S. 586, 593 (1940) *overruled by* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹⁶¹ Hence, not surprisingly, compulsory school attendance laws are the starting point for many of the controversies underlying the pivotal cases in the religious/ideological context. *See Wisconsin v. Yoder*, 406 U.S. 205, 207–08 (1972); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 629, 629 n.5, 632 (1943); *Gobitis*, 310 U.S. at 592; *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1063 (6th Cir. 1987).

centric system of public school attendance in America,¹⁶² and a relatively less geographic segmentation by religion, compared to race, in American society. This is not to say that certain religions do not predominate in certain localities or that private religious schools are not, and have not been, significant alternatives to public schools. But, however much such conditions may subtract from a default presence of religious plurality in public schools, it seems safe to say that a fear of religious segmentation in public schools has not preoccupied the courts in the same manner that fears of racial segmentation have in the past.

Given that a presumption of plurality underlies the various arguments of community-advocates and skeptics in the realm of religion/ideology and public schools, this informs a second divergence between religion/ideology and race. If the primary point of contestation in the racial context was whether the judiciary should allow for the creation of racially pluralistic school communities, the primary question in the religious/ideological context is (for the most part) how best to *manage* an already present religious/ideological plurality in public schools.

Consider first the various arguments of the community-advocates. I discuss a rather diverse set of these arguments below, and what ties them all together is a relatively similar concern as to how the state may best occupy the middle ground in the face of religious plurality. That is, with regard to the state's actions—manifested in a local school board's actions and/or the actions of the federal judiciary—how can the state best cultivate a common middle ground between its goals and the inevitable objections from individuals, *without* imposing illegitimate burdens on individuals? This fundamentally speaks to a concern regarding community management.

For example, in his opinion for the Court in *Minersville School District v. Gobitis*, Justice Frankfurter offered a defense of the Minersville school board's requirement of a flag salute by teachers and students in the face of religious objection from students who were Jehovah's Witnesses.¹⁶³ Frankfurter viewed the mandatory flag salute as an acceptable middle ground between the competing demands of community and respecting religious freedom. On the one hand, core rights of the Gobitis children such as their (internal) freedom of conscience, speech, and assembly were not endangered by the mandatory flag salute.¹⁶⁴ At the same time, even though much of his opinion was framed as an act of judicial deference to state legislative authority, Frankfurter gave voice to the benefits of the mandatory flag salute in its cultivation of national, and by implication local, unity. As he stated: "The influences which help toward a common feeling for the common country are manifold. Some may seem harsh and others no doubt are foolish. Surely, however, the end is legitimate."¹⁶⁵

¹⁶² See *Miliken*, 418 U.S. at 741–43.

¹⁶³ *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 591–92 (1940), *overruled by* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹⁶⁴ *Gobitis*, 310 U.S. at 600.

¹⁶⁵ *Id.* at 598; *see also id.* at 595–600.

A second example of community-advocacy along the same lines is Judge Lively's opinion from *Mozert*. The structure of his argument regarding the Hawkins County school board's choice of curriculum follows in broad strokes the Frankfurter approach to the mandatory flag salute. According to Lively, the required textbook did not unduly infringe upon the objecting students and their parents because it amounted to mere exposure and did not encompass any governmental compulsion of the children to engage in conduct contrary to their beliefs.¹⁶⁶ At the same time, the mandatory readers would serve a community-enhancing function by teaching critical thinking to all school children and providing them with a common ground to engage with one another notwithstanding their difference in religious background.¹⁶⁷ The teaching of critical thinking would serve as a crucial means of managing religious plurality.

The "tolerance of divergent . . . religious views" referred to by the Supreme Court is a civil tolerance, not a religious one.¹⁶⁸ It does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires recognition that in a pluralistic society we must "live and let live."¹⁶⁹

To be sure, the precise mode of managing religious plurality endorsed by Lively was distinct from Frankfurter's defense of the mandatory flag salute. Indeed, Lively's emphasis on the distinction between state-mandated exposure to ideas (which he deemed acceptable) and state-mandated conduct like a flag salute (which he deemed unacceptable) figured prominently in his opinion.¹⁷⁰ Hence he explicitly registered his disagreement with Frankfurter's opinion in *Gobitis*.¹⁷¹ But again, a common and primary emphasis on cultivating community in public schools joins both opinions, and both opinions deploy a set of arguments defending state actions as acceptable means of managing plurality to enhance community.

Finally, similar arguments are prominent within the scholarly literature as well. Stephen Macedo, for example, sets forth a theory of "civic liberalism" that he elaborates upon primarily in the context of public schools and religious plurality (*Mozert*, for example, factors into his analysis more than any other legal case).¹⁷² As with most of the other judges and scholars mentioned in this section, Macedo begins with the assumption that deep religious/ideological plurality is inescapable.¹⁷³ Hence, the state should tolerate and accept this fact.¹⁷⁴ This is

¹⁶⁶ *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1064–66, 1069, 1070 (6th Cir. 1987).

¹⁶⁷ *Id.* at 1060.

¹⁶⁸ *Id.* at 1069 (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

¹⁶⁹ *Id.*; see also *id.* at 1068–70.

¹⁷⁰ *Id.* at 1069–70.

¹⁷¹ *Id.* at 1066.

¹⁷² MACEDO, *supra* note 20, at 181–89.

¹⁷³ *Id.* at 40–50.

Macedo's concession to the religious freedom and autonomy of individuals.¹⁷⁵ However, building upon John Rawls's theory of "political liberalism,"¹⁷⁶ Macedo argues that when it comes to democratic governance, the state and its citizens can demand that members of the polity converge upon the use of "public reasoning" as an acceptable common ground for engagement.¹⁷⁷

Such a norm implies standard liberal norms like reciprocity and toleration for one's fellow citizens.¹⁷⁸ As such, "[c]ivic liberals must walk a tightrope, emphasizing the great weight of shared political aims but, so far as possible, avoiding taking sides on the wider religious dimensions of political matters and allowing that reasonable citizens may disagree about their religious and some of their basic philosophical views."¹⁷⁹ One can easily see how such an outlook would align well with the Lively opinion in *Mozert*, and indeed, Macedo offered little sympathy for the position staked out by the plaintiff-parents in that case:

As a matter of basic principle at least, we have good reason to refuse the *Mozert* families' request to opt out. If intransigence here appears to be at odds with religious freedom, it must be remembered that rightful liberty is civil liberty, or liberty that can be guaranteed equally to all. All of us must accept limits on our liberty designed to sustain a system of equal freedom for all. Each of us can reasonably be asked to surrender some control over our own children for the sake reasonable common efforts to ensure that all future citizens learn the minimal prerequisites of citizenship. There is no right to be exempted from measures necessary to secure the freedom of all.¹⁸⁰

¹⁷⁴ *Id.* at 2.

¹⁷⁵ *Id.*

¹⁷⁶ RAWLS, *supra* note 17, at 4.

¹⁷⁷ MACEDO, *supra* note 20, at 169 (citing JOHN RAWLS, A THEORY OF JUSTICE 214 (1971)).

¹⁷⁸ *Id.* at 169–72.

¹⁷⁹ *Id.* at 175.

¹⁸⁰ *Id.* at 202. For other community-advocacy arguments in the literature, see Amy Gutman's theory of democratic education. Amy Gutman, *Undemocratic Education*, in LIBERALISM AND THE MORAL LIFE 71, 75–81 (Nancy L. Rosenblum ed., 1989) [hereinafter Gutman, *Undemocratic Education*]. Her theory leads her to be critical of the *Mozert* parents. *Id.* at 81–85; Amy Gutman, *Civic Education and Social Diversity*, 105 ETHICS 557, 572–73 (1995) [hereinafter Gutman, *Civic Education*]. Her theory is critical of the *Yoder* parents as well. *Id.* at 570; see also Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 162–65, 170–72 (1995) (asserting that schools should serve the goal of making children culturally literate and facilitate a common civic-cultural identity among them). See generally GUTMANN, *supra* note 20 (arguing for a democratic approach to education).

Macedo's argument thus speaks to a primary concern of managing diversity within a community.

There are a number of arguments on the more skeptical side of these debates, however, where judges and scholars have articulated their ambivalence about various state actions undertaken toward community goals in public schools. As seen in the cases and scholarly works discussed below, what underlies this ambivalence are a range of competing rights and alternative concerns, most of which center on religious freedom and parental authority in directing the education of children. Yet, for the most part, such skeptical arguments in the religious/ideological context converge with the community-advocacy arguments in presuming a background condition of religious plurality, and in advocating for state action (or nonaction) that encompasses a different way to manage that plurality within the public school context.

In the case of *West Virginia Board of Education v. Barnette*,¹⁸¹ Justice Jackson wrote for the Court in striking down a mandatory flag salute by teachers and students adopted by the West Virginia state board of education, and overruled the *Gobitis* ruling.¹⁸² Parents of school children who were Jehovah's Witnesses, and who raised a religious objection, again brought the case.¹⁸³ Notwithstanding the potential benefits to national unity that may have underlay a mandatory flag salute, Jackson viewed this mode of managing plurality as problematic for several key reasons: it encompassed a coercion of the objecting students in violation of their First Amendment free speech protections;¹⁸⁴ no substantial costs were imposed upon others if certain students engaged in peaceful noncompliance with the flag salute;¹⁸⁵ and ultimately, Jackson suggested that such an exercise would be ineffective in cultivating civic and cultural unity.¹⁸⁶ As he stated in elaborating on the last point:

As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.¹⁸⁷

¹⁸¹ 319 U.S. 624 (1943).

¹⁸² *Id.* at 626–29, 642.

¹⁸³ *Id.* at 629.

¹⁸⁴ *Id.* at 631–37; *see also id.* at 645 (Murphy, J., concurring); *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 601–02, 605–07 (1940) (Stone, J., dissenting) *overruled by* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

¹⁸⁵ *Barnette*, 319 U.S. at 630.

¹⁸⁶ *Id.* at 640–42; *see also id.* at 644 (Black, J., and Douglas, J., concurring); *id.* at 646 (Murphy, J., concurring).

¹⁸⁷ *Id.* at 641.

However, it is worth emphasizing the concessions to the authority of the state, also articulated by Jackson, in shaping a cultural unity out of the religious plurality in public schools. Jackson stated “the State may ‘require teaching by instruction and study of all in our history and in the structure and organization of our government, including the guaranties of civil liberty, which tend to inspire patriotism and love of country.’”¹⁸⁸ And later in the opinion, he noted that “[n]ational unity as an end which officials may foster by persuasion and example is not in question.”¹⁸⁹ Thus, much as Frankfurter sought to draw an acceptable line between religious autonomy and the demands of the state, the same goal is apparent in Jackson’s opinion. While the two simply differ on the legitimacy of the mandatory flag salute itself, they do converge upon the goal of seeking to manage religious plurality between these competing interests of individual autonomy and preserving community.

Similarly, the orientation toward managing, as opposed to creating, religious plurality in public schools can be gleaned in the argument of Judge Boggs in *Mozert*. Boggs was the most skeptical among the three Sixth Circuit judges about the Hawkins County school board’s actions.¹⁹⁰ He was also the most sympathetic to the plaintiff-parents among the three judges, even though he ultimately concurred in the ruling.¹⁹¹ But Boggs forcefully articulated the limited scope of what the parents were demanding: it was not the requirement of new books in the curriculum, but a relatively modest opt-out for their children.¹⁹² This requested accommodation encompassed clear concessions to state authority to otherwise structure its public schools. At stake in this disagreement between the plaintiff-parents and the Hawkins County school board then was mere disagreement over better or worse ways to manage the claims of religious difference raised by the former. Perhaps with some of these points in mind, the plaintiff-parents did garner a degree of sympathy in the scholarly literature, with several authors emphasizing the relative modesty and defensibility of an opt-out provision relative to the position of the school board in that case.¹⁹³

¹⁸⁸ *Id.* at 631 (quoting *Gobitis* 310 U.S. at 604 (Stone, J., dissenting)).

¹⁸⁹ *Id.* at 640.

¹⁹⁰ *Mozert v. Hawkins Cty. Bd. of Educ.*, 827 F.2d 1058, 1073 (6th Cir. 1987) (Boggs, J., concurring).

¹⁹¹ *Id.* at 1073–74.

¹⁹² *Id.* at 1074–75.

¹⁹³ BATES, *supra* note 100, at 268–302; Shelley Burtt, *Religious Parents, Secular Schools: A Liberal Defense of an Illiberal Education*, 56 REV. OF POL. 51, 53, 57–58, 65–66, (1994); Dent, *supra* note 137, at 923–27. Though it preceded the *Mozert* opinion by about ten years, Hirschhoff would likely have been sympathetic to the plaintiff parents too:

Although the state has legitimate interests in preparing youth for citizenship, for a vocation, and for a satisfactory personal life, the potential for indoctrination of children in the public schools in values which conflict with those of their parents necessitates limitations on the power of the state to require instruction. Such

A similar observation may be made in the *Yoder* case. Even though the objecting Amish parents prevailed in their desire to withdraw their children from public schools, Justice Burger's opinion for the Court (and the claims of the Amish parents as well) proceeded from assumptions of community-management.¹⁹⁴ This may be gleaned from a notable concession to state authority articulated in the Court's opinion: the Amish parents did not contest the authority of the state in compelling school attendance until completion of the eighth grade and the Court ruling itself referred to the continuing force of this school attendance requirement.¹⁹⁵

The Court offered this more general statement of the state's authority, notwithstanding its ruling in this case:

Nothing we hold is intended to undermine the general applicability of the State's compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated.¹⁹⁶

In short, even though *Yoder* contemplated a dramatic accommodation of religious freedom by allowing for the departure of Amish children from the public school community, this was still a ruling that both placed constraints on the scope of religious liberty—the Amish children were not given free license to withdraw from all school requirements—and that recognized a continuing state interest in fashioning community in public schools.¹⁹⁷ The orientation of the Court here was one of *managing* the problems of religious plurality posed by the claims of the Amish parents.

Finally, consider a set of skeptical arguments, distinguished from the preceding arguments only in their even greater skepticism of the unifying function of public schools and in their greater concession to other values such as parental

potential indoctrination conflicts with the first amendment's protection of freedom of speech, its implicit protection of freedom of thought and the "marketplace of ideas," and the general principle that our government is a government by consent of the governed. To avoid possible indoctrinative effects, parents must have a constitutionally protected right to excuse their children from instruction which conflicts with their parents' values.

Mary-Michelle Upson Hirschhoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 957 (1977).

¹⁹⁴ *Wisconsin v. Yoder*, 406 U.S. 205, 210 (1972).

¹⁹⁵ *Id.* at 207, 212.

¹⁹⁶ *Id.* at 236.

¹⁹⁷ *See id.* at 221.

autonomy or diversity. In certain respects, these arguments track familiar themes that we have seen elsewhere in the religious/ideological context. Common within these arguments is a starting presumption of deep religious or ideological plurality that is understood to inevitably intersect with public schools. Hence the motivating question remains—as was the case with the community-advocacy and skeptical arguments noted above—on how best to manage plurality.

Yet, as a point of divergence, these—for lack of a better term—“heightened-skeptics” of community-building in public schools see the most fruitful avenues of management to not lie within greater accommodation of religious freedom within the public schools.¹⁹⁸ Rather, their focus is on schemes that contemplate government-subsidized school choice among public, charter, and/or private school options.¹⁹⁹ Hence if these heightened-skeptics are still focused on themes of managing plurality, their version of management is across the range of educational options and *not* simply within the public schools.

For example, Rosemary Salomone focuses on the problems of plurality that are prompted by the concerns of religious conservatives.²⁰⁰ She ultimately proposes a three-part framework for elementary and secondary education that is more accommodating of religious and ideological plurality than the present system:

The proposed model would include a mix of three formats of government-supported schools operating under state education statutes: publicly funded and controlled public schools in their current form under the auspices of local school boards, some or all of which may introduce family choice strategies within the geographical bounds of a state-established school district; public charter schools funded directly by government and managed by outside groups under the sponsorship of a legislatively designated governmental entity; and private choice schools, including religiously affiliated institutions, funded through voucher payments provided by the state to parents who demonstrate economic need.²⁰¹

To be sure, Salomone gives some weight to the state’s interest in forging societal unity—hence the presence of public schools in her three-part scheme. Her scheme also encompasses state authority and oversight over the entire proposed system, recognizing that “[e]ven private choice schools partially funded through government tuition subsidies to parents would be prohibited from teaching or acting in any way that undermines the nation’s overarching commitment to racial

¹⁹⁸ See ROSEMARY C. SALOMONE, VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION 5–8 (2000).

¹⁹⁹ *See id.*

²⁰⁰ *Id.* at 6.

²⁰¹ *Id.* at 256.

equality or political commitment to gender equality (within the reasonable bounds of religious beliefs), [and] to religious tolerance.”²⁰² But the primary thrust of her proposal is her assertion that plurality may best be managed by allowing for the separation of diverse constituencies.²⁰³ Her scheme would allow for community cohesiveness, but in a segmented form and not just through public educational institutions. She states that in her model “community is not necessarily defined by residence but by a shared sense of purpose . . . [an] education built on a shared worldview, provided [the coalesced family groups] adhere to core political commitments, the value of civil toleration, and specified academic performance standards.”²⁰⁴

In a similar vein, Michael McConnell has also endorsed a government-subsidized school choice scheme out of a similar concern for religious and ideological plurality.²⁰⁵ Such a scheme would encompass a greater respect for the religious and ideological values of parents than the *status quo* educational system, though McConnell would also retain a role for state oversight.²⁰⁶ Perhaps even more than Salomone, however, McConnell’s argument is motivated by a deeper skepticism of the value of public schools in managing religious/ideological plurality. As he states:

²⁰² *Id.* at 257.

²⁰³ *Id.* at 7–8.

²⁰⁴ *Id.* at 264.

²⁰⁵ Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, in MORAL AND POLITICAL EDUCATION 87, 87–88 (Stephen Macedo & Yael Tamir eds., 2002) [hereinafter McConnell, *Education Disestablishment*]. I should note, McConnell does also address racial plurality in a tangential way in his arguments on education. For example, he speaks approvingly of the possibility of Afrocentric charter or private schools as a component of his scheme for segmenting elementary and secondary education. Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL. F. 123, 125–28, 149–51 (1991) [hereinafter McConnell, *Multiculturalism*]. Still, even when he incorporates racial plurality into his argument, it is clear that his primary focus is on religious plurality. This is why I situate his argument within the religious/ideological context.

²⁰⁶ McConnell, *Education Disestablishment*, *supra* note 205, at 87–88.

Until relatively recently, the common schools were able to communicate an effective brand of democratic values, but that was because they were not squeamish about embracing a particular worldview—the Protestant. It is unlikely that this can be replicated under modern conditions of increased diversity in society and increased assertiveness by minority groups. A modern public school faces two choices: either it adopts a comprehensive doctrine and thus abandons its claims to being a liberal institution, or it avoids comprehensive doctrines and abandons the hope of supplying a morally coherent structure for its teaching of democratic values.²⁰⁷

These arguments of heightened-skeptics share one thing in common with skeptical arguments in the racial context: both seemingly question the value of plurality within the public school.²⁰⁸ Yet, unlike community-skeptics in the racial context, we very clearly see from Salomone and McConnell a sense that the task of managing religious/ideological plurality is a crucial one for the state—hence, their focus on schemes that would manage plurality by allowing different communities to educate their children in a more segmented fashion.²⁰⁹

IV. PLURALITY WITHIN COMMUNITY

As is implied by the discussion in Part III, I view the main reason for the greater judicial focus on community-creation in the race context and community-maintenance in the religious/ideological context as stemming from default conditions on population distribution. Compulsory school attendance laws and the relatively greater geographic dispersion of different religious/ideological constituencies within American society—compared to the dispersal of certain racial minorities—have allowed for a default condition of relative plurality in American public schools along religious/ideological lines that is not true for race. Thus, I view the association of creation-race and maintenance-religion/ideology as being not necessarily intrinsic to those dimensions of identity, but rather more directly related to how those particular identities have tended to intersect with geographic patterns in American life.²¹⁰

²⁰⁷ *Id.* at 122.

²⁰⁸ SALOMONE, *supra* note 198, at 6; McConnell, *Education Disestablishment*, *supra* note 205, at 126–28.

²⁰⁹ For another argument in a similar vein, see Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1024–25 (1996); see also William A. Galston, *Two Concepts of Liberalism*, 105 ETHICS 516, 524 (1995) (providing Galston’s defense of the “diversity state,” which could be seen to align with the above arguments on school choice, even though Galston does not address some of these arguments directly).

²¹⁰ I do qualify the preceding statement by saying “not necessarily.” One might argue that the relatively greater geographic segmentation along racial lines in American life,

By way of illustrating this point, let us return to the example of Yale University. In this particular incident, the focus of student activism and administrative response was largely on matters of racial difference (with perhaps some discussion of ideological plurality too). Yet the problem of plurality confronting Yale is, I would submit, not a creation problem but a community-maintenance problem—namely, how best to manage diverse claims of equality, dignity, and respect within an *already* racially pluralistic university community. Indeed in its profile for the class of 2019, Yale reported that “42.5% of freshmen are US citizens or Permanent Residents from [racial/ethnic] minority groups” and that 64% of students received some financial aid.²¹¹ This background condition of relatively high racial plurality at Yale might be traced to its highly selective and deliberate admissions process, and its policy of need-blind admissions²¹²—both of

compared to religion, could suggest that there is indeed something intrinsic to those identities driving geographic segmentation, and thus indirectly causing the creation/maintenance distinction between racial and religious/ideological plurality in public schools. While I am more confident in asserting the importance of geographic patterns in causing the above noted distinction, I do not offer an answer on this latter question.

²¹¹ *Yale College Class of 2020: Freshman Class Profile*, YALE.EDU, http://admissions.yale.edu/sites/default/files/files/class_profile_2019_final.pdf [<https://perma.cc/Z7JU-CB2B>].

²¹² On “What Yale Looks For” in its admissions process, the Yale College admissions website states:

We estimate that over three quarters of the students who apply for admission to Yale are qualified to do the work here. Between two and three hundred students in any year are so strong academically that their admission is scarcely ever in doubt. But here is the thing to know: the great majority of students who are admitted stand out from the rest because a lot of little things, when added up, tip the scale in their favor. So what matters most in your application? Ultimately, everything matters. The good news in that is that when so many little things figure into an admissions decision, it is fruitless to worry too much about any one of them.

...

We convene a committee of experienced admissions officers, Yale faculty, and Yale deans to select applicants who have shown exceptional engagement, ability, and promise.

Transcripts, test scores, essays, and recommendations help paint a picture not only of a student’s accomplishments to date but also of the ways in which an applicant has taken advantage of the opportunities available to him or her. For example, does your school offer AP courses, an International Baccalaureate program, neither, or both? We only expect you to take advantage of such courses if your high school provides them.

which have undoubtedly been crucial in allowing the university to construct a community of students quite unlike the typical public school community.

The Yale example thus illustrates the potential for community-maintenance themes to travel with problems of racial plurality as well as religious/ideological plurality. (It may also indicate perhaps the extreme measures often needed to turn problems of racial plurality into community-maintenance problems too.) But beyond this, the Yale example is also useful in exploring my third and final assertion in this Article: for community-builders, problems of maintenance are generally preferable to problems of community-creation. This is not to say that lines of division within a community may not, at times, be as deep or troubling as lines of division that correspond to community-creation issues. Nor am I implicitly suggesting that religious/ideological differences in America have uniformly been less intense or problematic than racial differences.

Rather, the basis for my claim is merely that however deep the lines of division may be within an already recognized or accepted community, one tool may remain available for community-builders to bridge differences in that context that will not be available in the community-creation context: the potential of a common culture based upon experiences, reference points, places, individuals, and events that can widely be viewed as common among all community members. This common culture, as defined by these components is, in essence, a great part of what was being referenced by the Yale Intercultural Affairs Committee, associate master Erika Christakis, President Salovey, and the students who, angered by the Christakis email, all invoked a desire for substantive communal engagement. And this common culture provides all members of the community a means—in a sense a language—to genuinely engage with one another.

Put in more concrete terms, grappling with the multitude of issues intertwined with questions of racial inclusion and exclusion is obviously a tall order in any context. But in the case of a university community like Yale, framing those

Again, we are looking for students who will make the most of Yale and the most of their talents. Knowing how you've engaged in the resources and opportunities at your high school gives us an expectation of how you might engage the resources at Yale if admitted.

In selecting future Yale students, President Brewster wrote, "I am inclined to believe that the person who gives every ounce to do something superbly has an advantage over the person whose capacities may be great but who seems to have no desire to stretch them to their limit." Within the context of each applicant's life and circumstances, we look for that desire and ability to stretch one's limits.

What Yale Looks For, YALE.EDU, <http://admissions.yale.edu/what-yale-looks-for> [<https://perma.cc/ZWG9-5ZV4>]. On its financial aid policy, the website states: "Yale admits students without regard to their ability to pay and meets 100% of demonstrated financial need. For all students. Without loans." *Financial Aid At-A-Glance*, YALE.EDU, <http://admissions.yale.edu/financial-aid> [<https://perma.cc/5CJW-U9Z4>].

concerns within the very grounded context of Halloween costumes, or the legacy of racism in named campus buildings, provides an entry point for these incredibly difficult questions where students can draw on common reference points, common events, and common spaces. As the Yale debates themselves indicate, one probably errs in thinking that there is anything like a universal student experience at Yale or any other university campus. The dilemmas of plurality obviously do not disappear within a community. Yet, if communities possess a strong enough culture with sufficient engagement between diverse groups, the *perception* of at least some points of commonality may facilitate communal cohesiveness—such as some sense that on certain things, “just about every student at Yale knows ‘x,’ or is aware of ‘y,’ or has seen ‘z,’” or has had a particular reaction to something “well-known” in their lives at Yale. The belief of certain points of commonality (the substance of which will undoubtedly vary from student to student and will likely change over time) allows for dialogue on plurality to begin and for claims to be made and heard in a community. Thus, the culture within a community provides a potential means of engaging with plurality that is absent where no community exists on a particular point of disagreement.

In noting the potential of a common culture to serve as an adhesive for plurality within a community, my claim both converges and diverges from a related argument put forth by Jonathan Zimmerman. In his book, *Whose America?*, Zimmerman examines the theme of racial and religious plurality in public schools by focusing on debates over school curricula and textbooks over much of the twentieth century.²¹³ Among other things, Zimmerman concludes by noting that the problems of religious plurality in this context have been somewhat more vexing relative to race.²¹⁴ The conflicts driven by racial plurality can—and have been—mitigated by the repeated strategy of including more and more representatives of each minority group into an overarching, unifying historical narrative of American progress in history textbooks. In other words, a narrative of American history and progress is possible that can subsume racial plurality. In contrast, given the apparently more intractable nature of religious plurality in this context—according to Zimmerman—no such strategy in history textbooks has been available along the religious dimension.²¹⁵ To quote Zimmerman on this point:

Despite shrill warnings by a wide range of polemicists, the inclusion of racial and ethnic minorities in textbooks did not dilute America’s majestic national narrative. Instead, these fresh voices were folded into the old story, echoing a century-long pattern of challenge, resistance, and

²¹³ JONATHAN ZIMMERMAN, *WHOSE AMERICA?: CULTURE WARS IN THE PUBLIC SCHOOLS 2–8* (2002).

²¹⁴ *Id.* at 7–8.

²¹⁵ *Id.* at 6–8, 214–22. I should note, however, that Zimmerman is himself critical of this approach to teaching history. *Id.* at 224–25.

co-option. On the religion front, compromise proved far more elusive. Reflecting Americans' essential beliefs about God and the universe, religious principles simply could not be reconciled in an additive, come-one-come-all fashion. Conflicts over history textbooks generally occurred within a shared set of assumptions about American civic tradition. But religious disputes often lacked this common language, a lack that accounts for their vehemence as well as their persistence.²¹⁶

To the extent that Zimmerman's argument may be instructive for problems of American community-building more broadly, his conclusions only partially converge with mine. Zimmerman is onto something in noting the strategy of ameliorating conflict by expanding inclusivity with respect to racial questions in history textbooks.²¹⁷ By giving members of more racial groups a part in the overarching historical narrative of American progress, racial conflicts over school curricula can be situated within a common reference point (in a way that religious conflicts have apparently not been situated). This aligns, I believe, with my claim on the benefits of managing plurality within a community.

Yet Zimmerman's argument does not speak to forms of unity that may be rooted not in larger civic narratives, but in culture and common experiences. For this reason, his argument perhaps overlooks the possibility of cultural adhesives to bridge gaps across racial or religious differences—even if some of those differences may be based on seemingly intractable points of belief. Thus, if the problems of racial plurality look different at Yale because of the presence of a university community and culture, it seems clear that the problems of religious/ideological difference in many public schools have often looked different than religious/ideological conflicts outside schools—for a similar reason. The mechanisms for managing religious/ideological plurality in many public schools have not been solely dependent upon the creation of unifying civic narratives. Rather, at least one crucial adhesive mechanism has been the creation of a common culture within the public school that binds diverse students together. A common culture can manage plurality by softening the edges of disagreement, providing alternative grounds for cohesion, providing a means of mutual respect and empathy across major societal fault lines, or by providing a means for the major fault lines to be put aside and ignored for other topics—such as parent-teacher-student discussion of school dress codes, or the cost of extracurricular activities, or the availability of certain advanced classes, or school pride in athletic teams.

If a common culture may indeed provide adhesive benefits to overcome community-maintenance problems, this point takes us back to the key insight discussed in Part II: that public schools provide a valuable function in bringing diverse students together into close physical proximity. Yet, while the Court focused on abstract values such as citizenship, toleration, building good character,

²¹⁶ *Id.* at 6.

²¹⁷ *Id.* at 32–54.

or facilitating student exposure to diversity, one other benefit flows from this interaction that, as we have seen, has been strongly implied by the Court: such interaction facilitates the creation of shared experiences and common cultural reference points for students from diverse backgrounds.

V. CONCLUSION

In this article, I have examined some of the central cases on race and public education, and religion/ideology and public education as a means of exploring crucial themes of unity and plurality in the American political community. My examination of these cases has led me to three claims: first, judicial conceptions of community in these opinions demonstrate a belief that public schools can help facilitate community across both racial and religious/ideological lines. Second, these opinions also demonstrate a point of divergence: judicial arguments in the racial context were more preoccupied with problems of community-creation, while in the religious/ideological context, judicial arguments demonstrate a relatively greater concern with community-maintenance. Finally, the problem of maintenance is a relatively easier problem for community-builders because it offers the possibility of a common culture serving as an adhesive across lines of division within the community.

Thus, even if we cannot expect deep plurality to disappear from American society, state actors who are concerned with bridging differences and finding grounds for unity may want to consider some of these issues to be evolving rather than persistent problems. That is, a problem of community-creation may—if a community subsequently takes hold—eventually become a problem of community-maintenance. Such an evolution should give community-builders cause for optimism in certain contexts: if such a situation occurs, even inescapable problems of plurality may become easier to manage within a community, relative to the kinds of problems that may persist between communities.