

## THE UNINTENDED CONSEQUENCES OF THE COURT'S RELIGIOUS FREEDOM REVOLUTION: A HISTORY OF WHITE SUPREMACY AND PRIVATE CHRISTIAN CHURCH SCHOOLS

*Vania Blaiklock, Esq.*

**ABSTRACT**—Although private church schools have historically received less attention than charter schools and other private nonsectarian schools in public discourse, in recent years, the Supreme Court's First Amendment jurisprudence has allowed private church schools to make great strides in achieving state funding. At a time where public education is facing criticism on all sides, it seems natural that school choice supporters are more vocal than ever. This Essay takes a closer look at private church schools and their relationship to white supremacy in anticipation of the Court's decision in *Carson ex rel. O.C. v. Makin*. Ultimately, that case will decide whether states must fund students taking part in a state school-aid program who choose to use that aid at sectarian schools without violating the First Amendment. Situated within the legacy of *Brown v. Board of Education* and Massive Resistance, this project examines distinctions between segregation academies and private church schools. I will argue that while there is a distinction between church schools and segregation academies, such schools seem to share the same purpose of maintaining mostly white classrooms. By examining private church schools through two theoretical frameworks that underpin Critical Race Theory: racial realism and strategic racism, I argue that unlike other private schools, church schools are uniquely situated to preserve white supremacy given their explicit constitutional protection under the First Amendment—a protection that the current Supreme Court will likely strengthen in *Carson*.

*[Note: This Essay was completed before the Supreme Court released its Carson ex rel. OC v. Makin opinion on June 21, 2022. The opinion does not change any of the arguments made in the following sections and all citations have been updated to reflect the 2022 slip opinion.]*

**AUTHOR**—American Studies Ph.D. student, College of William & Mary. J.D., William & Mary Law School, 2018; B.S. Political Science, Lee University, 2015. I would like to thank Professors Jamel Donnor and Allison Orr Larsen for their insight and advice during the preparing of this Essay.

INTRODUCTION .....	47
I. THE HISTORY OF SEGREGATION ACADEMIES AND CHURCH SCHOOLS .....	51
A. <i>Segregation Academies Generally</i> .....	52
B. <i>Distinguishing Church Schools</i> .....	57
II. SHARING PURPOSE: MAINTAINING WHITE SUPREMACY .....	62
A. <i>Evolving the Purpose: Racial Realism &amp; the Illusion of Integration</i> .....	64
B. <i>Protecting the Purpose: Strategic Racism &amp; First Amendment Protections</i> .....	68
CONCLUSION.....	72

## INTRODUCTION

Private religious schools are on a winning streak at the Supreme Court. Although the question of the State’s role in funding private religious schools has a long history in Supreme Court jurisprudence,<sup>1</sup> the Court has recently moved toward a strict “no discrimination” approach, holding that states which fund private schools cannot discriminate against religious schools when it comes to funding.<sup>2</sup> In its third and most recent case on the subject, *Carson ex rel. O.C. v. Makin*, the Court has indicated, just how far it is willing to take this “no discrimination” approach to providing public aid to private religious schools.<sup>3</sup>

The battle lines in these sorts of cases are seemingly clear: whereas some criticize the approach as a perversion of the Court’s First Amendment religious aid jurisprudence, school choice and religious freedom advocates have applauded the “no discrimination” approach.<sup>4</sup> What both camps largely overlook, however, is an ugly underbelly in the history—the unavoidable connection between religious schools and systemic racism. This Essay fills that gap.

---

<sup>1</sup> See, e.g., *Locke v. Davey*, 540 U.S. 712, 717–18 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639, 643–45 (2002); *Lemon v. Kurtzman*, 403 U.S. 602, 648 (1971); *Everson v. Bd. of Educ.*, 330 U.S. 1, 1 (1947) (all decisions dealing with state funding to religious institutions and the Establishment Clause).

<sup>2</sup> See, e.g., *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020) (holding once state assists in funding private education, it cannot discriminate against private schools that are religious); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2024–25 (2017) (holding Missouri Department of Natural Resources could not exclude religious preschool and daycare program from public benefit solely because it was religious).

<sup>3</sup> See *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1997 (2022) (holding Maine’s tuition assistance program violates the Free Exercise Clause by excluding religious private schools).

<sup>4</sup> For a comprehensive review of responses to the “no discrimination” approach, see G. Alan Tarr, *Espinoza and the Misuses of State Constitutions*, 73 RUTGERS U. L. REV. 1109, 1111, 1144 (2021).

Church schools are rooted in the history of desegregation and the public response to *Brown v. Board of Education*.<sup>5</sup> By focusing primarily on whether a state discriminates based on religion, the Court has overlooked the role that church schools play in maintaining white supremacy.<sup>6</sup> Thus, in expanding state aid to private church schools to prevent religious discrimination, the Court potentially empowers state-funded racial discrimination, perhaps without even knowing it is doing so.

After *Brown*, Southern states immediately reorganized their schools to avoid mandatory integration, a strategy that some scholars have called “Massive Resistance.”<sup>7</sup> Part of these efforts included so-called “segregation academies.”<sup>8</sup> Generally, studies define segregation academies as private schools founded between 1954 and 1970 in Southern states to aid white parents in avoiding integrated schools.<sup>9</sup>

---

<sup>5</sup> For the purposes of this paper, the term “church schools” refers specifically to evangelical private Christian schools created for the purpose of incorporating the Christian faith and doctrine in primary and secondary educational settings. See *infra* Section I.B.

<sup>6</sup> For the purposes of this paper, “white supremacy” means the conscious or unconscious desire to maintain white dominance politically, economically, and culturally through exclusion. See Charles W. Mills, *White Supremacy*, in A COMPANION TO AFRICAN-AMERICAN PHILOSOPHY 269, 269–81 (Tommy L. Lott & John P. Pittman eds., 2003); see also Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1714, 1736 (1993) (arguing that the primary premise of whiteness is the right to exclude, a premise that whiteness shares with the definition of property).

<sup>7</sup> For a more detailed definition of Massive Resistance, see *infra* notes 23–24 and accompanying text; see also JEFFREY L. LITTLEJOHN & CHARLES H. FORD, *ELUSIVE EQUALITY: DESEGREGATION AND RESEGREGATION IN NORFOLK’S PUBLIC SCHOOLS* 49–51 (2012) (discussing how Virginia, and specifically Norfolk, became a battleground for Massive Resistance after *Brown*). For the assertion that private schools were a strategy of Massive Resistance, see Anthony M. Champagne, *The Segregation Academy and the Law*, 42 J. NEGRO EDUC. 58, 58, 61 (1973) (arguing “tremendous hostility arose in the white community toward integration” and thus segregated private schools became the “new vehicle for evading the principle of integrated education”).

<sup>8</sup> See Norman Dorsen, *Racial Discrimination in “Private” Schools*, 9 WM. & MARY L. REV. 39, 41 (1967) (discussing the role of private schools in the Massive Resistance to integrated public education); see also JOSEPH CRESPIANO, *IN SEARCH OF ANOTHER COUNTRY: MISSISSIPPI AND THE CONSERVATIVE COUNTERREVOLUTION* 9 (2007) (stating that in Mississippi, segregation academies were a part of the resistance movement following *Brown*, a movement that gave way to “more subtle, color-blind political language” as time passed); Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436, 1436 (1973) (stating that integration efforts in the South were nullified by the “establishment of a ‘private’ school system”).

<sup>9</sup> In this Essay, I have intentionally spelled white with a lowercase and Black with an uppercase following the lead of other authors who make this decision intentionally as a form of reclamation. See, e.g., Mike Laws, *Why We Capitalize ‘Black’ (and Not ‘white’)*, COLUM. JOURNALISM REV. (June 16, 2020), <https://www.cjr.org/analysis/capital-b-black-styleguide.php#:~:text=The%20first%20is%20broad%20adherence,suspended%20if%20%E2%80%9Ca%20particular%20author> [https://perma.cc/X4TD-PRX Z] (explaining that capitalizing Black acts to reclaim a shared identity and culture). For definitions and examples of segregation academies, see Jeremy R. Porter, Frank M. Howell & Lynn M. Hempel, *Old Times Are Not Forgotten: The Institutionalization of Segregationist Academies in the American South*, 61 SOC. PROBS. 576, 583–84 (2014); see also Sarah Carr, *In Southern Towns, ‘Segregation Academies’*

Scholars who study the development of segregation academies commonly conflate nonsectarian private schools with evangelical Christian schools (church schools).<sup>10</sup> Some of these scholars, however, have recognized in passing that the corresponding rise of church schools alongside segregation academies does not necessarily mean that the two served the same exclusive discriminatory purpose.<sup>11</sup> These scholars acknowledge the complex reasons for the rise in church schools in the 1970s and 1980s, but they do so only to highlight the role that segregation may have played in forming the politics of conservative white Christians.<sup>12</sup> Thus, church schools are either mentioned as a footnote to the broader topic of segregation academies, or referenced briefly as a catalyst of the religious right movement.<sup>13</sup>

But church schools require a more nuanced examination if we want to truly comprehend white supremacy's role in the use of religion as a tool to maintain the racial status quo—which becomes increasingly important as the Supreme Court continues to validate and encourage the public funding of

---

*Are Still Going Strong*, ATLANTIC (Dec. 13, 2012), <https://www.theatlantic.com/national/archive/2012/12/in-southern-towns-segregation-academies-are-still-going-strong/266207/> [<https://perma.cc/GZC5-JT Y2>] (discussing person of color's firsthand experience living in community with segregation academy).

<sup>10</sup> See, e.g., Porter et al., *supra* note 9, at 584 (describing scholars who conflate the two). One exception is Rachel Winstead's Honors Thesis. Pointedly, she states that "to fully understand . . . racism, [nonsectarian private schools and sectarian private] schools must be understood as fundamentally distinct from one another." Rachel Winstead, *Basements Below the Sanctuary: A Story of the Church School* 3–4 (May 9, 2020) (B.A. honors thesis, University of Mississippi), [https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=2589&context=hon\\_thesis](https://egrove.olemiss.edu/cgi/viewcontent.cgi?article=2589&context=hon_thesis) [<https://perma.cc/HM3S-BGKB>]. Similarly, this paper argues that church schools and nonsectarian segregated academies were initially distinct. However, Winstead's work and mine differ in that she examines the history of one school in Mississippi, whereas I examine church schools broadly and in relation to the Supreme Court's current expansive religious aid jurisprudence.

<sup>11</sup> See, e.g., CRESPIANO, *supra* note 8, at 13, 255 (recognizing other issues beyond integration mobilized and politicized the Christian right); SETH DOWLAND, *FAMILY VALUES AND THE RISE OF THE CHRISTIAN RIGHT* 30 (2015) (arguing white parents sent their children to church schools for a variety of reasons that included but were not limited to avoiding desegregation).

<sup>12</sup> See CRESPIANO, *supra* note 8, at 13, 255; DOWLAND, *supra* note 11, at 30 (describing how "government schools" were painted as "places of disorder and chaos").

<sup>13</sup> For the purposes of this paper, the term "religious right" refers to the conservative political mobilization of evangelical Christians started in the 1960s and 1970s to fight perceived culture wars on a variety of issues—such as abortion, desegregation, and the secularization of public schools. See CRESPIANO, *supra* note 8, at 13; see also Randall Balmer, *The Real Origins of the Religious Right*, POLITICO (May 27, 2014), <https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133/> [<https://perma.cc/RXQ7-GNL4>] (noting origins of religious right are intimately connected with school segregation).

these schools.<sup>14</sup> Such a nuanced examination likely has not occurred because none of the religious schools implicated in the Court's recent decisions were located in Southern states.<sup>15</sup> Because the history highlighting a relationship between segregation academies and church schools exists exclusively in the context of southern Massive Resistance, the Court has overlooked this link in deciding these recent non-southern cases. Nevertheless, decisions from the Supreme Court apply nationally and will apply to Southern states—so this history is relevant.

This Essay supplements the story by situating the Court's recent trilogy of private religious school funding cases within the history of southern church schools and white supremacy. Throughout this Essay, I argue that southern church schools, even if created for a purpose encompassing more than the maintenance of white supremacy, share in that purpose by their historical connection to segregation academies and their modern preservation of mostly white spaces. Segregation academies and southern church schools share a fundamental link: they demonstrate the ability of white supremacy to use religion as a tool to preserve racism and the status quo in America.

By highlighting the relationship between white supremacy and southern church schools, this Essay warns of potential unintended consequences of the Court's recent expansive religious freedom revolution. Part I describes the history and development of segregation academies in the South, as well as the creation of church schools in relationship to segregation academies. In this Part, I argue that modern church schools, whether explicitly started as segregation academies or not, tend to incorporate the vestiges of segregation by inculcating students with cultural values rooted in white supremacy. This can manifest in a variety of ways, such as in providing a mostly segregated education, teaching a curriculum that focuses on American nationalism and exceptionalism rooted in whiteness, or both.<sup>16</sup>

Part II bridges segregation academies and church schools by arguing that through their embrace of the language of individual rights, segregationists maintained white supremacy through more implicit means. Drawing on Critical Race Theory methodology, I demonstrate this implicit

---

<sup>14</sup> See *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2257 (2020). Additionally, the Supreme Court just decided *Carson v. Makin*, holding that states may not prohibit private religious schools from receiving direct aid without violating the Free Exercise Clause of the Constitution. *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1997 (2022).

<sup>15</sup> See, e.g., *Carson*, 142 S. Ct. at 1993 (Maine); *Espinoza*, 140 S. Ct. at 2251 (Montana); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017) (Missouri).

<sup>16</sup> One day, I hope to expand this project to also examine the specific curricula used in these schools to determine whether such material incorporates/teaches norms rooted in white supremacy. However, for the purposes of this Essay, I will only mention and discuss curriculum superficially in Part II.

embrace of white supremacy by applying the lens of racial realism and strategic racism to analyze the desegregation of southern church schools. Central to this analysis is my claim that church schools are uniquely situated, based on First Amendment protections, to preserve white supremacy without serious federal oversight. This strategy of using church schools to maintain white supremacy will likely be more successful under the current Supreme Court's religious aid jurisprudence.

Importantly, this Essay does not argue that these schools should not exist. Church schools seek to teach values thought to be rooted in Christian faith and doctrine.<sup>17</sup> As such, nothing in this Essay suggests that church schools are inherently racist or are hiding behind a religious smokescreen. Instead, this Essay serves as a reminder that judicial decisions have national—and often unacknowledged—consequences for marginalized groups.

#### I. THE HISTORY OF SEGREGATION ACADEMIES AND CHURCH SCHOOLS

In this Part, I detail the development and history of segregation academies and church schools in the South and explain how church schools compare to segregation academies.

Section I.A offers an overview of segregation academies generally—explaining the development of these schools as a means of southern Massive Resistance in the years after the Court reached its decision in *Brown v. Board of Education*. As an example of the phenomenon of segregation academies that arose in the South in the 1960s and 1970s, I highlight the school closures and segregation academies that developed in Virginia during this time.

In Section I.B, I distinguish segregation academies from church schools. Section I.B compares and contrasts church schools and argues that it would be a mistake to view church schools as synonymous with segregation academies. In addition, Section I.B provides the reader with context as to the *Bob Jones* decision—a decision that, while often read as preventing church schools from participating in racial discrimination, in fact can be viewed as opening the door to First Amendment protections for church schools that participate in subtler forms of racial discrimination.

---

<sup>17</sup> See CRESPIANO, *supra* note 8, at 249.

### A. Segregation Academies Generally

In the spring of 1954, the New York Times boldly proclaimed, “High Court Bans School Segregation,” on its front page.<sup>18</sup> Chief Justice Warren delivered the Supreme Court’s unanimous decision in *Brown v. Board of Education*, denouncing the “separate but equal” doctrine<sup>19</sup>—at least in the field of public education—and declaring segregated schools violative of the rights protected by the Fourteenth Amendment.<sup>20</sup> The Court held that “[s]eparate educational facilities are inherently unequal.”<sup>21</sup> Yet, even the Court appreciated the difficulties that would come with enforcing mandatory desegregation, as it hesitated to provide instructions on implementation until a year later.<sup>22</sup>

Such hesitation was not unwarranted. States, especially in the South, immediately reacted to mandatory desegregation with outrage and violence.<sup>23</sup> The years of active defiance following *Brown* are known as a time of “[M]assive [R]esistance” due to the rapid and immense opposition to desegregation.<sup>24</sup> In some states, like Texas and Arkansas, the resistance quickly grew violent, culminating in attacks from angry mobs of white people set on preventing Black students from desegregating schools.<sup>25</sup> Other states simply refused to comply with *Brown*, choosing instead to shut down their schools.<sup>26</sup> Virginia took this route in places such as Charlottesville, Prince Edward County, and Norfolk.<sup>27</sup>

---

<sup>18</sup> Luther A. Huston, *High Court Bans School Segregation; 9-to-0 Decision Grants Time to Comply*, N.Y. TIMES, May 17, 1954, at 1.

<sup>19</sup> The term “separate but equal” comes from the Court’s prior decision in *Plessy v. Ferguson* where it held that railroad train segregation laws did not violate the Fourteenth Amendment so long as the railroad train facilities were equal. *Plessy v. Ferguson*, 163 U.S. 537, 550–52, (1896).

<sup>20</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954), *supp’d*, 349 U.S. 294, 299 (1955).

<sup>21</sup> *Id.*

<sup>22</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294, 299 (1955).

<sup>23</sup> Champagne, *supra* note 7, at 60; Note, *supra* note 8, at 1437.

<sup>24</sup> Champagne, *supra* note 7, at 60; Note, *supra* note 8, at 1437.

<sup>25</sup> Note, *supra* note 8, at 1437.

<sup>26</sup> See Champagne, *supra* note 7, at 60; see also Nancy MacLean, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT’S STEALTH PLAN FOR AMERICA* 62 (2017) (noting that in Virginia the 1956 General Assembly implemented legislation that closed any white school that planned on complying with integration).

<sup>27</sup> See Champagne, *supra* note 7 at 60; Note, *supra* note 8, at 1438 n.16. I focus on Virginia because, despite the extreme levels of resistance to desegregation in Virginia, current segregation academy scholarship is mostly concerned with states in the Deep South, with a heightened focus on Mississippi. See, e.g., CRESPIANO, *supra* note 8, at 13 (focusing exclusively on segregation academies in Mississippi); Marilyn Grady & Sharon C. Hoffman, *Segregation Academies Then and School Choice Configurations Today in Deep South States*, 2 CONTEMP. ISSUES EDUC. LEADERSHIP 1, 1 (2018) (focusing exclusively on “Deep South” states and leaving out Virginia); Bracey Harris, *Reckoning with Mississippi’s ‘Segregation Academies’*, HECHINGER REP. (Nov. 29, 2019), <https://hechingerreport.org/reckoning-with-mississippiis->

Two locations in particular, Norfolk and Prince Edward County, best illustrate the gravity of Virginia's strategic approach to Massive Resistance. In the aftermath of *Brown*, Virginia's General Assembly developed a plan that "authorized the governor to close or cease funding integrated public schools."<sup>28</sup> Thus, the logic of the General Assembly seems to hold that there could be no desegregation if there were no public schools. This allowed school boards in Norfolk and Prince Edward County to avoid desegregation by closing schools. Thus, reopening these schools would require orders from federal courts.<sup>29</sup>

In Norfolk, the governor closed six all-white schools after the Norfolk school board authorized seventeen Black students to attend those schools in 1958.<sup>30</sup> This school closure lasted from September 1958 until February 1959, when a federal court order required the Norfolk school board to reopen the closed schools.<sup>31</sup> Although shorter in duration than other school closures, the Norfolk closure affected more students than any other in Virginia.<sup>32</sup> As a result, Norfolk's closure was a prime example of Massive Resistance in Virginia—putting it at the forefront of public discourse over desegregation.<sup>33</sup>

While Norfolk's closure demonstrated the sweeping extent of Virginia's Massive Resistance, Prince Edward's closure revealed its longevity.<sup>34</sup> In Prince Edward County, the school closure lasted from 1959 until 1964—ten years after *Brown*.<sup>35</sup> Unlike all other public schools in Virginia, Prince Edward County kept its public schools closed despite the General Assembly's decision to move away from this form of Massive Resistance.<sup>36</sup>

---

segregation-academies/ [https://perma.cc/QHG7-BTHN] (recent segregation academy report focused exclusively on Mississippi).

<sup>28</sup> Note, *supra* note 8, at 1437; see *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 221 (1964) (noting Virginia General Assembly created legislation to close or defund integrated schools).

<sup>29</sup> See Note, *supra* note 8, at 1437–38; see also LITTLEJOHN & FORD, *supra* note 7, at 112–13 (detailing Federal Judge Hoffman's reasoning for requiring the reopening of Norfolk's schools); Dorsen, *supra* note 8, at 43 (providing a detailed analysis of the Prince Edward County situation, including how the schools in that county were finally reopened only through a federal court order).

<sup>30</sup> LITTLEJOHN & FORD, *supra* note 7, at 77–78.

<sup>31</sup> *Id.* at 78, 102.

<sup>32</sup> The closure displaced 9,930 white students and seventeen Black students. *Id.* at 78. Littlejohn and Ford provide a comprehensive overview of the Massive Resistance that took place in Norfolk. See generally *id.* at 78–79, 99–104.

<sup>33</sup> See, e.g., Anthony Lewis, *Virginia Loses Court Plea for Delay on Integration*, N.Y. TIMES, Sept. 28, 1958, at 1 (discussing Norfolk school closure specifically in connection to Virginia statewide legal request for delays in immediate integration).

<sup>34</sup> This is not to suggest that the Norfolk closure did not have lasting effects on the students. It is just meant to highlight the length of time that the Prince Edward County closure existed in contrast to Norfolk, where the closure was only one year, but affected a larger population of students.

<sup>35</sup> Dorsen, *supra* note 8, at 42–43.

<sup>36</sup> See *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 221–23 (1964).



Black students in Prince Edward County went without any formal education until 1963.<sup>37</sup> The public schools only reopened in 1964 because the Supreme Court held that Prince Edward County's school closure violated the Fourteenth Amendment.<sup>38</sup> The lasting implication of the closure for Black students continues today.<sup>39</sup>

Though school closures meant no school at all for some Black students, the same was not true for white students.<sup>40</sup> Instead, localities in Virginia created and developed private schools that white students could attend outside of the legal reach of *Brown*, which only applied to public education.<sup>41</sup> Additionally, Virginia's government provided white parents with grants to assist with the financial cost of private schools.<sup>42</sup> After much litigation, however, the Eastern District of Virginia deemed the grants unconstitutional in 1969 because they provided state funding to a "racially segregated education."<sup>43</sup> Other Southern states used this loophole in *Brown* to maintain segregated private institutions, appropriately called segregation academies.<sup>44</sup> Once the courts invalidated Massive Resistance in the form of school closings, Southern states such as Virginia put their energy into private schools and "freedom of choice" plans.<sup>45</sup>

---

<sup>37</sup> *Id.* at 223; see also JILL OGLINE TITUS, *BROWN'S BATTLEGROUND: STUDENTS, SEGREGATIONISTS, & THE STRUGGLE FOR JUSTICE IN PRINCE EDWARD COUNTY, VIRGINIA* 10 (2011) (arguing in the wake of resistance to *Brown*, Black students in Prince Edward County lost even the "substandard system [of education] that had stood at the heart of the black community for decades").

<sup>38</sup> *Griffin*, 377 U.S. at 225.

<sup>39</sup> For example, the Black students prohibited from being educated during this time never truly recovered from their lack of education—thus they were left illiterate, which meant they could not assist their kids with homework or obtain jobs paying more than minimum wage. TITUS, *supra* note 37, at 10, 204.

<sup>40</sup> See Dorsen, *supra* note 8, at 43; see also TITUS, *supra* note 37, at 31–34 (describing in detail the way in which the Prince Edward School Board assisted in creating and supporting a private school for white children). Further, this reinforced the notion that *separate and unequal* was to be the law of the land. Even when shutting down schools, state education systems treated Black children unequally.

<sup>41</sup> Champagne, *supra* note 7, at 65–66; Note, *supra* note 8, at 1438.

<sup>42</sup> See Dorsen, *supra* note 8, at 42–43.

<sup>43</sup> *Griffin v. State Bd. of Educ.*, 296 F. Supp. 1178, 1181 (E.D. Va. 1969).

<sup>44</sup> In Southern states like Alabama, Georgia, Louisiana, Mississippi, South Carolina, North Carolina, Tennessee, and Virginia, combined enrollment in private schools increased by "roughly 2,000 percent" between 1966 and 1972. Grady & Hoffman, *supra* note 27, at 2, 6; see Champagne, *supra* note 7, at 58; Note, *supra* note 8, at 1436.

<sup>45</sup> *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 221–22 (1964). For the purposes of this Essay, "freedom of choice" plans refer to the notion of putting school selection in the hands of parents and not the government, ultimately giving parents the right to send their kids where they want to, even if that means sending them to an all-white school. See CRESPIANO, *supra* note 8, at 173. For more analysis on the connection between segregation academies and modern school choice plans, see generally Grady & Hoffman, *supra* note 27 (detailing history of segregation academies and school choice plans); see also Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 816

Even though the Court decided *Brown* in 1954, many white parents only flocked toward segregation academies following the Civil Rights Act of 1964.<sup>46</sup> There were a few reasons for this delay. Due to the imprecise language in *Brown II*, localities were allowed to determine how and when desegregation would occur, leading to “a range of legal and extra-legal strategies” that frustrated integration.<sup>47</sup> These legal strategies included a shift in linguistic focus from the issue of white segregation based on racial superiority to the issue of private choice.<sup>48</sup> Additionally, in the 1970s, the economy in the South began to grow, “provid[ing] many middle-class families with the economic means to afford private tuition.”<sup>49</sup> Thus, the number of students in private schools expanded tremendously in the late 1960s and early 1970s amid public schools beginning to truly integrate.<sup>50</sup>

For this reason, the baseline definition of a segregation academy is a private school founded in the South sometime between the late 1960s and the early 1970s.<sup>51</sup> This timeline is significant because while private schools (both nonsectarian and sectarian) existed in small quantities prior to *Brown*, they exploded during the 1960s and 1970s. For example, the Yale Law Journal estimated in 1973 that total enrollment in private schools increased from 25,000 students in 1966 to 535,000 by 1972.<sup>52</sup> Segregated academies are thus distinguished from parochial and church schools by the “timing and conditions under which they emerged.”<sup>53</sup>

At times, the baseline definition of a segregation academy above is supplemented by the requirement that the private school received state funds as an explicit attempt by Southern states to avoid desegregation.<sup>54</sup> For example, in 1973, the Yale Law Journal defined segregation academies as schools fitting the founding date requirement that were “first operated with tuition grants from state governments.”<sup>55</sup> By contrast, Anthony Champagne—publishing around the same time as the Yale Law Journal

---

(2011) (exploring school choice rhetoric over the last century and noting specifically that the slogan has encompassed both “resistance to school desegregation and tactics to achieve it”).

<sup>46</sup> See CRESPIANO, *supra* note 8, at 9; Porter et al., *supra* note 9, at 578.

<sup>47</sup> Porter et al., *supra* note 9, at 578.

<sup>48</sup> CRESPIANO, *supra* note 8, at 9; Champagne, *supra* note 7, at 61.

<sup>49</sup> Porter et al., *supra* note 9, at 578.

<sup>50</sup> Note, *supra* note 8, at 1441–42.

<sup>51</sup> *Id.*; Champagne, *supra* note 7, at 58; see also CRESPIANO, *supra* note 8, at 249 (stating that early nonsectarian private schools after *Brown* were founded in the 1960s and early 1970s and that it is not until after 1976 that private Christian schools start to dominate the private school distribution).

<sup>52</sup> Note, *supra* note 8, at 1441.

<sup>53</sup> Porter et al., *supra* note 9, at 577–78.

<sup>54</sup> Dorsen, *supra* note 8, at 44–45; Note, *supra* note 8, at 1444–47.

<sup>55</sup> Note, *supra* note 8, at 1444–45.

article—used the founding date requirement but chose to omit state funding from the definition of segregation academies, finding these direct grants from states were “no longer common.”<sup>56</sup> Regardless of whether the definition includes direct monetary support from the state, segregation academies were created in the 1960s and 1970s as the result of white supremacist ideology focused on perpetuating white dominance through white exclusivity.<sup>57</sup> Despite *Brown*, segregationists had a particularly vested interest in keeping all-white schools.

Scholars typically limit their research on segregated academies to schools located in Mississippi or other Deep South states such as Louisiana, Alabama, South Carolina, and Georgia.<sup>58</sup> These states led resistance to the Civil Rights Movement which often turned violent. For example, between 1954 and 1964, some of the “most ghastly, high-profile acts of racial violence”—such as the violent murder of Emmett Till—occurred in Mississippi.<sup>59</sup> Thus, Mississippi, and states similarly situated, remain the focus of projects looking at the history of segregated academies.<sup>60</sup>

In particular, Mississippi receives a lot of focus because it was home to “the first significant organization of segregationist resistance, the Citizens’ Council.”<sup>61</sup> The White Citizens’ Council’s first chapter was in Indianola, Mississippi.<sup>62</sup> Indianola is also home to a notable Mississippi segregation academy, Indianola Academy, which is still open today.<sup>63</sup> As a part of its segregationist strategy, the Citizens’ Council led fundraising efforts that

---

<sup>56</sup> Champagne, *supra* note 7, at 58. Yet, as the Supreme Court continues to endorse state funding to religious schools, these types of grants may be well on their way to being common again. *See infra* Section II.B. It begs the question: would segregation academies have been successful under the current Court’s jurisprudence?

<sup>57</sup> *See* Champagne, *supra* note 7, at 63 (discussing use of private property right to exclude as a way to enforce segregation); *see also* Dorsen, *supra* note 8, at 41 (concluding private schools were being used to resist integration in order to maintain “lily-white schools”). For more on white dominance through white exclusivity, *see* Harris, *supra* note 6, at 1736.

<sup>58</sup> *See generally* Grady & Hoffman, *supra* note 27 (focusing on Deep South states); CRESPIANO, *supra* note 8 (discussing racial violence and extremism in Deep South); Note, *supra* note 8 (discussing segregation academies in Southern states).

<sup>59</sup> CRESPIANO, *supra* note 8, at 5. The University of Mississippi riot of 1962 also served as another high-profile example of the racial violence in Mississippi during this period. *See* JAMES MEREDITH, THREE YEARS IN MISSISSIPPI 223–24 (1966). The riot occurred due to the admittance of James Meredith, a Black man, to the school. *Id.* at 223.

<sup>60</sup> *See generally* Porter et al., *supra* note 9 (focusing exclusively on the South); Carr, *supra* note 9 (addressing the continued presence of segregation academies in Mississippi).

<sup>61</sup> CRESPIANO, *supra* note 8, at 5.

<sup>62</sup> Michael W. Fuquay, *Civil Rights and the Private School Movement in Mississippi, 1964–1971*, 42 HIST. EDUC. Q. 159, 161 (2002).

<sup>63</sup> Carr, *supra* note 9.

funded private schools in Mississippi with both public and private money.<sup>64</sup> The Citizens' Council was instrumental to the proliferation of private segregated schools in Mississippi and beyond.<sup>65</sup>

Segregation academies remained formally segregated until 1976, when the Supreme Court required them to integrate in *Runyon v. McCrary*.<sup>66</sup> The Court closed the private school loophole to *Brown* by holding that 42 U.S.C. § 1981, a federal law against private discrimination in contracts, “prohibits private schools from excluding qualified children solely because they are Negroes.”<sup>67</sup> Yet, this decision did not substantively change the racial makeup of the former segregation academies, and many of these schools remained majority-white schools.<sup>68</sup> A study on the survival of segregation academies found that areas in which “whites formally organized during [the] civil rights movement have higher rates of enrollment in academies relative to other communities in the South.”<sup>69</sup> This suggests that the original purpose of segregation academies—to further white dominance through exclusion of Black students—persists today.

### B. Distinguishing Church Schools

With few exceptions, scholars have historically conflated church schools founded during the 1960s and 1970s with the general definition of segregation academies.<sup>70</sup> This is understandable because evangelical church

---

<sup>64</sup> Fuquay, *supra* note 62, at 164–65. For more information on the Citizens' Council's creation and purpose, see generally STEPHANIE R. ROLPH, *RESISTING EQUALITY: THE CITIZENS' COUNCIL, 1954–1989* (2018).

<sup>65</sup> See Fuquay, *supra* note 62, at 159.

<sup>66</sup> See *Runyon v. McCrary*, 427 U.S. 160, 164–67, 186 (1976).

<sup>67</sup> Importantly, *Runyon* also reaffirmed the right of private schools to teach whatever material they wanted, including segregationist dogma. *Id.* at 163, 175, 177; see 42 U.S.C. § 1981 (providing that people in the United States can make and enforce contracts regardless of race).

<sup>68</sup> See Porter et al., *supra* note 9, at 594; see also Carr, *supra* note 9 (describing a segregation academy that continues to have majority-white enrollment).

<sup>69</sup> Porter et al., *supra* note 9, at 595.

<sup>70</sup> See, e.g., Champagne, *supra* note 7, at 59 (including parochial schools in table estimating growth in private schools between the 1960s and 1970s); Note, *supra* note 8, at 1444–47 (including “Christian Academies” in definition of segregation academies); Ellen Ann Fentress, *White Churches Involved at Every Step*, THEACADEMYSTORIES)<https://www.theacademystories.com/post/White-churches-involved-at-every-step> [<https://perma.cc/Y979-XSEV>] (arguing segregation academies found legal shelter under church schools). For exceptions, see DOWLAND, *supra* note 11, at 26–27 (recognizing difference between church schools and segregation academies); CRESPIANO, *supra* note 8, at 13 (describing different treatment of segregation academies and church schools in Mississippi); Winstead, *supra* note 10, at 3–4 (emphasizing importance of distinguishing between church schools and segregation academies). In 1967, Professor Norman Dorsen distinguished between the two types of schools, but only to examine whether the First Amendment would prohibit the state from dismantling segregation in sectarian schools. Dorsen,

schools also started to flourish in the 1960s and 1970s amid increased efforts to desegregate local schools.<sup>71</sup> As the founding of these schools overlap, it is easy to assume that they were created for the same purpose: to maintain white supremacy by avoiding desegregation.<sup>72</sup> In reality, however, the history is more complicated.

Southern churches played an extensive role in maintaining resistance to desegregation.<sup>73</sup> Even churches that did not create schools indicated their approval of segregation academies by allowing those academies to use church buildings for classes.<sup>74</sup> An example of this arrangement occurred in Indianola, Mississippi: Following a 1970 federal court ruling prohibiting formal segregation in local public schools, white parents pulled their students out of the public schools and enrolled them in the segregated Indianola Academy.<sup>75</sup> The Academy, however, lacked the necessary capacity in its own facilities to house all the white public school students, so it held classes on satellite campuses—one of which was in a Baptist church.<sup>76</sup> Another example occurred in Prince Edward County, Virginia—while public schools were shut down, white churches “offered the new Prince Edward Academy use of their buildings free of charge.”<sup>77</sup> It is thus unsurprising that scholars typically conflate private church schools with segregation academies.

Though the connection between segregation academies and church schools is readily apparent, it would be a mistake to conflate them.<sup>78</sup> An adequate account of the complex social and historical context of the development of church schools is necessary to understand both the history and sustainability of these schools.<sup>79</sup> In contrast to the timeline of segregation academies, enrollment in non-Catholic church schools increased by 137%

---

*supra* note 8, at 54–58. That argument is outdated by the Supreme Court’s holding in *Bob Jones University v. United States* because the Court allows the federal government, indirectly through the taxing power, to prevent church schools from segregating. 461 U.S. 574, 595 (1983).

<sup>71</sup> CRESPINO, *supra* note 8, at 249. I specify evangelical schools because Catholic parochial schools existed prior to any desegregation efforts and in some places, like Norfolk, were among the first schools to desegregate. See LITTLEJOHN & FORD, *supra* note 7, at 54; Note, *supra* note 8, at 1443.

<sup>72</sup> Winstead, *supra* note 10, at 3.

<sup>73</sup> See PAUL HARVEY, *CHRISTIANITY AND RACE IN THE AMERICAN SOUTH 189–90* (2016); see also Winstead, *supra* note 10, at 22 (arguing many Christians at the time of Massive Resistance found white supremacy and Christianity inseparable).

<sup>74</sup> See LITTLEJOHN & FORD, *supra* note 7, at 174; Grady & Hoffman, *supra* note 27, at 5; Fentress, *supra* note 70.

<sup>75</sup> Carr, *supra* note 9.

<sup>76</sup> *Id.*

<sup>77</sup> TITUS, *supra* note 37, at 34.

<sup>78</sup> See DOWLAND, *supra* note 11, at 30.

<sup>79</sup> CRESPINO, *supra* note 8, at 249 (describing prevalence of southern church schools and values that supported growth); Winstead, *supra* note 10, at 8 (explaining how conflating church schools with segregation academies erases the complexity behind narratives of white supremacy).

between 1970 and 1980.<sup>80</sup> This increase begins at the tail end of the segregation academies timeline making it easy to assume that desegregation also influenced the creation of church schools. Other changes, however, such as the perceived secularization of the public school system by the Supreme Court, also contributed to the creation of church schools.<sup>81</sup>

In the 1960s, the Supreme Court decided both *Engel v. Vitale* and *School District of Abington v. Schempp*, initiating the perception of public school secularization.<sup>82</sup> In *Engel*, the Court held that sectarian public school prayer violated the Establishment Clause of the First Amendment.<sup>83</sup> Likewise, in *Schempp*, the Court held that Bible reading and the saying of The Lord's Prayer in public school violated the Establishment Clause.<sup>84</sup> In conservative Protestant households, these two decisions amounted to an attack on core values and the Christian faith, which led to the creation of more church schools to combat the perceived secular indoctrination of white children.<sup>85</sup>

Additionally, in the late 1970s, conservative white Christians united and mobilized against several perceived culture wars, such as those regarding abortion, gay rights, and the Equal Rights Amendment movement.<sup>86</sup> This mobilization, commonly known as the rise of the religious right, was a movement against a perceived threat to the white Christian way of life that included, but was not limited to, desegregation.<sup>87</sup> This mix of values allowed for the rhetoric of the religious right to conceal its racist origins and bond evangelicalism with political conservatism.<sup>88</sup>

---

<sup>80</sup> DOWLAND, *supra* note 11, at 23.

<sup>81</sup> Evangelical churches largely sponsored these schools, and as such, taught curricula deeply rooted in evangelical theology. CRESPIANO, *supra* note 8, at 249.

<sup>82</sup> *Engel v. Vitale*, 370 U.S. 421, 436 (1962); *Sch. Dist. v. Schempp*, 374 U.S. 203, 224–26 (1963). Dowland provides a detailed analysis on the impact these two cases had on white Christian parents' views that public schools were too secularized. DOWLAND, *supra* note 11, at 23, 30–33.

<sup>83</sup> *Engel*, 370 U.S. at 424.

<sup>84</sup> *Schempp*, 374 U.S. at 223.

<sup>85</sup> DOWLAND, *supra* note 11, at 23. Interestingly, the same justices who decided these two cases also decided *Brown* and other proutegration cases, which were seen to be an attack on the white family and core values.

<sup>86</sup> CRESPIANO, *supra* note 8, at 13.

<sup>87</sup> *Id.*; Balmer, *supra* note 13.

<sup>88</sup> See Rolph, *supra* note 64, at 160; DOWLAND, *supra* note 11, at 2; see also Balmer, *supra* note 13 (arguing religious right's targeting of abortion was simply a more palatable rallying cry to hide their real motive of "protecting segregated schools").

Admittedly, segregationists were often the same people who were intimately involved in fighting these religious culture wars.<sup>89</sup> This demonstrates the compatibility of the white supremacist agenda and the religious right. As a by-product of the movement to provide white parents with an alternative to “secular” values, southern churches created church schools.<sup>90</sup> The religious right successfully distinguished their religious schools from segregation academies by emphasizing issues other than desegregation—namely the apparent attack on religious values.<sup>91</sup>

Thus, the conflation of church schools and segregation academies is problematic because only a few church schools actually qualify under the technical definition of a segregation academy. Church schools really increased in popularity from the late 1970s through the early 1980s, partly due to the Supreme Court’s decisions on prayer and religious teaching in public schools and partly due to the rise of the religious right.<sup>92</sup> In contrast, the term segregation academy refers specifically to schools founded after the 1954 *Brown* decision and into the 1970s.<sup>93</sup> Conflating church schools with segregation academies allows church schools to defend against any accusation of segregation by arguing that their existence is rooted in theology, not white supremacy. In other words, by failing to properly distinguish church schools from the more overtly white supremacist segregation academies, legal scholarship has allowed church schools to circumvent responsibility for their own unique role in perpetuating white supremacy.

On another note, during this time church schools’ protection under the First Amendment had not been lost on the courts, the public, or segregationists.<sup>94</sup> Due to this protection, it was not until 1982, in *Bob Jones*

---

<sup>89</sup> See Balmer, *supra* note 13; see also KEVIN M. KRUSE, ONE NATION UNDER GOD: HOW CORPORATE AMERICA INVENTED CHRISTIAN AMERICA 203–04, 205 (2015) (describing role segregationists played in school prayer debate in Congress).

<sup>90</sup> CRESPIANO, *supra* note 8, at 13, 249. This fight against “secular values” in education continues as a narrative for supporting both church schools and homeschooling alternatives. See for example the recent evangelical movie, *God’s Not Dead 4: We the People*, a movie directed and produced by evangelical Christians, which centers around Christians defending their homeschooling curriculum from government officials. GOD’S NOT DEAD: WE THE PEOPLE (Pinnacle Peak Pictures 2021).

<sup>91</sup> CRESPIANO, *supra* note 8, at 249.

<sup>92</sup> DOWLAND, *supra* note 11, at 23. This is likely the reason why Porter, Howell, and Hempel found that looking into church schools in their modern study of segregation academies, while valid, would render few samples. See Porter et al., *supra* note 9, at 584.

<sup>93</sup> See CRESPIANO, *supra* note 8, at 9; Grady & Hoffman, *supra* note 27, at 5; Porter et al., *supra* note 9, at 578; Note, *supra* note 8, at 1441–44.

<sup>94</sup> See *Runyon v. McCrary*, 427 U.S. 160, 167 (1976) (noting that the case did not present the question of whether § 1981 clashed with the practices of “private sectarian schools that practice racial exclusion on religious grounds”); Lesley Oelsner, *High Court Curbs Private Schools on Racial Barrier*, N.Y. TIMES,

*University v. United States*, that the Supreme Court explicitly addressed racial discrimination in church schools.<sup>95</sup> The outcome of this case practically prohibited church schools from participating in racial discrimination.<sup>96</sup> The Court accomplished this by holding that the Internal Revenue Service's removal of tax-exempt status from organizations that racially discriminate is not unconstitutional under the First Amendment.<sup>97</sup>

In *Bob Jones*, the Court is intentional about addressing the First Amendment question. Basing its decision on twenty-five years of Supreme Court precedent and the “myriad Acts of Congress and Executive Orders” against educational segregation, the Court held that the government's strong interest in preventing racial discrimination outweighed any restriction on religious free exercise.<sup>98</sup> Yet, this requirement for a strong governmental interest, which relies on precedent and complies with the political behavior of the time, suggests that whether the First Amendment protects the actions of a church school will be fact specific and that explicit racial discrimination is likely required for a removal of tax-exempt status. Therefore, even in *Bob Jones*, the Court reinforced the potential protections afforded to church schools by the First Amendment, protections that could be strengthened under a pro-religious freedom Court.

In sum, not taking southern church schools as distinct vehicles of white supremacy seriously limits our understanding of the role desegregation has played in the evolution and mixing of white supremacy and religion in the United States. This is especially true considering that by 1976, southern church schools outnumbered the older segregation academies.<sup>99</sup> It is

---

June 26, 1976, at 1; see also CRESPIANO, *supra* note 8, at 9. I explore the potential current relevancy of this protection in modern constitutional jurisprudence in greater length in Part II.

<sup>95</sup> See generally 461 U.S. 574 (1982) (deciding whether private church schools can maintain tax-exempt status). The D.C. Circuit had previously addressed the tax-exempt status of church schools in *Green v. Connally*, putting the religious right on notice and causing many church schools to change their admission requirements to allow Black students, but it was not until *Bob Jones* that the Supreme Court affirmed the D.C. Circuit's reasoning. *Green v. Connally*, 330 F. Supp. 1150, 1155 (D.D.C. 1971). Crespino discusses the religious right's leaders' reactions to *Connally* in detail. CRESPIANO, *supra* note 8, at 254–55.

<sup>96</sup> See *Bob Jones*, 461 U.S. at 603–04.

<sup>97</sup> *Id.* at 604. For the specific IRS rule that prohibits tax-exempt organizations from discriminating, see Rev. Proc. 75-50, 1975-2 C.B. 587. The rule includes reporting requirements that require an organization to report on its racial demographics as well as a public-facing requirement that stipulates the antidiscriminatory nature of the organization. The IRS updated the public-facing requirement in 2019 to allow internet disclosures. Rev. Proc. 2019-22, 2019-22 I.R.B. It should also be noted that this decision has rarely been applied to take away a church school's tax-exempt status. See DOWLAND, *supra* note 11, at 46.

<sup>98</sup> *Bob Jones*, 461 U.S. at 593, 603–04.

<sup>99</sup> CRESPIANO, *supra* note 8, at 249.



significant, then, that church schools are distinguishable from segregation academies. If church schools occupy a different space than do segregation academies, then all church schools—not just those created in the 1960s and 1970s—should be considered in examining the evolution and adaptation of white supremacy.<sup>100</sup>

## II. SHARING PURPOSE: MAINTAINING WHITE SUPREMACY

Given that *Bob Jones* scrutinized race-based exclusion in schools, private segregation in education—whether in segregation academies or church schools—should have faced complete eradication. And to the extent that the federal government now prohibits these schools from actively preventing Black student attendance, private segregation no longer legally exists. Legal prohibition, however, has not translated to real extinction. This is especially true when the underlying action—educational segregation—is understood for its true function: the maintenance and indoctrination of white supremacy.

After *Brown* and its progeny made it legally unacceptable to maintain white supremacy in public educational spaces, segregationists moved to private ones.<sup>101</sup> But even this strategy became more difficult after *Runyon* extended the prohibition of educational segregation to private spaces.<sup>102</sup> Because of these Civil Rights Era decisions, segregationists needed to discover more subtle ways to maintain white supremacy in education. Accordingly, segregationists embraced the language and discourse of individual liberties, rights, and private property as alternative ways to argue for ideas and policies that resulted in the continuation of white-dominated spaces.<sup>103</sup>

Professor Christopher Schmidt suggests that this shift is politically and socially acceptable because it moves the conversation of civil rights “from a question of white supremacy versus equality toward a question of liberty versus equality.”<sup>104</sup> Beyond the general political and social acceptability of this shift, the use of individual liberties and rights to legally argue for ideas

---

<sup>100</sup> Conservative white Christians typically take their faith seriously, which has severe implications for church schools that incorporate white supremacy, as it requires tackling racism backed by religious fervor. *See id.* at 277.

<sup>101</sup> Note, *supra* note 8, at 1436.

<sup>102</sup> *See Runyon v. McCrary*, 427 U.S. 160, 179 (1976).

<sup>103</sup> Christopher W. Schmidt, *Beyond Backlash: Conservatism and the Civil Rights Movement*, 56 AM. J. LEGAL HIST. 179, 189–90 (2016).

<sup>104</sup> *Id.* at 190.

and policies is also palatable to the evangelical Christian community—a group to which white segregationists often belonged.<sup>105</sup>

Church schools, often founded and created by evangelical Christians, also rely on the language of individual liberty and rights to justify their existence.<sup>106</sup> Individual rights-based rhetoric provides a more acceptable method for the work that legally segregated schools accomplished in the past.<sup>107</sup> Thus, it is not incredibly difficult to imagine that the maintenance of white supremacy has evolved into a succession of purpose between segregation academies of the past and church schools of the present.

In this Part, I argue that contemporary church schools demonstrate this succession by staying as segregated as legally possible under the Constitution.<sup>108</sup> And, more importantly, by exercising their unique ability to protect this purpose under the First Amendment religion clauses, church schools can avoid future federal restrictions on prowhite indoctrination.<sup>109</sup>

Section II.A defines two theories of Critical Race Theory: racial realism and strategic racism and then uses those theories to analyze the outcome of desegregation in modern church schools. I use racial realism to illustrate how token legal integration may not necessarily lead to an eradication of white supremacy in church school education. Instead, a more subtle form of white supremacy occurs through the continued existence of white dominated classrooms.

In Section II.B, I use strategic racism to highlight the unique protections that church schools have under the First Amendment. Using the recent

---

<sup>105</sup> See Balmer, *supra* note 13; see also Andrew R. Lewis, *The Transformation of the Christian Right's Moral Politics*, 17 FORUM 25, 28–29 (2019) (arguing that the language of individual rights has been beneficial to white evangelical political mobilization since the 1980s). The compatibility of individualism to Christianity is not necessarily intrinsic to the Christian faith, instead it is a uniquely evangelical concept—seen most regularly in southern evangelicalism—which allows southern evangelicalism to be so compatible with Americanism. See HARVEY, *supra* note 73, at 45, 70 (providing an example of how individualism became a tenet of the southern Baptist tradition—a large Protestant evangelical sect).

<sup>106</sup> See CRESPIANO, *supra* note 8, at 4; see also DOWLAND, *supra* note 11, at 27 (asserting the proposition that church schools were founded by mostly non-Catholic Christians in the 1970s).

<sup>107</sup> CRESPIANO, *supra* note 8, at 4. The legal attack on church schools in *Bob Jones* did more than dismantle complete segregation, it also unified evangelical Christianity with segregationism and pushed white Christians to act more cohesively as a political body. See *id.* at 13.

<sup>108</sup> See, e.g., DOWLAND, *supra* note 11, at 26 (finding that non-Catholic religious schools remain majority white); Grady & Hoffman, *supra* note 27, at 17 (finding that private school students, including church schools, tend to be mostly white). This is not to suggest that all parents send their students to private church schools because of white, homogenous classrooms. Parents choose alternatives to public education for a variety of reasons. See, e.g., *id.* at 11–17 (discussing virtual schools, charter schools, and homeschooling). Yet, regardless of intent, the fact that church school classrooms remain majority white has implications for the continued perpetuation of white dominance through white exclusivity.

<sup>109</sup> See CRESPIANO, *supra* note 8, at 4; see also DOWLAND, *supra* note 11, at 24–27.

Supreme Court’s religious aid jurisprudence as an example, I demonstrate how church schools will be potentially more successful in exercising First Amendment protections today.

*A. Evolving the Purpose: Racial Realism & the Illusion of Integration*

The legal victories gained by Black people in the 1950s and 1960s brought forth a countermovement of political and racial conservatism that insisted on limits to antidiscrimination policies.<sup>110</sup> Racial conservatism’s core arguments rely on concepts such as the “color-blind” interpretation of laws and “formal racial equality,” which focuses more on eradicating explicit types of individual racism and ignoring more subtle forms.<sup>111</sup> Once the Supreme Court started to reinforce these ideas in its legal jurisprudence, the advancements obtained in the 1950s and 1960s began to stall, or in some cases, were reversed.<sup>112</sup>

Considering the delay and reversal of Civil Rights Era victories, legal scholars—mostly scholars of color—developed Critical Race Theory (CRT) to establish “new theories and strategies” needed to combat the subtler forms of racism that emerged after the Civil Rights Movement.<sup>113</sup> CRT shares an intellectual history with critical legal theory and the legal realist work of the 1970s and 1980s in that it relies on the assumption that the law is not neutral, objective, or apolitical.<sup>114</sup> Yet CRT is distinguishable in that it highlights the ways in which the law has constructed race, which CRT asserts is “not simply—or even primarily—a product of biased decision-making on the part of judges, but instead, the sum total of the pervasive ways in which law shapes and is shaped by ‘race relations’ across the social plane.”<sup>115</sup> At its core, CRT is an intellectual movement that attempts to critically ascertain the

---

<sup>110</sup> See Schmidt, *supra* note 103, at 190–91.

<sup>111</sup> See Neil Gotanda, *A Critique of “Our Constitution is Color-Blind,”* 44 STAN. L. REV. 1, 46 (arguing that color-blind constitutionalists “live in an ideological world where racial subordination is ubiquitous yet disregarded—unless it takes the form of individual, intended, and irrational prejudice”); see also Joshua Paul, *‘Not Black and White, but Black and Red’: Anti-Identity Identity Politics and #AllLivesMatter*, 19 ETHNICITIES 1, 4, 6 (discussing the development of color-blind paradigms as a strategic way of reconstructing status quo race logic in a way that appears “rational”). For an example of racial conservatism using color-blind constitutionalist logic, see *Parents Involved in Cmty. Schs. v. Seattle*, 551 U.S. 701, 748 (2007).

<sup>112</sup> See KIMBERLÉ CRENSHAW, NEIL GOTANDA, GARY PELLER & KENDALL THOMAS, *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* xvii, xxviii (1995); see also RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* 4 (2d ed. 2012) (providing a brief summary of Critical Race Theory’s early origins).

<sup>113</sup> DELGADO & STEFANCIC, *supra* note 112, at 4.

<sup>114</sup> CRENSHAW ET AL., *supra* note 112, at xviii–xix.

<sup>115</sup> *Id.* at xxv.

relationship among race, power, and the law with the hope of “eliminating all forms of oppression.”<sup>116</sup>

I focus on two theories of CRT in this Essay: racial realism and strategic racism. Derrick Bell, an early pioneer of CRT, developed racial realism in 1992.<sup>117</sup> Racial realism acknowledges the permanent and evolutionary nature of racism in this country, but also frees Black people from the burden of seeking unobtainable equality.<sup>118</sup> Additionally, it puts progressive success into context as “short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance.”<sup>119</sup> For this reason, racial realism provides an essential perspective for describing how racism has become “more subtle though no less discriminatory.”<sup>120</sup> Bell’s concept recognizes that studying racism requires noticing the ways in which racism adapts and changes to maintain a regime of white supremacy that subordinates people of color.

Whereas racial realism provides a framework to notice subtle forms of racism, strategic racism provides a framework for understanding the way that subtle racism operates in a post-1964 world.<sup>121</sup> Importantly, strategic racism, a term first established by Ian Haney López in 2013, differs from traditional racism in that it does not involve “discrete acts of bigotry by malicious individuals.”<sup>122</sup> Instead, strategic racism operates as a manipulative and conscious plotting to gain or maintain white people’s collective sociopolitical dominance.<sup>123</sup> As such, strategic racism is mostly about strategy and not necessarily overt, malicious racial animus (although it can include individual racial animus); it operates outside of and in connection with other ways of maintaining power.<sup>124</sup>

---

<sup>116</sup> See Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. Cal. L. Rev. 1763, 1763 n.3 (1999); see also Jamel K. Donnor, *Lies, Myths, Stock Stories, and Other Tropes: Understanding Race and Whites’ Policy Preferences in Education*, 51 URB. EDUC. 343, 350–51 (2016) (noting CRT is both a human rights and racial justice project focused on eliminating oppression).

<sup>117</sup> Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 373 (1992).

<sup>118</sup> See *id.* at 373–74.

<sup>119</sup> *Id.* at 373.

<sup>120</sup> *Id.*

<sup>121</sup> For racial realism, see Bell, *supra* note 117, at 373–74. For strategic racism, see IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 42, 46 (2014).

<sup>122</sup> LÓPEZ, *supra* note 121, at 42, 46.

<sup>123</sup> *Id.* at 46; see also Donnor, *supra* note 116, at 351 (citing López to argue that in the twenty-first century, racism operates strategically to manipulate “existing racial antipathies and ideas of racial differences” for personal gain).

<sup>124</sup> See LÓPEZ, *supra* note 121, at 46.

Tokenism, defined as the presence of a few Black individuals in a majority-white space, is an example of strategic racism in the educational setting.<sup>125</sup> As complete segregation became legally impossible,<sup>126</sup> white supremacists had to accept the presence of some Black students. Generally, this resulted in most private schools, including church schools, strategically allowing a small number of Black students to enroll—which some scholars call “token integration”—avoiding the potential of losing their federal tax exemption.<sup>127</sup> In the years following *Brown*, federal courts were adamant about state desegregation in the legal sense, shutting down the private school loophole.<sup>128</sup> This suggests that to avoid violating post-*Brown* desegregation cases like *Runyon* and *Bob Jones*, private church schools can rely on token integration—acceptance of Black students in small numbers.<sup>129</sup> Yet, the legal requirement of Black attendance, does require these schools to affirmatively recruit or retain Black students. Instead, the only requirement is that these schools do not formally forbid Black students to attend. Thus, tokenism allows private schools to strategically maintain their white racial dominance without any threat of actual integration.

For the purposes of this Essay, I define “actual integration” as school composition reflective of the city in which that school is located.<sup>130</sup> Studies suggest that like other private schools’ students, church school students are

---

<sup>125</sup> See DOWLAND, *supra* note 11, at 26 (providing data on schools mostly consisting of white students); see also Dorsen, *supra* note 8, at 40 (providing data on racial isolation in schools).

<sup>126</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 582–85. Interestingly, before *Green v. Connally* in 1968, some white parents accepted sending their kids to schools with a small number of Black students so long as the school was not genuinely integrated. See Note, *supra* note 8, at 1441.

<sup>127</sup> DOWLAND, *supra* note 11, at 26; CRESPINO, *supra* note 8, at 4; Dorsen, *supra* note 8, at 40.

<sup>128</sup> See *Runyon v. McCrary*, 427 U.S. 160, 179 (1976); *Bob Jones*, 461 U.S. at 603–04. For an example of federal courts’ attempts at shutting down the private school loophole before these Supreme Court cases, see Dorsen, *supra* note 8, at 44–45 (describing how a federal court in Louisiana rejected any loophole that would allow states to fund private segregated education).

<sup>129</sup> DOWLAND, *supra* note 11, at 26.

<sup>130</sup> I recognize that city population is not a perfect measure of integration success because not everyone in a city will identify as religious or even consider sending their children to religious schools. However, even though church schools are religious, that is not the only factor a parent might consider when using their right to send their child to a church school. As noted, I believe that there are a variety of reasons a parent might consider when deciding private versus public school. See Grady & Hoffman, *supra* note 27, at 11–17; Ava M. Davis, *Why Do Parents Choose to Send Their Children to Private Schools?* (Dec. 2011) (Doctor of Education dissertation, Georgia Southern University), <https://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi?article=1382&context=etd> [https://perma.cc/K8WC-FA3M]). All parents in a city technically have the right to participate in school choice, so looking at the entire city demographic is appropriate to determine the level of integration in a particular church school. This will especially be true now that the Supreme Court’s religious aid decisions allow for public funding to assist parents choosing church schools. See, e.g., *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1998 (2022) (holding that states cannot ban religious schools from state private school funding); *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2261 (2020) (holding that state that provides tax credits for private school tuition cannot prohibit parents from using those credits for church schools).

more likely to be white.<sup>131</sup> They are, however, likely to enroll a small number of non-white students, which displays the illusion of integration and avoids any legal claims of segregation.<sup>132</sup>

Admittedly, the presence of Black students at church schools means any accusation of white supremacy based on segregation must be based on subtle, indirect separation. Traditionally, the courts viewed desegregation as the solution to the ills of segregated classrooms.<sup>133</sup> As church schools show, however, a school need not have complete segregation to maintain an overwhelmingly white classroom.<sup>134</sup> In *Brown* the Court argued that the problem with separate educational facilities was that such separation denoted some inferiority on the minority group.<sup>135</sup> Such white dominance is lessened—but not eradicated—in schools that remain majority white with only a token number of Black students. Therefore, as the racial realism theory emphasizes, white supremacy in church schools exists in a subtler form today but the consequences are just as serious.<sup>136</sup>

In fact, this more subtle adaptation of white supremacy may be harder to dismantle than complete segregation because the subtle adaptation appears to comply with integration. In this system, white supremacists can defend these subtler forms of white supremacy with race-neutral terms, such as “school choice” and “free exercise of religion.”<sup>137</sup> It is no surprise, then, that some scholars have argued that white supremacy “was reborn in the civil

---

<sup>131</sup> Grady and Hoffman, including church schools in their study, found that “private school students are more likely to be white.” Grady & Hoffman, *supra* note 27, at 17. Professor Jongyeon Ee found that white students make up the majority of enrollments in non-Catholic religious schools. See Jongyeon Ee, Gary Orfield & Jennifer Teitell, Private Schools in American Education: A Small Sector Still Lagging in Diversity, 16 (Mar. 5, 2018) (UCLA Civ. Rts. Project Working Paper), [https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-schools-in-american-education-a-small-sector-still-lagging-in-diversity/Ee-Orfield-Teitell-Private-School-Report\\_03012018.pdf](https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-schools-in-american-education-a-small-sector-still-lagging-in-diversity/Ee-Orfield-Teitell-Private-School-Report_03012018.pdf) [<https://perma.cc/GD2A-D8SL>]. The National Center for Education Statistics does provide data for racial demographics of private schools, and such information can be searched for online. See *Search for Private Schools*, NAT'L CTR. FOR EDUC. STATS., <https://nces.ed.gov/surveys/pss/privateschoolsearch/> [<https://perma.cc/RJ9E-2AVL>]. For the purposes of this Essay, however, I will assume that prior studies are correct in concluding that private church schools maintain majority white spaces. A future study could elaborate on this claim by examining the enrollment patterns of traditional private schools, private church schools, and public schools, controlling for geographical location.

<sup>132</sup> DOWLAND, *supra* note 11, at 26.

<sup>133</sup> See Champagne, *supra* note 7, at 60.

<sup>134</sup> See Ee et al., *supra* note 131, at 16 (providing data that white students make up a great majority of enrollment in non-Catholic religious schools).

<sup>135</sup> See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954), *supp'd*, 349 U.S. 294, 299 (1955).

<sup>136</sup> See *Bell*, *supra* note 117, at 373 (arguing “abstract legal rights” will only cause discrimination to become more subtle).

<sup>137</sup> See CRESPIANO, *supra* note 8, at 13; see also Schmidt, *supra* note 103, at 183, for an explanation of how white supremacists transitioned to race-neutral terms to accomplish racist outcomes.

rights era, not irreparably weakened.”<sup>138</sup> This is especially true when white supremacy converges with religion: whiteness becomes sacred, so white supremacists can protect it with a religious fervor.<sup>139</sup>

*B. Protecting the Purpose: Strategic Racism & First Amendment Protections*

Although all private schools can use the strategy of tokenism to maintain white supremacy in their schools, the religion clauses of the First Amendment protect only church schools.<sup>140</sup> The First Amendment prohibits Congress from making any law that would affect the free exercise of religion.<sup>141</sup> Because church schools are religious institutions, they fall under the protection of the First Amendment.<sup>142</sup>

In *Wisconsin v. Yoder*, the Supreme Court addressed the connection between a state’s interest in education and the fundamental rights inherent in the First Amendment clauses.<sup>143</sup> In *Yoder*, the Court held that balancing between these two interests is necessary when it comes to parents’ rights to govern “the religious upbringing of their children.”<sup>144</sup> Thus, some segregationists thought the First Amendment would protect them from the private desegregation requirements in *Runyon* if schools were converted to church schools.<sup>145</sup> This strategy failed because in *Bob Jones* the Court had held that the federal government could require religious schools to prohibit official racial discrimination in admissions and in policies without violating the First Amendment.<sup>146</sup>

---

<sup>138</sup> See Rolph, *supra* note 64, at 6.

<sup>139</sup> Paul Harvey discusses in detail how whiteness becomes sacred in the South through Christianity. Harvey, *supra* note 73, at 151. See also *id.* at 118–52.

<sup>140</sup> In *Runyon v. McCrary*, which required desegregation in private nonsectarian schools, the Supreme Court stated that the constitutionality of “private sectarian schools that practice racial exclusion on religious grounds” was not raised and chose not to answer that question. 427 U.S. 160, 167 (1967). Additionally, in the 1970s, some segregated schools assumed that their status as “church schools” would protect them from desegregation requirements and from losing their tax exemptions. See CRESPIÑO, *supra* note 8, at 9.

<sup>141</sup> U.S. CONST. amend. I.

<sup>142</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213–14 (1972) (holding a parent’s right to instruct the religious upbringing of their children is protected under the First Amendment’s Free Exercise Clause). Notably, in *Bob Jones*, the Court specifically addressed a First Amendment question because of Bob Jones’ religious affiliation. *Bob Jones Univ. v. United States*, 461 U.S. 574, 603–04 (1983).

<sup>143</sup> *Yoder*, 406 U.S. at 213–14.

<sup>144</sup> *Id.* at 214. The Court limited the preference for religious free exercise with a balancing test in *Employment Div. v. Smith*, 494 U.S. 872, 885–90 (1990), but it was later resurrected by Congress’s passing of the Religious Freedom Restoration Act (RFRA). See *Holt v. Hobbs*, 574 U.S. 352, 356–57 (2015).

<sup>145</sup> See CRESPIÑO, *supra* note 8, at 9.

<sup>146</sup> See *Bob Jones*, 461 U.S. at 603–04 (finding when the government interests are compelling enough, such as in this case, regulations prohibiting religious conduct can be allowed).

*Bob Jones*, however, does not nullify the strategy of using religion to protect against racial discrimination prohibitions. In that case, the Court decided to impose restrictions on free exercise in religious schools because of racial discrimination, and it did so by using a balancing test.<sup>147</sup> The government's compelling interest in "eradicating racial discrimination in education" outweighed the burden placed on religious liberty by removing tax-exempt status for schools with racially discriminatory admission policies.<sup>148</sup> The strength of First Amendment protections enjoyed by religious schools depends on how a given court balances the interests presented.<sup>149</sup> The current Supreme Court's religious school funding cases suggest strong investment in protecting religious institutions' First Amendment interests.<sup>150</sup>

Though not related to racial animus or discrimination, the Court's recent decisions in *Espinoza* and *Trinity Lutheran* provide evidence of the Court's impulse to support religious claims under the First Amendment.<sup>151</sup> In both cases, the majority applies the strict scrutiny standard to laws that "discriminate" against religious educational institutions.<sup>152</sup> Strict scrutiny means that the Court will protect the religious interest unless the government has a compelling interest that is narrowly tailored to justify burdening religious free exercise.<sup>153</sup> Typically, laws decided under this standard are held to be unconstitutional.<sup>154</sup> In *Trinity Lutheran*, the Court held that Missouri could not prevent Trinity Lutheran from applying for a public benefit program for schools and daycares simply because it was a church.<sup>155</sup> Likewise, and relying on *Trinity Lutheran*, the Court held in *Espinoza* that Montana's decision to prevent state scholarship aid from being used at

---

<sup>147</sup> *Id.* at 604.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 603–04.

<sup>150</sup> See, e.g., *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1998 (2022) (holding a state funding private schools must fund religious schools); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (holding a state that grants tax credits for private school tuition cannot prohibit parents from using that money for religious schools); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2025 (2017) (holding the state's reimbursement program for nonprofits could not discriminate against religious nonprofits).

<sup>151</sup> See generally *Espinoza*, 140 S. Ct. at 2262; *Trinity Lutheran*, 137 S. Ct. at 2021. For the purposes of this Essay, I am saying that these decisions are not related to racial animus or discrimination. However, a study on school choice suggests that these kinds of cases have racial consequences because they authorize "pluralism and diversion from the common school" without benefitting the most disadvantaged students. Minow, *supra* note 45, at 843.

<sup>152</sup> *Espinoza*, 140 S. Ct. at 2257; *Trinity Lutheran*, 137 S. Ct. at 2021.

<sup>153</sup> See *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993).

<sup>154</sup> *Id.*

<sup>155</sup> *Trinity Lutheran*, 137 S. Ct. at 2019, 2025.



church schools unconstitutionally burdened “religious schools” and “the families whose children attend or hope to attend them.”<sup>156</sup>

On December 8, 2021, the Court heard a third case, *Carson ex rel O.C. v. Makin*, which also looks at whether a state funding program—this time in Maine—must provide tuition aid directly to sectarian schools if other private schools are given aid under the state program.<sup>157</sup> The Maine program provides students with a voucher for private school tuition when no public school is in their area, so long as the school is not religious.<sup>158</sup> Like *Trinity Lutheran* and *Espinoza*, the Court in *Carson* held this practice violated the Free Exercise Clause of the First Amendment.<sup>159</sup> Taken together, these decisions indicate that First Amendment protection for church schools, curbed in *Bob Jones*, is not moot. On the contrary, the current Court seems to endorse this protection—opening the door for church schools to engage in practices that further white supremacy.

In *Trinity Lutheran*, *Espinoza*, and *Carson*, the Court repeatedly notes its reliance on the fact that the state in question allowed funding to some private schools and as such, cannot discriminate against church schools.<sup>160</sup> But this does not control against any fear of the maintenance of white supremacy in these schools. State and local assistance riddles the history of segregation academies and church schools.<sup>161</sup> Ironically, under the Court’s new religious aid jurisprudence, the state aid to schools that maintained white spaces, which was “no longer common” in the 1970s,<sup>162</sup> may become common again.

The Court’s school funding jurisprudence highlights a more general concern about church schools and future constitutional challenges. In the funding cases, we see the current Court’s inclination to find in favor of religious liberty when balancing rights under the Constitution. Strategically, church schools may successfully resist constitutional challenges to white supremacy in education in areas going beyond lack of full integration (e.g., school choice strategies and church school curriculums).<sup>163</sup> As church schools perpetrate a subtle form of white supremacy expressed in nonracial

---

<sup>156</sup> *Espinoza*, 140 S. Ct. at 2261.

<sup>157</sup> *Carson ex rel. O.C. v. Makin*, 142 S. Ct. 1987, 1993 (2022).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 2000.

<sup>160</sup> *Id.* at 1996; *Espinoza*, 140 S. Ct. at 2256; *Trinity Lutheran*, 137 S. Ct. at 2021.

<sup>161</sup> *See supra* Part I.

<sup>162</sup> Champagne, *supra* note 7, at 58.

<sup>163</sup> Specific church school curriculum is outside the scope of this project. However, I briefly point to examples of ways in which curriculum may become a contentious battle in the future for church schools. Future research could expand upon this point and investigate the specific details of church school curriculum.

terms, the loophole created by *Trinity Lutheran* and its progeny will not likely arise in the context of legal claims to resegregate schools or to maintain otherwise explicitly racist policies.

As early as *Brown v. Board of Education*, the Court recognized that “awakening [a] child to cultural values” is a principal function of education.<sup>164</sup> Even though this recognition was the foundation of desegregation, later in *Runyon v. McCrary* the Court held that, in private schools, “it may be assumed that parents have a First Amendment right to send their children to educational institutions that promote the belief that racial segregation is desirable.”<sup>165</sup> This assumption, balanced with racial exclusion, resulted in a peculiar jurisprudence from the Court: curricula upholding values based in white supremacy are acceptable under the Constitution so long as the school teaching such a curriculum does not exclude students based on race.

In *Family Values*, Professor Seth Dowland describes evangelical church schools as uniquely situated to teach nationalism and American exceptionalism because these schools must “establish that America possessed religious foundations.”<sup>166</sup> For example, Liberty Christian Academy, a Virginia church school that originated as a segregation academy, included strong patriotic language in its original pamphlets, such as: “Patriotism is a part of our program. Our students are taught to love this great nation and to respect her. We have never had an anti-American demonstration.”<sup>167</sup> While patriotism is not intrinsically bad, language that suggests that America is without faults prevents students from engaging in a critical study of this nation’s past and erases the experience of minorities and other groups who have been the bearers of American oppression. This school is still operating today and could be state funded under the Court’s current aid jurisprudence.<sup>168</sup>

Additionally, these schools rely on textbooks—few of them written by minority authors—that uphold “traditional [American] values.”<sup>169</sup> Curricula that preserve American nationalism and exceptionalism, along with traditional values, might serve the theological purpose of connecting Christianity to America’s founding.<sup>170</sup> However, such curricula may also

---

<sup>164</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954), *supp’d*, 349 U.S. 294, 299 (1955).

<sup>165</sup> *Runyon v. McCrary*, 427 U.S. 160, 176 (1976).

<sup>166</sup> DOWLAND, *supra* note 11, at 39.

<sup>167</sup> *Id.* at 29.

<sup>168</sup> See *About LCA: History*, LIBERTY CHRISTIAN ACAD., <https://www.lcabulldogs.com/about-lca/> [<https://perma.cc/NM6W-WKHK>].

<sup>169</sup> DOWLAND, *supra* note 11, at 26.

<sup>170</sup> *Id.* at 39–40.

function to maintain a vision of America that is rooted in whiteness and dominance.<sup>171</sup> The end goal is to indoctrinate new generations of students, both white and Black, with the cultural values of white supremacy. In that sense, the peculiar position the Court highlighted in *Runyon* is a perfect example of racial realism.<sup>172</sup> Perhaps ironically, the Court encourages white supremacy to evolve in a way that is seemingly equal: schools may also indoctrinate Black students with curriculum that upholds white dominance.<sup>173</sup>

#### CONCLUSION

The relationship between contemporary church schools and white supremacy goes beyond the mere categorization of a “segregation academy.” Given that most contemporary church schools could dispute a segregation academy classification, they are uniquely situated to preserve a subtler form of white supremacy without serious criticism. These schools strategically use racial tokenism to maintain an illusion of integration. This illusion satisfies legal suspicion without being unpalatable to white supremacists desperate to keep the exclusionary nature of whiteness. The Court’s religious aid jurisprudence has empowered this strategy.

The strategy of using church schools to maintain white supremacy is efficient because churches, unlike other private schools, have explicit constitutional protection under the First Amendment’s religion clauses. These clauses supply a safe space for church schools to teach a curriculum glorifying the role of whiteness and dominance in American history without contradiction.<sup>174</sup> Therefore, church schools continue to exist as predominately

---

<sup>171</sup> This is not a new way of preserving white supremacy. In fact, the scholar Michael Fuquay states that one of the main reasons for creating private segregated academies was to protect against the “federal government [using] the schools to promote alternative values.” Fuquay, *supra* note 62, at 160.

<sup>172</sup> See *Runyon v. McCrary*, 427 U.S. 160, 176 (1976) (holding that “the Constitution . . . places no value on discrimination” but also that parents have the right to send their children to schools that promote racial segregation).

<sup>173</sup> Interestingly, this position was the result of the Court applying the First Amendment’s Freedom of Association Clause and not its Free Exercise Clause. *Runyon*, 427 U.S. at 176. Yet, as previously demonstrated, the Free Exercise Clause provides another layer of protection for church schools. Anyone attempting to question or challenge a contemporary church school’s curriculum or dogma as racially discriminatory would face an opponent equipped with the Freedom of Association Clause on the one hand, and the Free Exercise Clause on the other—strengthening the odds of winning for the church school faced with a constitutional challenge.

<sup>174</sup> Although beyond the scope of this project, it would be interesting to compare and contrast the current 1619 Project with the curriculum taught at church schools. *The 1619 Project Curriculum*, PULITZER CTR., <https://pulitzercenter.org/lesson-plan-grouping/1619-project-curriculum> [https://perma.cc/3EGF-UP2B]. This curriculum is controversial in general, but any acceptance of it in the public-school system would be unenforceable in most private schools—with church schools having the strongest claim against any mandatory adoption. For 1619 Project controversy, see Sarah Schwartz, *Lawmakers*

white institutions, which can teach whiteness in the classroom while also relying on the protections of the First Amendment. As a result, these schools continue to instill students with cultural values rooted in white supremacy. In *Bob Jones*, the Court explicitly held that the government has a “fundamental, overriding interest in eradicating racial discrimination in education.”<sup>175</sup> This Essay demonstrates that the Supreme Court’s new approach to public funding for religious church schools has—whether intentionally or not—placed its interest in eradicating racial discrimination in education in a vulnerable position.

---

*Push to Ban '1619 Project' From Schools*, EDUC. WK. (Feb. 3, 2021), <https://www.edweek.org/teaching-learning/lawmakers-push-to-ban-1619-project-from-schools/2021/02>[<https://perma.cc/FV7A-7VLU>] (examining the bills in states designed to prohibit the 1619 Project from public classrooms).

<sup>175</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).