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When Public Meets Private: Private School Enrollment and Segregation in Virginia

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When Public Meets Private: Private School Enrollment and Segregation in Virginia

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Abstract

Recognizing Virginia's central role in the expansion of segregated southern private schools after the Brown v. Board of Education ruling, we review law and policy related to private school segregation. We also conduct an empirical analysis of Virginia private school enrollment and segregation since the turn of the twenty-first century, finding uneven enrollment even as the number of private schools has grown. Segregation in the sector is deepening. As public funding for private schools rises, we make the case that the increasingly blurred lines between public and private education in Virginia are rooted in adaptive discrimination.

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I. Introduction

Private school segregation in the aftermath of *Brown v. Board of Education*¹ is a form of adaptive discrimination, or discrimination that “adapts to law and to social norms prohibiting intentional discrimination . . . begin[ning] with public and private efforts to evade antidiscrimination law.”² A key manifestation of adaptive discrimination is white withdrawal to alternatives like private schools, thereby avoiding racial equity efforts in traditional public systems.³ White exit from equity mandates is also influenced by the legal and social ease with which white stakeholders are able to leave.⁴

Hovering around 10 percent, private school enrollment in the United States has remained relatively steady over the past four decades, with marked declines in most regions of the country before 1980.⁵ Yet private school enrollment in the South rose between 1960 and 2000, particularly in counties with majority

1. *Brown v. Bd. Educ.*, 347 U.S. 483 (1954).

2. Elise C. Boddie, *Adaptive Discrimination*, 94 N.C. L. REV. 1235, 1235 (2016).

3. *See id.* at 1261 (identifying private schooling arrangements as one way in which whites are able to “exit or withdraw from antidiscrimination or equality-oriented regimes”) (internal quotations omitted).

4. *See id.* at 1248 (examining the dynamics of adaptive discrimination and attributing it to “racial discrimination’s historically cyclical nature: formal bans on intentional discrimination are followed by episodic retrenchment as discrimination is reconstituted in race-neutral forms that more readily escape legal sanction”).

5. *See* Charles T. Clotfelter, *Private Schools, Segregation, and the Southern States*, 79 PEABODY J. EDUC. 74, 78 tbl.1 (2004) (providing data on private school enrollment in the Northeast, Border, South, Midwest, West, and United States in 1960, 1970, 1980, 1990, and 2000); *see also* Nat’l Ctr. Educ. Stat., *Private Elementary and Secondary School Enrollment and Private Enrollment as a Percentage of Total Enrollment in Public and Private Schools, by Region and Grade Level: Selected Years, Fall 1995 through Fall 2017.*, DIG. EDUC. STAT. (2019) (illustrating a relatively stable total private school enrollment around 10-11%, although total private school enrollment has been on a slight decline since 1995) [perma.cc/MLF7-MQXZ].

shares of Black students.⁶ As battles waged over the implementation of *Brown v. Board of Education*, the South reported a 242.2 percent increase in nonsectarian private school enrollment and a 167.7 percent increase in sectarian private school enrollment by the early 1970s.⁷

School segregation, in the South and elsewhere, continues to matter for all students. It is related to highly differentiated resources along key dimensions like teacher experience and quality, curriculum and facilities.⁸ These opportunity gaps fuel achievement and attainment gaps for low-income students of color.⁹ For affluent and white students, segregation reinforces prejudice and opportunity hoarding while also impeding the development of critical thinking and problem solving skills.¹⁰ Harms for all students accumulate into harms for our democratic society—rendering it more divided and unequal.¹¹ When it comes to segregation in the private school sector, the lack of public

6. See Clotfelter, *supra* note 5, at 77 (“Over the period 1960 to 2002, whereas the share of all students attending private schools in the United States dropped by more than 2 percentage points, the share in the South increased by 4 percentage points.”).

7. See *Segregation Academies and State Action*, Note, 82 YALE L.J. 1436, 1442 n.45 (1973) [hereinafter *Segregation Academies*] (noting that these numbers were a result of voluntary reporting to the U.S. Office Of Education between 1961–62 and 1970–71 and that the sectarian private school enrollment reporting did not include Roman Catholic-affiliated private schools).

8. See NAT’L ACAD. EDUC., RACE-CONSCIOUS POLICIES FOR ASSIGNING STUDENTS TO SCHOOLS: SOCIAL SCIENCE RESEARCH AND THE SUPREME COURT CASES 12 (Robert L. Linn & Kevin G. Welner eds.) (2007) (proposing a conceptual framework for the educational achievement of students which considers the relationship between individual characteristics of students, neighborhood and school attributes, state, and district policies, and teacher attributes).

9. See *id.* at 30 (reporting on data from “the *amicus* briefs from the 553 Social Scientists and from the Caucus for Structural Equity” as “evidence that residential segregation strongly determines the composition of social networks and limits opportunities for those growing up in economically distressed households”).

10. See Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCI. AM. (Oct. 1, 2014) (examining “the impact of racial diversity on small decision-making groups in an experiment where sharing information was a requirement for success” and finding that “[t]he groups with racial diversity significantly outperformed the groups with no racial diversity”) [perma.cc/54AL-G4D3].

11. See ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION 95–111 (2010) (emphasizing the importance of democracy as a tool for accountability, social equality, and membership in a civil society).

governance portends another harm to democratic society.¹² By contrast, more integrated schools support more socially cohesive societies by closing opportunity gaps and producing more flexible, creative, and empathic citizens.¹³ The high stakes of school segregation—for individual students and society writ large—make it imperative to understand the mechanics behind it.

Virginia played a crucial role in the expansion of segregated southern private schools. Academics, political leaders, and journalists in the state fomented Massive Resistance to federal school desegregation orders.¹⁴ Virginia was the first southern state to adopt a central resistance tactic: private school tuition vouchers for white families seeking to avoid desegregation.¹⁵ Though a wholesale effort to eliminate the state’s constitutional requirement to provide public education in favor of a privately operated, segregated system did not come to fruition, numerous new publicly funded private schools known as segregation academies emerged during this period.¹⁶ Scholars have called Virginia a “pioneer in the

12. See Erika K. Wilson, *Racialized Religious School Segregation*, 132 *Yale L.J.F.* 598, 602 (2022) (“[O]utsourcing education to the private sector limits the reach of public schools’ modeling American democracy.”).

13. See Rosalyn A. Mickelson & Mokubung Nkomo, *Integrated Schooling, Life Course Outcomes, and Social Cohesion in Multiethnic Democratic Societies*, 36 *REV. RSCH. EDUC.* 197, 201–03 (2012) (illustrating the relationship between integrated education and democracy through short- and long-term academic and nonacademic outcomes); see also Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 *J. PERS. SOC. PSYCH.* 751, 768 (2006) (“[R]esults from the meta-analytic conclusively show that intergroup contact can promote reductions in intergroup prejudice.”).

14. See NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT’S STEALTH PLAN FOR AMERICA* 61–73 (2017) (describing the efforts of economists and legislators to keep Virginia schools segregated or else shut them down); see also ROBERT A. PRATT, *THE COLOR OF THEIR SKIN: EDUCATION AND RACE IN RICHMOND, VIRGINIA, 1954–89* 56–72 (1993) (discussing the resistance to the bussing program following judicial desegregation orders).

15. See Nancy MacLean, ‘*School Choice*’ *Developed as a Way to Protect Segregation and Abolish Public Schools*, *WASH. POST* (Sept. 27, 2021, 6:00AM) (“The State Board of Education provided vouchers, then called tuition grants, of \$250 (\$2,514 in 2021 dollars) to parents who wanted to keep their children from attending integrated schools.”).

16. See Chris Ford et al., *The Racist Origins of Private School Vouchers*, *CTR. AM. PROGRESS* (July 12, 2017) (discussing Prince Edward County’s decision to close public schools, rather than integrate them, which sent white students to segregated private schools) [perma.cc/6QMD-HZFE]; Briana Jones & Laura Goren, *Don’t Repeat Virginia’s History of Divesting from Public Schools*,

academy movement”¹⁷ and “party to more high-profile segregation litigation [than any other], and unfortunately on the wrong side of history.”¹⁸

More recently, some conservative politicians in Virginia joined a national movement stoking the education culture wars and linking them to school privatization.¹⁹ A 2022 legislative bill sought to amend the Code of Virginia by prohibiting instruction around “divisive concepts,” defined in part as “ideas that promote one race, religion, ethnicity or sex as inherently superior to another, or that an individual by virtue of their race, religion, ethnicity or sex is inherently racist, sexist or oppressive.”²⁰ The bill went on to mandate that if an educator was found guilty of engaging with “divisive concepts,”²¹ a parent had the right to

COMMONWEALTH INST. (Mar. 1, 2023) (noting “Virginia legislators continued enacting policies to deny a high-quality education for Black students,” despite the state constitution’s requirement to provide a public education system) [perma.cc/DX9F-T88Q].

17. KITTY TERJEN, *White Flight: The Segregation Academy Movement*, in *THE SOUTH AND HER CHILDREN: SCHOOL DESEGREGATION 1970-1971* 69, 72 (Robert E. Anderson, Jr. ed., 1971).

18. Juliet B. Clark, *From Massive Resistance to Quiet Evasion: The Struggle for Educational Equity and Integration in Virginia*, 107 VA. L. REV. 1115, 1118 (2021).

19. See Jay P. Greene & James D. Paul, *Does School Choice Need Bipartisan Support? An Empirical Analysis of the Legislative Record*, AM. ENTER. INST. (Sept. 22, 2021) (“Of the 18 states that passed or expanded new [private choice] programs, only two had houses and senates led by the Democratic Party.”) [perma.cc/4H8S-7FJH].

20. H.B. 781, Gen. Assemb., 2022 Sess. (Va 2022).

21. See *id.* § 1(A).

As defined in the legislation, “divisive concept” means the concept that (i) one race, religion, ethnicity, or sex is inherently superior to another race, religion, ethnicity, or sex; (ii) an individual, by virtue of the individual’s race, religion, ethnicity, or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (iii) an individual should be discriminated against or receive adverse treatment solely or partly because of the individual’s race, religion, ethnicity, or sex; (iv) members of one race, religion, ethnicity, or sex cannot and should not attempt to treat others without respect to race, religion, ethnicity, or sex; (v) an individual’s moral character is necessarily determined by the individual’s race, religion, ethnicity, or sex; (vi) an individual, by virtue of the individual’s race, religion, ethnicity, or sex, bears responsibility for actions committed in the past by other members of the same race, religion, ethnicity, or sex; (vii) an individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of the individual’s race, religion, ethnicity, or sex; (viii) meritocracy, punctuality, proper language usage, free markets, and

request a voucher “in an amount equal to all sums from any source that the local school board received for the education of such student.”²² Though the legislation failed to advance through the Democratic majority in Virginia’s Senate,²³ it signaled a new front in a conservative privatization agenda that already sought to capitalize on pandemic-related educational disruptions.

Alongside the conservative privatization agenda, the U.S. Supreme Court has been steadily chipping away at the separation of church and state. In June 2022, the conservative supermajority handed down an opinion requiring states that subsidize private education through vouchers to extend those subsidies to private religious schools.²⁴ Coupled with a string of rulings granting religious exemptions from regulation, a crucial question will be whether or not religious schools now mandated to receive public funding may legally deny admission to students on the basis of religion, sexual orientation, and/or race/ethnicity.²⁵ In the wake of

traits such as strong work ethic are racist or sexist or were created by members of a particular race to oppress members of another race; (ix) the ideology of equity of outcomes is superior to the ideology of equality, a concept enshrined in the Constitution of the United States, of opportunities; (x) mathematics and scientific empiricism are products of western civilization and thus are rooted in racism; (xi) the Commonwealth or the United States is fundamentally or systemically racist or sexist; or (xii) capitalism, free markets, free industry, and other related economic systems are inherently racist.

22. *Id.* § 1(I).

23. See *HB 781 Public elementary and Secondary Schools; Student Citizenship Skills, Etc.*, VA.’S LEGIS. INFO. SYS. (last updated Feb. 15, 2022) (stating that the bill was left in committee on February 15, 2022) [perma.cc/3X2B-RCA4].

24. See *Carson v. Makin*, 596 U.S. 767, 789 (2022) (“Maine’s ‘nonsectarian’ requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise.”).

25. See Strict Scrutiny, *Law & Religion on the Barrett Court*, CROOKED MEDIA (Aug. 1, 2022) at 07:00–12:00 (downloaded using iTunes) (discussing the impact of *Carson* and its predecessors in limiting school’s latitude in funding religious private schools) [perma.cc/VX9B-BYET]; see also RICHARD C. SCHRAGGER ET AL., *When do Religious Accommodations Burden Others?*, in *THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY* 328, 334 (Susanna Mancini & Michel Rosenfield eds., 2018) (questioning whether recent precedent regarding harm or burden to religious institutions could apply to other funding scenarios).

these rulings, eroding the boundary between religion and state-sponsored activity may become a key contemporary form of adaptive discrimination. It will do so by providing public funding to schools that may not have the same safeguards for students' civil rights as public schools.

Despite the privatization push, a number of recent studies have concluded that, after taking into account family socioeconomic status, students do not fare better academically or socially in private schools. Based on a national longitudinal survey of students from birth to fifteen, University of Virginia researchers concluded that private school students did not outperform public school peers on academic tests or measures of social adjustment, attitudes, motivation and/or behavior after controlling for parent education and income levels.²⁶ Similar studies echo those findings for academic metrics²⁷ and for public school students who transfer to private schools using vouchers.²⁸ These contemporary findings are layered on earlier documentation of segregation academies, which showed many lacked basic educational standards.²⁹

In the following article, we review law and policy related to private schools and segregation, much of which originated in Virginia. We also draw on available private and public school data to explore the characteristics of Virginia's private school

26. See Robert C. Pianta & Arya Ansari, *Does Attendance in Private Schools Predict Student Outcomes at Age 15? Evidence from a Longitudinal Study*, 47 EDUC. RESEARCHER 419, 429 (2018) (noting that all improvements by private school students could be conclusively linked to socioeconomic advantages).

27. CHRISTOPHER A. LUBIENSKI & SARAH THEULE LUBIENSKI, THE PUBLIC SCHOOL ADVANTAGE: WHY PUBLIC SCHOOLS OUTPERFORM PRIVATE SCHOOLS 147–86 (2013) (conducting a study which measured achievement and achievement-related factors in public and private schools).

28. See KEVIN G. WELNER & PRESTON C. GREEN, *Private School Vouchers: Legal Challenges and Civil Rights Protections*, in THE SCHOOL VOUCHER ILLUSION: EXPOSING THE PRETENSE OF EQUITY 47, 56-57 (Kevin Welner et al. eds., 2023) (compiling a series of studies comparing the academic performance of low-income students attending voucher and public schools).

29. See U.S. COMM'N C.R., 1961 COMMISSION ON CIVIL RIGHTS REPORT BOOK 2: EDUCATION 94–98 (1961) [hereinafter 1961 COMMISSION REPORT] (collecting reports of experts on the deficiencies of the newly-established private schools) [perma.cc/GAH7-92VV].

enrollment and segregation between 2000 and 2019.³⁰ To the extent we are able to define and identify them, we pay particular attention to legacy segregation academies.

We find that student enrollment in Virginia's private schools has been uneven over the past two decades, though the number of private schools has steadily risen. Some of the growth in the number of private schools is likely associated with recent policy shifts making it easier to funnel public money to private schools. Racial/ethnic diversity in the private school sector has lagged far behind the rapidly diversifying public one. Moreover, many former segregation academies remain open and serve higher shares of white students than private schools as a whole. The private school sector is also increasingly segregated.

We argue that the increasingly blurred lines between public and private education in Virginia and the South are rooted in adaptive discrimination. That legacy of discrimination continues to shape private—and public—school enrollment. We also find serious gaps in the data on private school enrollment and segregation academies. Inadequate data make it difficult to ascertain the full extent of segregation and inequality in the sector, as well as inequality between public and private schools.

As the public school enrollment grows increasingly diverse, contemporary efforts to privatize public education represent an extended form of adaptive discrimination. The history of delayed legal and policy responses to segregation academies suggests that confronting adaptive discrimination early and forcefully matters. Greater contemporary oversight and enforcement of a private sector increasingly subsidized by a public one is crucial, as is limiting the extent to which the private sector expands—at least with public support.

The article proceeds in multiple parts. We first describe the legal context for blurred public and private lines in Virginia schools before pivoting to the rapid rise of segregation academies in Virginia and across the South. Both the legal context and the expansion of segregation academies illustrate adaptive discrimination at work. We then examine a limited wave of 1970s

30. See Steve Suitts, *Segregationists, Libertarians, and the Modern "School Choice" Movement*, S. SPACES (June 4, 2019) (documenting school enrollment since school desegregation) [perma.cc/7Z5F-VRC4].

and 1980s efforts to establish and enforce anti-discrimination in private schools, swiftly undermined by a white Christian nationalist backlash. That backlash enabled the emergence of charter schools, a neoliberal alternative to private schools. We show how these efforts brought us to the turn of the twenty-first century and a version of adaptive discrimination centered on questions regarding the separation of church and state. We then explore the state of research on private school segregation and enrollment before pivoting to our own analysis of Virginia’s private school trends. We close with a set of implications and recommendations.

II. *Legal Context for Blurred Public and Private Lines in Virginia Schools*

Federal courts have an uneven track record when it comes to private school segregation. Because the 14th Amendment’s guarantee of equal protection under the law ostensibly extends only to public institutions, the establishment and support of private schools became a central strategy to avoid *Brown*’s desegregation mandate.³¹ At the same time, courts have recognized limits to discrimination in the private sphere—particularly when the private sector is subsidized by the public one.³²

The legal basis for restricting private sector discrimination flows from the Civil Rights Act of 1866, specifically Section 1981.³³ Congress passed the Act to give legislative teeth to the 13th amendment. With regard to intentional discrimination, Section 1981 promises non-white individuals:

[The] full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties,

31. See *Brown v. Bd. Educ.*, 347 U.S. 483, 495 (“We have now announced that such segregation is a denial of the equal protection of the laws.”).

32. See *Runyon v. McCrary*, 427 U.S. 160, 169–70 (1976) (explaining that existing federal law prohibiting racial discrimination reaches to both private contracts and private acts of racial discrimination).

33. See *id.* (using the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1870), as the basis for explaining that federal law can prohibit discrimination in forming private contracts).

and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.³⁴

The term “custom” would become crucial, originally used to describe behavior intersecting with private economic interactions to ensure the freedom and rights of formerly enslaved Black persons.³⁵ Subsequent jurisprudence clarified that Section 1981 offered protection against intentional state-sponsored discrimination, as well as discrimination by private actors in the realms of housing and employment.³⁶ In one particularly important case, handed down in 1968, the Court ruled that congressional enforcement powers under the 13th Amendment allowed it to prohibit racial discrimination in the sale of property.³⁷

Segregation academies represented potential violations of both the 13th and 14th amendments, as contemporary “badges and incidents of slavery” in the case of the 13th and as violations of equal protection under the law in the case of the 14th.³⁸ And because many private schools receive federal funds, Title VI of the 1964 Civil Rights Act should also apply.³⁹ As we will see, though,

34. 42 U.S.C. 1981(a) (1866).

35. See James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 288–89 (1989) (“Senator John Sherman . . . expressed the free labor philosophy on which their party was founded in their efforts to safeguard the fundamental rights of former slaves through the Reconstruction Amendments and related legislation.”).

36. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442 (1968) (determining that Congress can regulate purely private actions so that money and the freedom to purchase objects is equally shared amongst all); see also *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 445 (2008) (noting that the right to form and enforce contracts includes federal protection against retaliation for making a complaint about one violating an individual right to contract).

37. See *Jones*, 392 U.S. at 442–43 (“At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live.”).

38. See Anthony M. Champagne, *The Segregation Academy and the Law*, 42 J. NEGRO EDUC. 58, 66 (1973) (“Since the segregation academies are the result of a doctrine of white supremacy that can reasonably be interpreted as a badge or incident of slavery, it seems clear that Congress would have the power under the Amendment to desegregate the academies.”); see also *id.* at 60 (referencing the equal protection analysis invoked by the Supreme Court in *Brown*).

39. If the private schools receive federal funds, other civil rights statutes should also apply, including ones protecting students on the basis of disability or

the reach of the state into the private sphere has been contested—and schools, especially Virginia schools, have often been at the center of those contests.

A. Brown, Brown II, and the Seeds of Privatization to Maintain Segregation

In 1954, the Supreme Court justices unanimously decided *Brown v. Board of Education*.⁴⁰ The Court declared that school segregation violated the 14th Amendment’s guarantee of equal protection under the law.⁴¹ One year later, the justices issued another unanimous ruling, calling for desegregation to be implemented “with all deliberate speed,” by local authorities who understood local conditions and overseen by local courts.⁴² Of course, these local actors were the same architects and products of the Jim Crow system that *Brown* overturned—and many would take part in resisting its implementation.⁴³ Amici in *Brown II* expressly laid out the form resistance would take, including a “complete abolition of the free public school system” and “turning state schools into private schools.”⁴⁴ Moreover, southern officials

sex. We use the word “should” to indicate that we have not seen Title VI enforcement around these issues to date.

40. *Brown v. Bd. Educ.* 347 U.S. 483 (1954).

41. *See id.* at 495 (“Separate educational facilities are inherently unequal.”).

42. *See Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*) (ordering district courts to “to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed”).

43. *See* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 436 (1976) (detailing the political and legal tensions unfolding between *Brown* and *Brown II*); Brian James Daugherty, *Keep on Keeping on: The NAACP and the Implementation of Brown v. Board of Education in Virginia* 32–37 (2010) (Ph.D. dissertation, College of William & Mary) (on file with William & Mary ScholarWorks) (describing the reactions of leaders throughout the south to the *Brown* decision and their commitment to resistance).

44. Brief of John Ben Shepperd, Att’y Gen. Tex. as Amicus Curiae Supporting Respondent, *Brown v. Bd. Educ.* 347 U.S. 483 (1954), at *17.

interpreted *Brown II* to sanction delay, allowing ample time for resistance to organize.⁴⁵

Segregationist policy responses to *Brown* and *Brown II* were enacted with extensive support from leading libertarian intellectuals.⁴⁶ Despite personally disavowing the racism undergirding the push to maintain segregation, libertarians like Milton Friedman made common cause with the architects of Massive Resistance in Virginia and beyond.⁴⁷ Friedman's major treatise, *The Role of Government in Education*, published the same year as *Brown II*, decried "monopolies" on education in a free enterprise system.⁴⁸ His end goal was to shift the costs of public education to families, starting with vouchers to purchase educational services in the non-profit or for-profit sectors.⁴⁹ Friedman posited that schools would emerge to meet family demand—and if that demand was segregation, so be it.⁵⁰

45. See *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 224–25 (describing the long delays and the resistance following *Brown II*).

46. See Suits, *supra* note 30 ("Friedman's advocacy for a system of government-financed vouchers to replace 'government schools,' as he called them, was grounded in his free market beliefs.").

47. See *id.* ("[I]n a page-long footnote he acknowledged that essentially the same proposal 'has recently been suggested in several states as a means of evading the Supreme Court ruling against segregation").

48. See MILTON FRIEDMAN, *The Role of Government in Education*, in *ECONOMICS AND THE PUBLIC INTEREST* 123, 123 (Robert A. Solo ed., 1955) ("Education is today largely paid for and almost entirely administered by governmental bodies or non-profit institutions.").

49. See *id.* at 125 (proposing an education system in which the government has a drastically reduced role and parents have more choice in their children's education).

50. See *id.* at 128 n.2 (clarifying that forced segregation and forced non-segregation are evils though he would choose forced non-segregation if required). As Friedman was writing his essay for the book, he received feedback from the editor, Solo, arguing that the vision for widespread and "free" school choice was divorced from ongoing racial discrimination constraining the choices of Black individuals. Friedman disagreed, worried that government enforcement of civil rights risked a policy state. See Nancy MacLean, *How Milton Friedman Exploited White Supremacy to Privatize Education*, INST. FOR NEW ECON. THINKING 4–5 (Inst. for New Econ. Thinking, Working Paper No. 161, Sept. 1, 2021) ("Whatever their personal beliefs about race and racism, they helped Jim Crow survive by providing ostensibly race-neutral arguments for tax subsidies to the private schools sought by white supremacists.").

Friedman's ideology and rhetoric lent race-evasive credibility to white segregationist goals.⁵¹ His first doctoral student, G. Warren Nutter, helped establish a center at the University of Virginia that disseminated and supported the school voucher idea.⁵² White supremacist organizations like Virginia's Defenders of State Sovereignty and Individual Liberties, explicitly founded to protect white rights and racial segregation, shifted tone under the influence of the libertarians.⁵³ The Defenders went from promoting "segregation of the races as a right of state government" to advocating "freedom of choice of association."⁵⁴ The extended collaboration between segregationists and neoliberals in Virginia and across the South represented convergence around a sharply limited form of government.⁵⁵ The same collaboration coalesced around individual freedom for "those who had long profited from racial capitalism and sought to shield it from government action on the part of Americans, Black and white, committed to democratic values."⁵⁶ Importantly, Virginia segregationists who adopted the vocabulary and vision of liberty, competition and

51. See MacLean, *supra* note 50, at 4 (noting how Friedman's credentials, including a Nobel Prize, and his ostensibly race-neutral arguments gave ammunition to white supremacists fighting desegregation).

52. See JAMES M. BUCHANAN, *Political Economy: 1957-1982*, in IDEAS, THEIR ORIGINS, AND THEIR CONSEQUENCES: LECTURES TO COMMEMORATE THE LIFE AND WORK OF G. WARREN NUTTER 119, 124–26 (recounting the founding of the Thomas Jefferson Center and its emphasis on "public choice" for schools).

53. See MacLean, *supra* note 50, at 16–17 (quoting the president of the Charlottesville Defenders of State Sovereignty and Individual Liberties chapter's enthusiasm for Friedman's ideas and their alignment with the organization's mission).

54. See *Application Form for the Defenders of State Sovereignty and Individual Liberties*, ENCYC. VA. (listing the belief in segregation as "a right of the state government" on the 1954 application) [perma.cc/F8X6-K7RD]; James H. Hershman, Jr., *James M. Buchanan, Segregation, and Virginia's Massive Resistance*, NEW ECON. THINKING (Nov. 9, 2020) (describing the white supremacist adoption of the First Amendment's guarantee of freedom of association in relation to school choice).

55. See MACLEAN, *supra* note 14, at xiii–xxxii (providing one example of how a student of Friedman, James Buchanan, created a new center at UVA to promulgate school voucher policies and eventually partnered with Charles Koch with the goal of limiting and transforming American government).

56. *Id.* at 24.

market-based choice sought to evade legal scrutiny centered on overt racial animus and discrimination.⁵⁷

B. Massive Resistance through School “Privatization” in Virginia

In 1956, Virginia policymakers passed the first iteration of tuition grant laws, amending the state constitution to allow public funds for private schools, including private religious schools.⁵⁸ Laws subsequently passed during the special legislative session held in August and September of 1956 instructed the state board of education to distribute private school tuition grants to local districts and allowed the state retirement plan to benefit teachers in private segregation academies.⁵⁹ State policymakers also required that any desegregated public schools close, threatening to

57. *See id.* (describing the 106 different measures designed to resist the pressure for integration).

58. *See* *Harrison v. Day*, 106 S.E.2d 636, 640–42 (Va. 1959);

It will be observed that the stated purpose of the plan embodied in these acts is to prevent the enrollment and instruction of white and colored children in the same public schools. To that end, all elementary and secondary public schools in which both white and colored children are enrolled are, upon the happening of that event, automatically closed, removed from the public school system, and placed under the control of the Governor. All State appropriations for the support and maintenance of such schools are cut off and withheld from them. Such State funds so withheld, and certain other funds raised by local levies, are to be used for the payment of tuition grants for the education in nonsectarian private schools of children who have been attending such public schools, who cannot be assigned to other public schools, and whose parents or custodians desire that they do not attend schools in which both white and colored children are enrolled and taught. Schools which may be policed under federal authority, or disturbed by such policing, are, upon the happening of that event, likewise automatically closed, and, under related statutes, tuition grants are made available for pupils who have been attending such schools.

see also *Almond v. Day*, 89 S.E.2d 851, 854, 857 (Va. 1955) (explaining that the amendment was required because a Virginia Supreme Court decision had outlawed the use of public funds for private school on the grounds that the limited number of existing vouchers, reserved for children of veterans returning from World War II, violated the separation of church and state).

59. *See* U.S. COMM’N C.R., CIVIL RIGHTS U.S.A.: PUBLIC SCHOOLS SOUTHERN STATES 1962 166 (1962) [hereinafter CIVIL RIGHTS U.S.A.] (“These acts . . . permit local governing bodies to allow tax credit for contributions to these schools . . . [and] permit teachers in these private schools to participate in the State retirement system.”) [perma.cc/SR5S-7BEY].

withhold state aid if local authorities resisted. State funding would then be redirected to private school vouchers.⁶⁰

Legal challenges forced an amendment to the state tuition laws in 1959.⁶¹ State courts ruled the closure laws unconstitutional, on the basis of Reconstruction-era language establishing a system of public schools for all students.⁶² The same day, a federal district court declared:

Tested by these principles we arrive at the inescapable conclusion that the Commonwealth of Virginia, having accepted and assumed the responsibility of maintaining and operating public schools, cannot act through one of its officers to close one or more public schools in the state solely by reason of the assignment to, or enrollment or presence in, that public school of children of different races or colors, and, at the same time, keep other public schools throughout the state open on a segregated basis. The “equal protection” afforded to all citizens and taxpayers is lacking in such a situation.⁶³

In the aftermath of the ruling, desegregation opponents zeroed in on the idea that equal protection violations could not occur if no Virginia students were receiving a public education.⁶⁴ Virginia narrowly avoided a constitutional amendment seeking the closure of all public schools, which would have resulted in the full privatization of public education.⁶⁵ But the state courts interpreted the constitution to mean that localities had the right to defund

60. See CIVIL RIGHTS U.S.A., *supra* note 59, at 165–66 (“It is also required that every locality participate in the tuition-grant program. If a locality fails to put up its share, the State pays the full cost, and deducts the locality’s share from some other payment to which the locality is entitled.”).

61. See *Harrison*, 106 S.E.2d at 646–47 (determining that the state tuition laws violated sections of the Virginia Constitution pertaining to the governance of local schools).

62. See *id.* (noting that Section 129 of the Virginia Constitution “requires the state to maintain an efficient system of public free schools throughout the State”) (internal quotations omitted).

63. *James v. Almond*, 170 F. Supp. 331, 337 (E.D. Va. 1959).

64. See *Harrison v. Day*, 106 S.E.2d 636, 639 n.1 (Va. 1959) (listing the statutory scheme utilized in Virginia to greatly reduce and eliminate the public school system in the wake of the *Brown* decision through school closures, tuition grant systems, and removal of local control).

65. See MACLEAN, *supra* note 14, at 70–71 (noting that the strategy of permitting the sale of public institutions to private institutions would have likely provoked public outrage even among supporters of segregation).

public schools—and fund private ones with public dollars.⁶⁶ The amended tuition grant laws adapted to the new legal context and did not specifically mention desegregation. Instead, the laws called the vouchers “state and local scholarships.”⁶⁷

Virginia paid \$125 for each elementary student and \$150 for each high school student, with local districts providing additional funds.⁶⁸ In total, public funding covered the lowest of the following options: the actual price of tuition at the private school, the original per pupil public expenditure or \$250 for elementary students and \$275 for high school students.⁶⁹ In 1961 alone, Virginia and her localities made 8,371 tuition grants enabling private school enrollment for a number of white students, at a cost of over \$2 million of public funds.⁷⁰ Grants typically flowed to families directly, or to local education foundations that served as intermediaries funneling money from the public sector to the private one.⁷¹ This arrangement protected private schools from public oversight and made it difficult to fully assess the reach of vouchers.⁷² Though public schools remained open in many districts, vouchers offered white students private, fully segregated alternatives.⁷³ After three years, a report from the U.S. Civil

66. See CIVIL RIGHTS U.S.A., *supra* note 59, at 165 (identifying cases where legislation was amended to allow tuition grant programs to utilize public dollars to fund private schools specifically aimed to benefit the placement of white children).

67. See *id.* (defining “State and Local Scholarships” as grants available to students attending private schools or public schools outside of the student’s district).

68. *Id.*

69. *Id.*

70. See *id.* at 166 (excluding Prince Edward County in the data for this year due to the fact that the public schools in Prince Edward County were closed).

71. See *id.* at 165–67 (describing the process by which grants are distributed); see also Letter from James B. Massey Jr., Norfolk Academy, to E. L. Lamberth, Superintendent, Norfolk City Public Schools, (1958) (stating that the school will not participate in the tuition grant program because the school is “independent” and “in no way wishes to relinquish its independence to State control, the Trustees have determined that the school will not participate in the Tuition Grant Program”) [perma.cc/WLY4-EJG3].

72. See CIVIL RIGHTS U.S.A., *supra* note 59, at 165–67 (describing how vouchers enabled private schools to remain segregated).

73. See *id.* (documenting that a major goal and result of the vouchers was to allow white students to attend segregated schools).

Rights Commission indicated that the grants were draining resources from public schools and forcing tax increases.⁷⁴ Though some local districts wanted to opt out of the tuition grants, a state committee in the Virginia House of Delegates unanimously rejected the idea and instead expanded public subsidization of private schools.⁷⁵ Local school boards were permitted to offer public transportation to private schools, and teachers completing training were allowed to use publicly funded scholarships to teach in private schools.⁷⁶

Prince Edward County, Virginia, home to one of the five cases consolidated in *Brown*, embodied extreme local resistance to the federal desegregation mandate.⁷⁷ Following the state's playbook, the jurisdiction's public schools were shuttered for five years and all public dollars flowed to fund white students' education at the private Prince Edward Academy.⁷⁸ An analysis of segregation academies in Virginia, including Prince Edward Academy, revealed that maintaining the "purity of [the white] race" was a central concern of white families employing the vouchers, layered onto concerns about "progressive education," "subversive ideas," "freedom of association" and "individual liberty."⁷⁹ Some Black families in Prince Edward County sent students to public schools in other parts of the state or to live in other states altogether, while others worked to establish church-run schools or centers and summer programs to partially fill the void created by the

74. *See id.* (noting as a major criticism of the grants program "is that the grants are a drain on public school funds which diminish local support for public schools and tend to require tax increases").

75. *See id.* at 166 ("On February 8, 1962, a bill to permit localities to withdraw from the State tuition-grant program was killed by the house of delegate's education committee. The vote of the committee was unanimous.").

76. *See id.* (describing multiple acts that encouraged freedom of choice, allowing parents to transfer their children to schools of their choice, including nonsectarian private schools).

77. *See Ford, supra* note 16 (overviewing how Prince Edward County, VA had intentionally closed public schools in 1959 to avoid desegregation attempts).

78. *See CIVIL RIGHTS U.S.A., supra* note 59, at 166 (describing how Prince Edward County utilized tuition grants from the state totaling 1,347 grants of \$150 to \$200 per grant out of the roughly \$2 million dollars given out by the state that year).

79. MARY ELLEN GOODMAN, S. REG'L COUNCIL NO. SRC-19, SANCTUARIES FOR TRADITION: VIRGINIA'S NEW PRIVATE SCHOOLS 3 (Feb. 8, 1961).

closures.⁸⁰ Established in 1963, the Prince Edward County Free School Association, formed by Prince Edward County's Black community and supported by the Kennedy administration, also helped educate Black students locked out of public education.⁸¹

Finally, in 1964, the U.S. Supreme Court intervened, forbidding private school vouchers in Prince Edward County on the grounds that they were not intended for use in a jurisdiction that offered no public school alternative.⁸² The *Griffin* case also documented extensive public subsidies supporting private schools, including direct state and district tuition payments to white families in the county, as well as state retirement benefits for white public school teachers who transferred to the newly established segregation academy.⁸³ Virtually all white students and teachers in Prince Edward County transferred from the closed public system to the newly established, ostensibly private Prince Edward County Foundation schools.⁸⁴ Questioning whether the Foundation schools were actually private, the Fourth Circuit concluded that:

80. See Alfred L. Cobbs, *Brown v. Board at 65: Alfred L. Cobbs Recalls the Day Prince Edward County Closed Its Schools to Fight Mandatory Integration — and the Families Who Took In Those Lost Students*, THE74 (May 14, 2019) (presenting the various ways that Black communities adapted to the challenges of the desegregation period) [perma.cc/BQ3B-2Q6Z]; Margaret E. Hale-Smith, *The Effect of Early Educational Disruption on the Belief Systems and Educational Practices of Adults*, 62 J. NEGRO EDUC. 171, 174 (1993) (describing a Quaker organization that helped to relocate educationally disenfranchised Black students in Prince Edward County); Kara Miles Turner, *Both Victors and Victims: Prince Edward County, Virginia, The NAACP, and Brown*, 90 VA. L. REV. 1667, 1686 (documenting the difficulties faced by students moving out of the county or out of state to continue their education) (2004).

81. See Emanuel Riley, *The Prince Edward County Free School Association*, REDISCOVERING BLACK HIST. (May 19, 2015) (outlining the creation of the school association that sought to help Black students who could not receive private education after the closure of the public system) [perma.cc/67BY-PZNF].

82. See *Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 232–33 (1964) (explaining that the district court's injunction against these benefits was proper where the county had intentionally closed its public schools to avoid desegregation).

83. See *Griffin v. Bd. Supervisors*, 339 F.2d 486, 489–90 (4th Cir. 1964) (demonstrating how segregated private schools were subsidized directly and indirectly, such as through tuition reimbursements paid to parents).

84. See *id.* at 491–92 (“All of the white students applied for admission . . . and all were accepted . . . There is no evidence indicating that any white teacher remained in the public school system or failed to take a job in the Foundation schools.”).

In Prince Edward and in Surry [another Virginia school district], the newly established white schools are nominally no part of the counties' school systems, but they are in fact the counties' schools, supported by the counties and, indeed, tailor-made to continue their initially avowed and persistently pursued policy of segregation.⁸⁵

Further, in remanding the case to the district court, the appellate judges noted, "The involvement of public officials and public funds so essentially characterizes the enterprise in each of the counties that the Foundation schools must be regarded as public facilities in which discrimination on racial lines is constitutionally impermissible."⁸⁶

And yet, rather than ordering the full desegregation of Foundation schools alongside the reopening of regular public schools, the Fourth Circuit recommended that public payments to families enrolling children in Foundation schools cease so long as the private schools remained segregated.⁸⁷ When it came to the issue of public school closures, the courts held that closure on the basis of race violated the 14th Amendment and ordered the county to collect the taxes necessary and reopen the public schools.⁸⁸ So public schools in Prince Edward County reopened while the nominally private Prince Edward Academy also remained open—and segregated.⁸⁹ Failure to fully desegregate both at the same

85. *Id.* at 492.

86. *Id.* (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961)). *Burton* determined that a private entity leasing space within a publicly funded building fell under the protections of the 14th Amendment, prohibiting racial discrimination by a private entity that benefited from the use of public funds. 365 U.S. 715, 726.

87. *See Griffin v. Bd. Supervisors*, 336 F.2d at 493 ("[T]he District Court should enter an order enjoining the defendants from processing or paying tuition grants to parents desiring to send their children to the Foundation schools as long as those schools remain segregated, or to any other segregated school that is . . . an extension of the public school system.").

88. *See Griffin v. Cnty. Sch. Bd.*, 377 U.S. 218, 233 ("[T]he District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County.").

89. Sandra Evans, *Era Ends at Once-Segregated Va. School*, WASH. POST (Dec. 15, 1986) (reporting that Prince Edward Academy finally desegregated in 1986) [perma.cc/2UXW-AA74].

time allowed adaptive discrimination to flourish.⁹⁰ The option remained for white families to exit a desegregating public system into a “private” school that could not have been established without public financing.⁹¹

III. *Rapid Rise of Segregation Academies as Federal Commitment to Desegregation Accelerated*

The growth of segregation academies in Virginia and other southern states accelerated rapidly once the federal government committed to interbranch coordination on desegregation. *Brown II*’s “all deliberate speed” meant that, eight years after *Brown*, just one-third of racially diverse southern districts had adopted policies or practices allowing Black students to attend formerly white-segregated schools.⁹² These “freedom of choice” policies represented the bare minimum of desegregation in ways that required the least of white students and their institutions, and instead meant desegregation only happened when Black students chose to go to often hostile white schools.⁹³

Congressional passage of the 1964 Civil Rights Act, with Title VI prohibiting discrimination on the basis of race, color or national origin, was followed swiftly by the Elementary and Secondary Education Act (ESEA) of 1965.⁹⁴ Both offered new opportunities for federal executive branch oversight and enforcement of school desegregation.⁹⁵ Title VI combined with ESEA meant that

90. See Boddie, *supra* note 2, at 1252 (explaining that this anti-desegregation strategy allowed segregation to persist despite “Brown’s extension of formal constitutional protections”).

91. See *id.* (“[L]ocal officials flouted Brown by closing public schools and funding private, white educational academies with public funds.”).

92. See U.S. COMM’N C.R., 1963 STAFF REPORT: PUBLIC EDUCATION 7 (1964) (noting that 32.1% of “biracial districts have policies or practices” allowing Black students to enroll in formerly segregated schools).

93. See David Smith, *Little Rock Nine: The Day Young Students Shattered Racial Segregation*, GUARDIAN (Sept. 24, 2017) (describing the hostile reception young Black students faced when they chose to attend recently desegregated schools).

94. Pub. L. No. 89–10, 79 Stat. 27 (codified as 20 U.S.C. §§ 6301–8961).

95. Janel A. George, *The End of “Performative School Desegregation”: Reimagining the Federal Role in Dismantling Segregated Education*, 22 RUTGERS RACE & L. REV. 189, 223 (2021) (“The law increased the federal footprint in

substantial federal dollars were at stake if southern school districts continued to resist desegregation.⁹⁶ The U.S. Department of Health, Education and Welfare, working in concert with the U.S. Department of Justice, issued school desegregation guidelines in 1965 that grew increasingly demanding over a short, four-year period.⁹⁷ In 1968, the U.S. Supreme Court affirmed and extended those desegregation guidelines in another case emanating from Virginia, *Green v. New Kent County*.⁹⁸ Declaring that segregation must be eliminated “root and branch,” the Court signaled renewed urgency and outlined measurable standards for school desegregation.⁹⁹ Segregation academy enrollment exploded in Virginia and across the South.¹⁰⁰

Congress conducted hearings in 1970 to better understand the growing segregation academy movement.¹⁰¹ An affiliate of the Southern Regional Council testified that academy enrollment was “growing so fast no one can keep an accurate account,”¹⁰² that schools “were created in 3-6 weeks time,” and that close to 400,000

education funding in an effort to equalize access to quality education, regardless of geography or student socioeconomic status.”)

96. *See id.* at 222 (“By the end of 1966, the Johnson administration had terminated federal funds for thirty-two southern school districts based on their refusal to end racial segregation in schools.”) (internal quotations omitted).

97. *See id.* (“In 1965, HEW issued regulations and desegregation guidelines. By the end of 1968, more than 200 fund terminations had been ordered under Title VI, all of these against southern school districts.”) (internal quotations omitted).

98. *See* 391 U.S. 430, 441–42 (1968) (“[T]he school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents *442 with a responsibility which *Brown II* placed squarely on the School Board.”).

99. *See id.* at 438–39 (outlining and exclaiming the need for remedy of the school board’s intentional failures to integrate with all deliberate speed).

100. *See* *Boddie*, *supra* note 2, at 1282 (expanding on these efforts in Virginia and the South in spite of the ruling).

101. *See* Jack Rosenthal, *Public School Property Transferred to ‘Segregation Academies,’ Senate Panel Is Told*, N.Y. TIMES (June 25, 1970) (describing the “weeks of hearings” in Congress to learn about “resource transfers,” racial discrimination, and in-school segregation) [perma.cc/9ZCX-YSA7].

102. Reese Cleghorn, *Segregation Academies: The Old South Tries Again*, SATURDAY REV., May 16, 1970, at 76.

students were enrolled.¹⁰³ That number rose to roughly half a million at the apex of the movement.¹⁰⁴ In Mississippi alone, the number of private schools grew from 17 in 1963 to 236 in 1970.¹⁰⁵

A. Establishing and Publicly Funding Segregation Academies

Multiple organizations enabled the establishment of segregation academies. Churches opened and ran them out of basements.¹⁰⁶ Many others were affiliated with the white supremacist White Citizens Councils that emerged in the aftermath of *Brown*.¹⁰⁷ The White Citizens Council's schools operated under the slogan, "segregation for education, education for segregation," with the organization claiming 150 schools in Mississippi, South Carolina and Virginia.¹⁰⁸ In the Council's regular publication, *The Citizen*, instructions for establishing segregation academies were disseminated.¹⁰⁹ The Council reached

103. *Equal Educational Opportunity: Hearings Before the Select Comm. on Equal Educ. Opportunity*, 91st Cong. & 92nd Cong., at 1963 (1970) [hereinafter *Equal Educ. Opp. Hearings*].

104. See Champagne, *supra* note 38, at 58 (estimating that as many as 500,000 students attended segregation academies in the early 1970s).

105. Robert Lockett, *From Council Schools to Today's Fight for Public Ed*, JACKSON FREE PRESS (Feb. 15, 2017, 1:20 p.m.) (quoting Charles C. Bolton, Professor for History in the University of North Carolina, previously the University of Southern Mississippi) [perma.cc/BUB3-J4NX].

106. See Vania Blaiklock, *The Unintended Consequences of the Court's Religious Freedom Revolution: A History of White Supremacy and Private Christian Church Schools*, 117 NW. U. L. REV. 46, 49 n. 10, 58 (2022) ("Southern churches played an extensive role in maintaining resistance to desegregation. Even churches that did not create schools indicated their approval of segregation academies by allowing those academies to use church buildings for classes.")

107. See *id.* at 56 (noting the White Citizens' Council's origins in Mississippi and their "fundraising efforts that funded private schools").

108. See Kenneth T. Andrews, *Movement-Countermovement Dynamics and the Emergence of New Institutions: The Case of "White Flight" Schools in Mississippi*, 80 SOC. FORCES 911, 922-23 (2002) ("While the Citizens' Council claimed to sponsor 150 academies throughout the south by 1969, the exact shape of that sponsorship is vague."); *Equal Educ. Opp. Hearings*, *supra* note 103, at 1964 (documenting the "happy slogan" of the Citizens' Council).

109. See Michael W. Fuquay, *Civil Rights and the Private School Movement in Mississippi, 1964-1971*, 42 HIST. EDUC. Q. 159, 163 (2002) ("The entire September 1964 edition of *The Citizen*, the Council's monthly magazine, was dedicated to the promotion of a private school movement.").

other stakeholders with weekly TV and radio programs, as well as films supporting segregation.¹¹⁰

The public subsidization of segregation academies documented in Virginia's *Griffin* case continued as the number of academies grew.¹¹¹ Segregation academies received federal and state tax credits and exemptions, the gift, lease or purchase of public school property and equipment, freely provided transportation and security, buses, textbook subsidization or outright donations, state employee benefits and subsidization, public utilities assistance and public and business assistance.¹¹²

Despite the public support, running newly established, separate segregation academies was expensive.¹¹³ Segregation academies frequently retained underprepared teachers and leaders, struggled with retention and were characterized by inadequate facilities, supplies, transportation and meals.¹¹⁴ A study of segregation academies in Alabama found that two thirds employed one or more teachers not meeting the standards for a certificate, half had one or more teachers without a college degree and more than two thirds had teachers teaching outside their subject matter expertise.¹¹⁵ These numbers flowed from the fact

110. See *The Murder of Emmett Till: White Citizens' Councils*, PBS AM. EXPERIENCE ("The group even had weekly TV and radio programs, and states would sponsor promotional films spotlighting the benefits of segregation.")

111. See *Segregation Academies*, *supra* note 7, at 1441–42 (stating growth in Southern private schools grew from 25,000 to 535,000 in six years).

112. See TERJEN, *supra* note 17, at 72 (demonstrating the IRS accepted "good faith" statements from segregation academies about their efforts to desegregate, which "defeated its own stated policy"); see also Champagne, *supra* note 38, at 62 (describing a segregation academy that was built on land donated by the public school system with funding from the public school board and included classroom supplies from the public schools); *Segregation Academies*, *supra* note 7, at 1440, 1445–47 (noting the transfer of closed public school to private academies, as well as the assistance from the public school system).

113. See *Segregation Academies*, *supra* note 7, at 1444–47 ("However, the judicial invalidation of [tuition grants] has caused them to charge significant tuition fees, often producing financial hardship for lower- and middle-class families and thereby forcing reductions in local school taxes.")

114. See *id.* at 1449 n.75 ("A committee of the Georgia State Senate reported that in 1971 better than half the private schools in the state lacked 'adequate facilities, library volumes, teaching aids, staff personnel, certified teaching staff, lunchroom facilities and [do not] . . . comply with safety and health standards.'")

115. See *id.*

that many segregation academy supporters criticized traditional teacher training as stressing “theory and method too much” with little ability to “discipline students” and tending toward “dangerous ideas.”¹¹⁶ Indeed, evidence from the period indicated that many academies offered restricted curricula, sometimes focused heavily on religion or “traditional” education.¹¹⁷ Additionally, two-thirds of Alabama segregation academies did not offer counseling services, nearly half employed leaders without the requisite experience, materials and two thirds had “grossly inadequate” materials and equipment.¹¹⁸ Building quality varied greatly, with some new facilities but others housed in former public school structures or buildings not designed for educational purposes at all (e.g., a former bowling alley).¹¹⁹

B. Lack of Oversight or Regulation Despite Flow of Public Support to Segregation Academies

Public dollars and other forms of aid continued to flow to newly established schools with little to no state oversight or regulation of school quality. In Virginia, the state board of education was charged with making rules and regulations with regard to

A study of segregation academies in Alabama found that “two-thirds of the academies currently [1971] employ one or more teachers who do not qualify for teaching certificates. Half of the schools have one or more teachers with less than the baccalaureate degree. More than two-thirds of the schools assign one or more teachers to fields of instruction other than those for which they were minimally prepared.

116. See GOODMAN, *supra* note 79, at 13 (“Foundation enthusiasts tend to be highly critical of teachers’ colleges, and of conventional teacher training requirements (as Foundation people understand both).”).

117. See *id.* at 14–16 (“It is an explicit and widely held tenet of Foundation education that curriculum should be centered on the ‘fundamentals’ – the ‘tool subjects’ plus science and languages – to the near exclusion of all else.”).

118. See John C. Walden & Allen D. Cleveland, *The South’s New Segregation Academies*, PHI DELTA KAPPAN, Dec. 1971, at 234, 238 (stating that thirty-seven quantitative criteria were used to determine the quality of private academies in Alabama, and it was found that many of the criteria were not met in more than half of the schools).

119. See *id.* (“A few of the schools are housed in modern, newly constructed facilities . . . More of the academies use structures abandoned by the public schools or buildings constructed for another purpose entirely.”)

“minimum academic standards” for students receiving vouchers to non-sectarian private schools.¹²⁰ A federal report from 1961 made clear the need for more oversight in Virginia, as some segregation academies were using town libraries rather than school libraries and indicating that “fire marshals worked with us.”¹²¹ In Virginia and other states, private school accreditation often came from newly emerging southern regional associations, some of which still exist today.¹²² The Southern Independent School Association (SISA) formed in 1970 when state organizations banded together to represent 396 schools and 176,000 students.¹²³ The group discussed standards of accreditation. It also included an active committee intent on procuring history textbooks for segregation academies that cemented white supremacist Lost Cause ideology. The texts perpetuated the idea that enslaved persons were content with slavery.¹²⁴

The lack of strong education in segregation academies, alongside the splintering of a collective interest in public education, made it difficult to sustain white southern support for the tax dollars necessary to operate elementary and secondary schools more generally.¹²⁵ Diminished resources accompanied the white retreat from a diversifying and desegregating public sector while substandard, constricted curricula that reinforced white supremacy flourished in segregation academies.¹²⁶

120. 1961 COMMISSION REPORT, *supra* note 29, at 90.

121. See Goodman, *supra* note 79, at 12 (describing “emergency schools” that were opened in buildings that were “made available” to the private schools).

122. *Equal Educ. Opp. Hearings*, *supra* note 103.

123. See Ernest Flora IV, *Instant Schools: The Frenzied Formation and Early Days of The Mississippi Private School Association 95* (May 2020) (Ph.D. dissertation, University of Mississippi) (on file with the University of Mississippi eGrove) (explaining the early meetings which created SISA); see also Note, *Segregation Academies and State Action*, 82 YALE L. J. 1436, 1448 (1973).

124. Greg Huffman, *Twisted Sources: How Confederate Propaganda Ended Up in the South's Schoolbooks*, FACING SOUTH (Apr. 10, 2019) [perma.cc/AF9U-8L7R].

125. See Walden, *supra* note 118, at 238 (“Both the willingness and ability of local governments to provide adequate financial support for schools designed to educate all children have diminished in the very areas where such support historically has been inadequate.”).

126. See *id.* (describing the twin challenges that faced public schools and segregation academies).

IV. *Belatedly Establishing and Enforcing Anti-Discrimination in Private Schools*

As private segregation academy enrollment accelerated in the late 1960s and early 1970s, civil rights advocates and lawyers continued to press the federal government for more oversight and enforcement of anti-discrimination provisions, on the grounds that these schools were subsidized—at the very least—by generous tax exemptions and corporate and individual contributions eligible for deductions.¹²⁷ Land or building donations that enabled the construction of new segregation academies were subject to major deductions, for instance.¹²⁸ In the case of segregation academies housed in churches, the government granted additional tax deductions.¹²⁹

The federal courts considered private school discrimination in *Runyon v. McCrary*, a 1976 case involving two Black students seeking admission to segregation academies in Northern Virginia.¹³⁰ No Black students had been admitted to either school since opening in the late 1950s.¹³¹ The basic question in front of the courts was whether Section 1981 of the 1866 Civil Rights Act prohibited private as well as public discrimination in the context of a potentially competing “freedom of association” claim guaranteed under the First Amendment.¹³² In its ruling, the Court

127. See Wilfred F. Drake, *Tax Status of Private Segregated Schools: The New Revenue Procedure*, 20 WM. & MARY L. REV. 463, 463–73 (introducing the history of the tax code’s treatment of segregated schools and the court cases that helped to enforce desegregation).

128. See John M. Spratt, Jr., *Federal Tax Exemption for Private Segregated Schools: The Crumbling Foundation*, 12 WM. & MARY L. REV. 1, 3 (1970) (“A donor who provides a building or land for a school site, if the basis of his property is below market value, may deduct the current market value without realizing capital gain.”).

129. See TERJEN, *supra* note 17, at 72 (stating that the government continually accepted “good-faith” statements from schools claiming they did not segregate and granted more tax deductions).

130. *Runyon v. McCrary*, 427 U.S. 160, 163–65 (1976).

131. *Id.* at 165.

132. See *id.* at 175–76 (examining whether federal anti-discrimination law can apply to privately-owned and funded organizations or schools).

prohibited private schools from denying admission to students on the basis of race.¹³³

In Mississippi, a class action suit against the Secretary of the Treasury and the Commissioner of Internal Revenue trying to prevent three recently established segregation academies from receiving tax exempt status won a 1970 injunction,¹³⁴ reaffirmed in 1971, modified in 1980, and still holding today.¹³⁵ The ruling prohibited the Internal Revenue Service (IRS) from offering tax exempt status or charitable deductions to private schools engaging in racially discriminatory behavior.¹³⁶ That behavior was determined by a framework that included the presence of a statement of non-discrimination, enrollment trends by race and outreach to and scholarships for minority students.¹³⁷ IRS non-discrimination determinations were made on the basis of “good faith” statements by the private schools under review.¹³⁸ Early analyses of IRS determinations concluded that private schools often violated their “open door policies” and still received major tax benefits.¹³⁹

By the early 1980s, two conflicting federal cases regarding private elementary, secondary, and postsecondary schools reached the Supreme Court. One, *Bob Jones University v. United States*, first entered the courts in the early 1970s and was ultimately decided thirteen years later.¹⁴⁰ Bob Jones University did not admit

133. See *id.* at 176 (“[I]t does not follow that the Practice of excluding racial minorities from such institutions is also protected by [Freedom of Association].”).

134. *Green v. Kennedy*, 309 F. Supp. 1127, 1140.

135. *Green v. Connally*, 330 F. Supp. 1150, 1179–80 (D.D.C. 1971), *aff’d*, *Coit v. Green*, 404 U.S. 997 (1971).

136. See *id.* at 1164 (clarifying that this new ruling applies to all private schools no matter the reasoning for the school’s founding or purpose).

137. See Terry Berkovsky et al., *Private School Update*, in 2000 EO CPE TEXT 187, 188 (2000) (stating that private schools “must demonstrate that they have adopted and published a nondiscriminatory policy,” and must prove they are operating in a nondiscriminatory manner such that they “overcome an inference of discrimination against [B]lacks”).

138. See TERJEN, *supra* note 17, at 72 (“[I]t became painfully clear that the IRS, in accepting ‘good faith’ statements by the schools themselves as to whether they discriminate, was defeating its own stated policy.”).

139. See *id.* at 73–74 (noting the IRS’s questionable favorable rulings for private schools and pushback on those rulings).

140. 461 U.S. 574, 577–79 (1983).

Black students until 1971, and from 1971 to 1975 only admitted married Black students.¹⁴¹ To prevent interracial marriages, the university did not admit unmarried Black students.¹⁴² Finally, in 1983, the Supreme Court affirmed that private organizations receiving tax breaks should not engage in racially discriminatory behavior.¹⁴³ In the other case, a class action brought by Black plaintiffs from seven states, plaintiffs alleged the IRS framework failed to fully identify racially discriminatory behavior among private k-12 schools, impeding desegregation in public schools.¹⁴⁴ Closing off a potential avenue of stricter oversight of private school segregation in the k-12 sector, the Court ruled that the plaintiffs lacked standing.¹⁴⁵

In sum, while the federal government retains a lever over nondiscrimination in private schools through tax policy, prior litigation criticized requirements, oversight and enforcement as weak.

V. *Backlash to Anti-Discrimination Enforcement in Private Schools and the Emergence of a Neoliberal Alternative*

Virginia, in addition to fomenting Massive Resistance across the South, was perhaps not coincidentally also the birthplace of Jerry Falwell's Moral Majority in 1979.¹⁴⁶ A white Christian

141. See *id.* at 580 (noting Bob Jones University was “not affiliated with any religious denomination” but believed firmly that interracial dating and marriage was against fundamentalist religious beliefs and the Bible).

142. See *id.* (adding that Bob Jones University accepted applications from Black students that married “within their race”).

143. See *id.* at 605 (“Although a ban on intermarriage or interracial dating applies to all races, decisions of this Court firmly establish that discrimination on the basis of racial affiliation and association is a form of racial discrimination.”).

144. See *Allen v. Wright*, 468 U.S. 737, 743 (1984) (estimating that the plaintiffs sought to present a class of people that included several million people negatively impacted by the IRS guidelines).

145. See *id.* at 766 (holding that standing requires more than a generalized grievance).

146. See Andrew Francis Bell, *Radical Religious Rebels: The Rise and Fall of Jerry Falwell and the Moral Majority* 11 (Aug. 2008) (M.A. thesis, East Tennessee State University) (“[R]ace relations . . . became a pressing issue during this time period with Lynchburg, Virginia being a microcosm of the evangelical movement during the tumultuous 1960s, not only because of a young minister named Jerry

Nationalist organization, the Moral Majority's headquarters were in Lynchburg, VA.¹⁴⁷ In the leadup to the formal establishment of the Moral Majority, Falwell led a series of "I love America" rallies around the country, seeking to knit together a coalition ready to battle the separation of church and state.¹⁴⁸ The Moral Majority drew on central tenets of white Christian nationalism by merging a hierarchical, authoritarian and patriarchal version of Christianity with civic institutions and public policy.¹⁴⁹ Pamphlets connected to the "I Love America" rallies show Falwell speaking of being born twice, first "enjoying the heritage of American citizenship" and second, "enjoying the freedom in Christ that every child of God understands and appreciates."¹⁵⁰ He also worried about "moral and religious decay," tying it to abortion, the Equal Rights Amendment, pornography and homosexuality.¹⁵¹

Evidence suggests that opposition to the enforcement of anti-discrimination in private segregation academies provided the initial motivation for the rise of the conservative Christian movement, though scholars traditionally have cited *Roe v. Wade* as the impetus for it.¹⁵² Falwell's Lynchburg Christian School, a

Falwell and his activities but also for the civil rights clashes that occurred in the town.").

147. See *id.* at 37 (noting the Moral Majority's influence on the formation of the Christian Coalition, which would be incorporated in 1987 in Richmond, VA).

148. See *id.* at 67 (stating these tours were implemented to mobilize the political base in the late 1970s).

149. See Kevin J. Burke et al., *White Christian Nationalism: What Is It, and Why Does It Matter for Educational Research?* 52 EDUC. RESEARCHER 286, 288 (Mar. 2023) ("The hallmark of White Christian nationalism is the belief that public institutions and policies should reflect and assert Christianity (the hierarchical, authoritarian, patriarchal version), based on the flawed premise that the United States was founded as a Christian nation.").

150. See Jerry Falwell, *How the "I Love America Club" Was Born*, CLEAN UP AMERICA HOTLINE REPORT, at 1, 1 (1979).

151. See *id.* at 2 (discussing other sources of the "moral and religious decay" including the prohibition of prayer in schools, "violence and sex on television," and "[s]ituation ethics" among other things).

152. See Randall Balmer, *The Real Origins of the Religious Right*, POLITICO MAG. (May 27, 2014) (introducing the common conception that the evangelical movement "who had been politically quiescent for decades, were so morally outraged by *Roe* that they resolved to organize in order to overturn it") [perma.cc/8F2C-CF7W].

church-run segregation academy, was one of many that received anti-discrimination questionnaires from the federal government in the wake of stepped up legal enforcement after *Green v. Connally* in 1971.¹⁵³ The Bob Jones University case further inflamed resentment on the religious right, which sought to characterize the issue as one of religious freedom rather than segregation and white supremacy.¹⁵⁴ This stance ignored the ways in which white evangelicals have used religion to rationalize and maintain racial hierarchies—up to and including the church’s role in establishing segregation academies.¹⁵⁵ Though the Moral Majority mobilized evangelicals with anti-abortion stances in the later 1970s, resistance to anti-discrimination provisions in sectarian segregation academies formed the basis of the early movement.¹⁵⁶

In the 1980s and 1990s, private school enrollment held fairly steady across the country’s five major regions, hovering between about 8 percent (in the South and West) and 15 percent (in the Northeast)¹⁵⁷ As private school enrollment and segregation stabilized, a new form of choice, drawing on earlier neoliberal ideas advocated by Milton Friedman, stood poised to reshape the landscape nationwide.

Charter schools, at least initially, represented a bipartisan compromise on many of the crucial turn-of-the-21st century issues

153. See *id.* (“The *Green v. Connally* ruling provided a necessary first step: It captured the attention of evangelical leaders especially as the IRS began sending questionnaires to church-related ‘segregation academies,’ including Falwell’s own Lynchburg Christian School, inquiring about their racial policies.”).

154. See *id.* (“Although Bob Jones Jr., the school’s founder, argued that racial segregation was mandated by the Bible, Falwell and Weyrich quickly sought to shift the grounds of the debate, framing their opposition in terms of religious freedom rather than in defense of racial segregation.”)

155. See Erika K. Wilson, *Racialized Religious School Segregation*, 132 *Yale L.J. F.* 598, 621 (Nov. 17, 2022) (describing the historical role religion has played “in othering nondominant groups and in justifying racial constructions and hierarchical orderings” and the link between religious groups and political viewpoints); see also Burke, *supra* note 149, at 289 (asserting Christianity has been used to establish the racial superiority of white people across many different historical eras).

156. See Burke, *supra* note 149, at 289 (explaining the “real driver” behind the moral outrage of the Christian conservatives in the early 1970s was opposition to policies against segregation in schools).

157. CHARLES T. CLOTFELTER, *AFTER BROWN: THE RISE AND RETREAT OF SCHOOL DESEGREGATION* 104 (2004).

raised when it came to subsidizing private schools with public money.¹⁵⁸ When they first emerged, charter schools were exclusively nonsectarian, in sharp contrast to the private school sector, four-fifths of which was sectarian.¹⁵⁹ Charters, then, steered clear of the church-state boundary in a way that voucher-funded sectarian private schools did not.¹⁶⁰ And in an era increasingly defined by neoliberal reform, charter schools appealed politically to a variety of stakeholders supportive of competition and autonomy in the public school sector.¹⁶¹

Charter schools are public schools operated by for- or non-profit organizations outside of the regular public system.¹⁶² In 1992, the first charter school was established in Minnesota; a decade later, there were more than 2,600 charters around the

158. See GARY ORFIELD & ERICA FRANKENBERG, EDUCATIONAL DELUSIONS? WHY CHOICE CAN DEEPEN INEQUALITY AND HOW TO MAKE SCHOOLS FAIR 6 (2013) (noting the overwhelming and long-running bipartisan support for charter schools to provide disadvantaged students with better educational opportunities).

159. See *id.* at 19.

Conservatives wanted choices outside the regular public schools and liberals wanted to protect the separation of church and state and avoid subsidizing private schools, four-fifths of which were religious. Charters were a new form of nonsectarian autonomous public school outside the established public school system, managed by nonprofit or for-profit groups.

160. See *id.* (“The charter movement gained great popularity both because its basic assumptions were in tune with the times and because it avoided much of the political conflict produced by a long and futile fight over vouchers.”).

161. See *id.* at 130 (noting the era of the public being skeptical of the government helped with public support for charter schools where the charter schools were more autonomous than typical public schools and gave students a choice of what school to go to without being limited to the government-given option); see also Idrees Kahloon, *The War on Economics*, NEW YORKER (May 16, 2022) (discussing how the emphasis on economics detracts from conversations surrounding equity in public schooling) [perma.cc/8Y7H-R83U].

162. ORFIELD & FRANKENBERG, *supra* note 158, at 19.

country.¹⁶³ By 2022, there were 7,800 charter schools.¹⁶⁴ State charter school law and policy varies widely, with implications for the number established within a state.¹⁶⁵ For example, Virginia's first charter law was passed in 1998 and seven Virginia charter schools operated in 2022.¹⁶⁶

Bipartisan support for charter schools began to fracture during the Trump administration, as its educational privatization agenda became clear.¹⁶⁷ And new questions about the sectarian status of publicly funded charter schools have emerged in the wake of a string of 21st century U.S. Supreme Court decisions eroding the lines between church, state and schools.¹⁶⁸

163. See Sara Rimer, *Study Finds Charter Schools Lack Experienced Teachers*, N.Y. TIMES (Apr. 8, 2003) ("More than 2,600 charter schools, which operate with public funds but are independent of local school boards and most government rules, have opened since 1991 and serve nearly 700,000 students in 36 states and the District of Columbia.") [perma.cc/BYM9-998W]; *Minnesota's Charter School Story*, MN ASS'N CHARTER SCHS. ("The first charter was issued in late 1991 to Bluffview Montessori School in Winona, while the first charter school to open its doors was City Academy in St. Paul.") [perma.cc/878M-CFKB].

164. *Just the FAQs – Charter Schools*, CTR. FOR EDUC. REFORM ("As of 2022, there were more than 7,800 charter schools across the country with more than 3.7 million students, with demand higher everywhere they are located.") [perma.cc/8LK2-ESE6].

165. See WAYNE RIDDLE ET AL., CONG. RSCH. SERV., 97-519 EPW, CHARTER SCHOOLS: STATE DEVELOPMENTS AND FEDERAL POLICY OPTIONS 6–8 (1998) (listing differences in treatment of charter schools in states in which they are most prominent).

166. *Charter Schools*, VA. DEP'T EDUC. (June 22, 2022) [perma.cc/L6Y3-RSSL]; see also Megan Pauly, *What to Know About the Charter School Debate*, VA. PUB. MEDIA (Jan. 14, 2022, 5:08 PM) (attributing the relatively low number of charter schools in Virginia to the fact that local school boards have sole authority to approve charter schools in their districts, and that such an approval results in less funding for the school board) [perma.cc/MRX6-L5J3].

167. See Erica L. Green, *Charter Schools in Surprise Political Fight as Trump and Democrats Turn Away*, N.Y. TIMES (Feb. 25, 2020) ("Public charter schools — caught between growing Democratic disenchantment and a Trump administration shift toward private schools — are preparing for political battle, as the long-protected education sector finds itself on the verge of abandonment.") [perma.cc/5F65-R49M].

168. See Sarah Mervosh, *Oklahoma Approves First Religious Charter School in the U.S.*, N.Y. TIMES (June 7, 2023) ("The decision [to approve a religious charter school] sets the stage for a high-profile legal fight over the barrier between church and state in education, at a time when other aspects of public education are being challenged.") [perma.cc/J9AD-GW7M].

VI. *Privatizing Public Education in the 21st Century*

Over the past two decades, federal courts have made it easier to direct public money toward sectarian private schools. The Supreme Court started the trend in its 2002 *Zelman v. Simmons-Harris* decision when it condoned a Cleveland voucher program that included religious schools.¹⁶⁹ Indeed, despite stark overrepresentation of religious private schools in Cleveland’s voucher program, the majority ruled that the voucher program there offered “private choice” and “neutral programming available to a broad class of individuals.”¹⁷⁰ The Court expressed concern about the educational plight of Black students in Cleveland’s regular public schools as a way to sanction vouchers.¹⁷¹ Justice Thomas in particular saw the voucher program as the state “provid[ing] greater educational opportunity for underprivileged minority students.”¹⁷² The Court’s framing ignored its own role in creating unequal educational opportunities for urban Black students after it blocked metropolitan school desegregation in 1974.¹⁷³ When ordering desegregation across the city-suburban boundary line became much more difficult in the aftermath of *Milliken v. Bradley*, the absence of systematically integrated school choices meant that many urban school systems were forced to double down on making separate schools more equal.¹⁷⁴

169. 536 U.S. 639, 662–63 (2002); *see also* Mervosh, *supra* note 168 (“In key Supreme Court rulings in 2020 and 2022, the court ruled that religious schools could not be excluded from state programs that allow parents to send their children to private schools using government-financed scholarship or tuition programs.”).

170. *See Zelman*, 536 U.S. at 653 (“We believe that the program challenged here is a program of true private choice, consistent with *Mueller*, *Witters*, and *Zobrest*, and thus constitutional.”).

171. *See Zelman*, 536 U.S. at 683–84 (Thomas, J., concurring) (touting the benefits of voucher programs like the one in Cleveland as a means of raising the quality of education available to underprivileged students).

172. *Id.* at 677.

173. *See Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974) (finding that the allegation that “acts of the outlying districts had any impact on the discrimination found to exist in the Detroit schools” “was unsupported by record evidence despite ten days of lower court testimony suggesting otherwise”).

174. *See* JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 178

Eighteen years later, a 5-4 Supreme Court revisited the issue of public funding for private, sectarian schools.¹⁷⁵ In *Espinoza*, the judges held that state governments could not exclude religious schools from participating in publicly funded voucher programs.¹⁷⁶ Montana, like at least eighteen other states, offered tax credits to individuals and companies donating to scholarship organizations.¹⁷⁷ Those organizations, in turn, doled out money to families for private school tuition.¹⁷⁸ Prior to *Espinoza*, families drawing down on the private school scholarships in Montana and other states with voucher policies were not allowed to use them to attend private religious schools.¹⁷⁹ The Supreme Court ruled that the Montana provision barring families from using scholarships to attend private religious schools discriminated against religious schools and families.¹⁸⁰

Just two years after *Espinoza*, the Court further diminished the line between church and state in *Carson v. Makin*, voting 6-3 to mandate that state governments provide support to private religious schools if they provide support to other, non-religious private schools.¹⁸¹ In parts of rural Maine, the state had previously

(2011) (“*Milliken v. Bradley* made the boundary between suburb and city all but impassable for the purpose of desegregation.”)

175. *Espinoza v. Mont. Dep’t Revenue*, 140 S.Ct. 2246 (2020).

176. *See id.* at 2261–63 (finding that Montana’s policy failed to withstand the strict scrutiny analysis applicable to discrimination based on religious status).

177. *Id.* at 2251–52.

178. *See id.* (“The program grants a tax credit to anyone who donates to certain organizations that in turn award scholarships to selected students attending [private] schools.”).

179. *See id.* (“In 2015, the Montana Legislature sought ‘to provide parental and student choice in education’ by enacting a scholarship program for students attending private schools.”).

180. *See id.* at 2261–63 (“Given the conflict between the Free Exercise Clause and the application of the no-aid provision here, the Montana Supreme Court should have disregarded the no-aid provision and decided this case conformably to the Constitution” of the United States.”) (internal quotations omitted).

181. *See Carson ex rel. O.C. v. Makin*, 596 U.S. 767, 789 (2022) (“Maine’s ‘nonsectarian’ requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment. Regardless of how the benefit and restriction are described, the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise.”). Some legal scholars believe the decision could open the door to religious charter schools as well. *See, e.g.,* Matt Barnum, *The Next Frontier: Supreme Court Case Could Open Door to Religious Charter Schools*, CHALKBEAT (Feb. 24, 2022) (citing

offered families vouchers to attend nearby, nonsectarian private schools if the local community was unable to fund a high school.¹⁸² Again, the Court found that Maine's prohibition on funding for sectarian private schools discriminated against religious families, infringing upon free exercise rights.¹⁸³

These three cases, taken together, have shifted the principal question in cases involving sectarian schools, from one about the separation of church and state to one about the protection of the free exercise of religion.¹⁸⁴ This altered analysis has worrisome implications for civil rights. Given the historical difficulties and failures surrounding the enforcement of anti-discrimination measures in private segregation academies, many of them religious, what does an increasingly permissive context for blurring the church-state boundary mean for students' civil rights today? More generally, what does a resurgent school privatization push mean for students' civil rights?

A. State Voucher Legislation and Civil Rights Machinery

Many states have been eager to take advantage of the judiciary's increasing flexibility toward funding private schools with public dollars. Legislation over the last 20-year period has left almost half of all states with a program that subsidizes private schools.¹⁸⁵ While overall enrollment in voucher programs remains

Preston Green, an educational law professor, for his insight that religious charter schools may be the 'next frontier' for religious entities seeking greater influence in education) [perma.cc/J4YQ-RJ96]; Suzanne Eckes & Preston Green, *Carson v. Makin: Implications for Students' Civil Rights in Taxpayer Funded Religious Schools*, CANOPY F. INTERACTIONS L. & RELIGION (Sept. 28, 2022) (exploring the issue of private religious schools engaging in discriminatory practices using public funds and whether or not this was considered by the Court) [perma.cc/Z8JV-LUP7].

182. See *Carson*, 596 U.S. at 771–73 (describing Maine's program and its prohibition on funding sectarian schools).

183. See *id.* at 787–89 (following the precedent set in *Espinoza* to find that Maine's prohibition violated the Free Exercise clause of the First Amendment).

184. See Mervosh, *supra* note 168 (explaining how the Supreme Court's position on public funding for religious education has shifted in the past decades).

185. Kevin G. Welner & Preston C. Green, *Private School Vouchers: Legal Challenges and Civil Rights Protections* 6, 8–9 (UCLA C.R. Project, working paper, 2018); The Trump administration failed to get Congress to directly fund

small, at about half a percent of the total number of U.S. students,¹⁸⁶ the judicial climate and steady conservative push toward privatizing public schools may herald more rapid growth in coming years.¹⁸⁷

Traditionally, it has been harder to pass voucher legislation than neovoucher, or scholarship tax credit, legislation.¹⁸⁸ The latter may provoke less political opposition than vouchers because tax credits are more associated with tax policy and typically drawn from general state rather than specific education monies.¹⁸⁹ In parallel with earlier concerns about accountability in segregation academies, many tax credit scholarship programs limit or even prohibit government oversight in private schools benefiting from the funding.¹⁹⁰ When oversight exists it typically comes in the form of curriculum and instructional time guidelines, as well as background checks for staff.¹⁹¹ About half of the twenty-two tax

school vouchers, although Congress did grant major tax breaks in the form of “529 savings plans” to families for K-12 private school tuition. *See* Steve Suitts, *Segregationists, Libertarians, and the Modern “School” Movement*, S. SPACES (June 4, 2019) (describing unsuccessful efforts made by Trump’s Secretary of Education, Betsy DeVos, to divert \$1 billion in educational funding directly to private school vouchers) [perma.cc/2L92-CSHJ].

186. *See* Mark Berends, *The Current Landscape of School Choice in the United States*, KAPPAN (Aug. 23, 2021) (“[T]he total number of students receiving vouchers remains a tiny fraction of the total number of students in the U.S. (about 0.5%).”) [perma.cc/3TD4-32PF].

187. *See e.g.* Okla. Att’y Gen., Opinion Letter 2022-7 (Dec. 1, 2022) (opining that in the wake of *Espinoza*, Oklahoma’s law prohibiting religious institutions and private sectarian schools from affiliating with the public charter school program is probably unconstitutional and should not be enforced).

188. *See* Matt Barnum, *The Rise of Tax Credits: How Arizona Created an Alternative to School Vouchers – and Why They’re Spreading*, CHALKBEAT (Sept. 18, 2017) (explaining that tax credits, sometimes called neovouchers, “inject[] a middle layer into the government’s support of private school tuition” and “avoid some of the legal and political obstacles that have dogged efforts by advocates”) [perma.cc/NP4V-H27N].

189. *See* ANDREW COULSON, MACKINAC CTR. FOR PUB. POL’Y, FORGING CONSENSUS: CAN THE SCHOOL CHOICE COMMUNITY COME TOGETHER ON AN EXPLICIT GOAL AND A PLAN FOR ACHIEVING IT? 46 (2004) (discussing the public perception of tax credits versus vouchers and how legislation efforts have moved toward tax credits) [perma.cc/F6AG-WJTU].

190. *The Myths and Facts About Education Tax Credits*, AM. C.L. UNION [perma.cc/924R-2ZK2].

191. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-664, PRIVATE SCHOOL CHOICE: ACCOUNTABILITY IN STATE TAX CREDIT SCHOLARSHIP PROGRAMS 14 (Sept.

credit scholarship programs reviewed by the Government Accountability Office in 2019 required specific teaching qualifications.¹⁹² Very few (four of twenty-two) programs require annual audits or financial reviews.¹⁹³

Civil rights machinery is also sorely lacking in voucher and scholarship tax credit tuition programs, even as public funding increases.¹⁹⁴ Civil rights protections for voucher recipients vary widely by state, with some offering minimal protections and others offering none.¹⁹⁵ Neovoucher programs, which include the scholarship tax credits as well as Education Savings Accounts (ESAs) that distribute public education funding directly to families to use as they may, carry even less civil rights protection.¹⁹⁶ Across states offering voucher and neovoucher programs, a 2019 report indicated that less than half do not bar discrimination on the basis of race.¹⁹⁷ Most states also do not prevent discrimination on the basis of other characteristics like religion, gender, sexuality or disability.¹⁹⁸ When tax scholarship credit programs accept

2019) (commenting on certain academic guidelines in private schools as well as the programs that apply them).

192. *Id.*

193. *Id.* at 17.

194. See Suzanne E. Eckes et al., *Dollars to Discriminate: The (Un)intended Consequences of School Vouchers*, 91 PEABODY J. OF EDUC. 537, 538 (2016) (“[L]egislators appear to have neglected to construct policies that safeguard student access and ensure that public funds do not support discriminatory practices. Without additional safeguards, states risk providing public money that can be used to promote discriminatory policies and practices.”).

195. See *id.* at 546.

We found both explicit nondiscrimination provisions, as well as other sections that may operate to curtail any discriminatory practices in voucher programs. The policies, however, do not uniformly demand that private participating voucher schools avoid discrimination and, none of the 26 policies reviewed comprehensively addresses discrimination on the basis of race, ethnicity, national origin, sex, sexual orientation, and disability.

196. See BAYLISS FIDDIMAN & JESSICA YIN, CTR. FOR AM. PROGRESS, THE DANGER PRIVATE SCHOOL VOUCHER PROGRAMS POSE TO CIVIL RIGHTS 2 (May 13, 2019) (noting the ways in which voucher programs fail to protect students’ rights in private school settings).

197. See *id.* at 3 (“[L]ess than half of the currently operating voucher programs provide statutory protections for racial discrimination.”).

198. See Suzanne E. Eckes & Julie F. Mead, *Under the Law: Discriminatory Practices in Voucher Programs*, PHI DELTA KAPPAN, Mar. 2020, at 65, 65

students with disabilities, families must give up elements of due process under IDEA.¹⁹⁹ Many state voucher statutes do not require that publicly supported private schools serve all students with disabilities.²⁰⁰ No statutes require that publicly supported private schools serve students learning English.²⁰¹

Uneven state civil rights guidelines and enforcement in voucher and neovoucher programs may violate federal anti-discrimination law. Because states receive federal funding, they should be prohibited from supporting programs that discriminate.²⁰² Yet the more indirect the subsidies for private school enrollment, the more difficult civil rights enforcement becomes.²⁰³ And the increasing judicial emphasis on the free exercise of religion carries ominous undercurrents for discriminating on the basis of religious beliefs.²⁰⁴

B. Revisiting Public Subsidies for Private Schools in Virginia

Virginia's scholarship tax credit, launched in 2013, is a modest version of more robust efforts in other states.²⁰⁵ It provides a 65 percent tax credit for donations to scholarship foundations meeting

(explaining that “most of those states have done little or nothing to prevent” forms of discrimination other than racial discrimination).

199. See JULIE F. MEAD & SUZANNE E. ECKES, NAT'L EDUC. POL'Y CTR. HOW SCHOOL PRIVATIZATION OPENS THE DOOR FOR DISCRIMINATION 6 (2018) (explaining how IDEA applies to public schools and places no obligations on private schools).

200. See *id.* at 7 (“[C]harter schools, although a form of public school and bound by federal law, tend to enroll more homogenous populations and smaller populations of students with disabilities and children learning English than traditional public schools.”).

201. Eckes et al., *supra* note 194, at 547 tbl.2.

202. See FIDDIMAN & YIN, *supra* note 196, at 4 (“Title VI of the Civil Rights Act of 1964 bars any school that receives federal funds from discriminating against students on the basis of ‘race, color, or national origin.’ The IRS also requires that private schools adopt racially nondiscriminatory policies to receive and maintain 501(c)(3) nonprofit status.”).

203. See *id.* at 5–7 (outlining how private schools utilizing voucher systems can skirt oversight on discrimination relating to religion and sex).

204. See *generally* Groff v. DeJoy, 600 U.S. 447 (2023) (bolstering protections for workers asking for religious accommodations); 303 Creative LLC v. Elenis, 600 U.S. 570 (2023) (siding with a web designer who did not want to provide services to same-sex couples because of her religious beliefs).

205. VA. CODE ANN. § 58.1-439.26 (2013).

the state’s qualifications.²⁰⁶ Then the foundations provide private school scholarships to students based on income eligibility requirements.²⁰⁷ Eligibility for the scholarships extends to middle class families, as anyone at 300 percent of the federal poverty line—and 400 percent for families of students with special needs—qualifies.²⁰⁸ At the same time, the projected average scholarship in for 2021-22 was just under \$3,000, a small fraction of the average private school tuition (\$11,510 thousand for elementary and \$16,650 for secondary).²⁰⁹ The result is that, even though as many as 37 percent of Virginia’s students are eligible, just 0.3 percent participate.²¹⁰

In 2016 and 2017, conservative lawmakers sought to introduce ESAs into Virginia’s education landscape, which make some or all of public per-pupil funding available to families to spend on their student’s education.²¹¹ Democrats controlled Virginia’s executive office at the time, however, and nixed both earlier neo-voucher attempts.²¹²

As the 2022 and 2023 Virginia General Assembly convened, Republicans signaled renewed interest in education savings accounts.²¹³ Introduced in the House of Delegates, the neovoucher

206. *Id.* § A.

207. *Id.* § C.

208. *Education Improvement Scholarships Tax Credits Program*, VA. DEP’T EDUC. [perma.cc/97MD-CBCA].

209. Melanie Hanson, *Average Cost of Private School*, EDUC. DATA INITIATIVE (last updated Oct. 8, 2023) [perma.cc/26X6-M763]; *Education Improvement Scholarship Tax Credits Program*, EDCHOICE (last updated Dec. 14, 2023) [perma.cc/CA62-V6E6].

210. Kate Masters, *Former DeVos Aide Appointed Virginia’s Deputy Secretary of Education*, VA. MERCURY (Apr. 11, 2022, 2:00 PM) [perma.cc/UMS4-4U6V]; see also *Education Improvement Scholarship Tax Credits Program*, supra note 209 (“More than 40 percent of Virginia students are eligible for a scholarship and less than 1 percent of students statewide actually use a scholarship.”).

211. H.B. 389, 2016 Sess. (Va. 2016).

212. *Va. Governor Vetoes Voucher-Like Bill*, AM. UNITED (June 1, 2016) [perma.cc/RB7S-AN9D]; see also Brittany (Corona) Vessely, *Explaining Virginia’s Parental Choice Education Savings Accounts (PCESA) Bill*, ENGAGE (Mar. 15, 2016) (outlining key details of the education savings account legislation) [perma.cc/T22G-LLB2].

213. See Nathaniel Cline, *Education Savings Account Bills Fail in Both House and Senate*, VA. MERCURY (Feb. 7, 2023) (reporting that Republicans put forward four bills regarding state funding of private education) [perma.cc/8QKL-9Z8Z].

bill extended education savings accounts to any interested families, bypassing a priority for historically disadvantaged groups.²¹⁴ Other states have targeted lower wealth families first, later expanding to higher wealth families.²¹⁵ The Virginia bill also proposed increasing the number of families qualifying for existing scholarship tax credits to those within 1000 percent of the federal poverty line.²¹⁶ It did not leave the House committee in the 2022 or 2023 session—though interest remains.²¹⁷

VII. *What Earlier Research Says About Private School Enrollment, Segregation, and Student Outcomes*

The literature related to private school enrollment and segregation is relatively thin. This is partly a function of the difficulty of obtaining reliable data over time. A federal Private School Survey (“PSS”) has collected biennial data on private school enrollment and characteristics since 1989.²¹⁸ The years covered by the survey obviously fail to capture how states in the South supported and accelerated private school enrollment for white students as part of the concerted, early resistance to *Brown v. Board of Education*. The PSS maintains a list of private schools updated periodically using third party sources, including state departments of education and national private school associations. Data from the census also contributes to the universe, resulting in a list of private schools nationwide.²¹⁹ But participation in the PSS is voluntary, and there are no consequences for refusing to

214. H.B. 1024, 2022 Sess. (Va. 2022).

215. See Libby Stanford & Mark Lieberman, *Education Savings Accounts, Explained*, EDUC. WEEK (Mar. 27, 2023) (tracing the introduction and expansion of education savings accounts across eleven states) [perma.cc/W3XL-B8K4].

216. H.B. 1371, 2023 Sess. (Va. 2023).

217. *Id.*

218. See *Private School Universe Survey (PSS)*, NAT’L CTR. FOR EDUC. STATS. [hereinafter *PSS*] (noting that PSS began in the 1989–90 school year is conducted every two years) [perma.cc/H654-VX72].

219. See *id.* (“The list is updated periodically by matching it with lists provided by nationwide private school associations, state departments of education, and other national private school guides and sources. Additionally, an area frame search is conducted by the Bureau of the Census.”).

participate in the survey.²²⁰ As a result, the response rate fluctuates from year to year.²²¹ The goal for the PSS is an 85 percent weighted response rate nationally, though in recent years it has fallen to between about 70 and 77 percent.²²²

Studies relying on the PSS consistently find that private school enrollment is disproportionately white and segregation levels are high.²²³ In a 2002 report, released just as *Zelman* opened up more legal pathways for voucher programs, sean reardon and John Yun found that over 80 percent of private school students attended religious schools.²²⁴ Segregation between Black and white students, further concluded the authors, was higher among private schools than public schools.²²⁵ For instance, Black students

220. See *Private School Universe Survey (PSS)*, U.S. CENSUS BUREAU (last updated March 14, 2023) (explaining that participation in the PSS is voluntary, and that while there is no penalty for not responding, a high response rate is important to the success of the survey) [perma.cc/M87C-FDYB].

221. See PRIVATE SCHOOL UNIVERSE SURVEY, NCSE HANDBOOK OF SURVEY METHODS, NAT'L CTR. FOR EDUC. STATS. 6–8 (detailing the varying response rates since the early 2000s).

222. See *id.* at 6–7 (explaining that since 2003, the response rate has hovered around 85 percent, though in 2016 it began to drop). Response rates are available starting from 1999–2000 up to 2017–18. Across all available years, the response rate averages to 87.9%. However, prior to 2005, the PSS used a different weighting structure. If evaluating the response rates from 2005 on using the standardized weights, the average response rate drops slightly to 85.3%. Up through the 2011–12 survey, response rates were consistently above 90%. Response rates then drop precipitously, from 91.8% in 2011–12 to 80.6% in 2013. The response rates continue to drop after that, falling to 69.2% in 2015–16 and then climbing slightly to 76.6% in 2017–18. *PSS*, *supra* note 218.

223. See sean f. reardon & John T. Yun, *Private School Racial Enrollments and Segregation*, HARV. C.R. PROJECT, June 26, 2002, at 3–5, 25 (finding that private schools in metropolitan areas are disproportionately white, particularly in the south, and that segregation levels are high among private schools, especially among religious schools).

224. See *id.* at 3 (“There has, however, been a curious lack of information about, and interest in, the racial enrollment patterns of the nation’s private school students, over eighty percent of whom attend religious schools.”).

225. See *id.*

Although 78% of the private school students in the nation were white in 1997-98, the average black private school student was enrolled in a school that was only 34% white. For comparison, note that among public schools, 64% of students were white and the average black public school student attended a school that was 33% white.

attended private schools with considerably lower average shares of white students, despite the fact that white enrollment in the private school sector was much higher than in the public one.²²⁶ White students were also more racially isolated in private schools than in public schools.²²⁷

A longitudinal, detailed study of school segregation, released on the 50th anniversary of *Brown*, found that private school enrollment in the South increased from 5 percent in 1960 to 9 percent by 2000.²²⁸ The same study explored rural segregation and private schools, finding that private school enrollment in non-metropolitan southern areas rose sharply if the percentage of nonwhite public school students accounted for half or more of the enrollment.²²⁹ Non-metro southern private schools, often the only alternative to desegregating public schools, contributed to about 40 percent of overall school segregation in the non-metro areas.²³⁰ In southern metropolitan areas, private schools contributed to a much smaller share of overall segregation, about 8.5 percent.²³¹ Segregation between and within school districts in the metropolitan South accounted about equally for the remainder of the total.²³²

226. *Id.*

227. *See id.* at 4 (“In public schools 47% of white students attend schools that are 90–100% white, while in private schools 64% of white students attend schools that are 90–100% white.”).

228. Clotfelter, *supra* note 5, at 78 tbl.1.

229. *See id.* at 92 (“The clearest indication of the link between desegregation and private enrollment in these nonmetropolitan areas is the finding that the rate at which Whites enrolled in private schools tended to rise with the non-White percentage in the county, increasing markedly in counties with percentages of non-White students over 55%.”).

230. *See id.* at 86.

Taken together, the disparity in average racial composition of public and private schools and differences among private schools accounted for about 16% of total segregation. For nonmetropolitan areas, where the county is taken as the unit of comparison, the average segregation index was .096, with district segregation accounting for 40% of the total.

231. *See* CLOTFELTER *supra* note 157 at 120 fig. 4.4.

232. *See* Clotfelter, *supra* note 5, at 157 tbl.5.

More recent research on school segregation in metropolitan areas, relying on a similar decomposition measure, found that school segregation is more extreme when options like private schools are more numerous and resource inequality between schools is higher.²³³ Another study measuring how much individual schools contributed to segregation in a given county or city found that, in 2017, private schools contributed to about 15 percent of overall school segregation nationwide though they only enrolled 11 percent of students.²³⁴

Finally, little contemporary research specific to segregation trends in segregation academies exists. Lack of data remains a central issue. However, a study of Mississippi segregation academies, relying on carefully compiled archival data that included private school enrollment records, historical newspapers and state education and demographic reports, explored trends over time in these institutions.²³⁵ It presented evidence that some segregation academies were established in the early aftermath of *Brown*, with founding taking off after the Civil Rights Act of 1964 and two late 1960s Supreme Court rulings signaled that meaningful desegregation of public schools was imminent.²³⁶ The study also indicated that changes to federal tax policy and the 1976

233. See Jeremy Fiel, *Closing Ranks: Closure, Status Competition, and School Segregation*, 121 AM. J. SOCIO. 126, 141 (2015) (examining school segregation by considering the proportion of schools that are private or charter and the effects of unequal distribution of resources across schools).

234. See Tomás Monarrez et al., URB. INST., WHEN IS A SCHOOL SEGREGATED? MAKING SENSE OF SEGREGATION 65 YEARS AFTER *BROWN V. BOARD OF EDUCATION* 15 (Sept. 27, 2019) (“Charter and private schools tend to account for a smaller average share of segregation (9 percent and 15 percent, respectively) because these sectors educate a smaller share of students, on average (8 percent attend charter schools, and 11 percent attend private schools.”).

235. See Kayla Kemp, *Origins, Perseverance, and Consequences of Segregation Academies in Mississippi: 1954 to Present*, Proceedings of the Population Association of America Annual Meeting (May 6, 2021) (on file with author).

236. See *id.* (“describing 1969 as the year when the greatest number of Mississippi counties adopted the segregation academy for the first time”); see also Ernest Flora IV, *Instant Schools: The Frenzied Formation and Early Days of the Mississippi Private School Association* 37–39 (Jan. 1, 2020) (Ph.D. dissertation, University of Mississippi) (eGrove) (describing the proliferation of private schools in Mississippi in the wake of advancements in civil rights).

*McCrary*²³⁷ decision put a quick stop to the establishment of segregation academies—but not before hundreds began flourishing.²³⁸

*VIII. Contemporary Enrollment and Segregation in Virginia
Private Schools*

Given the quickening pace of educational privatization and Virginia's central historical role in it, we sought to better understand the state's contours of private school enrollment and segregation. We use data from the federal PSS and the Common Core of Data (CCD) for the years 2001, 2007, 2013, and 2019. This allowed us to capture the most recent academic year data available²³⁹ for private schools while also establishing trends over time during an era of increasing judicial and legislative support for school privatization.

As recommended by the PSS, our analysis typically relied on weighted data to account for private schools that chose not to respond to the survey.²⁴⁰ When applied, the final weights had an appreciable impact on how we understood private school enrollment and, in some cases, tell a different story than the unweighted data. The weights suggested by the PSS caused significant fluctuations in the metropolitan-level data, with a number of more racially diverse Virginia private schools represented multiple times. For instance, in the Richmond area, two schools with higher shares of Black students were counted

237. *Runyon v. McCrary*, 427 U.S. 160 (1976).

238. See Kemp, *supra* note 235 (citing the Supreme Court's affirmation of the decision to withdraw tax-exempt status from private schools that permitted racial discrimination as well as *Runyon v. McCrary*).

239. The latest year for which PSS data are available is 2019–20. Other analyses of private school enrollment data (not available for Virginia) indicate the private school enrollment grew by about 4 percent in 21 states and D.C. THOMAS S. DEE & LURYE SHARON, *MISSING KIDS: EXPLORING THE PANDEMIC PLUNGE IN PUBLIC SCHOOL ENROLLMENT THROUGH HOMESCHOOLING, PRIVATE SCHOOL AND POPULATION CHANGE DATA* (2023).

240. See STEPHEN BROUGHMAN ET AL., NAT'L CTR. FOR EDUC. STATS., *PRIVATE SCHOOL UNIVERSE SURVEY (PSS): PUBLIC-USE DATA FILE USER'S MANUAL FOR SCHOOL YEAR 2011–12 4* (2018) (analyzing PSS data requires final weights to account for varying selection probabilities and missing schools, ensuring estimates accurately represent the entire private school population).

seventy-six times as part of the weighting process.²⁴¹ This overrepresentation of certain schools may inflate actual diversity in the private school sector, especially in particular metros. We were unable to gain clarity about the weighting decisions from the PSS administrators. To accommodate for uncertainty of the weights at the more granular level, we focused our private school trend analysis on the statewide, rather than metropolitan, level. In sum, tables exploring statewide private school trends utilize the weighted data but we note where there are serious inconsistencies.

A. Enrollment in Virginia Schools

Between 2001 and 2019, we find steady growth in Virginia's public school enrollment and uneven or declining private school enrollment.²⁴² The number of public schools grew by almost fifty between 2001 and 2019 and the number of public school students grew by over 100,000.²⁴³ Meanwhile, the number of private schools increased by more than 300 according to the weighted data, though the number of private school students increased by only 4,500.²⁴⁴ A sharp decline in private school enrollment occurred between 2007 and 2013.²⁴⁵ Growth in the private sector, then, suggests very different economies of scale than in the public sector.

241. The two schools were Westhampton Day and Community Christian Academy.

242. Tbl.1.

243. See Hamilton Lombard, *School Enrollment in a Post-Pandemic Virginia*, UVA STAT CHAT (Jan. 26, 2022) (noting that public school enrollment at the state level grew steadily until the pandemic, but that projections now forecast an enrollment decrease due to declining birth rates and an increase in homeschooling and private school enrollment) [perma.cc/53DR-32DT].

244. See *id.* (demonstrating that in 2001, according to schools responding to the PSS, enrollment was at 102,088, before declining sharply to 79,558 students in 2019).

245. See PSS, *supra* note 218 (showing data that Virginia's private schools had an enrollment loss of about 6,000 students between 1997 and 2019).

Table 1
Private and Public School Total Enrollment in Virginia Over Time

	2001-02	2007-08	2013-14	2019-20
Public Schools				
Schools	1798	1853	1845	1845
Students	1,156,158	1,228,043	1,270,990	1,292,798
Private Schools				
Schools	703	872	907	1024
Students	106,939	116,935	101,605	111,427

Source: Private School Survey (PSS) and National Center for Education Statistics (NCES) Common Core

When we examine the racial composition of both public and private schools, we find that Black public school enrollment is declining over time even as Black private school enrollment is increasing moderately.²⁴⁶ Despite the increase, Black students continue to make up a far lower percentage of private school enrollment (11.16 percent) than public school enrollment (26.97 percent).²⁴⁷ The number and percentage of Hispanic²⁴⁸ public school students in Virginia is increasing rapidly but Hispanic student representation in private schools is growing at a much

246. Tbl.2.

247. *Id.*

248. We recognize continued discourse about the appropriate label for Hispanic/Latino/Latinx identities. Hispanic is used to refer to people from countries in Latin America where Spanish is the primary language spoken, which does not capture every group (for example, in Brazil Portuguese is the official language). However, the National Center for Education Statistics and Private School Survey use Hispanic as their identifier, so we have opted to mirror the NCES language in this paper. See PSS, *supra* note 218, at 2019–20 tbl. 9 (using “Hispanic” as an identifier in their data table).

slower rate.²⁴⁹ Asian students and students identifying as another racial group make up roughly even shares of public and private school enrollment in Virginia.²⁵⁰ White student enrollment in public schools has declined considerably from 62.99 percent in 2001 to 47.57 percent in 2019.²⁵¹ At 62.88 percent, the private school enrollment remained disproportionately white in 2019, but fell sharply from 81.18 percent in 2001.²⁵²

Overall, private school students represented a relatively flat share of the Virginia enrollment during the period studied.²⁵³ In 2001, private schools educated about 8.47 percent of students in the state, compared to 7.94 percent in 2019.²⁵⁴ These trends may shift in the wake of the pandemic, but in 2019, Virginia’s public schools still educated more than nine in ten students in the state.²⁵⁵

Table 2
Demographic Composition of Public and Private Schools In Virginia Over Time

Race	2001-02		2007-08		2013-14		2019-20	
	#	%	#	%	#	%	#	%
White								
Public	728,245	62.9%	703,001	58.7%	663868	52.2%	614999	47.5%
Private	86,812	81.1%	93,829	80.2%	73662	72.5%	70073	62.8%
Black								
Public	311839	26.9%	318241	26.5%	295088	23.2%	282219	21.8%
Private	11938	11.1%	12237	10.4%	11118	10.9%	15438	13.8%

249. Tbl.2.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *Id.*

255. *See id.* (showing that Virginia public schools educated 91% to 92% of students in each year listed).

Hispanic								
Public	6312	5.46	1050	8.78	1656	13.0	2198	17.0
	9	%	82	%	17	3%	70	1%
Private	3432	3.21	4844	4.14	4608	4.54	8041	7.22
		%		%		%		%
Asian††								
Public	4970	4.30	6729	5.62	8053	6.34	9328	7.22
	2	%	3	%	0	%	9	%
Private	4407	4.12	5539	4.74	6632	6.53	1056	9.48
		%		%		%	5	%
Other								
Public	3243	0.28	3757	0.31	6588	5.18	8242	6.38
		%		%	7	%	1	%
Private	349	0.33	486	0.42	5585	5.50	7310	6.56
		%		%		%		%
Total								
Public	1156	91.5	1197	91.1	1270	92.6	1292	92.0
	158	3	375	0	990	0	798	6
Private	1069	8.47	1169	8.90	1016	7.40	1114	7.94
	38		35		05		27	

Source: Private School Survey (PSS) and National Center for Education Statistics (NCES) Common Core

We also explored enrollment patterns in legacy segregation academies and/or private schools that accepted tuition vouchers during Massive Resistance. Understanding that segregation academies emerged in anticipation of and in response to the *Brown* decision, we determined that most segregation academies were

† In 2001-02 and 2007-08, Other only represented American Indian/Alaska Native students. The PSS introduced Students of Two or More Races and Native Hawaiian/Pacific Islander (separate from Asian students) as an additional category in the 2009-10 PSS, which we have included in the Other category going forward. This change in categories accounts for some of the fluctuations for Asian students and Other students.

established between 1950-1975.²⁵⁶ With these years in mind, we sought to find the establishment date for the private schools that consistently responded to the PSS in our sample years. The date of establishment was found primarily on the website for each private school, though we also utilized the Private School Review for information where none could be found on the school's website.²⁵⁷ This process yielded fifty-three private schools established during the period of interest and consistently reporting data to the PSS.

As noted in several places above, and by design, accurately identifying legacy segregation academies and/or private schools that accepted tuition voucher students is difficult. Detailed records related to private school tuition grants during the era of Massive Resistance are not readily available, partly because money was often sent to individual families or to educational foundations that disbursed it to affiliated schools.²⁵⁸ Many legacy segregation academies are not eager to share their origins stories and records often remain solely under the purview of the schools.²⁵⁹ In the course of compiling our list of Virginia's segregation academies, we also noted several instances of segregation academy name changes or mergers (e.g., Prince Edward Academy became the Fuqua School, Belfield Academy in Charlottesville merged into St. Anne's-Belfield,²⁶⁰ and Stony Point School merged with Sabot School to become Sabot at Stony Point).²⁶¹ Archival research is

256. See TERJEN, *supra* note 17, at 69 ("For the 1970–71 school year, the Southern Regional Council estimates that 450,000 to 500,000 students attend private segregated schools in the 11-state South."); see also *A History of Private Schools and Race in the American South*, S. EDUC. FOUND. (explaining the history and formation of private schools in the South in reaction to civil rights legislation and court cases) [perma.cc/5MVZ-KBXN].

257. Because some schools changed their names over time, we cross checked each school for their name and address to ensure accuracy. In the case where a street address was changed, the city and county of the school were used to help verify this information. PSS, *supra* note 218.

258. See TERJEN, *supra* note 17, at 69 ("Sources of information about the number of newer schools are fragmentary and in many cases uncertain.").

259. See *id.* at 70–72 (listing segregation academies' incomplete records in many states between 1967 and 1970).

260. See CIVIL RIGHTS U.S.A., *supra* note 59, at 170 (describing desegregation in Charlottesville, Virginia, including Belfield); *History*, ST. ANNE'S-BELFIELD SCH. (discussing the merger with Belfield Academy but not mentioning the segregation academy history) [perma.cc/7MQ5-MJPX].

261. *Our Story*, SABOT SCH. [perma.cc/W7JY-6CUD].

time intensive and too often infeasible for understanding patterns across large numbers of schools. While some school desegregation cases include records related to private school tuition grants, digital copies are difficult to locate. All to say, the timing of establishment became the only systematic form of identification for legacy segregation academies.

After being forced by the courts and the IRS to admit all students on a nonracial basis in the mid-1970s,²⁶² legacy segregation academies remain disproportionately white in the 21st century. In Virginia's legacy segregation academies, the white student enrollment in 2019 was 71 percent, considerably higher than in all private schools (63 percent)²⁶³ and far higher than regular public schools (48 percent).²⁶⁴ Black students accounted for about 9 percent of legacy segregation academy enrollment in 2019, with Hispanic, Asian and students identifying as another race each accounting for between 6-7 percent.²⁶⁵ Virginia's legacy segregation academies represent a tenth of overall private school enrollment, with enrollment declining since 2007.²⁶⁶

262. See *A History of Private Schools and Race in the American South*, *supra* note 256 (“[T]he IRS adopted a non-discrimination policy applying to private schools in 1970, though it took eight years to be implemented.”).

263. Tbl.3. The unweighted comparison for white private school enrollment in 2019 was slightly higher, at 63.7%. *Id.*

264. Tbl.2.

265. Tbl.3.

266. *Id.*

Table 3
Demographic Composition of Virginia Segregation Academies over
time, unweighted[†] (n = 53)

Race	2001-02		2007-08		2013-14		2019-20	
	#	%	#	%	#	%	#	%
White	116	84.4	111	83.6	944	75.0	832	70.9
	22	0	84	1	8	5	8	9
Black	111	6.62	920	6.88	891	7.08	107	9.18
	0						7	
Hispanic	516	3.99	553	4.13	617	4.90	787	6.71
Asian	619	4.49	650	4.86	808	6.42	728	6.21
Other	32	0.50	69	0.52	825	6.55	812	6.92
Total	137		133		125		117	
	70		76		89		32	

Source: Private School Survey (PSS)

So in Virginia's public schools, the percentage of students of color, particularly Black students, has been consistently much higher since 2001 than in both segregation academies and private schools in aggregate.²⁶⁷ The enrollment growth of Asian students in public schools has been roughly comparable to that of Asian students in private schools.²⁶⁸ Hispanic student enrollment in public versus private schools has diverged substantially, with the

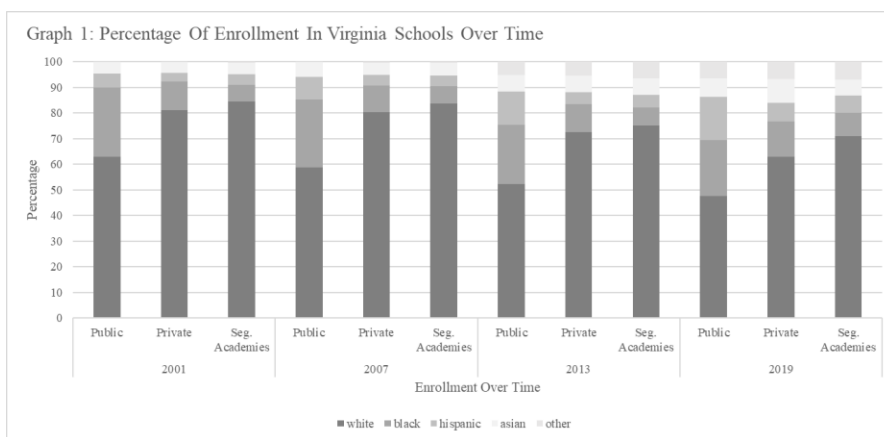
[†] We did not use weights in our analyses of segregation academies because we only analyzed academies that reported data to PSS and were not seeking to generalize to the universe of segregation academies.

267. Compare tbl.2 (listing the percentage of Black students at public schools at around 21%–26% since 2001) with tbl.3 (listing the percentage of Black students at segregation academies at around 6%–9% since 2001) and tbl.2 (listing the percentage of Black students at private schools at around 10%–13% since 2001).

268. Tbl.2.

share of Hispanic students in public schools nearly ten percentage points higher than in private schools in 2019-20.²⁶⁹ The gap between Hispanic enrollment in public schools and segregation academies is even wider.²⁷⁰

These differences in sector composition indicate that private schools disproportionately drew white students away from public schools in Virginia during the period analyzed. Additionally, legacy segregation academies persistently have been less diverse than private schools in Virginia as a whole.²⁷¹ While the percentage of students of color has increased overall, legacy segregation academies have not changed as quickly or as significantly as other private schools across Virginia.²⁷²



Source: Private School Survey (PSS) and National Center for Education Statistics (NCES) Common Core

269. *Id.*

270. *Compare* tbl.3 (listing the percentage of Hispanic students at segregation academies at approximately 4%–7% since 2001) *with* tbl.2 (showing the percentage of Hispanic students at public schools grow from approximately 5% in 2001 to 17% in 2019).

271. *Compare* tbl.3 (showing that segregation academies have a student population that has been 70%–85% white since 2001) *with* tbl.2 (listing the percentage of white students at private school generally at about 61%–84% since 2001).

272. *Compare* tbl.3 (displaying that the percentage of students of color in segregation academies has increased from approximately 15% in 2001 to 29% in 2019) *with* tbl.2 (showing that the number of students of color in private schools generally has increased from approximately 19% in 2001 to 37% in 2019).

B. Segregation and Exposure in Virginia Schools

We relied on two measures of racial/ethnic interaction to explore the contours of private school segregation in comparison to public school segregation: *exposure* and *isolation*. Together, exposure and isolation represent the interaction students have either with other groups or their own, respectively.

Exposure is a weighted average that measures differential student interaction with student groups (e.g., race, economic status).²⁷³ It refers to the possibility of potential interaction between group members, and is important for understanding the extent to which students are exposed to students in groups different than their own.²⁷⁴ Alongside exposure, *isolation* also serves as a means of evaluating the contribution of private schools to racial isolation.²⁷⁵ High isolation would mean that students would have relatively lower exposure to other groups.²⁷⁶

In the 2019–20 academic year, Black students represented about 14 percent of private school enrollment.²⁷⁷ However, the average white student attended a private school where Black students represented a much lower average share of the enrollment, at about 9 percent.²⁷⁸ Appendix I shows the consistent difference between exposure rates in public schools and private schools in Virginia, with private schools contributing to the continued isolation of white students despite the shifting racial landscape of Virginia schools overall.²⁷⁹

273. Douglas S. Massey & Nancy A. Denton, *The Dimensions of Residential Segregation*, 67 SOC. FORCES 281, 287 (Dec. 1988).

274. *Id.*

275. *See id.* at 288 (establishing the isolation index as measuring the extent to which “minority members are exposed only to one another rather than to majority members”).

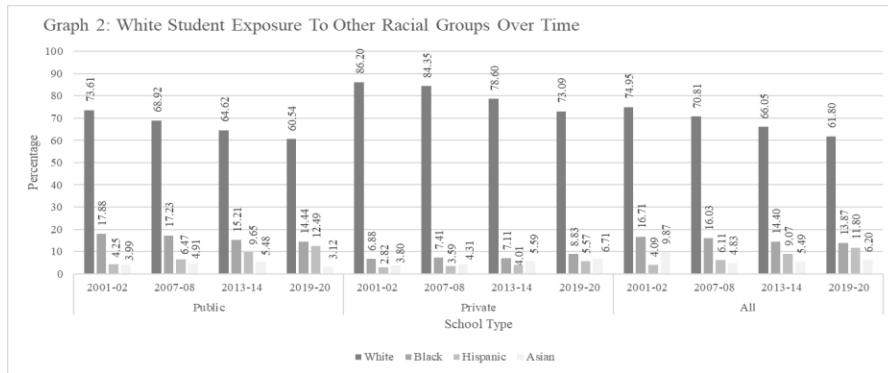
276. *See id.* (stating that exposure and isolation indices are “the probability that a randomly drawn X-member shares an area with a member of Y . . . or the probability that he or she shares a unit with another X member”).

277. *See* tbl.2 (noting that black students made up 13.85% of private school students).

278. *See* graph 2 (listing the average rate of exposure of white students to Black students in private schools at 8.83% in 2019).

279. *See* app. 1 (observing the continued difference between exposure rates in public schools and private schools).

Our analysis demonstrates that white student exposure to students from different racial/ethnic groups is increasing, but white private school students are starting from positions of higher isolation.²⁸⁰ The average white student in 2019-20 attended a private school that was 73 percent white.²⁸¹ This is only just reaching the levels of exposure in public schools twenty years ago, where in 2001-02 a white student attending a private school went to a school that was 74 percent white.²⁸² Similarly, where white exposure to Hispanic students in public schools has almost tripled since 2001 from about 4 percent to 12 percent, white exposure to Hispanic students in private schools has only just reached about 6 percent.²⁸³ White student exposure to Asian students is similar across public and private schools across all examined years.²⁸⁴



Source: Private School Survey (PSS) and National Center for Education Statistics (NCES) Common Core

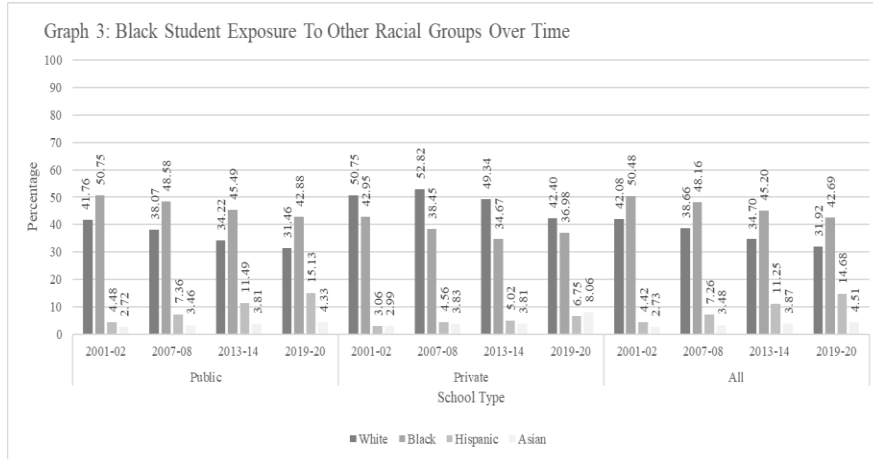
280. See graph 2 (exhibiting an increasing trend of the exposure rate for white students to different racial and ethnic groups but still noting different initial isolation starting positions).

281. *Id.*

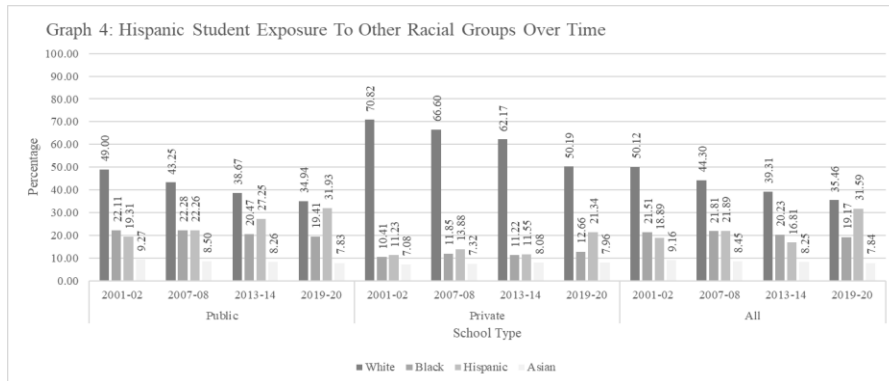
282. *Id.*

283. *Id.*

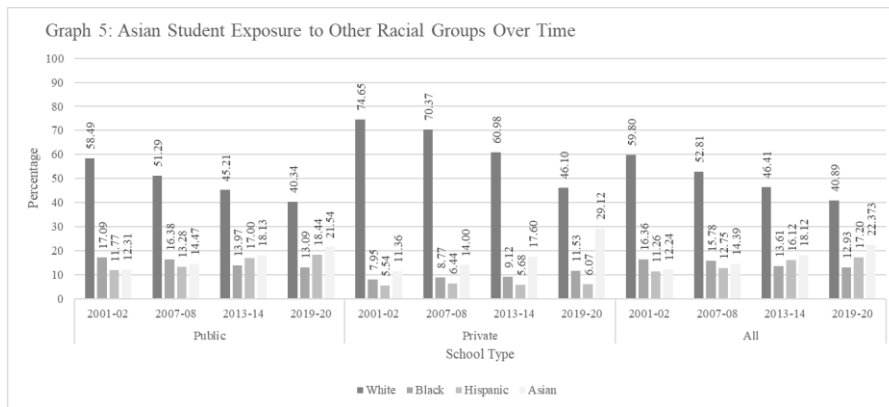
284. *Id.*



Source: Private School Survey (PSS) and National Center for Education Statistics (NCES) Common Core



Source: Private School Survey (PSS) and National Center for Education Statistics (NCES) Common Core



Source: Private School Survey (PSS) and National Center for Education Statistics (NCES) Common Core

Segregation academies continue to lag behind broader trends in increased interracial exposure in private schools. Table 4 shows the rates of exposure in Virginia segregation academies across racial groups. Students enrolled in segregation academies are slightly more exposed to white students than they would be in other private schools across all study years. In 2019, white students made up 71 percent of Virginia segregation academies’ student body, compared to 63 percent in Virginia private schools overall.²⁸⁵ The typical white student in segregation academies attends school where about 75 percent of the peers are also white, compared to 73 percent in all private schools.²⁸⁶ While white exposure to other races has increased, segregation academies remain more segregated than their other private school counterparts and far more segregated than their public school counterparts.²⁸⁷

The average Black student enrolled in a private school in the 2019-20 academic year attended a school that was 42 percent

285. Tbl.3; tbl.2. Note that the figure for all Virginia private schools includes segregation academies, which likely influences the overall numbers.

286. Tbl.3.

287. Tbl.4.

white.²⁸⁸ If that same student were to attend a segregation academy, that number jumped to 60 percent.²⁸⁹ Similarly, the average Black student enrolled in private schools attended a school where one in every three students was also Black.²⁹⁰ For segregation academies, only one in every five students was Black.²⁹¹

For Hispanic and Asian students, exposure in segregation academies moves in a similar direction to the trends seen in private schools overall, though Hispanic and Asian students’ exposure to white students in segregation academies was greater than in private schools, indicating more extreme levels of segregation still present in segregation academies.²⁹² In the 2019–20 academic year, Hispanic and Asian students in private schools on average attended schools where the student body was only about half white.²⁹³ This pattern does not hold true for segregation academies, where Hispanic students and Asian students both attended schools where three in five students were white.²⁹⁴

Table 4
Rates of Exposure In Segregation Academies, unweighted

	2001-02	2007-08	2013-14	2019-20
White Students				
% white	86.27	85.49	78.21	74.83
% Black	5.87	5.86	6.10	7.81
% Hispanic	3.40	3.66	4.27	5.72

288. App. 1.

289. Tbl.4.

290. App. 1.

291. Tbl.4.

292. *Id.*; app. 1.

293. App. 1.

294. Tbl.4.

% Asian	4.24	4.53	5.68	5.65
<hr/>				
Black Students				
<hr/>				
% white	70.19	71.19	64.69	60.42
% Black	21.83	18.07	16.50	20.42
% Hispanic	4.23	5.78	5.78	7.50
% Asian	3.49	4.47	6.69	5.57
<hr/>				
Hispanic Students				
<hr/>				
% white	77.49	74.07	65.36	59.78
% Black	8.01	9.61	8.34	10.14
% Hispanic	8.23	9.42	9.72	12.30
% Asian	6.16	6.56	8.02	7.94
<hr/>				
Asian Students				
<hr/>				
% white	80.63	79.88	66.67	64.61
% Black	5.47	6.33	7.37	8.25
% Hispanic	5.07	5.58	6.12	8.69
% Asian	8.80	9.78	11.11	9.45

Source: Private School Survey (PSS)

C. Concentration and Isolation in Virginia Schools

Schools with high concentrations of different racial and ethnic groups represent another way to measure segregation. In this study, we define high concentration as any school that enrolls at least 90 percent white and Asian students or 90 percent Black and Hispanic students.²⁹⁵ In either case, 90 percent is a stark overrepresentation of enrollment trends in public and private schools for the different racial/ethnic groups.

Over time, we have seen a decrease in public and private schools with high concentrations of white and Asian students, though the private sector contains far more of these settings than the public one.²⁹⁶ In the 2001–02 academic year, 27 percent of public schools in Virginia enrolled a student population that was at least 90 percent white/Asian; these schools served 22.8 percent of all public school students.²⁹⁷ Those numbers decreased to only 9 percent of public schools in the 2019-20 academic year and 2 percent of the enrollment.²⁹⁸ By contrast, 49 percent of private schools in Virginia served high concentrations of white/Asian students in 2001-02.²⁹⁹ These schools enrolled the majority of all private school students, with 58 percent of all private school students attending highly concentrated white/Asian schools.³⁰⁰ The number of highly concentrated white/Asian private schools

295. Our evaluation of student exposure and concentration is divided into two dyads: Black/Hispanic and white/Asian. These groups were selected due to the patterns of school poverty exposure (measured by free and reduced lunch statistics) in Virginia, where school poverty exposure numbers for white and Asian students tend to look very similar. In general, Black students experience the highest exposure to school poverty, followed by Hispanic, white, and finally Asian students. See GENEVIEVE SIEGEL-HAWLEY ET AL., PA. STATE CTR. FOR EDUC. & C.R. & VCU SCH. EDUC., DOUBLE SEGREGATION BY RACE AND POVERTY IN VIRGINIA SCHOOLS 6–8 (Apr. 2021) (“As with overall numbers and locale, Black and Latinx students experience the highest exposure to school poverty regardless of grade level, while Asian and white students experience the lowest.”) [perma.cc/ZGE4-JPJA].

296. Tbl.5.

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

had decreased markedly to about 21 percent in the 2019-20 academic year, representing 17 percent of the total private school enrollment.³⁰¹

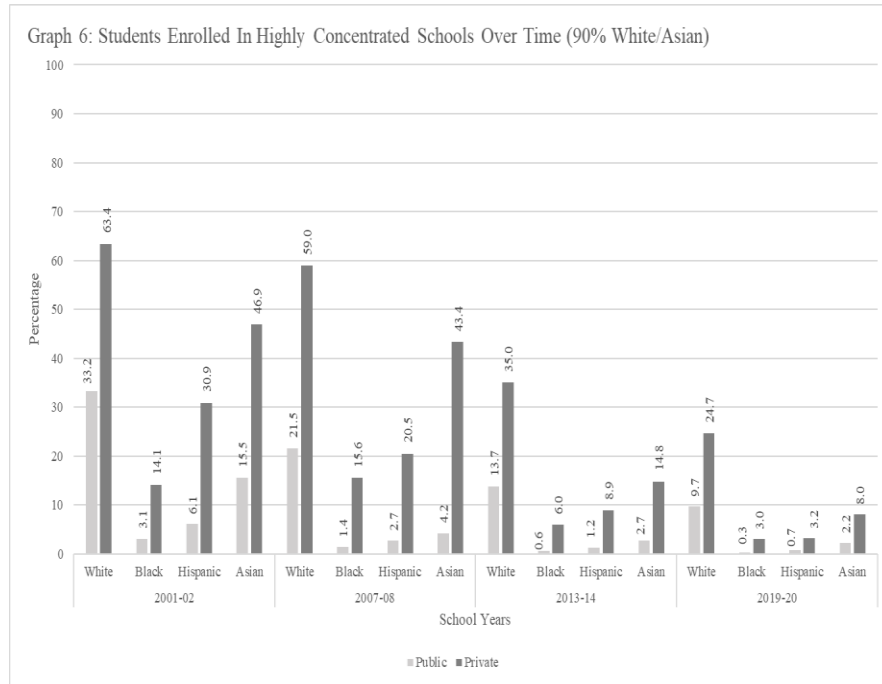
White student enrollment in private schools with high concentrations of white and Asian students is higher than in public schools but declining.³⁰² Fully 63 percent of white students attended a private school that had high concentrations of white/Asian students in the 2001-02 academic year, declining to about 25 percent in 2019.³⁰³ By comparison, just 10 percent of white students enrolled in highly concentrated white and Asian public schools in 2019.³⁰⁴

Table 5
Number of students and schools with high white/Asian concentration, statewide

	2001 -02		2007 -08		2013 -14		2019 -20	
	Stud ents	Scho ols	Stud ents	Scho ols	Stud ents	Scho ols	Stud ents	Scho ols
Pub lic	2636 91 (22.8 %)	490 (27.3 %)	1623 62 (13.2 %)	350 (18.9 %)	9887 3 (4.5 %)	236 (12.8 %)	6524 6 (1.8 %)	171 (9.3 %)
Priv ate	6161 9 (57.6 2%)	345 (49.0 8%)	6069 5 (51.9 0%)	418 (47.9 4%)	2821 5 (27.7 7%)	278 (30.6 5%)	1919 6 (17.2 3%)	211 (20.6 1%)

Source: Private School Survey (PSS) and National Center for Education Statistics (NCES) Common Core

301. *Id.*
302. Graph 6.
303. *Id.*
304. *Id.*



Source: Private School Survey (PSS) and National Center for Education Statistics (NCES) Common Core

Highly concentrated Black/Hispanic schools consistently made up a much smaller share than highly concentrated white/Asian settings when it came to both the number of schools and enrolled student population over time.³⁰⁵ Interestingly, the share of highly concentrated Black and Hispanic schools has been higher in the private sector than in the public one for the majority of the years explored,³⁰⁶ perhaps owing to the existence of private schools that have a mission to serve underrepresented populations specifically.³⁰⁷ In 2013-14, the number of highly concentrated

305. *Id.*

306. *Id.*

307. A 2007 analysis of charter school enrollment revealed that despite state statutes related to diversity and admissions policies, charter schools on average enroll a statistically significantly greater proportion of minority students than public schools across the United States. There are two possible explanations for this: first, Black parents may be self-selecting into these available schools due to

Black/Hispanic private schools reached 8 percent of all private schools, double the same ratio for public schools.³⁰⁸ This pattern flipped notably in the 2019-20 academic year, where 4 percent of public schools had high concentrations of Black/Hispanic students compared to the 3 percent of private schools with a similar enrollment composition.³⁰⁹ The decline may be due to the closure of many highly concentrated Black and Hispanic private schools over the period and/or weighting and reporting issues.³¹⁰

Overall, significantly fewer students attend these highly concentrated Black/Hispanic private schools compared to their public school counterparts.³¹¹ Students attending Black/Hispanic highly concentrated public schools comprised 4 percent of total student enrollment in public schools in 2001-02, accounting for 48,521 students, dropping to about 2 percent, or 38,642 students, by 2019-20.³¹² At about 2.5 percent, the share of student enrollment in highly concentrated private Black/Hispanic schools is roughly similar over time, representing just under 3,000 students.³¹³

limited options, and second, white parents may avoid charter schools with higher percentages of Black students, regardless of socioeconomic similarities. This pattern may be reproduced in private schools, leading to an environment where certain private schools lean into their identity of serving minority students, thus becoming less attractive to white students and parents. See Kelly E. Rapp & Suzanne E. Eckes, *Dispelling the Myth of "White Flight": An Examination of Minority Enrollment in Charter Schools*, 21 EDUC. POL'Y 615, 616-17, 916 tbl.1 (2007) (noting that charter schools generally enroll more minority students than traditional public schools).

308. Tbl.6.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

Table 6
 Number of students and schools with Black/Hispanic high concentration, statewide

	2001 -02	n	2007 -08	n	2013 -14	n	2019 -20	n
Public	48521 (4.2%)	93 (5.2 %)	40880 (3.3%)	78 (4.2 %)	4086 7 (1.4 %)	72 (3.9 %)	3864 2 (1.9 %)	70 (3.8 %)
Private	2960 (2.77%)	45 (6.4 0%)	2087 (1.78 %)	45 (5.16 %)	2087 (2.05 %)	70 (7.72 %)	2801 (2.51 %)	34 (3.32 %)

Source: Private School Survey (PSS) and National Center for Education Statistics (NCES) Common Core

When disaggregated into racial groups, student enrollment in these highly concentrated schools is surprisingly consistent over the study years. As shown in Graph 7, there is little variation in the percentage of white and Asian students enrolled in Black/Hispanic highly concentrated schools in both public and private schools. Hispanic student enrollment in these schools increased slightly over time, again aligning with the increases in overall Hispanic student population across all schools in Virginia during the same time.³¹⁴

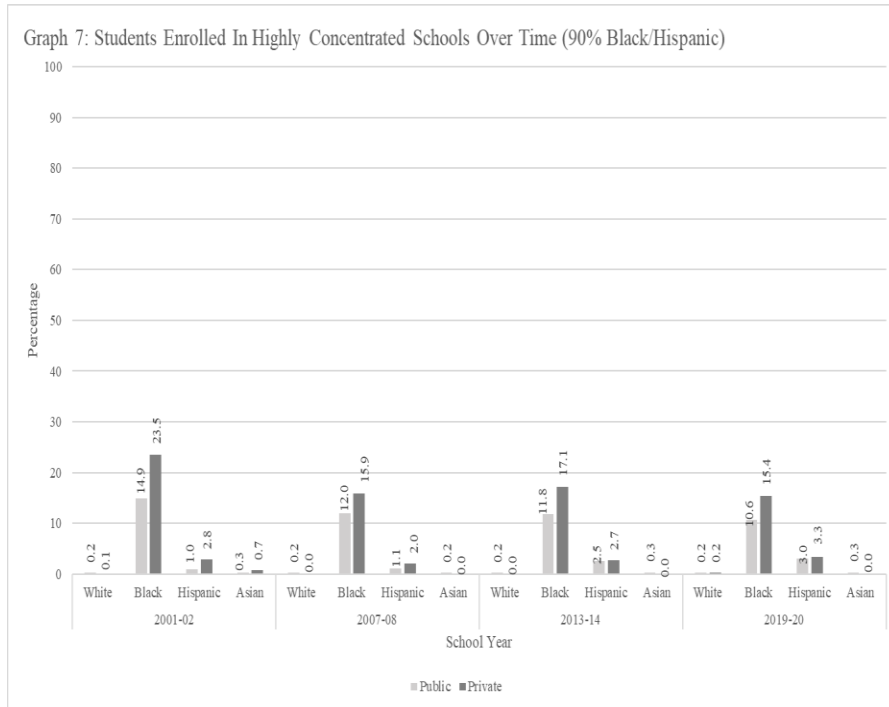
Black student enrollment in these highly concentrated public and private schools was most distinctive in the 2001–02 academic year. During that time, 24 percent of Virginia Black private school students attended a highly concentrated Black and Hispanic school, compared to 15 percent of Black public school students.³¹⁵ The following study year, Black student enrollment in the private schools dropped to just 16 percent, more in line with Black student enrollment in public schools at 12 percent.³¹⁶ These numbers decrease slightly over time.³¹⁷

314. Graph 7.

315. *Id.*

316. *Id.*

317. *Id.*



Source: Private School Survey (PSS) and National Center for Education Statistics (NCES) Common Core

D. Summary of Enrollment and Segregation Trends in Virginia Schools

Our findings on private school enrollment and segregation in Virginia bring renewed attention to a persistent but understudied dynamic in a state that pioneered vouchers to resist *Brown v. Board of Education*. We offer specific insight into Virginia’s legacy segregation academies decades after their founding, and attempt to understand the relationship between reinvigorated state aid to private schools and private school enrollment. We group our findings into four major takeaways.

First, in line with earlier trends indicating decreasing private school enrollment in other regions of the country,³¹⁸ unweighted private school enrollment figures in Virginia show some decline during our period of study.³¹⁹ But with weights applied to try to account for private schools that chose not to respond to the voluntary PSS (or that did not receive a survey), we observed a private school enrollment increase following the passage of the modest 2013 scholarship tax credit legislation and subsequent legislative interest in school privatization.³²⁰ Both the number of private schools and the number of private school students served increased considerably between 2013 and 2019, according to the weighted data.³²¹ To better understand the impact of the pandemic, it will be important to track this trend with private school data for the 2021 school year and beyond when they are released.

Second, Virginia's private schools continue to enroll much higher shares of white students than public schools. Trends are even more stark in Virginia's segregation academies, where enrollment by race has not shifted as significantly or quickly as it has in other private schools or in public schools.³²² Still, the private school sector in Virginia has slowly diversified, even if not as swiftly as the public school one.³²³

Third, departing from earlier trends, but in line with higher shares of white private school enrollment relative to public schools, Virginia's Black private school students consistently experience higher exposure to white students in private schools than in public schools.³²⁴ Hispanic and Asian private school students reported

318. See Reardon & Yun, *supra* note 223, at 5–7 (“Patterns of private school enrollment vary considerably across the country and among different segments of the population.”).

319. Tbl.1.

320. See *id.* (showing that enrollment in private schools increased from 101,605 in 2013–14 to 111,427 2019–20).

321. See *id.* (displaying an increase of 10,000 students and 100 schools between 2013–14 and 2019–20).

322. Compare tbl.3 (showing that segregation academies have been at least 70% white since 2001) with tbl.2 (reporting that public schools have fallen below 50% white in 2020 and private schools generally have dropped to 62.88% white in 2020).

323. Graph 1.

324. Graph 3.

similar trends.³²⁵ This trend is even more pronounced for segregation academies.³²⁶ These patterns make sense given the higher overall share of white private school student enrollment—and they still show an underrepresentation of Black and Hispanic student exposure to white private school students.

Fourth, private schools serving high concentrations of Black and Hispanic students have waxed and waned over the two decades of data.³²⁷ In the earliest period of study, nearly one in four Black private school students enrolled in a Virginia private school serving 90–100 percent Black and Hispanic students.³²⁸ That percentage declined somewhat over time but still represents a significant portion of Black private school students.³²⁹

Taken together, private schools in Virginia, and especially former segregation academies, are substantially more white than public schools.³³⁰ Relatedly, white students are more isolated in concentrated white/Asian private schools than public schools.³³¹ And despite the overrepresentation of white students in private schools, Black private school students are more likely to be in 90–100 percent Black and Hispanic settings compared to Black students in public schools.³³² This pattern indicates that the private school sector in Virginia may be remaking some of the segregation and inequality that exists in the public one.

With decidedly mixed trends, we urge caution in interpreting any as a move away from adaptive discrimination. For starters,

325. Graphs 4, 5.

326. App. 1.

327. See graph 7 (reporting that the percentage of Black students enrolled in highly concentrated private schools has ranged from 23.5% to about 15.5% between 2001–02 and 2019–20).

328. *Id.*

329. See graph 7 (showing that the percentage of Black students enrolled in highly concentrated private schools has dropped from 23.5% to 15.4% since 2001).

330. See tbl.2 (demonstrating that the private schools have ranged between 81.18% and 62.88% white, while public schools have ranged from 62.99% and 47.57% white); see also tbl.3 (showing that segregation academies have not dipped below 70.99% white).

331. See Reardon & Yun, *supra* note 223, at 54 (addressing how much interracial contact white students in Virginia have) [perma.cc/5B9G-GBJU].

332. Note, however, that the overall number of Black students in highly concentrated private schools is lower than in highly concentrated public schools (as the private sector is considerably smaller than the public one more generally).

our analyses are based on a voluntary survey of private schools unable to capture the post-pandemic years in a systematic way given the lag in reporting. A recent study based on 2019-2021 student-level administrative data from Virginia found that private school enrollment increased sharply in the wake of the pandemic, and public school enrollment declines were most marked for white and non-economically disadvantaged students.³³³ And then there is the school privatization legislation that continues to sweep across the country.³³⁴ In 2023 alone, over 140 bills seeking to expand private school vouchers or neovouchers were introduced in 42 states. Of the 12 enacted thus far, most expanded private school vouchers to all families, regardless of income or poverty status.³³⁵ Finally, efforts to circumscribe civil rights and liberties for historically marginalized students in Virginia's public schools are currently proliferating as school segregation by race and poverty deepens,³³⁶ perhaps making exit to the private sector less appealing for historically advantaged groups.

Acknowledging that private school trends could shift quickly in the wake of the pandemic,³³⁷ alongside the speed with which the

333. See BETH E. SCHUELER & LUKE C. MILLER, *Post-Pandemic Onset Public School Student Enrollment and Mobility in Virginia*, in COVID-19 IMPACTS RESEARCH BRIEF SERIES 1, 5 (Aug. 1, 2022) [perma.cc/22CG-3TG9] (showing that the number of students who exited public schools for private schools increased by about 90% between the fall of 2019 and the fall of 2020). The report did not disaggregate private school exit data by race/ethnicity or economic disadvantage. The data also did not permit analysis of private school segregation trends.

334. Bella DiMarco, *Legislative Tracker: 2023 State Bills on Public Support of Private Schooling*, FUTUREED [perma.cc/V9CE-8XGP].

335. *Id.*

336. See Va. Exec. Order No. 1 (Jan. 15, 2022) (ordering the Superintendent of Public Instruction to end instruction on “divisive topics,” namely Critical Race Theory); see also Karina Elwood, *Fairfax Schools Remove Mentions of Race in Ads for College Prep Program*, WASH. POST (June 1, 2023, 7:00 A.M.) (“Fairfax County Public Schools removed mentions of race from materials advertising a college preparation program after the state attorney general warned the marketing was ‘illegal discrimination.’”) [perma.cc/6N2E-TZXP]; Siegel-Hawley et al., *supra* note 295, at 6 (explaining the concept of “double segregation” by both race and income status).

337. See Mark Lieberman, *More Young Kids Opted for Private School After COVID Hit*, EDUC. WEEK (December 06, 2023) (“Enrollment in the nation’s private schools increased slightly during the early years of the pandemic, while public school enrollment dipped during the same period, newly released federal data show.”) [perma.cc/SGR7-BBUL].

school privatization agenda has gained legal and political traction in recent years,³³⁸ we offer a set of policy recommendations to further racial equity in the private school sector.

IX. Conclusions and Recommendations

In the face of evidence documenting the near erasure of the line between public and private support for segregation academies during Massive Resistance, it is important to consider how the trajectory of public school desegregation would have shifted had the courts refused to allow discrimination to adapt and instead extended mandates to the academies. Judicial inaction in the past, paired with weak oversight and enforcement in executive agencies like the IRS, has yielded a different and still segregated landscape.

Private schools collectively, and legacy segregation academies specifically, should reckon with the adaptive discrimination embedded in their histories. These processes should invite the public in and honor stories about the schools' origins stories, their impact during public school desegregation and any contemporary reckoning around diversity, equity, inclusion and justice.³³⁹ Universities and libraries should support these efforts and supplement them with historical records collections that document state aid to segregation academies.³⁴⁰

A dearth of quality data that can illustrate the contours of discrimination, past and present, represents a key form of adaptive discrimination. As public support for private schools increases, all private schools should be required to submit enrollment data to the federal Private School Survey. They should also be required to report data to the federal Civil Rights Data Collection.³⁴¹ Because

338. See Tim Walker, *Fewer and Fewer States Escaping School Privatization's Reach*, NEATODAY (August 17, 2018) (reporting that most states have begun to provide public funding to private schools) [perma.cc/H8QE-NGUN].

339. See *District Honors a Family's Importance in Local Integration Story*, CARROLLTON CITY SCHS. (Nov 17, 2022) (reporting on a former segregation academy's honoring of "pioneers of integration") [perma.cc/ADH7-AHWD].

340. See, e.g., *Desegregation, Special Collections & Archives Research Guide*, OLD DOMINION UNIV. LIBR. (last updated Dec. 13, 2023 2:04 P.M.) (documenting the history of publicly funded segregation in Virginia's public schools) [perma.cc/V98N-EVLQ].

341. See *Civil Rights in Education*, C.R. DATA COLLECTION OFF. FOR C.R., U.S. DEPT' EDUC. ("Since 1968, OCR has collected civil rights data related to students'

many states are committing state dollars to support private schools,³⁴² state education agencies must also collect data on private school enrollment and subgroups of students protected under civil rights laws. With data should come accountability.

Relatedly, civil rights oversight and enforcement in private schools is increasingly vital as significant public money flows once again to these institutions. This matters both for the individual student and for broader systems of segregation. Recent federal insistence on civil rights protections in charter schools receiving federal grant money,³⁴³ and longstanding insistence on those protections in federally funded magnet schools,³⁴⁴ should be extended to private schools receiving Title I funding or any other federal aid. Private schools accepting vouchers should also be required to participate in the federal school breakfast and lunch programs.³⁴⁵

Private schools must be held accountable for inclusionary admissions policies in order to receive tax exemptions. If private schools accept public money in the form of vouchers or neovouchers, they should be required to admit all who apply.

Closer coordination with the public sector is possible for private schools increasingly receiving public monies. Cooperation around student assignment and transportation,³⁴⁶ which matter

access and barriers to educational opportunity from early childhood through grade 12.”) [perma.cc/JXX5-LLF9].

342. See, e.g., Sarah Mervosh, *\$7,200 for Every Student: Arizona’s Ultimate Experiment in School Choice*, N.Y. TIMES (July 24, 2023) (“In a plan approved by the Republican-controlled Legislature last year, Arizona became the first state to make every student, even those from wealthy families, eligible for a school voucher — on average worth about \$7,200 per student annually.”) [perma.cc/V4A3-5PQX].

343. See Matt Barnum, *Why the Latest Fight About Charter Rules Matters — for Schools and Education Politics*, CHALKBEAT (May 9, 2022) (discussing the Biden Administration’s new rules for designated start-up money for charter schools) [perma.cc/JWU7-DGLD].

344. See JANEL GEORGE ET AL., LEARNING POL’Y INST., ADVANCING INTEGRATION AND EQUITY THROUGH MAGNET SCHOOLS 4–7 (2023) (recommending ways in which to support diversity in magnet schools) [perma.cc/Z4SX-82JR].

345. Welner & Green, *supra note* 185 at 10.

346. Pennsylvania, for instance, requires public school districts to transport students to private schools within a given radius. 24 Pa. Stat. § 13-1361; see also 24 Pa. Stat. § 17-1726-A (concerning the transportation requirements for Pennsylvania charter schools). But putting the transportation responsibility

greatly for school segregation, would be important. Creating a path to relinquish private school status and become public is also a policy option.

There are also paths to limiting the privatization of public education. State constitutional challenges that document how vouchers undermine the delivery of public education are making their way through courts in Tennessee, Ohio, Kentucky and West Virginia.³⁴⁷ The claims rest on how financing voucher programs, which are often very expensive, impede educational opportunities in public schools.³⁴⁸

Ultimately, our findings raise serious questions about whether and the extent to which the public should continue support for private school enrollment. If public support continues and, as recent trends indicate, expands, adaptive discrimination in private schools must be countered with much stronger oversight and enforcement of student civil rights.

solely on the public sector as it loses students to the private one can represent a financial hardship. Private schools should share in the financial responsibility.

347. See Marta W. Aldrich, *Tennessee Private School Voucher Law Is Stuck at the Starting Gate, Despite Court Victory*, CHALKBEAT TENN. (May 27, 2022) (discussing the impact of school voucher programs in Tennessee) [perma.cc/62PF-Q3WL]; Sarah Buduson, *Every Ohio Family Can Now Get a Private School Voucher; Some Say It Helps Students, Experts Call It 'Harmful'*, NEWS 5 CLEVELAND (Aug. 17, 2023) (addressing the problems revolving around vouchers in Ohio) [perma.cc/46MT-ZSMZ]; Peter Greene, *Kentucky Court Delivers Another Setback For School Choice*, FORBES (Dec. 15, 2023) (highlighting how court battles have delayed the use of the school voucher program in Kentucky) [perma.cc/CUG4-2JJU]; Nirvi Shah, *Year of School Choice" Promise Collides with Reality of Litigation-Caused Delays*, EDUC. NEXT, March 28, 2023 (discussing battles over school choice vouchers in West Virginia) [perma.cc/A7S4-RH4V].

348. DEREK W. BLACK, *Voucher Expansion and the Threat to Student's Educational and Civil Rights*, THE SCHOOL VOUCHER ILLUSION: EXPOSING THE PRETENSES OF EQUITY 67, 67–68 (Kevin Welner et al. eds., 2023).

Appendix I

Rates of Exposure In Public & Private Schools

	2001-02			2007-08			2013-14			2019-20		
	Pub lic	Pri vat e	All	Pub lic	Pri vat e	All	Pub lic	Pri vat e	All	Pub lic	Pri vat e	All
White Students												
% white	73.61	86.20	74.95	68.92	84.35	70.81	64.62	78.60	66.05	60.54	73.09	61.80
% Black	17.88	6.88	16.71	17.23	7.41	16.03	15.21	7.11	14.40	14.44	8.83	13.87
% Hispanic	4.25	2.82	4.09	6.47	3.59	6.11	9.65	4.01	9.07	12.49	5.57	11.80
% Asian	3.99	3.80	3.97	4.91	4.31	4.83	5.48	5.59	5.49	6.12	6.71	6.20
Black Students												
% white	41.76	50.75	42.08	38.07	52.82	38.66	34.22	49.34	34.70	31.46	42.40	31.92
% Black	50.75	42.95	50.48	48.58	38.45	48.16	45.49	34.67	45.20	42.88	36.98	42.69
% Hispanic	4.48	3.06	4.42	7.36	4.56	7.26	11.49	5.02	11.25	15.13	6.75	14.68

% Asian	2.7	2.9	2.7	3.4	3.8	3.4	3.8	5.8	3.8	4.3	8.0	4.5
n	2%	9%	3%	6%	3%	8%	1%	0%	7%	3%	6%	1%
Hispanic Students												
% white	49.00	70.82	50.12	43.25	66.60	44.30	38.67	62.17	39.31	34.94	50.19	35.46
% Black	22.11	10.41	21.51	22.28	11.85	21.81	20.47	11.22	20.23	19.41	12.66	19.17
% Hispanic	19.31	11.23	18.89	22.26	13.88	21.89	27.25	11.55	26.81	31.93	21.34	31.59
% Asian	9.27	7.08	9.16	8.50	7.32	8.45	8.26	8.08	8.25	7.83	7.96	7.84
Asian Students												
% white	58.49	74.65	59.80	51.29	70.37	52.81	45.21	60.98	46.41	40.34	46.10	40.89
% Black	17.09	7.95	16.36	16.38	8.77	15.78	13.97	9.12	13.61	13.09	11.53	12.93
% Hispanic	11.77	5.54	11.26	13.28	6.44	12.75	17.00	5.68	16.12	18.44	6.07	17.20
% Asian	12.31	11.36	12.24	14.47	14.00	14.39	18.13	17.60	18.12	21.54	29.12	22.37

Source: Private School Survey (PSS) and National Center for Education Statistics (NCES) Common Core