“EQUAL RIGHTS, WHICH EQUAL LAW MUST PROTECT”: LEGAL CHALLENGES TO SOUTHERN SEGREGATIONIST SCHOOLS AND THEOLOGICAL RACISM IN THE SOUTH

By

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“To Matilda”
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In 1953, the U.S. Supreme Court legitimized one of the hardest fought legal challenges of the civil rights movement; school desegregation. Despite the profound legal and social meaning of the \textit{Brown v. Board of Education} (1954) decision, the fight to truly eliminate desegregation practices within the U.S. education system was just beginning. Over the next decade, as more and more public schools systems truly began to integrate, private schools—especially religious private schools—became havens for whites seeking segregated education for their children. Why religious discriminatory academies grew in such significant numbers and became the primary shadow segregationist education in the U.S. during the 1960s through the 1980s remains a topic of debate. Some scholars have argued that the tax status of these schools made them more financially solvent than secular private schools that lost access to state funds through a series of legal injunctions in the 1970s. This dissertation examines how the financial considerations often attributed to the exponential increase in religious private academies in the wake of desegregation fail to recognize the longstanding theological dedication of white religious traditions to a segregated society. Far from being simple
tax havens for a secular effort to preserve segregation, these religious schools believed themselves to be protecting God’s mandate to keep the races separate. The ardent religious beliefs intertwined with the private academies’ discriminatory practices, however, created a challenge for the legal system attempting to grapple with the mandate to eliminate all support for discriminatory institutions by the government. The legal system was charged with determining a) if the segregationist practices of these institutions were religiously based and therefore protected by the First Amendment, and b) how to balance these First Amendment claims with the now constitutionally binding Brown decision. In grappling with these legal issues, governmental institutions confronted each other over how to balance between the right to church autonomy and religious free-expression and the mandates of desegregation.
CHAPTER 1
INTRODUCTION

In 1953, the U.S. Supreme Court legitimized one of the hardest fought legal challenges of the civil rights movement; school desegregation. Despite the profound legal and social meaning of the *Brown v. Board of Education* (1954) decision, the fight to truly eliminate desegregation practices within the U.S. education system was just beginning. Over the next decade, as more and more public schools systems truly began to integrate, private schools—especially religious private schools—became havens for whites seeking segregated education for their children. Religious segregationist education grew exponentially in the U.S. from the 1960s through the 1980s and remains an issue through the present. This dissertation examines the legal battles over tax-exemption status fought in the 1960s, 1970s and into the 1980s between civil rights activists and religious private academies. I argue that although the money these schools stood to lose from having to pay taxes was not insignificant to the survival of their operations, the right to the free-exercise of their religious belief in the preservation of a longstanding theological dedication to a segregated society was their primary and most essential goal.

These schools were not trying to fool the government as tax havens for segregation. The founders of these schools truly believed that segregation was God’s will and they had centuries of theology to support their ideology. The black civil rights movement was not alone in incorporating religion into its mission and its motivating force; whites opposing desegregation had their own religious traditions to draw upon as well. The theological connection between evangelical Christian beliefs and the preservation of a segregated society resulted in the exponential growth of Christian
segregation academies that changed the landscape of private schools in the United States for decades to come.

This project illuminates a new avenue of civil rights history by taking seriously the religious claims of segregationist whites and examining the legal and social consequences of the constitutional conflict the religious opposition to desegregation created. The legal system had its own long history of analysis and negotiation about religious belief systems that tended to prefer state interest to total free-exercise and struggled to define what constituted a religious practice essential to belief. When cases related to the tax status of religious discriminatory schools came before the courts, the “religious expression” of segregation practices was found to be subservient to the state interest of equal education mandated in Brown. The courts, however, were not the only government institutions to grapple with these legal issues. Governmental institutions confronted each other over how to balance religious free-exercise and church autonomy with the mandates of desegregation. The popular dedication to religious free-expression and hegemonic forces still in power at the levers of government allowed tax-exemption requests by religious schools practicing discrimination to go largely unchallenged. Despite the profound influence of Brown on public education in the South, eradicating all forms of segregated education proved elusive by the 1980s.

Many early explorations of the Brown v. Board of Education (1954) case frame the decision as a galvanizing moment for the civil rights movement of the 1950s and 1960s and connect it directly to the ultimate success in passing the Civil Right Act and Voting Rights Acts of the 1960s. These arguments can be seen in the scholarship of Richard Kluger’s Simple Justice, Mark Tushnet’s Making Civil Rights Law, and Michael
Belknap’s *Federal Law and Southern Order*. Kluger, Tushnet, and Belknap, though all coming at civil rights from different perspectives, all look to the immediate legal history surrounding *Brown* and find the result of the case to be a key influence to subsequent legal and cultural victories in the movement.¹ Other scholars, however, have noted the importance of taking a long-view of American legal history and its importance to the legal landscape that influenced the civil rights movement. These authors are concerned with the legal structures that hindered or helped the civil rights movement from all the way back to the formation of the United States as a nation. Some scholars, like Alexander Tsesis in *We Shall Overcome*, Joseph Ranney in *In the Wake of Slavery* and Ian Haney-Lopez in *White By Law*, see the legal roots of the civil rights movement as extending back much further than the work done by the NAACP in the 1940s and 1950s.² These authors look at the long view of federal and southern law and highlight both the positive and negative results of long embedded legal traditions that surround race and rights. Subsequent scholars working on the impact of *Brown* on the civil rights movement have questioned the extent to which the legal side of the movement was as revolutionary as those early scholars framed it to be. Instead, scholars like Michael Klarman in *From Jim Crow to Civil Rights*, Lisa Goluboff’s *The Lost Promise of Civil Rights*, and Anders Walker’s *The Ghost of Jim Crow* have highlighted the lost potential


of the legal impact from the civil rights movement. Despite the divergent takes on Brown’s impact, all recognize Brown as a profound event in legal and cultural history. Regardless of individual analyses of success or failure, scholars agree desegregation is a necessary step to an equal society. Separation creates inequality.

Though the era of legal school segregation in the United States may seem a long distant memory, demographic studies over the last 20 years show that desegregation is an unfinished project within the American educational landscape. A recent report from the Government Accountability Office (GAO) shows that over the course of thirteen years (from the school years 2000-2001 to 2013-2014) the percentage of K-12 public schools that could be considered de facto segregated institutions rose from 9 percent to 16 percent of all K-12 institutions. Schools comprised of mainly students of color represent a troubling 61 percent of all high-poverty schools. The GAO reported that these schools were highly racially and economically concentrated: 75 to 100 percent of the students in these schools were categorized as black or hispanic and qualified for free or reduced price lunches. The number of students attending those schools more than doubled, from 4.1 million to 8.4 million, over the thirteen years covered by the study. These de facto segregated schools also offered less math, science, and college

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4 Interestingly, the outcome of the *Brown v. Board of Education* (1954) decision was one of the first legal cases determined based on evidence of the psychological and social second class status internalized by black students from the dual educational system in the United States.
prep courses, and had higher rates of suspensions, expulsions, and more students held back in advancing from grade to grade.\(^5\)

The educational and social benefits of desegregated schools has been proved by a multitude of studies.\(^6\) Studies written after desegregation found that students of color with access to the resources of white schools performed better academically and had access to greater higher educational and employment opportunities.\(^7\) Desegregated schools have also been tied to generally better relationships between classes and races. “When kids are exposed to children who are different than them, whether it’s along racial lines or economic lines, that contact between different groups reduces the willingness of kids to make stereotypes and generalizations about other groups,” says Genevieve Siegel-Hawley, assistant professor at Virginia Commonwealth University School of Education. “It also reduces anxiety because a lot of prejudice grows out of fear of the unknown and feeling anxious when you’re around different people because you’ve never had that experience before.”\(^8\)

Despite decades of evidence proving the benefits of desegregation, segregated education in the United States is increasing. Even with these regressive demographic trends, the popular imagination about the legal history of desegregation and the

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7 ProPublica, December 19, 2014

8 USA Today, July 26, 2016.
successes of the civil rights movement has created the impression for many that the problem of segregation was solved over sixty years ago. There are several legal and political markers that provide touchstones for claims that the problem of segregated education has been solved. *Brown v. Board of Education* (1954) and *Brown II* (1955), which ruled segregated schooling illegal, are the legal-historical foundations upon which faith in the success of equity in education is based. The passage of the Civil Rights Act of 1963 is also looked to as the policy to finally put the nail in the coffin of segregation. In spite of the common historical markers often associated with the death of segregation in the United States, the legal battle over segregated schools lasted well into the 1980s.

Though the profound legal and social meaning of the *Brown v. Board of Education* (1954) decision cannot be downplayed, the fight to truly eliminate desegregation practices within the U.S. education system was just beginning. A decade after the decision, as more and more public schools systems truly began to finally integrate, private schools—especially religious private schools—became havens for whites seeking segregated education for their children. Why religious discriminatory academies grew in such significant numbers and became the primary shadow segregationist education in the U.S. from the 1960s through the 1980s remains a topic of debate. Some scholars have argued that the tax status of these schools made them more financially solvent than secular private schools that, over the course of the 1970s, lost access to state funds through a series of legal injunctions.\(^9\) My dissertation examines the how the financial considerations attributed to the exponential increase in religious private academies that were havens from desegregated public schools, fail to

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recognize the long standing theological dedication of white religious traditions to a segregated society. Far from being simple tax havens for a secular effort to preserve segregation, these religious schools believed themselves to be protecting God’s mandate to keep the races separate. The ardent religious beliefs intertwined with the private academies’ discriminatory practices, however, created a challenge for the legal system attempting to grapple with the mandate to eliminate all support for discriminatory institutions by the government. The legal system was charged with determining a) if the segregationist practices of these institutions were religiously based and therefore protected by the First Amendment, and b) how to balance these First Amendment claims with the now constitutionally binding Brown decision.

As the visibility of this battle declined, the challenges to segregated education moved from monitoring the number of black students integrated into public schools and bussing controversies, to less flashy legal contests such as use of state subsidized aid to private segregation schools. Public support for desegregation cases became even less enthusiastic when the battle over segregation moved into the complicated realms of religious schools, separation of powers within the government, and the limits of First Amendment protections. The pursuit of desegregation in private education no longer seemed such a cut and dried moral issue for many. The story of how desegregation legislation and litigation progressed, however, can tell us a lot about how the clear moral lines of desegregation policy became fuzzy when confronted with competing national ideals and constitutional hierarchies. Once public school desegregation was considered a “solved problem,” the private educational institutions created to help maintain segregation were a less comfortable target for many Americans for several reasons.
Primarily, the evangelical Christian affiliation of the religious segregated private academies made the public sympathetic to the constitutional right of free-exercise that these institutions claimed.

Religious schools have a diverse history in the United States. One of the oldest and largest groups of religious schools in the U.S. is Catholic academies. The origins of Catholic religious schools can largely be traced to effort by Catholics to circumvent the heavily Protestant public schools in the nineteenth century.\textsuperscript{10} Catholic schools were certainly used in the mid-twentieth century as havens by those seeking segregated education for their children as public schools were being integrated. The number of Catholic Schools, however, remained constant through the 1960s and beyond. That was not the case for private Christian academies. Non-Catholic, Christian academies numbered only about 123 in all of the United States at the time of the Brown decision and enrolled only about 12,000 students. By 1981, however, that number had grown to 18,000 Christian academies with over 2 million students enrolled. In 2012, the number of non-Catholic religious academies had grown to 13,000 and enrolled nearly 5% of the U.S. student population.\textsuperscript{11} This impressive number of private religious schools in the U.S. can be directly linked to the move toward desegregation in the United States that began in earnest in the mid-1960s.

These incredible numbers raise the question; why religious academies? Why not simply private nonsectarian schools? Even now, non-religious private schools only


boast 20 percent of all private school enrollments in the U.S. That means 80 percent of all students who attend a private academy attend a religiously affiliated one. How did religious academies become the educational projects infused with community energy and financial support in the wake of segregation?

One aspect of the answer lies in two coinciding legal changes that effected U.S. public education in the 1960s. Though Brown was decided in 1953, the widespread implementation of desegregation plans throughout the South did not begin until the mid-1960s. This implementation coincided with two Supreme Court decisions about the place (or lack thereof) of religion in public schools. Large-scale desegregation and the removal of prayer and Bible reading in school happened to make effective bedfellows in motivating the creation of religious private schooling throughout the South and beyond. These issues were not unrelated. Segregation was not simply a convenient secular supplement to the reinstatement of prayer and Bible reading into an educational curriculum. Longstanding white theologies on race—especially in fundamentalist, evangelical, and/or conservative Christian traditions—promoted separation of the races as God’s plan and will. The marriage between religious activities in school and separation of the races was not one of convenience, but of prolonged theological co-existence. It is important to explore these theological lineages if we are to understand how religious schools became the space for private school segregation in the U.S.

Scholarship on the colonial period highlights the role religion played in helping to construct the racialized order in early America. The work of Rhys Isaac in The Transformation of Virginia focuses on Virginia as a crucial location for the colonial
construction and solidification of racial order in the U.S. southern colonies.\textsuperscript{12} Isaac’s work demonstrates the profound role religion played in justifying, contesting, and forming the racialized society in early America. This examination of religion and race in early America is key to understanding how religious/racial worldviews were formed before the civil war era. Though religion is often an under emphasized issue in the colonial south, Isaac points to the profound importance that religion had in constructing race and social order that can be linked directly to the conflict between the North and South. The early American narrative is one of religion creating an increasingly stabilized notion of race in Southern society over time. This trajectory is generally confirmed by the scholarship of the pre- and post-Civil War era. Scholars writing on the relationship of race and religion in pre-and post-Civil War argue that religion had a profound impact on both challenging and perpetuating the racial hierarchy before during and after the Civil War.

Donald G. Mathews’ \textit{Religion in the Old South}, written in 1977, is an important precursor to many subsequent books about religion and race in the South.\textsuperscript{13} Presenting similar issues to those tackled by Christine Heyrman two decades later, Mathews investigates how Evangelical Protestantism came to dominate the Southern religious scene. He argues that the colonial period fostered an antagonism between lower classes and religious leaders because of an increasing focus on hierarchical class status within the church. For this reason, the introduction of evangelicalism in the eighteenth century appealed to lower classes. Evangelicalism came with a healthy dose


\textsuperscript{13} Donald G. Mathews, \textit{Religion in the Old South}. (Chicago: University of Chicago Press, 1977)
of anti-slavery activism, however, which had to be tempered and altered as the religion became more popular. Evangelicals soon began to promote slavery as a biblically sanctioned system that allowed for the conversion of the enslaved populations. This effort to convert slaves, however, led to a rich and complex black evangelical tradition that focused on liberation and reward for the oppressed. According to Mathews, this adaptation of evangelicalism by black Southerners changed and developed evangelicalism, helping it return to its original theological roots. Obviously influenced by Mathew’s work, Christine Heyrman’s *Southern Cross* and Charles Wilson's *Baptized in Blood* both address how religion in the white South served to preserve the racial order in the years leading up to the Civil War and sustained the commitment of the defeated South to their racialized social and religious idea in the war’s aftermath.

Christine Heyrman, in her book *Southern Cross*, looks at evangelical Christianity’s movement into the South in the late eighteenth century. As noted in Isaac’s *Transformation of Virginia*, the familial and social paternalistic hierarchy of the South was strongly supported and housed in the Anglican tradition. Though evangelicals had succeeded in making inroads among those who sought to challenge this longstanding hierarchy of race and class, influential members of the social elite were less than eager to join a religious movement that threatened their social status. This resulted, argues Heyrman, in a concerted campaign by evangelicals to focus on alleviating the ways in which evangelicalism challenged the traditional social structures of the white South and to instead find ways to accommodate dominant hierarchies in order to convert the elite. Charles Wilson’s book *Baptized in Blood*, illuminates the

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importance of religion to the discursive unity of Southern society in the post-Civil War era when Southerners struggled with military defeat and a potential loss of cultural and ideological cohesiveness. Wilson identifies a discursive framework created by Southern religious leaders and institutions to tie together Christianity and Southern culture in a rhetorical battle to replace the failed military effort. This rhetorical battle identified Southern society with a virtuous and holy people who were chosen and blessed by God. Encouraging ideas of romantic nationalism, Southerners equated their suffering to that of Christ and that Christ-like suffering ultimately resulted in their purification and perfection. This religio-cultural discourse fostered a continued separate regional identity from the perceived atheistic, industrialized North. This distinct identity was reinforced through the use of ritual, mythology, symbols, sanctification of regional history, and theological backing and resulted in an “evangelical consensus” which brought a significant level of uniformity to Southern religious culture. Social and therefore racial hierarchy was of great concern to the civil religion of the Lost Cause. The subordination of blacks was framed as inherent to an ordered, virtuous society. Former slaves were considered an integral part of the South’s labor force and hierarchical landscape that needed to be confined to their social caste. In order to preserve the “cosmic order” (to use Isaac’s term) of the Southern racial hierarchy, the implementation of Jim Crow laws was seen as crucial to the maintenance of Southern identity and culture.

Evan Curtis, in his book *The Burden of Black Religion*, adds to the narrative of religious and social othering of black populations by Southern whites in noting how the post-war splitting of black and white churches resulted in a shifting white perspective of

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“black religiosity.”\textsuperscript{16} In the face of persistent denial of blacks’ intellectual capability, the veneration of the ease and dedication with which slaves adopted the Christian religion demonstrated ways in which, for abolitionists and slavery apologists alike, blacks could contribute to and benefit from American society. Romantic racialists, as the author calls them, understood slaves to exhibit significant “docility, receptiveness to the divine, unquestioning faith, and an intuitive sense of the transcendent.”\textsuperscript{17} After emancipation, however, this narrative of blacks’ devout religiosity turned into one that denigrated blacks for being too religious, too superstitious and too prone to folk practices; muddling and twisting Christianity. The newly found independence of freed blacks was seen as allowing them to slip back into their Africanness, something white evangelists, particularly whites during reconstruction sought to extract from their practice.

Though representative of very different perspectives, the works of Heyrman, Curtis, and Wilson demonstrate how important religion and race are to each other’s development in the United States. Heyrman’s view of race as influential on religious development, Wilson’s post-slavery look at the re-sanctification of racialized worldviews, and Curtis’ look at the theological and social divergence of whites and blacks in the antebellum period all demonstrate that instead of fading away in the late nineteenth and early twentieth century, religion and race remained intimately tied in both institutional and public perception in the U.S. This relationship between race and religion fostered a growing divide between theological and social interpretations of the preservation of racial hierarchy in antebellum society. The religious life of blacks and whites, particularly


\textsuperscript{17} Evans, \textit{The Burden of Black Religion}, 41
in the South, developed separately and resulted not just in segregated churches (among other things), but also in a divergent theology surrounding race in black and white churches. The importance of these theologically-based arguments about the relationship between the races on the social and cultural development of the twentieth century exploded in the conflicts of the civil rights era, and are a crucial issue for scholars to engage if they hope to understand race relations in the twentieth century.

The historiography of civil rights as a religious movement sometimes incorporates this longer history of race and religion in the United States, but more often concentrates on the importance of civil rights religiosity for people in the struggle and gives little attention to the roots of religious racism in white traditions. Glenn Feldman is especially critical of this trend in his anthology, *Politics and Religion in the White South*, which seeks to address the potential misconceptions that he believes might arise out of the work of Charles Marsh’s *God’s Long Summer* and David Chappell’s *A Stone of Hope*. 18

David Chappell’s study of the intellectual influences, successes, and failures of the civil rights era, *A Stone of Hope*, argues that liberalism, though politically dominant in the 1960s, failed to provide the theoretical or practical support that African Americans required to engage in a full scale effort to demand equal rights and protections. An important aspect of Chappell’s argument, however, is not simply about what inspired African Americans to act, but what prohibited Southern white racists from preventing the success of the civil rights movement. The author argues that it was the inability of

Southern white churches to construct a cohesive and coherent theological base from which to defend segregation and the failure to unite congregants in oppositional activism.\(^\text{19}\)

Charles Marsh’s work, highlighted the importance of religion to the civil rights activists, but did not exclude the way religion functioned for Southern whites to promote anti-civil rights activism. Marsh’s text notes that religious conviction and support both drove and sustained the freedom movement of black civil rights. Conversely, Marsh argued that the Southern white church culture created a powerful tradition that endorsed a purity religion that framed segregation as a religious duty. The inclusion of these narratives makes Feldman’s criticism seem somewhat unfounded.\(^\text{20}\)

Feldman, however, argues that these books turned more recent historiography in a direction that highlights Southern religion as primarily promoting liberal reform. Feldman takes pains to note that Marsh’s and Chappell’s books need to be understood as focused on an African American perspective on evangelical religion, and that the lack of resistance seen from white evangelicals to desegregation can only be understood as coming from church elites and official denominational organizations.\(^\text{21}\) He directly counters Chappell’s assertion that white Southerners were not able to construct a religious defense of segregation to combat civil rights activism by arguing that such a system already existed and was deeply entrenched in Southern folk understandings of their evangelical religious tradition—something that could be reinforced (though he does not mention them)—by the work of Heyrman and Wilson. Instead he argues, these long

\(^{19}\) Chappell, *A Stone of Hope*.

\(^{20}\) Marsh, *God’s Long Summer*.

\(^{21}\) Feldman, *Politics and Religion in the White South*. 
entrenched traditions were overwhelmed by direct action from blacks and federal intervention, not a lack of religious force behind their segregationist ideology.\textsuperscript{22}

The more recent work of Andrew Manis and Paul Harvey, however, attempt to bring a longer perspective of race and religion into the civil rights narrative. Andrew Manis updates and brings Charles Wilson’s argument into the era of civil rights, and addresses the issue of long entrenched traditions head on, arguing in his book, \textit{Southern Civil Religions in Conflict}, that black and white religious traditions in the South (he looks at Baptists specifically) both developed their own separate conflicting civil religions which envisioned sharply variant visions of the purpose and trajectory of the United States as a nation. Viewing the civil rights movement from this perspective, according to Manis, frames the movement as not just a struggle for racial equality and justice, but as a struggle over the meaning of the United States as a nation through clashes over the significance of Christian scripture as well as the founding national documents.\textsuperscript{23}

Coming from a different perspective, Paul Harvey, in his book, \textit{Freedom’s Coming}, presents a counter-narrative to that of Chappell in that he sees the success of the civil rights as coming not from a lack of religious conviction by whites to preserve segregation, but instead as derived from the shared aspects of religious practice that cross fertilized between black and white religion in the South over their centuries of co-existence.\textsuperscript{24} This common culture and racial interchange penetrated not only the South, but the North as well and became key factors in the success of the civil rights

\begin{itemize}
\item \textsuperscript{22} Feldman, \textit{Politics and Religion in the White South}.
\item \textsuperscript{23} Manis, \textit{Southern Civil Religions in Conflict}.
\item \textsuperscript{24} Harvey, \textit{Freedom’s Coming}
\end{itemize}
movement. These similarities undermined the power of racialized religious ideals and gave increasing cultural cache to the civil rights ideologies. What scholars looking at the civil rights movement in the United States in the twentieth century sometimes fail to demonstrate, however, is how the long term relationship between racial ideas and religious belief can be traced all the way back to colonial social structure. The role of religion in civil rights was not an anomaly, but instead was forged over the course of the American past as religiously-based cosmologies of racialized society developed for both blacks and whites.

This project will contribute to this historiography by highlighting the importance of the relationship between religion and race throughout the history of the United States. They have been mutually reinforcing and constitutive. I argue that one cannot understand religious development in the United States without acknowledging the importance of race in shaping the development of theology, geography and social forms of the nation and vice versa. As these works demonstrate, race was not a static and stable concept, but had to be continually reified through religious means over and over again at different points in American history. The longstanding theological and “folk” religious ideas supporting this constant reification—on both black and white sides of the religious traditions—were well-developed over the course of U.S. history. Likewise, religion was forced to change and adjust to racial norms and challenges as it came up against powerfully entrenched social hierarchies in the South. My dissertation will stress the importance of this relationship between religion and racism, even and especially when looking at the legal history of civil rights, school desegregation, and the frequently religiously-affiliated institutions created to resist desegregation.
After the Civil Rights Act of 1963 passed, the government had a legislative resource with real teeth to begin the process of integration and the legal support to punish school system that resisted. According to the letter of the law outlined in the act, public schools were to be integrated, fair housing practices were to be imposed, and public spaces were to be made available to all regardless of race. Whites who perceived desegregation as an imminent moral and material threat to their (white) communities, relied on state and local leaders that held the institutional power and were overwhelmingly white to put policies into place to circumvent legal mandates to desegregate for a decade. The largely successful legal challenges to these evasions appeared in the early 1960s as the courts were forced to tackle, one at a time, a myriad of state methods employed to avoid integration.

The work of Anders Walker and Joseph Crespino explore this moderated resistance and argue that moderates did more to damage the impact of Brown in the long term than the short-lived massive resistance movement. Crespino highlights the ways in which whites reinforced and maintained segregation long after statutes banning the practice were in place by using strategic accommodations to give the impression of compliance while practical segregation persisted. Crespino complicates these actions by demonstrating a range of segregationist groups, each taking different tacks to maintain as much societal status quo as possible. Crespino juxtaposes the actions of groups like the Citizen’s Council—a middle class, conservative segregationist group that endorsed minimal compliance in an attempt to stave off racial violence—with the more radical and violent action of the KKK.²⁵ Anders Walker’s The Ghost of Jim Crow, looks

²⁵ Crespino, In Search of Another Country
not at the states engaged in massive resistance, but instead at states whose moderate governors willingly complied with the letter of the law, but engaged in “strategic constitutionalism” which allowed them to “tak[e] a legalist, moderate path of resistance to the Supreme Court.” 26 Walker points to moderates, not massive resisters as the foils to a truly realized equality. Moderate Southern governors “saw the South as guiding constitutional jurisprudence in favor of a new era of segregation, animated not so much by Jim Crow’s legal body as by its ghost.” 27 Segregation in education was one of the most fruitful areas in which this moderate “strategic constitutionalism” experienced success for over a decade. Legal challenges to these strategic attempts to circumvent desegregation began to dismantle the moderate resistance by the mid-1960s.

The realm of education as a place to litigate civil rights is especially meaningful when taking into account the history of education in the U.S. and the connection between the public school system and religion. The place of religion in education was a controversial social and legal issue through the nineteenth century and into the twentieth century. These legal battles used many rights-based arguments to question the place of religion in public schools. As Lisa Goluboff points out in her book The Lost Promise of Civil Rights, the civil rights battle over education became the spearhead case from which civil rights litigation took their legal strategy of rights based law. The role of religion in education, however, is something hardly noted by civil rights scholarship legal or otherwise. 28 This connection between religion, education, and race

26 Walker, The Ghost of Jim Crow, 15
27 Ibid
28 Goubloff, The Lost Promise of Civil Rights.
becomes particularly relevant when exploring the role of churches in housing discriminatory education after the implementation of the Civil Right Act.

The relationship between religion and education in U.S. history has a long historiography. Beginning with R.F. Butts’s 1950 publication, The American Tradition in Religion and Education, which argued that founding documents could be used to prove that religion and public education should be entirely separate, the historiography on religion and education has highlighted the importance of education to the debate over the place of religion in the American public sphere. For Butts, direct or indirect aid to religious schools violated the anti-establishment clause. He used historical documents of the founders and early legislatures to argue that public schools were created to promote democratic citizenship and not religious preference. Since Butts’s work, scholars have argued that religion and school systems in the United States have had a much more complicated relationship than Butts implies.29

James Frasier in his book Between Church and State, demonstrates the close relationship between Protestantism and the developing public school system in the nineteenth century. He traces how public schools, often considered secular institutions were actually highly Protestant, not only by default, but intentionally. They were often set up and run by evangelical Protestants who considered religious instruction an integral part of education. Though public school systems were increasingly secularized over time, Frasier suggests that debates over the appropriate extent of funding to private religious schools, prayer in school, teaching creationism, and requiring Bible

reading is not going anywhere any time soon.\textsuperscript{30} For Frasier, the backlash against school secularization that persists to the present necessitates that religion and education must find a way to coexist. In other words, compromises on the place religion can occupy in the public schools must be made by the increasingly secularizing school system.

Lloyd Jorgenson explores the secularization of public schools brought up by Frasier in his book \textit{The State and the Non-Public School}, by looking at the political and legal developments that led to the state being unable to fund non-public schools and the removal of Bible reading and prayer from the public school systems. He argues that the Second Great Awakening, increases in immigration, nativism and anti-Catholicism in the face of the dominant role of Protestant clergy in the school movement led to a public school system dominated by anti-Catholic bigotry.\textsuperscript{31} This bigotry led to a rise in “the school question” which drew conflicts over Bible reading in schools and parochial school funding that ultimately took religious instruction out of schools rather than allow Catholics to benefit from public school support.

The work of Steven Green in \textit{The Bible, The School and the Constitution} directly challenges Jorgenson’s work by arguing that “the school question” of the nineteenth century arose, not as a result of anti-Catholic bigotry, but instead over 1) the issue of universal education, 2) the duty of the government in promoting religious values, 3) the connection between moral virtue and civic participation, 4) the role of religious institutions in civil society and most importantly, 5) the compatibility of religious diversity within a republican system largely based in Protestant traditions. In other words, the

\textsuperscript{30} James W. Fraser, \textit{Between Church and State: Religion and Public Education in a Multicultural America}. (New York: St. Martin’s Press, 1999.)

\textsuperscript{31} Lloyd P. Jorgenson, \textit{The State and the Non-Public School, 1825-1925}. (Columbia: University of Missouri Press, 1987)
school question was fundamentally about the place of religion in the public sphere of the United States. For Green, the school question of the nineteenth century set the stage for modern religion clause jurisprudence.\textsuperscript{32}

Following this historical treatment of religion in public schools, several scholars have focused on the way law has created a quagmire for public schools. Joshua Dunn and Martin West in their book \textit{From Schoolhouse to Courthouse}, present a historical survey of litigation in education across many topics including segregation, vouchers, and discipline. The purpose of the collection was to point out the dangers inherent in making education policy from the bench because vague pronouncements without clear solutions only cause confusion and paralysis on the part of public education officials. The authors urged courts to be cautious before wading into educational disputes and encouraged courts to consider whether implementable and effective remedies exist for alleged violations before launching into far-reaching reforms.\textsuperscript{33} When engaged in educational policymaking, the authors argued, courts should strive to contain the pernicious effects of litigation by offering clear standards and minimize legal uncertainty.

The scholarly debate surrounding the courts’ creation of sweeping change with little proscription is apparent in several areas of religion clause law. This is particularly true concerning the issue of how religion clause adjudication has led to a culture of church-state separation in the legal world. As seen in the scholarship of Butts, many have argued that separation was a founding principle that can be traced all the way back to the constitutional origins of the nation. More recent scholarship has challenged


\textsuperscript{33} Joshua M, Dunn and Martin R. West. \textit{From Schoolhouse to Courthouse: The Judiciary's Role in American Education}. (Washington, D.C: Thomas B. Fordham Institute, 2009)
this concept, most notably Philip Hamburger in his detailed book *Separation of Church and State*. Hamburger argues that founding documents contain no proof that the writers of the constitution intended for there to be a separation between church and state. He argues that religious liberty was the goal of founders and that separation was a mid-nineteenth century invention that arose in response to growing anti-Catholicism. In order to preserve Protestant privilege and encourage the assimilation of Catholics, a legal doctrine of separation of church and state became a method through which to prevent Catholic institutions from receiving government assistance. Many scholars, Green being one of them, have criticized Hamburger for distilling the development of religion clause jurisprudence to issues of bigotry. Despite Green’s protest, however, using the legal precedent of the religion clauses to defend status quo has been an important aspect of the legal history of religious segregationist academies.

When *Brown v. Board of Education* (1954) was decided free-exercise once again became a way to defend the status quo against new constitutional mandates. As noted above, rights-based arguments have long been important to the advancement of black citizens. What complicates the use of rights in advocating for one’s equal treatment in society, however, is the possibility of two strongly held concept of ‘rights’ coming into conflict with one another as the free-exercise and racial equality rights did. As is well documented by historians, the black civil rights movement of the 1950s and beyond was intimately connected to black religious life and theology. A long-fostered liberation

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theology in the black community (which relied on equating the black struggle to the
biblical narrative of Moses leading the slaves out of Egypt and the Beatitudinal promise
of the meek inheriting the earth) provided a significant amount of structure, tradition,
prophetic fulfillment to the events of the civil rights movement. For this group, religious
rights and civil rights went hand in hand. One’s right to religious conscience was deeply
connected to one’s fight for civil liberties.

The resistance to integration, however, had its own social and even biblical
mythology attached and in order to understand the legislative and legal battles waged to
prevent integration one must understanding the importance of racial separationist
theology to the white resistance movement. For this group, their right to religious liberty
was in conflict with the constitutional mandate to desegregate. The white resistance
resided more in existing social structures and in seats of local and state power, not in
the grassroots, community based organizations of the black civil rights movement. The
location of the white resistance made it less visible in certain ways, but I argue, no less
connected to religious and community traditions than the black movement.

Just as race and religion cannot be extracted from one another in examinations
of how desegregation and the resistance to it manifested, neither can race be extracted
from analyses of how legal decisions about religious freedom have been decided by the
United States courts. This connection is particularly important when looking at the civil
rights movement because of the massive number of civil rights cases that made it to the
courts in the second half of the twentieth century and the cultural import the U.S. places
on the legal victories during that time period.
Kimberlé Cranshaw and Ian Haney-López’s work illuminate the implicit effect that race has on legal decisions. Haney-López in his book, *White By Law*, examines how questions of citizenship and who could be given U.S. citizenship did much to create definitions around race throughout U.S. history. He noted,

Law constructs racial differences on several levels through the promulgation and enforcement of rules that determine permissible behavior. The naturalization laws governed who was and who was not welcome to join the polity, anti-miscegenation laws regulated sexual relations, and segregation laws told people where they could and could not live and work. Together, such laws altered the physical appearances of this country’s people, attached racial identities to certain types of features and ancestry, and established material conditions of belonging and exclusion that code as race. In all these ways, legal rules constructed race.\(^{36}\)

Law has and does create boundaries around race and who is considered “not white.” The law also determines many of the limitations placed on “non-whites” in a majority white society. The racial coding of law bleeds into all areas of adjudication. Most important for this project, however, is the First Amendment religion free-exercise case law that also involves cases in which race holds a key component to the issue at hand, or whose decision will heavily influence the lives of people of color. These cases often focus on the technical aspects of First Amendment law and downplay the racial implications or implicit bias held by the legal precedent or even the adjudicators themselves. Haney-López also highlights how law hides racial biases under neutral language. Though certainly not always conscious, judges, legislators, juries, and executors of law are victims of their own internalized racism.\(^{37}\)

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\(^{37}\) Ibid
This trend can be seen pretty clearly in First Amendment free-exercise adjudication where a definite societal insider-outsider status plays a role in which groups were granted precedent over “governmental interest” in the protection of their First Amendment rights claims and which were not. This is particularly true when the granting of religious rights are perceived as a threat to the community either morally or materially. For instance, in the eyes of the Court, the perceived threat to community presented by members of the Nation of Islam was not the same threat presented by the Amish.38

This insider/outsider social status in law and the racial implications led some legal scholars—especially those coming from the tradition of Critical Legal Studies39—to argue that under the deeply biased legal system, the dominant “rights” based method of adjudication used by disenfranchised populations should be abandoned for a more collectively based concept of “solidarity and individuality” to promote inclusivity of all social groups. But this method would not solve the problem caused by the ‘threats to


39 Critical legal studies held its greatest popularity in the 1980s and argued that a functionalist understanding of law which viewed legal change as responding directly to the needs of society in a rational and whiggish manner, like that asserted by the Wisconsin and neo-Wisconsin schools, obscured the way that law itself could act as a controlling mechanism over the most mundane to the most overarching aspects of everyday life. Far from producing objective responses to objective social developments, legal developments, according to this theory, result from political conflict between advantaged and disadvantaged social groups competing for “sources of wealth, power, status, knowledge, access to armed force, and organizational capability.” Shifts in political forces, however, do not continually alter legal systems. Instead, law has its own autonomous operation that often functions to protect the interests of the elite while projecting an image of law as “natural, just, and necessary” to those who largely do not benefit from the legal structures in place. CLS encourages scholars to view law, with its indeterminate effects, as a collection of ideologies and rituals that effect the “people’s ways of sorting out social experience” with an eye to how legal forms become so “deeply entrenched in our consciousness that we are often unaware of their rule over our conception of reality.” Particularly critical of the rise of “rights” discourse in the twentieth century as “misdirecting and abstracting [the] struggle for a better society,” CLS scholars argue that “popular aspirations for change be recast in the language of ‘solidarity and individuality,’ rather than in the language of ‘rights’.” Robert W. Gordon, “Critical Legal Histories,” Stanford Law Review 36, No. 1/2, Critical Legal Studies Symposium (Jan., 1984): 102-3. See the work of Robert Gordon, Christopher Tomlin, and Mark Tushnet.
community’ discourse used implicitly and explicitly in many decisions made on First Amendment rights that often impact populations of color the most. Additionally, rights discourses and action based on rights has resulted in real change, not just from a legal perspective but from a movement perspective when it comes to civil rights action. Kimberlé Cranshaw has highlighted the benefits of rights use in her work and taken CLS scholars to task over the importance that liberal legal ideology and rights activism has had on the legal and institutional racism in the United States. In a racialized society argues Crenshaw, blacks do not participate in “domination by consent,” but are instead coerced into living in societies constructed around racial domination and submission. The dismantling of liberal legal ideology—the operative oppressive force according to CLS—would do little, according to Crenshaw, to dismantle racism as a hegemonic mainstay of American society.  

Crenshaw argues “rights” discourse helped mobilize the civil rights movement against the power of hegemony. She finds the CLS’s scholars advocacy of “trashing” to be troubling when applied to the racialized context of the United States because dismantling liberal legal ideology would destroy a rhetoric that has been effective in allowing excluded and oppressed groups to combat a society actively hostile to their acquisition of social mobility and equality while allowing the persistence of white supremacy. She therefore advocates for considering both “coercion and consent” together as forces contributing to hegemonic domination.


41 “Trashing is premised on a notion that people are mystified by liberal legal ideology and consequently cannot remake their world until they see how contingent such ideology is.” Crenshaw, Race Reform and Retrenchment, 1357
Crenshaw’s point is demonstrated by the continued litigation done by desegregationists long after Brown and the Civil Rights Act were thought to have “solved the problem” of segregation in U.S. society. Resistance to desegregation continued in less obvious venues. By the mid-1960s, religious segregationist schools were opening at an incredible rate in response to successful moves toward public school integration. The fight against segregated schooling had to switch from public schools to the much more complicated and obscure realm of white flight to private schools. Not much has been written about segregationist academies themselves, let alone the rise in religious academies. Most scholarship on the issue of segregationist academies was published in the 1970s, the most lengthy being a study funded by the Lamar Society which resulted in the book The Schools that Fear Built: Segregationist Academies in the South.42 Published in 1976, the book disillusioned those who hoped that the religious segregationist academies would not last long. The authors argued that the private schools, though poorly funded and staffed with inexperienced teachers who emphasized Christian fundamentalism and right-wing ideology in their instruction, were not fading away, but instead expanding. According to Nevin and Bills, the schools succeeded in the perpetuation of segregation in rural areas where desegregation efforts were most needed. The authors did acknowledge, however, that these schools had missions other than the separation of white children from potential black classmates, such as circumventing the ban against school prayer, enforcing morals and discipline they felt were lacking in public schools, and the sense that these academies allowed

parents control over the schools’ operations. Despite these motivations, however, the authors maintained that the fundamental purpose of the academies was to continue segregation.

Others writing about the academies at that time echoed Nevin and Bills analysis. This was true, for example, of “Segregation Academies and State Action,” published in The Yale Law Journal in 1973, which called for judicial intervention to forcibly desegregate or close segregationist academies because of their threat to civil rights gains and free public education. Anthony M. Champagne’s article “The Segregation Academy and the Law,” published in 1973, again framed segregationist academies as evaders of Brown’s mandates and suggested several legal avenues through which to bring these schools into compliance with civil rights adjudication. Finally, Virginia Davis Nordin and William Lloyd Turner’s article, “More Than Segregationist Academies: The Growing Protestant Fundamentalist Schools,” published a bit later in 1980, noted that the religious principles claimed by these academies were not spurious. Their sociological study acknowledged the issue of race but highlighted the importance of religious belief as intrinsic to the schools.43 Another popular avenue used to evaluate these schools, particular in the 1980s with the changes made by the Reagan administration, was through the tax-exempt status of these academies. Neuberger and Crumplar’s article, “Tax Exempt Religious Schools Under Attack: Conflicting Goals of Religious Freedom and Racial Integration,” looks at the authority of the IRS to engage


More recent scholarship on the subject, such as Kenneth T. Andrews’ “Movement-Countermovement Dynamics and the Emergence of New Institutions: The Case of "White Flight" Schools in Mississippi," also Joseph Crespino’s In Search of Another Country: Mississippi and the Conservative Counterrevolution,\footnote{Kenneth T. Andrews, “Movement-Countermovement Dynamics and the Emergence of New Institutions: The Case of "White Flight" Schools in Mississippi" Social Forces 80, no. 3 (March 2002): 911-936, and Crespino, In Search of Another Country} have employed the lens of social history to highlight issues like organized community-level white resistance and the rise of conservative politics as motivating the growth of such academies. Crespino’s work highlights the influence and direction provided by churches and theological traditions in informing the racial and political conservatism of white Southerners. Crespino wants to emphasize “that for white Mississippians the intersections between race and religion was complex, serving at times to reinforce the racial status quo, at other times to undermine it, and still others provide an alternative framework for understanding the nature of social and cultural change in this period.”\footnote{Crespino, In Search of Another Country, 12}
The author’s exploration of private Christian schools which popped up all over the state as desegregation gained momentum fails to dive into the more complicated issues at work within the founding of these schools. Crespino indicates that these academies were erected under the “premise” of providing parents with an educational environment that taught religious morality and ethics, but also argues that these schools were only really used as ways to maintain *de facto* segregation. My work will contribute to this historiography by looking at how conflicts over segregationist academies are deeply based in the historical connection between racial separation and religion and where ideologically connecting religious and racist motivations for forming separate educational spaces.

In order to ground my legal and historical research on this issue, I have included a case study of the Goldsboro Christian School. Reflecting the pattern of many private religious segregationist academies, Goldsboro provides an excellent case study because the litigation the school was engaged in incorporated: First Amendment arguments, questions about governmental separation of powers, and complicated notions about the interrelationship between religious and social values. *Goldsboro* provides a broad legal picture of what religious segregationist schools encountered in the courts. The backstory to Goldsboro’s success, and the success of schools like it, begins with *Brown v Board of Education* in 1954 and the subsequent supportive case law that set the ground work for fears of desegregation. In order to comply with the letter of the law, states employed clever legal and legislative work-arounds to fulfill the bare minimum requirements mandated by the federal government without true desegregation of their public schools. These work-arounds allayed fears of integration for nearly a
decade among Southern whites resistant to integration. In the 1960s, however, these work-arounds began to receive legal challenges that consistently found in favor of more aggressive desegregation efforts. Suddenly whites faced the reality of Brown’s mandate and tangible loss in the battle to preserve the “Southern way of life” when it came to education. Two court cases in the mid-1960s created an inadvertent connection for whites between the issues of race and religion in the public schools.\footnote{First, the slow trickle of rulings by state and district courts overturning freedom of choice plans and student placement laws convinced whites that they were losing control over their public school systems. Additionally, the Civil Rights Act of 1964 frightened segregationists who had heretofore avoided federal intervention with its promises to evaporate funding for public schools (and therefore vouchers for private institutions) that did not comply with desegregation mandates. The parallel, but not unrelated blow of removing religious ritual from public schools encouraged an increased suspicion of the values found in public schooling. Finally, a string of Federal Court cases dismantled one by one all of the passive resistance tools that states had relied upon for circumventing integration and declared constitutional some of the most aggressive methods to bring desegregation to fruition.} The \textit{Engle v Vitale} (1962) and \textit{Abington v Schempp} (1963) decisions, which outlawed prayer and Bible reading in school, dovetailed with the increased enforcement desegregation practices.\footnote{\textit{Engel v. Vitale} 370 U.S. 421 (1962) and \textit{School Dist. of Abington Tp. v. Schempp} 374 U.S. 203 (1963)} All of these factors had the effect of sky-rocketing the creation of discriminatory religious private schools long after the initial call for desegregation.

As secular private schools struggled, private religious institutions (that had already established academies or planned to) able to promise parents that their school did or would uphold both the religious and racial values held by parents, had the opportunity to flourish. This is the environment into which the Goldsboro Christian School was born. Founded by the Second Baptist Church of Goldsboro, acting pastor of the fundamentalist institution, Ed Ulrich was the driving force behind the school’s establishment. Though chartered on the premise of resistance to the removal of prayer and Bible reading from schools, the school outwardly and purposefully denied black
students’ admission. Goldsboro Christian officials were not shy about defending their racially discriminatory admission policy as a “matter of religious conviction.”49 When their school system became involved in a court case centered on their tax exemption status because of their discriminatory policies, officials from the school system argued that the government was overreaching their designated powers and that it was the school’s constitutional right under religious free-exercise to follow the dictates of their religious conscience in their admission decisions. As a religious and educational institution, they claimed that they had a right to tax exemption.

The Court disagreed. Goldsboro Christian School’s case was combined with the Bob Jones University v United States (1982) case. The court ruled that the government did have the right to limit religious liberty when an "overriding governmental interest" was at stake, citing the precedential legal logic of many religion clause cases that had come before. According to the Court, both Bob Jones University and Goldsboro Christian School could lose their tax status if their racially discriminatory policies conflicted with governmental interest. The Court declared that "not all burdens on religion are unconstitutional."50

Far from a symbolic gesture, the loss of tax-exempt status had the potential to profoundly affect many of the small Christian schools that could not demand large tuition from families with limited incomes. Though the government could not come in and directly shut them down, the decision to deny their tax exemption status did affect religious segregationist academies’ ability to continue to operate on what for many of


50 Bob Jones Univ. v. United States 461 U.S. 574 (1982)
these academies were already tight budgets that kept them barely hanging onto solvency. The tax breaks for many of these academies were the difference between white Christian parents being able to educate children within their theological belief system or having to return them to what they perceived as godless and God-defying integrated public schools.

Civil rights advocates, however, pushed hard to challenge the status of these private schools. If tax exemption equaled a government benefit and not simply a government non-intervention, then the exemption could be taken away from these private academies if they were deemed to be discriminatory. The government could not support racist institutions due to the mandates of the Civil Rights Act. However, if tax exemption could be considered a non-intervention by the government then allowing tax exemption to stand could be interpreted as a legally neutral position that abided by the “impenetrable wall” of separation between church and state established in Everson v. Board of Education (1947).51 Both sides in the argument saw their own constitutional claims as valid.

If, as Hendrik Hartog suggests, a fuller understanding of legal and constitutional development requires attention to how the public understands and fights for their legal rights, then the influence of religion and race on both institutional and popular legal interpretation is an important issue to consider.52 Scholarly analysis of the civil rights era through the lens of legal history however, has predominantly failed to focus on the effects of religion on law and race. Instead, much of the literature on civil rights has


focused on the Brown v. Board of Education (1954) decision and what the NAACP’s major legal victory meant, not only for the immediate actors in the civil rights movement, but for the legal trajectory of civil rights into the present. The Bob Jones/Goldsboro case provides insight into how these two educational institutions and many like them understood their constitutional rights to religious free exercise as sacrosanct, even in the face of court rulings and government action by agencies like the IRS that determined otherwise.

The political climate after the Bob Jones decision by the Supreme Court ultimately worked to support Goldsboro’s concept of rights despite their legal loss. The Reagan administration’s decision to suspend the denial of tax exemption to these kinds of institutions before the case made it to the Supreme Court reflected a popular will in this area of constitutional rights. The influence of that popular will was borne out by the Reagan administration and congressional action that attempted to undermine the efforts of previous administrations, government agencies, and judicial decisions to prevent institutions that violated civil rights law from benefitting from government policy. Even in the aftermath of the decision, the administration gave little attention or support to the IRS’s performance in their role as investigators and penalizers of these discriminatory academies.

The will of the people, after all, is a tricky thing. Rights discourse and popular knowledge of constitutional rights has functioned to push the federal government in all branches to embody the founding narrative “that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life,
Liberty and the Pursuit of Happiness.” The thirteenth through fifteenth amendments added racial equality to the legal landscape of these national values. The public’s conception of their constitutional rights, however, demonstrate the tension inherent in rights discourse as constitutional equality and freedoms come into conflict with one another. The importance of religious free-exercise to the national imagination certainly rivals that of its commitment to racial equality. For those on the ground, weighing the merits of one against the other may have been simple. Supporters of civil rights believed the religious academies could not dodge the right to constitutional equality behind First Amendment arguments. Supporters of the religious academies and those running them believed that their right to enact the dictates of a belief system in an educational setting was being infringed upon by a government meant to uphold their rights.

Balancing these issues in the legal context, however, was more complex. The IRS, first tasked with determining the tax exemption status of these discriminatory schools, was labeled unqualified by public figures and Congress members to make necessary determinations about which schools were overtly discriminatory and which were demographically unidimensional. Arguing that the IRS was unqualified to “make law,” a role only elected officials could inhabit, supporters of the religious discriminatory schools objected to the regulations on tax-exempt status instituted by the IRS in the 1970s. A Congressional debate over the issue did little to reconcile the constitutional issues at hand over how to prioritize religious and civic rights. Ultimately, the Supreme Court was tapped to make the determination, but in a sense, the last word went to the

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53 Declaration of Independence (U.S. 1776), 2nd paragraph
Presidenti...al administration that quietly deprioritized investigations into civil rights violations by the private religious academies. Despite a legal victory from the Supreme Court, the conflict between the constitutional rights in play remained both within the government and among the people on the ground advocating for their perspective on rights supremacy.

For those fighting to defend their constitutional right to religious free-exercise, it was not about an expansion of rights, but about a conservative interpretation of what they believed to be the preservation of a fundamental, national identity. To do as Hartog and scholars like him have suggested and engage in a greater concentration on the ways that groups and individuals have framed their constitutional struggles as legally and socially meaningful means to explore not only those fighting for the expansion of rights for all, but also those fighting to preserve a set of rights that would prevent that expansion. Constitutional rights, as imagined and implemented by these actors, did not embody a foundation of rights that transcended and clashed with the existent oppressive social order, but instead functioned to preserve spaces where they could maintain that oppressive social order.

To support my argument and engage the historiographies in play, this dissertation moves through the interconnecting narratives of racism, religion and education as they informed the legal landscape in the fight over school desegregation. Chapter 2 examines the long history of race and religion's intertwined relationship. Understanding the intellectual and social influences that have functioned to infuse religion with racial meaning, as well as the religious origins of racialized ideas, helps to illuminate how religion functioned in the civil rights era and beyond, not only for African
Americans fighting for their rights, but also for whites defending the racial status quo. Religion has both shaped and destabilized notions of race, and has fostered as well as challenged social hierarchies based on race. Similarly, the “problem” of race in the United States has had significant effects on the development of religious movements, has led to conflicts between and within religious traditions, and has led to significant alterations in the development of religious traditions as a result. By proceeding through the historiography of the relationship between race and religion in American chronologically, it is plain to see that there is a rich scholarship available on religion and the development of race in the colonial period, the civil war era, and the civil rights era. Chapter 2 explores the ways in which religion was a key element in the campaigns to define whiteness and maintain a racial hierarchy seen by segregationist Christians as sanctified by God.

I discuss these policy work-arounds and their legal challenges in Chapter 3, where I examine how legal pushes toward desegregation led to creative methods to maintain segregated public schools long after segregation was ruled unconstitutional. Before the religious private academy became the standard educational institution to which white families could escape the increasing diversity of the public school classroom, segregationists engaged in several direct and passive efforts to maintain the status quo of racial hierarchy in the schools. When grand gestures of resistance such as closing schools and/or harassing black students integrated into white schools garnered too much negative national attention and federal intervention, some southern districts took more subtle measures to avoid any meaningful desegregation. Chapter 3 engages the historiography of white control over legal institutions and looks at the successful
legal challenges that used rights-based litigation against these work arounds leading to a rise in privatized segregated schools as an alternative.

Chapter 4 looks at the case history of First Amendment free-exercise and the racial implications to the decisions made by courts when defining what is considered legitimate religious practice and behavior legally protected by the establishment clause. These attempts at definition set the stage for not only the legal precedent of free exercise, but also for how these legal decisions framed public interpretation of what constituted religious freedom and what social groups can exercise those rights and in what context. When litigation came to the private religious academies, however, the insider status of their religious traditions and their whiteness was secure, but the changing morality within US society about racial equity made them outsiders to the national community and its idea about equality in education. This change in the perceived nature of national values threatened their status as insiders. Despite the change in rhetorical values surrounding race in the United States, however, these schools believed their right to the free-exercise of segregated education rooted in religious belief would win the day. Chapter 4 will explore the ways in which perceived legal rights of religious practitioners came up against legal doctrine and ways in which insider and/or outsider status contributed to the outcome of these cases.

Chapter 5 will analyze the continuous back and forth between the courts, Congress, and presidential administrations in their struggle over how the constitutional conflict operating between the issue of racial equality in education mandated by Brown

54 This deals with the cases Reynolds v. United States (1878) addressing Mormon polygamy, Pierce v. LaVallee (2nd Cir. 1961) and In re Ferguson (Cal. 1961) which dealt with the right of black Muslims to practice their faith in prison and Roberts v. Ravenwood Church of Wicca (1982).
and the deeply held constitutional commitment to freedom of religious practice by both the public and the government would be resolved. Though seemingly procedural and tedious, an examination of the battles over tax law as related to the private religious segregationist schools can illuminate several issues at play in the legal bodies and how the public viewed the role of government in its duty toward racial equality, religion, and intervention. Chapter 5 will look at the courts’ legal interpretation of religious free exercise through precedential case law (an interpretation used by segregated families and their allies when petitioning for government intervention to promote racial equality in education), which did not necessarily reflect the same interpretation held by members of Congress. Legal precedent in free-exercise cases and its reliance on rights-based adjudication illuminates how courts and litigants viewed religious free-exercise as far from unconditional in all instances. Despite the claims made by religious academies and those who supported them that the IRS violated the schools’ right to free-exercise, rights in US society are far from absolute. Chapter 5 will also address how the denial of tax exemption to religious private schools that practiced discriminatory admission raised more dynamic questions than just religion v. racial equality by bringing questions of government overreach, particularly in the case of religious institutions and the limits of non-legislative or judicial bodies like the IRS in making regulatory decisions. These issues were not easily resolved and made for vacillating policy between the different governmental bodies. While not unimportant, questions about the limits on powers of non-elected government departments often worked to downplay the importance of racism to these matters, or perhaps more nefariously, attempted to obscure racist
motivation under the guise of First Amendment rights protections and pearl-clutching over governmental hierarchies.

Chapter 6 looks at the town of Goldsboro, North Carolina and its most well-attended Christian school during the city’s period of desegregation. The timing of the school’s incorporation in 1963 was auspicious. Many white community members in Goldsboro, increasingly uncomfortable with the change of the place of religion and race in the public schools during this time, looked to private education for their children that reflected the “values” they held dear. Goldsboro provides a good example of the convergence of this controversy because it was a Christian school established at a crucial moment in the rise of religious private academies whose discriminatory practices demonstrate the complex convergence of theological and social motivations that the government (and the courts to a certain extent) wanted to neatly categorize as either pure religious belief or a spurious use of belief as a smoke screen for purely racist reasons. The Goldsboro case provides a fascinating and illuminating window into the direct conflict between the “rights consciousness” of constitutional protections against racial discrimination and religious practice in the United States.

The scholarly work done on the legal history of the civil rights movement is voluminous and tackles many thematic angles on how law effected and was affected by the movement. I believe, however, that there is still more work to be done on the connection of law and civil rights, particularly in how religion, an issue intimately connected to education in United States history, contributes to the development of civil rights constitutionality in the decades after Brown. Desegregation was messily implemented in the United States and that imperfection persists even to the present.
Desegregation was avoided long after the initial push of the *Brown* ruling had come and gone from the national scene. Segregationist schools, especially religiously based schools, persisted long after the civil rights era and were sites on which popular constitutional ideas came into conflict. There are still additional paths to explore. This project illuminates one such avenue of civil rights history by taking seriously the religious claims of segregationist whites and examining the legal and social consequences of the constitutional conflict the religious opposition to desegregation created.
CHAPTER 2
RACE AND RELIGION IN HISTORICAL PERSPECTIVE

In order to understand the context of the beliefs that informed the segregationist academies of the 1960s, 1970s, and beyond, it is important to look at the theological traditions from which they grew and the biblical referents used to support the religiously-based tradition of segregation and racial inequity. In the wake of the Brown v. Board of Education (1954) decision, a swift and damning response emerged against desegregation from the pulpits of conservative congregations throughout the South. One such voice was that of the Reverend James F. Burks of Bayview Baptist Church in Norfolk, Virginia. He delivered his sermon "Integration or Segregation?" on May 30, 1954, two weeks after the Brown decision and called on his congregation to resist the successful use of Christian doctrine by the civil rights movement in support of integration. “The spiritual ‘oneness’ of believers in the Lord Jesus Christ” he claimed, was just that; spiritual and not practical. “Those who are ‘one in Christ’ are such through a Spiritual union and certainly not physical.”

His comments were directed at the growing popularity of theological claims made by those in support of desegregation. The civil rights movement had been hard at work framing their message in religious as well as secular terms. African American ministers involved in the civil rights struggle and their white allies often used biblical passages to legitimize and fortify the cause. Unity in the “Body of Christ”, a concept derived from a passage from Ephesians 4:1-6, was called upon time and time again by integrationists

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2 I, therefore, the prisoner of the Lord, beseech you to walk worthy of the calling with which you were called, with all lowliness and gentleness, with longsuffering, bearing with one another in love, endeavoring to keep the unity of the Spirit in the bond of peace. There is one body and one Spirit, just as you were
to demonstrate that desegregation had meaning not just for the tradition of liberty in the nation, but for the souls of its citizens as well. Integrationist theological concepts gained traction as the civil rights movement gained momentum. With liberation theology as an enduring religious theme in African American belief, the powerful presence of religion in the desegregation movement has been widely accepted as integral to the history of civil rights.\(^3\) The theological tradition called upon by the Reverend Burks and white preachers like him demonstrates that whites opposing desegregation likewise had an established theological tradition that encouraged racial separation and was used to counter the theological claims of civil rights activists.

Whites resisting integration used biblical passages to defend and enforce racial segregation and white superiority in the wake of the \textit{Brown} decision. The historical roots of biblical passages used to reinforce the efforts to preserve segregation reveal a long history of religion working to define and reconstitute racial order and the meaning of whiteness. From a biblical perspective, the close living, working, and worshiping relationships between races were acceptable in the antebellum South while the hierarchies of class were impenetrable. Blacks were slaves, whites were masters; in both a social and cosmic sense. The abolition of slavery, however, upset this order and resulted in racial separationism filling the void. The philosophy of separation gained purchase in the wake of emancipation as the well-established hierarchies in integrated

spaces began to break down. Formerly mixed race churches (run by whites) began to embrace the establishment of blacks own places of worship. Law began to enforce physical separation through Jim Crow regulations. With these social changes in the postbellum South, theological traditions also had to shift. Antebellum North American Evangelicals had little use for the old “monogenesis” tradition of scriptural interpretation that categorized the world races based on biblical passages. The disruption brought to the social and cosmic hierarchy by the Civil War, however, brought about a new enthusiasm for the relatively dormant (for North American Evangelicals) monogenesis ideas, a history Chapter 2 will explore.

Analysis of the intellectual and social influences that have functioned to infuse religion with racial meaning, as well as the religious origins of racialized ideas, helps to illuminate how religion functioned in the civil rights era and beyond, not only for African Americans fighting for their rights, but also for whites defending the racial status quo. Chapter 2 illuminates the ways in which religion was a key element in the campaigns to define whiteness, preserve segregation, and maintain a racial hierarchy seen by segregationist Christians as sanctified by God. An exploration of the theologically-based belief in segregation is important in order to illuminate why and how religious private schools became a “safe-haven” for segregated education in the late twentieth century United States and beyond.

Monogenesis and Racialized Knowledge

Reverend Burks’ sermon drew upon theological precedent that first emerged in the era of global colonization. During this period, racial discourse was influenced by modern biblical interpretations of the origins of humanity, especially the theory of biblical monogenesis. Prior to the Enlightenment, the early modern era largely embraced the
idea that all of the world’s population derived from a single biblically identified origin. Despite the singular origin of “man”, however, biblical tribes were sent to different ends of the earth where they were understood to have developed distinct characteristics. The Enlightenment did little to alter knowledge about race and racial origin because scientific “findings” were often structured to support scriptural authority. What the Enlightenment did accomplish, however, was laying the groundwork for secularized categorizations of racial difference. In the wake of the Enlightenment, empirical and “rational” science went to work “proving” the reality of racial characteristics, difference, and most damaging, hierarchies.\(^4\) The Enlightenment, therefore, allowed not only the Bible, but also science to become a source of support and justification for separation of the races into different categories of humans in the seventeenth, eighteenth and nineteenth centuries. Though monogenesis theories were used both by theologians arguing for the spiritually unity of all the world’s people \(and\) by theologians arguing for a biblically sanctioned separation of the races. Enlightenment thinkers gave credence to the separationists interpretation of the Bible by finding facial, cranial, and other physiological “evidence” that the races may have a common origin, but developed into a distinct hierarchy of humanity.\(^5\) Unsurprisingly, this new way of thinking about race only strengthened the development of theology calling for racial separation.

\(^4\) Ibram X. Kendi, \textit{Stamped from the Beginning: The Definitive History of Racist Ideas in America}.(Nation Books, 2016), 80-85

\(^5\) The work of Travis Glasson in \textit{Mastering Christianity} and Colin Kidd’s \textit{The Forging of Races} demonstrate that the relationship between intellectual and institutional conceptions of race were highly contested, with the Bible used to both denounce and endorse religious ideas of racial order. Colin Kidd, \textit{The Forging of Races: Race and Scripture in the Protestant Atlantic World, 1600-2000}, (Cambridge, UK: Cambridge University Press, 2006), 81
Theologians arguing for a hierarchy of race accepted the Genesis account of a single creation in Adam and Eve, but in contrast to “brotherhood of mankind” theologians, the “hierarchy” theologians pointed to another passage from Genesis as powerful “evidence” that God was the intentional author of racial difference, giving segregation biblical as well as social significance. The roots of the theology lay in Genesis 9:19 which recounted the story of Noah and his sons, Shem, Ham and Japeth—identified as the progenitors of all the world’s population. The narrative of racial creation began with the account of Noah who, drunk and unconscious in his tent from drinking wine, had fallen asleep with his robes open, leaving him naked. His son Ham saw his father and failed to cover him, instead relaying the information to his brothers—some versions of biblical text intimated that he did so with ridicule. Shem and Japeth hearing the state their father was in, not only covered him up, but averted their eyes from his naked body out of respect. Noah, upon finding out about Ham’s behavior, cursed his descendants to be the “servant of servants” while blessing Shem’s descendants and “enlarging” the descendants of Japeth. Both Shem and Japeth were additionally informed that Ham’s descendants would be their servants. The result of this event laid the textual groundwork for not only slavery apologists, but also for monogenesists and later segregationists.\(^6\)

This biblical moment proved crucial to those theologians arguing for a racial hierarchy.\(^7\) The separation of the races, therefore, for many theologians could be

\(^6\) Genesis 9:19

\(^7\) John Woolman, A journal of the life, gospel labours, and Christian experiences of John Woolman, To which are added his last epistle, and other writings. (Published by Edward Marsh, 1847). University of Michigan, Digitized, Jun 13, 2007; Richard Nisbet, Slavery not forbidden by Scripture, or, A defence of the West-India planters, from the aspersions thrown out against them, by the author of a pamphlet, entitled, "An address to the inhabitants of the British settlements in America, upon slave-keeping" (1773), 4
attributed to the behavior of their forefathers. Each of the tribes were placed in different locations throughout the world and developed separately. Though all humanity was descended from Adam, the human family split and each of their fates was sealed in the biblical moment of betrayal. This tradition of biblical interpretation played an important role in the development of American theology concerned with the issues of slavery. The act of enslaving other peoples raised many questions for Christians. Both acceptance and condemnation emerged in a theological divide. As soon as slavery reached the colonies, questions arose over whether slavery could be justified in biblical terms. Even more controversial was whether slaves who had converted to Christianity could be held in bondage. Christians enslaving other Christians was thought by many to be a violation of biblical law in the early days of North American slavery. This violation came into direct conflict with what many perceived as the Christian “duty” of slaveholders to bring the gospel to their slaves.

John Woolman, an abolitionist and itinerant preacher was one among many to publish on the question of slaveholding for Christians twenty years before independence. As an abolitionist, Woolman’s clear position was that owning slaves was contrary to Christianity. In his journal, published by Edward Marsh in 1847, Woolman called upon the “one blood” theology of monogenesis to support his abolitionist beliefs;

when we remember that all nations are of one blood, Gen. iii. 20, that in this world we are but sojourners, that we are subject to like afflictions and infirmities of the body, the like disorders and frailties of the mind, the like temptations, the same death, the same judgement, and that the all wise Being is Judge and Lord over us all, it seems to raise an idea of general

Digitized by Cornell University for the Samuel J. May Anti-Slavery Collection, Accessed, 10/20/2016; and James Henley Thornwell, in Paul Harvey’s, Freedom’s Coming: Religious Culture and the Shaping of the South from the Civil War Through the Civil Rights Era. (Chapel Hill: University of North Carolina Press, 2005), 24

56
brotherhood, and a disposition easy to be touched with a feeling of each others afflictions; but we forget these things and look chiefly at our outward circumstances, in this and in some ages past, constantly retaining in our minds the distinctions between us and the negroes, with respect to our knowledge and improvement in things divine, natural and artificial, our breasts be apt to be filled with fond notions of superiority, there is danger of erring in our conduct toward them.\(^8\)

Additionally, Woolman seemed to have no problem with the idea of a close interaction between races. He also promoted contemplation over the role Christians had toward a race he no doubt considered in need of paternalistic guidance: “Some People, in whose hands they [slaves] are, keep them with no View of outward Profit, do not consider them as black Men, who, as such, ought to serve white Men; but account them Persons who have need of Guardians, and as such take care of them.”\(^9\) This paternalist interpretation of Christian duties toward blacks may have disavowed the practice of slavery but it fully embraced the role of whites in bringing the gospel to blacks in order to bring them to Christ.

On the other side of the argument were those justifying slavery in biblical terms. In 1773 a sermon entitled “Slavery Not Forbidden By Scripture,” West-Indian planter Richard Nesbit defended the biblical basis for slavery from the writing condemning it. He began his sermon by noting that;

If precedent constitutes law, surely it [slavery] can be defended, for it has existed in all ages. The scriptures, instead of forbidding it declare it lawful. The divine legislator, Moses, says: 'Both thy bond-men and thy bond maids, which thou shalt have, shall be of the heathen that are round about you; of them shall ye buy bond-men and bond-maids. Moreover, of the children of the strangers that do sojourn among you, of them shall ye buy, and of their families that are with you, which they beget in your inheritance

\(^8\) Woolman, A journal of the life, gospel labours, and Christian experiences, 201

\(^9\) Woolman, A journal of the life, gospel labours, and Christian experiences, 219
for your children after you, to inherit them for a possession, they shall be your bondmen forever.  

Nesbit’s sermon used passages from the Bible that would be repeated for generations to come in American churches to justify a divine sanction for slavery. These passages from Exodus and Deuteronomy focused on the importance of the master/slave relationship to biblical narrative and provided enough evidence for many American Christians to embrace slavery as religiously justified. Additionally, the role of the slaveholder in the spiritual life of their slaves was an issue that came into increasing prominence as evangelical Christianity overtook Anglicanism as the major religious influence in the South. As the slave system became more and more entrenched in Southern culture, the stigma against conversion of slaves to Christianity began to diminish. Ethical questions about the possibility of enslaving Christians, black or white, gave way to theological acceptance of slavery and the duty of master as caretaker charged with saving the soul of his heathen slave. Not only could black Christians be enslaved, but slaves must be Christianized in order for the masters themselves to fulfill their own Christian obligations to the souls of their “property.” God’s evangelical mission could only be fulfilled through the preaching and teaching in mixed-race groups. Races did not need to be physically separated because their separation was socially hierarchical and divinely ordered. For these theologians, God had intentionally ordered the world with a hierarchy of humanity and one’s Christian duty was fulfilled through maintenance of that hierarchy.

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10 Richard Nisbet, *Slavery not forbidden by Scripture*, 4

11 Ibid
Theological Racism in the Americas

The British colonial South provided a fertile environment for a theological tradition that endorsed racial hierarchy and racial separation—though the separation became more social than physical. Anglicanism held the majority religious stake. As Rhys Issac demonstrated in his work *The Transformation of Virginia*, Anglican theology framed the submission of slaves and their hierarchical role in Southern colonial society as not just one of labor convenience, but as replicating a higher order reflected on earth.¹² The hierarchy of slave-holding colonies was based in and mirrored the cosmic order that operated under natural systems of balance to which all creatures, systems and places were subject. Slaves were, according to this ideology, operating in their “natural”, “divinely sanctioned role.”¹³ The early American narrative of race and religion relied on this hierarchical order to create an increasingly stabilizing notion of race and labor in Southern society.¹⁴ The inception of the Great Awakening and the rise of evangelical counterculture in Baptist and Methodist movements, as well as the rising political movement of revolutionary patriotism did much to disrupt these Anglican ideas of cosmic hierarchy in the South for a time.¹⁵


¹³ The work of Rhys Isaac in *The Transformation of Virginia* focuses on Virginia as a crucial location for the colonial construction and solidification of racial order in the U.S. southern colonies. Despite this growing solidification, however, Jon Sensbach in his exploration of a North Carolina Moravian community, in *A Separate Canaan*, looks at how religion continued to complicate racial social order, yet increasingly came up against the realities of African slavery in the colonial era and early republic.

¹⁴ For more on the increasing identification of race with slave labor see Edmund Morgan’s *American Slavery, American Freedom*. Morgan takes a more class based look at the system of racialized slavery and does not address the religious influences on race and labor.

¹⁵ Butler, *Awash in a Sea of Faith*, 202
As antagonism between lower classes and religious leaders in the Anglican tradition increased in the eighteenth century, Evangelical Protestantism came to dominate the Southern religious scene by appealing to lower classes. Though evangelicals had succeeded in making inroads among those who sought to challenge the longstanding hierarchy of race and class, influential members of the social elite were less than eager to join a religious movement that threatened their social status and promised to disrupt, not only the existing class divisions, but also the racial hierarchies that were the basis of their social, financial and religious ways of life. This resistance from elites resulted in a concerted campaign by evangelicals to focus on alleviating the ways in which evangelicalism challenged the traditional social structures of the white South and instead found ways to accommodate dominant hierarchies in order to convert the elite. According to Christine Heyrman, the desire of evangelical Protestants to gain legitimacy in Southern society and protect the future success of their churches there began to outweigh the devotion to equitable ministry. By 1800, only sixty years after making significant inroads into Southern religious life, “nothing meant more to them [evangelicals] than reclaiming white souls, and nearly any concession to the South’s ruling race could be justified in the name of that end.”¹⁶ Key to gaining acceptance among elite Southerners was first and foremost backing off the critique of slavery and racial hierarchy. Gaining elite adherents from the slave-owning Southerners would otherwise be a losing battle.¹⁷ Thus in the years leading up to the Civil War, evangelicalism in the South fundamentally changed from being a critic of Southern

¹⁶ Heyrman, *Southern Cross*, 76

¹⁷ Mathews, *Religion in the Old South*; Heyrman, *Southern Cross*
society’s existing power structures to key supporters of that structure and integral to maintaining the cosmic hierarchy of its Anglican predecessors.

Evangelicals, like the Anglicans before them, began to promote slavery as a biblically sanctioned system that allowed for the conversion of the enslaved populations in order to further integrate itself into Southern culture and protect the future success of its ministries.\(^\text{18}\) A popular justification by Evangelicals for slavery in the South was God’s sanctioning of whites as caregivers to their slaves as part of a divine plan to create a Southern Christian civilization. The evils of the slave trade were considered tempered by the fact that slaves were brought into the care of their Christian masters. These masters facilitated the saving of slaves’ souls while also keeping slaves in a subservient role to fulfill their hierarchical destiny as ordered by the Divine. Many preachers in the South dedicated their ministries to the conversion of slaves and the preaching of this divine order. For example, a Presbyterian theologian from South Carolina, James Henley Thornwell, stated, “by a ‘gracious Providence,’ the Africans were brought to American shores and thereby redeemed of barbarism and sin… The peculiar institution was thus a ‘link in the wondrous chain of Providence, through which many sons and daughters have been made heirs of the heavenly inheritance.’”\(^\text{19}\)

In “Religious Instruction to the Negros—A Plantation Sermon”, published in May of 1831, the Reverend Charles C. Jones of Georgia delivered a series of sermons designed to assuage fears from plantation owners that Christian teachings would breed dissent among their slaves. Arguing that a slave-owner from the community would be

\(^{18}\) Heyrman, *Southern Cross*, Ch. 5

\(^{19}\) Paul Harvey, *Freedom’s Coming: Religious Culture and the Shaping of the South from the Civil War Through the Civil Rights Era*. (Chapel Hill: University of North Carolina Press, 2005), 24
appointed to preach to slaves and thereby have the same interests at heart that the planter himself would have, Jones claimed that conversion would prevent dissention among slaves and in fact improve relations between master and slave. The Reverend promised;

1. There will be a better understanding of the mutual relations between master and servant…the relative duties of the master and servant are so important, and are so often insisted upon and defined in the Scriptures, we do not recollect ever to have heard a sermon from the pulpit concerning them…

2. There will be great subordination and a decrease in crime amongst Negroes…It will be noticed that obedience is inculcated as a Christian duty, binding on the Servants, and has the authority of the Masters is supported by considerations drawn from eternity…

3. Much unpleasant discipline will be saved to the Churches…

4. The Church and Society at large will be benefitted…for a faithful servant is more profitable than an unfaithful one. He will do more and better work, be less troublesome, and less liable to disease…

5. The Souls of our servants will be saved…We believe that God will bless our instructions according to our desire…

6. We shall relieve ourselves of a great responsibility…some have thought that God permitted the Africans to be brought to this country, That His truth might be made known to them…Every owner of slaves has an account to render to God for his treatment of them.  

Reverend Jones' sermon demonstrates the increased acceptance of Christianizing slaves. Jones promoted a religious perspective that framed slaves as brought to the North American continent by God in order to know His teachings. The hesitation to convert slaves shifted to a religious duty to save their souls.

As Evangelicalism and the racialized slave system became more and more entrenched in Southern culture, the stigma against the conversion of slaves to Christianity began to weaken. Christians enslaving other Christians was thought by many to be a violation of biblical law in the early days of slavery. This discomfort with the conversion of slaves came into direct conflict with what many slaveholders

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perceived as their Christian “duty” to bring the gospel to their slaves. The role of the
slaveholder in the spiritual life of their slaves was an issue that came into greater
prominence as evangelical Christianity overtook Anglicanism as the major religious
influence in the South. Ethical questions about the possibility of enslaving Christians
black or white, gave way to theological acceptance of slavery, and further, the duty of
the master as caretaker charged with save the soul of his “heathen” slave. As Steven
Hale, commissioner from the state of Alabama, wrote to Gov. Magoffin from the state of
Kentucky upon the election of Abraham Lincoln, the South believed itself to have not
only a practical but a moral duty to “preserve an institution [slavery] that has done more
to civilize and Christianize the heathen than all human agencies beside --- an institution
alike beneficial to both races, ameliorating the moral, physical and intellectual condition
of the one, and giving wealth and happiness to the other.”\(^{21}\) Not only could black
Christians be enslaved, but slaves must be Christianized in order for the masters
themselves to fulfill their own Christian obligations to the souls of their “property.” This
hierarchical reality held the monogenesis theological thesis at bay through the
antebellum period. The races had no religious directive to physically separate. The
closeness of the races is what allowed paternalistic Christian conversion to occur,
fulfilling for whites God’s plan of to save all people. This hierarchical comfort would not
last, however, in the wake of the abolition of slavery and the perceived threats to white
supremacy.

\(^{21}\) S.F. Hale, Commissioner from the State of Alabama to the State of Kentucky, to Gov. Magoffin of
Kentucky. Frankfurt, December 27, 1860. Official Records of the Union and Confederate Armies Ser. IV,
vol. 1: 4-11. Cornell University Library Online
Black and White Theology Separates

The massive effort by white slaveholders to convert slaves led to the unintended consequence of creating a rich and complex black evangelical tradition that focused on liberation and reward for the oppressed. Freedom theology emerged as an important doctrine for converted slaves who fought against a pro-enslavement interpretation of the Bible. This theology relied on Old Testament passages to provide biblically based narratives that applied to their lives. Though the evangelical movement brought with it integrated worship to the South, churches began to institute greater and greater physical separation between their congregants. After 1800, churches were constructed with balconies to hold their black members. Within twenty years, church seating was fully segregated in the South regardless of denomination or region. This physically reinforced inequality received challenges early on from slaves and free blacks who created their own spaces sometimes hidden, sometimes out in the open through which to express their own religious theological development.²²

Before the Vesey revolt of 1822 separate black churches were an accepted if unwelcome part of the landscape in the South. Often begun in an act of protest by blacks who received blatantly unequal treatment in their integrated churches, black Methodist churches in particular were a growing part of the pre-Civil War landscape. Though separated physically from their church of origin, black churches were considered “auxiliary” branches of established white institutions and often clashed with their church of origin over control of buildings and leadership decisions.²³ These


churches sprang up as semi-independent bodies where black congregants could worship without being treated as second class Christians. Black churches preached divine law and divine justice for those held in bondage and looked to passages of Moses leading God’s chosen people out of slavery. The churches reclaimed the theological narrative, doing away with the slavery endorsing theologies they had heard in mixed-race churches. Black churches threw off popular slaveholder passages, like Peter 2:18: “Slaves, obey your earthly masters with respect and fear, and with sincerity of heart, just as you would obey Christ.” Instead, they sought out passages subverting the slave system and racial order and used them as the basis for a theology of liberation. Particularly popular were passages like Exodus 9:1-3: “Then the Lord said to Moses, Go to Pharaoh and speak to him, Thus says the Lord, the God of the Hebrews, Let My people go, that they may serve Me. For if you refuse to let them go and continue to hold them, behold, the hand of the LORD will come with a very severe pestilence on your livestock which are in the field, on the horses, on the donkeys, on the camels, on the herds, and on the flocks.”

After the Vesey Revolt of 1822, however, fears that even semi-independent churches—away from under the watchful eye of the masters—with groups of slaves and free blacks would result in rebellion. Whites soon disallowed blacks seeking their own spaces to worship from congregating. The creation of separate spaces both physically and spiritually, however, was let loose with the conclusion of the Civil War and resulted

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24 Peter 2:18
25 Exodus 9:1-3
in the near complete separation of Southern congregations in the wake of emancipation. Immediately after emancipation, many whites assumed that the racial composition of their congregations would remain largely unchanged. But the mass withdraw of former slaves from white churches on Sunday to meet in their own congregations with their own preachers was eventually accepted and endorsed by white Christians. By 1880, the prevailing sentiment among whites was one of acceptance of religious segregation. Whites began to believe that the separation of the races made each safer and happier, and fulfilled God's divinely sanction separation of the races. As Harvey notes:

At the centennial anniversary of one of the oldest Southern black churches, First American Baptist of Savannah, the white divine Henry Holcombe Tucker reminded the celebrating congregation that the “providence of God has made us two; and what God has put asunder let not man join together…If God himself has drawn the color line, it is vain as well as wicked for us to try to efface it.” By that time, the theological racism of the white southern tradition justified separation as practiced in church life and codified in law in the coming decades. The biracial worship patterns of antebellum churches were becoming a distant memory, and Christian interracialism a virtual impossibility in the context of southern apartheid.27

When black and white churches split after the civil war, the religious narratives began to diverge in earnest as African Americans set-up their own churches with theology that reflected their experience. Justification for church splits along racial lines were often couched in non-racial reasons such as worship style or conflicts over the use of monetary contributions,28 but race as a dividing force came through powerfully in theological narratives that held a prominent place in newly independent black churches. The exodus of Israelites from Egypt provided a powerful group catharsis in its narrative

27 Harvey, Freedom's Coming, 27

28 Maffley-Kipp, Setting Down the Sacred Past, 74
of deliverance of a biblically enslaved group from their unmerited suffering in order to experience eventual freedom via heavenly intercession. Even more than the Exodus narrative, however, the Babylonian exile narrative found in the books of Isaiah and Jeremiah reflected an ecclesiastical freedom rather than a physical one. The analogy involved a comparison with the Jews' experience of bondage in Babylon (in which they were forced to follow the rules of the Babylonians rather than the rules of their own sacred tradition) to that of the black church-goers bondage to the white churches' theology and traditions. In the biblical narrative, the Babylonian exile involved a forced detention of Jews after the overthrow of the kingdom of Judah. The exile ended when Cyrus the Great allowed the Jews to return to their ancestral home. The freedom to separate the churches for black Christians was much like the Jews' return from exile to the land of Canaan where they were eventually allowed to rebuild their temple. These were not the only theological narratives to emerge within the newly independent churches. Many movements arose corresponding to different social trends and needs. At the turn of the twentieth century, for instance, a return to Africa movement made parallels between the continent and the biblical Eden as it was imagined to be untouched by European or “Asiatic” influence. Eventually, as mentioned previously, the Unity in the “Body of Christ” concept derived from a passage from Ephesians 4:1-6 was a powerful theological concept during the civil rights movement. But while African Americans worked to form a social, cultural, and racial narrative of their past and future

29 Maffley-Kipp, Setting Down the Sacred Past, 75
30 Maffley-Kipp, Setting Down the Sacred Past, 167
through the lens of religious change and destiny, whites were similarly using theology and religious discourse to make sense of and direct their practical and cosmological crises.

**Consecrating Southern Race Hierarchies**

Evangelical religion in the white South contributed greatly to the preservation of the racial order in the years leading up to the Civil War and sustained the commitment of the defeated South to their racialized social and religious ideas in the war’s aftermath. Southern religious leaders and institutions worked hard after the Civil War to tie together Christianity and Southern culture in a rhetorical battle to replace the failed military effort. This rhetorical battle identified Southerners as a virtuous and holy people who were chosen and blessed by God. Ideas of romantic nationalism gained prominence as Southerners equated their suffering to that of Christ. This suffering had purified and perfected the region and its people. This religio-cultural discourse fostered a continued separate identity from the perceived atheistic, industrialized North. Southerners saw themselves as martyred religious figures, which gave southern culture a consecrated status. Key to Southern culture in this theology was the divinely sanctioned hierarchy of the South that kept women, poor whites and most importantly, blacks in subordinated positions. Emancipation had severely threatened God’s holy taxonomy. Not only did the South need a narrative to counteract the devastating loss they suffered in the war, but also a narrative to help them preserve the social order that had sustained them thus far. The work of Charles Wilson demonstrates that even in their devastating loss to the North, Southern whites shifted their theological mindset to

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32 Frey and Wood. *Come Shouting to Zion*
preserve their status as a chosen people. The devastation they endured became a test of faith and a chastisement so that the faithful would experience “humiliation, patience, resignation, and submission to Divine will.” The setback wrought by the Civil War would allow the South to rise again “doubly purified for the good work and fight.” Social and therefore racial hierarchy was of great concern to the civil religion of the Lost Cause. As Paul Harvey points out, Reconstruction allowed for the brief surge of freedmen exercising their rights as political citizens. White conservatives, incensed at the disruption of a “divinely ordered hierarchy,” used an evangelically-based discourse of “sin and redemption” to justify the political opposition and extralegal violence used to suppress the black vote. Former slaves were considered an integral part of the South’s labor force and hierarchical landscape that needed to be confined to their social caste. In order to preserve the “cosmic order” of the Southern racial hierarchy, violence and intimidation were sanctified during Reconstruction’s tenure. The subordination of blacks was framed as inherent to an ordered, virtuous society. If the laws of man did not provide the means to protect this order, the laws of God would be defended with violent retribution outside of the legal system. The end of Reconstruction led to implementation of Jim Crow laws, which realigned man’s law with God’s and was seen as crucial to maintaining Southern identity and culture. The religion of the lost cause in conjunction with a progressively more segregated religious landscape led to a development of white

33 Wilson, *Baptized in Blood*, and Harvey, *Freedom’s Coming*, 20

34 Harvey, *Freedom’s Coming*, 39, 41 “The North’s policy, a Methodist editor reminisced in 1880, had been to “visit upon us all the results of the war to the bitterest extremity, deny us equal rights before the law, consume out effects, and absorb us religiously.” Redemption had brought a marked change, for ‘conciliation, brotherly love, and the preservation, of all our institutions, liberties and forms of law’ would be the ‘one great purpose of all our people.’”

35 Wilson, *Baptized in Blood*. 
theology that could—in its own contained environment—provide a biblical basis for the creation of an ever more separated society (where there had not necessarily been one before) that was sanctioned by the Bible. This separation was not only necessary to protect the social order, but also to protect biblical truth. These practices and religious traditions, a legacy of Reconstruction, fed into the use of religion by whites in response to the civil rights movement. Whites had little enthusiasm for monogenesis theology in a society where race equaled slave status, law and custom sanctioned slavery, and race and class hierarchies reflected divine will. Hierarchical control allowed certain integrated spaces—particularly integrated worship spaces—because social, legal, and scriptural control was secure. After the Civil War, however, when blacks left white churches, monogenesis theology among white Christians gained theological traction. With traditional aspects of control lost, the theology of segregated spaces and segregated races held new meaning for North American Christianity.

White Theology Reacts to Desegregation

The deep roots of racism in white religious traditions has been given little attention in civil rights era scholarship.36 Southern white church culture, however,

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36 David Chappell’s study of the intellectual influences, successes, and failures of the civil rights era, A Stone of Hope, argues that liberalism, though politically dominant in the 1960s, failed to provide the theoretical or practical support that African Americans required to engage in a full scale effort to demand equal rights and protections. An important aspect of Chappell’s argument, however, is not just what inspired African Americans to act, but what prohibited southern white racists from preventing the success of the civil rights movement. The author argues that it was the inability of southern white churches to construct a cohesive and coherent theological base from which to defend segregation and the failure to unite congregants in oppositional activism. I argue that a cohesive theological basis for segregation did exist and manifested itself in religious institutions which attempted to maintain the status quo of southern segregation in the face of government and grassroots civil rights opposition. Glenn Feldman, puts forth a similar argument, noting that these books turned more recent historiography in a direction that highlights Southern religion as primarily promoting liberal reform. Feldman takes pains to note that Chappell’s book needs to be understood as expressing an African American perspective on evangelical religion, and that the lack of resistance seen from white evangelicals to desegregation can only be understood as coming from church elites and official denominational organizations. He directly counters Chappell’s assertion that white Southerners were not able to construct a religious defense of segregation to combat civil rights
created a powerful tradition that endorsed a religious rhetoric that framed segregation as a religious duty. These long entrenched traditions were overwhelmed by direct action from blacks and federal intervention (at least in a legal sense) not a lack of religious force behind their segregationist ideology. In the mind of religious whites, the battle over the results of civil rights activism was not about hatred of blacks, but about the defense of a cosmic order that had been in place since before the United States gained independence. “Some saw in desegregation the symbolic fulfillment of their view of America as a land of equality and inclusion…Opposing them and the civil rights struggle were those who feared desegregation as a threat to their image of America as a properly and predominantly white, protestant nation.”37

One conspicuous national figure that embodied this fear was Theodore Bilbo, a Mississippi politician, who served in the U.S. Senate in the decade before the Brown decision. Senator Bilbo wrote a book in 1947 addressing what he termed “the Negro problem” in the United States. Part history of blacks in the U.S., part religious treatise, and part racist diatribe, the book entitled “Take your Choice Separation or Mongrelization” provided a monograph length reference and support for his famous campaign to deport 12 million black Americans to Liberia at federal expense in order to separate the races. Bilbo used religious language to defend this need for separation. During a speech on the Senate floor in April of 1939, “Bilbo concluded, “It is further a

activism by arguing that such a system already existed and was deeply entrenched in Southern folk understandings of their evangelical religious tradition—something that could be reinforced—though he does not mention them—by the work of Heyrman and Wilson. I argue, however, that resistance can indeed be seen coming from church elites, if you alter understandings of what forms that resistance took. (Anders Walker, The Ghost of Jim Crow is a great map for how the under the radar work of moderates did much to sabotage the legal work done to end segregation)

37 Manis, Southern Civil Religions in Conflict, xii
plan of the almighty that the Negroes may be transferred back to the land of their forefathers." In his book, Bilbo spent a fair amount of time justifying the practice of segregation, writing, “Briefly and plainly stated, the object of this policy [of segregation] is to prevent the two races from meeting on terms of social equality.” Meeting equally on social terms, for Bilbo, created the possibility of more intimate relationships between blacks and whites. Even for those who may be willing to open their mind to “economic, political, and educational equality for the Negro oppose such equality in practice for fear that it will lead to ‘social equality,’ by which most of them mean intermarriage…Most white Americans remain…opposed to intermarriage and many of them to the abolition of public segregation as a possible first step toward it.”

Changing attitudes about overt racism in the post-WWII era ultimately spelled doom for Bilbo’s Senate career. In the 80th session of Congress, more than a decade after joining the Senate, Bilbo was barred from taking his seat. The ideas Bilbo

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38 “He brought the idea back to the Senate floor in April 1939, claiming that the black American had “no better friend than I am to him.” By this time, Bilbo had developed a detailed plan for the creation of his “Greater Liberia” and claimed he had 2.5 million signatures from blacks who wanted to return to Africa. Bilbo spoke at length about the history of colonization proposals, citing Thomas Jefferson, Daniel Webster, Henry Clay, and Ulysses S. Grant as past supporters of the concept. He proposed that England and France cede portions of their West African colonies in exchange for the forgiveness of their war debts.” Robert L. Fleegler, “Theodore G. Bilbo and the Decline of Public Racism, 1938-1947”, The Journal of Mississippi History, (Spring 2006): 10-11


40 Bilbo, Take Your Choice, 62

41 The war against Nazism and the revelation of the Holocaust heightened white elites’ awareness of racism; with the rise of the Cold War American policymakers were keenly aware of the obstacles Jim Crow posed to the nation’s foreign policy; and wartime propaganda stressed a pluralistic definition of citizenship. See: Steve Lawson, Running for Freedom: Civil Rights and Black Politics in America, Mary Dudziak, Cold War Civil Rights: Race and the Image of American Democracy since 1941, and Richard W. Steele, “The War on Intolerance: The Reformulation of American Nationalism.”
proposed, however, were far from silenced by the end of his political career. His book continued to find a significant following, particularly from advocates of segregation from a religious angle. As the civil rights movement moved forward and the legal separation/segregation of Jim Crow laws was threatened, the tradition of post-Reconstruction-style social division of the races was in danger. Unable to rely on the legal, social, or governmental defense of segregation, God’s law became a proxy for segregationists like Bilbo with which they could fight the moral battle of separation against a society whose moral code was aligning with desegregationists.

In the wake of the *Brown v. Board of Education* (1954) decision, many religious leaders began to write and publish sermons explaining to their congregations and a national audience the details of their theological defense of segregation. The passages from Genesis used by monogenesists for centuries laid the foundation for the theological arguments put forth by ministers who argued that the descendants of each of Noah’s sons were intentionally geographically separated by God. One such evangelist of segregation was Carey Daniel, a pastor at the First Baptist Church of West Dallas in the 1950s. In addition to his religious vocation, Daniel served as President of the White Citizen’s Council, an anti-desegregation organization that employed violence and intimidation, but drew a more affluent membership than the Ku Klux Klan and was able to attack economic and social advancement opportunities for blacks as well.⁴² Daniel and his brother—Texas’ Democratic Senator (and candidate for governor) Price Daniel—were staunch segregationists and active in efforts to prevent integration by any means. They promised to turn their church buildings into a segregationist academy if

Dallas schools were forced to integrate, declaring, "While correcting the evil of integration...we also plan to correct several other evils." Items in the proposed curriculum included: condemnation of the United Nations and "oneworld ideology," and presentation of evolution "as a damnable heresy and not as scientific fact."\[43\]

Daniel's most widely circulated sermon, "God, the Original Segregationist", was an exploration of the theological roots of segregation, which he connected to Old and New Testament passages.\[44\] The sermon was originally delivered to his congregation on May 23, 1954 in response to the Supreme Court's school desegregation ruling.

According to Daniel's sermon, God never intended for the different races of the earth to live together side by side. Branches of the human family were intentionally separated by God after the flood and each of Noah's sons represented a separate race. Shem's descendants were the Semitic race, which were given "the land of Israel" as well as territory expanding south and east all the way to the Euphrates river; Japheth's descendants were the Gentiles given "the Isles of the Gentiles...and all territories 'to the

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\[44\] His keystone texts were Genesis 10:32 and 11:1-9 in the Old Testament—"These are the families of the sons of Noah, after their generations, in their nations; and by these were the Nations divided in the earth after the flood. (The Bible word for race is always "nation") and "And the whole earth was of one language, and one speech...And they said, Go to, let us build us a city and a tower, whose top may reach until heaven; and let us make us a name, lest we be scattered abroad upon the face of the whole earth. And the Lord came down to see the city and the tower, which the children of men builded. And the Lord said, Behold, the people is one, and they all have one language; and this they begin to do: and now nothing will be restrained from them, which they have imagined to do. Go to, let us go down, and there confound their language, that they may not understand one another's speech. So the Lord scattered them abroad from thence upon the face of all the earth: and they left them to build the city. Therefore is the name of it called Babel; because the Lord did there confound the language of all the earth: and from thence did the Lord scatter them abroad upon the face of all the earth." And Acts 17:26,27 in the New Testament—"And God hath made of one blood all the nations of men for to dwell on all the face of the earth, and hath determined that times before appointed, and the bounds of their habitation; that they should seek the Lord, if haply they might feel after him and find him, though he be not far from every one of us." Carey L Daniel, *God the original segregationist, and seven other sermons on segregation*, (Dallas, 1950), 8 (emphasis by the author)
ends of the earth,” with the exception of the entire content of Africa which was reserved for Ham’s descendants.45

The Canaanites were identified as having a special status among the sons of Ham and were key to Daniel’s interpretation of segregation practices. The Canaanites were the only children of Ham damned to live a life in servitude and were said to have occupied such infamous biblical cities as Sidon, Tyre, and Sodom and Gomorrah.46 According to this theological interpretation, therefore, all African Americans in the United States were those who had once been “cursed to be a servile race” and came from cities marked in the Bible as filled with debauchery, immorality, and violence. Knowledge of the biblical heritage of blacks in the United States, argued Daniel, made clear “why we here in the South are determined to maintain segregation.”47

Like Daniel, the Reverend James F. Burks claimed that when man violated God’s will of racial separation the result was “social and spiritual weakness.”48 His sermon, was careful to differentiate its message from that of racial hatred or racial hierarchical beliefs (despite the social implications of those beliefs), noting that “there is nothing in God’s economy that entitles one man to more rights than another.”49 His primary concern in the sermon was the issue of racial intermixing, which he carefully noted had no basis for protection in the Constitution. Though equal rights and privileges were guaranteed, he noted, these rights were ruled by the Supreme Court in Plessy v.

46 Daniel, God the Original Segregationist, 8-10
47 Daniel, God the Original Segregationist, 9.
48 “Rev. James F. Burks, Pastor of Bayview Baptist Church, Norfolk, Virginia, sermon delivered on May 30, 1954” from Dailey, The Age of Jim Crow, 283
49 “Rev. James F. Burks sermon” from Dailey, The Age of Jim Crow, 279
Ferguson (1896) as perfectly legal to execute in separate settings. This separation, in fact, was not only constitutionally legal, but biblically mandated. Daniel, similarly, was careful not to equate the theological edict of racial separation with racial hatred. He repeatedly noted that he had very close African American friends, dedicating his published sermon to Bishop James Stewart and Sergeant Frank Garrett “two of my many beloved and esteemed Negro friends, and two Noble Leaders in the Back to Africa Movement.” Further, he claimed that for all the rhetoric coming out of the North, Southern whites “have earned the unquestionable distinction of being the greatest friends and benefactors the darkies ever had.”

Separation, according to both Daniel and Burks, was not about hatred or belief that blacks were an inferior people (separating themselves from the Progressive Era rhetoric of scientific racial hierarchies), but instead about following biblical edicts laid out by God.

Chief among the concerns with desegregation, according to Daniel’s sermons, was the issue those like Bilbo had been harping on for decades; the potential for intermarriage among blacks and whites, an issue Daniel discussed at length in his sermon as being against biblical mandates. Allowing black and white children to attend school together would inevitably lead to interracial friendships, romances, marriages, and most problematic procreation. “Race-mixing” was a particularly important aspect of this religious discourse because this “mixing” directly violated the theological tradition that made claims of God’s designation of different races and placement of them in different parts of the world intentionally. Strongly influenced by the racist fear of whites

50 Ibid

51 “Rev. James F. Burks sermon” from Dailey, The Age of Jim Crow, 283

52 Daniel, God the Original Segregationist, 9
about “predatory” black sexuality, Daniel framed the condemnation of interracial sex in biblical terms. Schools were not a place of academic education, but social education as well. If schools were mixed, young people might just begin to form intimate friendships and romances with black students. This was a direct violation of God’s will. For Daniel, though slave traders had violated God’s intended separation once, perhaps that was in service of Christianizing the “heathen.” If the nation were to further violate the plan by mixing races, not only socially, but genetically, the U.S. would be defying biblical order.\(^5\) His rhetoric elucidates the theology operating in the missions of segregationist academies. Short-sighted as such contradictory concepts of accepting theoretical racial equality while promoting racial segregation might have been, this ideology was a religiously-based way of thinking by which hatred of another race could be removed from the equation of prejudicial action. They could “love” their neighbors without living in concert with them. Furthermore, particularly when it came to legal claims for their constitutional right to discriminate for religious reasons, the issue of segregation could be framed as not one of justice or conscience, but of biblical mandate. According to the belief system, Christians who truly understood the Bible had the duty to follow a segregationist path.

**Desegregation and Miscegenation**

Miscegenation was a recurring theme for the vast majority of segregationist theologians. Connected closely to the rejection of evolution, Daniels pointed to 1 Corinthians 15:39 “All flesh is not the same flesh: but there is one kind of flesh for men,

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\(^5\) Daniel, “Mixiecrats vs. Dixiecrats” in *God the Original Segregationist*, 38
another (kind of) flesh for beasts, another of fishes, and another of birds.”

Daniel’s interpretation of this passage emphasized that the corporeal differences between humans and animals was an impenetrable wall which could not be breached—proof positive that humans were not descendants of apes. This passage was extrapolated out not only to separation between the species, however, but also between the races.

And just as the Lord has built walls of segregation between these four kingdoms, so he has built other walls almost as high within each kingdom to separate the different species, the different Kinds within each Kind...(We never see robins flying in the same flocks as crows. Not even a mandate from the Supreme Court could make them do it. Eisenhower might send his air force up there to do something about it. We may be sure that his 101st Airborne Division would be much better occupied in trying to force the co-mingling of robins and sparrows than in trying to force the mixing of human races at Little Rock!...God has planted a deep gregarious instinct in every fish to associate only with its own kind and to reproduce only after its own kind, and that instinct can never be rooted out.)

The moral panic over the mixing of races was certainly nothing new in the American landscape. Slavery, with its myriad opportunities for sexual abuse by masters of slaves, resulted in many enslaved children whose masters were also their fathers.

54 1 Corinthians 15:39

55 “Mr. Johnson Introduces the Miscegenation Issue (January 30, 1866)” from Dailey, The Age of Jim Crow. Race-mixing in this view, was against God’s will, and though, according to these theological segregationists, slavery was wrong—it helped to Christianize African heathens, which was part of God’s plan—but God never intended the races to be intermixed. Daniel’s ultimate goal, was not simply to keep the races separated in American schools, housing, and public places, but to reinstate what he saw as God’s original plan of segregation. He was a strong advocate of the back to Africa movement which he believed would “restore the ocean-wide racial segregation which the Lord Himself established after the flood of Noah.” He saw the Back to Africa movement as a safe haven for blacks interested in leaving what he labeled “the racial hornet’s nest being stirred up by the Communists and their two handmaidens, the NAACP and the Supreme Court,” in the United States. If there were any blessing to come out of the Brown v. Board (1954) decision, according to Daniel, it was that it gave fuel to the back to Africa movement. He also connected the desegregation movement with foreign agitation, specifically communism. Daniel implied that communists were behind civil rights agitation, noting, “As long as colored folks remain here in such large and ever-increasing numbers there will be communist agitators who will convince many of them that they are being cheated out of their “civil rights.” Further, he accused Russia and the Kremlin specifically of stirring up racial strife and tension in the United States in order to divide, conquer, and ultimately enslave the United States under the communist regime. Daniel, God the Original Segregationist, 60.
Despite the general acceptance of masters being able to control the bodies of their slaves, there was still much objection to sexual desire crossing racial boundaries. Interracial “fornication” (and marriage) had been illegal for centuries.

In 1662 Virginia enacted its first law prohibiting intermarriages. Similar laws were adopted in most of the colonies. Maryland adopted such a law in 1662, Massachusetts in 1702, North Carolina in 1715, Delaware in 1721, and Pennsylvania in 1725. The enforcement of these laws was lax, not only because of the unspoken acceptance of a master being allowed to take sexual license with his slaves, but also because a slave women’s testimony could not be used against a white man in court. These laws, therefore, were set up to prevent intermarriage, condemn sexual congress, but to tolerate the illicit sexual relationships between white men and black women as long as any resulting offspring inherited the condition of their mothers and were controlled by law.

This fear of interracial sex remained a concern in the United States in the years leading up to the Civil War and beyond. The abolition movement of the early 1800s provided an especially strong challenge from whites who feared that abolitionists would


57 Johnston, Race Relations, 183. “The planter class had no desire to be thought personally responsible for race mixture, and this class was in spirit responsible for the colonial legislative policy designed to prevent the evil. The system of life built up in the agricultural colonies resulted in planter control. Both social and governmental institutions were devices wrought by the planters. The system of Negro slavery may have been thrust upon them by England, but the problems arising from it were first of all the planters’ problems, and on the governing class is the responsibility for the system of slave institutions worked out in the colonies. The study of this question shows that the planter policy with regard to the intermixture of races, as it concerns the Negro, was as follows: to prohibit the marriage of the Negro and the white race but to tolerate illicit union of the Negro woman and the white man, provided always that the mulatto offspring should follow the condition of its mother. Possibly the planter had decided that under the existing system the prevention of intermixture was humanly impossible. Without doubt, he believed that more of evil would result from the mulatto reared by a white mother than from the mulatto reared by slave mothers, and if the mulatto child of the Negro mother were controlled by legislation”
force whites to intermarry in order to eradicate racial prejudice. Especially apt to participate in this intermarriage, according to these critics, where white abolitionist women, whose marriage to black men would result, not only in mixed children, but even more concerning, in the economic and social rise of black men to equal—or more shocking—superior status to white men. This perceived link between black economic mobility and intermarriage was such a threat during the 1830s and 40s that anti-abolition riots broke out in New York City and Philadelphia—Northern cities with only secondary connections to the slave South—out of a perceived threat of “amalgamation.”

There were powerful religious motivations behind the objections to intermarriage. An investigation by the police into the burning of Pennsylvania Hall, an abolitionist headquarters, in 1838 by an angry mob gave rioters the benefit of the doubt by concluding that the presence of such a building in the city “for the encouragement of practices believed by so many to be subversive to the established orders of society, and even viewed by some as repugnant to the separation and distinction which has pleased the great Author of nature to establish among the various races of men,” could expect nothing less than to receive the wrath of the masses.

Black codes and Jim Crow laws established in the wake of emancipation were further efforts to keep the races separated. By 1958, twenty-four states still had active anti-miscegenation laws, including all of what are considered the Southern States. These states included Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nebraska, Nevada, North


59 Lemire, “Miscegenation,” 91 [emphasis mine]
Carolina, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia and Wyoming. Indeed, legal prohibitions on interracial marriage were not struck down across the United States until the 1967 case of *Virginia v. Loving* (1967). The shift in the legal and social landscape in the mid-1960s which pushed racial integration, removed Bibles and prayer from schools, and made laws against inter-marriage illegal elicited a significant response from religious groups whose religious conviction informed them that a racially mixed society was an affront to God’s divine plan. Far from using religion as an excuse to engage in racist behavior, religion fueled their worldview about the racial shape of society and informed their perception that God’s directives were under attack by a secularizing world.

**Connecting Race and Religion**

In order to understand Southern white resistance to civil rights it is crucial to recognize the deep-rooted relationship between religion and race throughout the history of the United States. Religious development in the United States has been profoundly informed by race. As race has shaped the development of theology, geography and social forms of the nation, so has religion influenced how racialized systems have formed and persisted in the U.S. Race was never a static and stable concept, but was continually reified through religious means over and over again at different points in U.S. history. The persistent theological ideas used to support this constant reification—on both black and white sides of the religious traditions—were well-developed over time, not simply pulled out of segregationists’ back pockets to justify their stance in the face of the civil rights movement. From this perspective, the civil rights movement was not just a struggle for racial equality and justice, but also a struggle over interpretations of Christian scripture and the role religion could play in public life. The role of religion in
civil rights was not an anomaly, but instead was forged over the course of the nation’s past when religiously-based cosmologies of racialized society developed for both blacks and whites.

Whiteness was not a stable and unchanged category, but necessitated a constant regeneration of identity in moments of perceived crisis when the social dominance of whiteness was threatened. Reconstituting the meaning of whiteness and the “appropriate place” for whites to inhabit in both social and spiritual hierarchies was an ongoing project for clergy and laypeople alike in the massive resistance campaign during the civil rights movement. Religion was a key element in the campaigns to define whiteness, preserve segregation, and maintain a racial hierarchy seen by segregationist Christians as sanctified by God.

The rise of theological separationism based in monogenesis, was a longstanding tradition that caught fire for Southern evangelicals particularly in the postbellum South. At the loss of the Anglican-influenced concept of a cosmic hierarchy (reflected on earth through oppression via a racialized slave system) at the conclusion of the Civil War, a new theology and new system of control had to take the old system’s place. Into this void came the theology of separation as God’s divine plan that had influence on Southern white evangelical Christianity through the civil rights period. Understanding the intellectual and social influences that have functioned to infuse religion with racial meaning, as well as the religious origins of racialized ideas, helps to illuminate how religion functioned in the civil rights era and beyond, not only for African Americans fighting for their rights, but also for whites who drew upon theological ideas about the relationship between the races to defend segregationist practices.
CHAPTER 3
RACE, EDUCATION AND RELIGION

Following the federal mandate from the Brown v. Board of Education (1954) decision to desegregate public schools in the South, a wave of massive resistance in the form of school closures, violent confrontation, and deliberate delays threw up barriers to integrating school systems for more than a decade. An especially effective way to skirt federal requirements was the creation of segregationist academies throughout the region. These were private institutions of education, often supported by state and local government vouchers and/or tax money, which allowed white parents to keep their children in segregated classrooms. Though many were secular institutions and were ultimately denied state aid,¹ a substantial number of these academies had religious affiliations, which made the denial of state aid a bit more complicated. Chapter 3 will look at the legal path that led to private religious academies being the primary haven from desegregation by the 1960s, 1970s, and beyond.

Before the religious private academy became the standard educational institution to which white families could escape increased diversity in the public school classroom, segregationists engaged in several direct and passive efforts to maintain the status quo of racial hierarchy in the schools. When grand gestures of resistance such as closures of schools and/or the harassment of black students integrated into white schools garnered too much negative national attention and federal intervention, some southern districts took more subtle measures to avoid any meaningful desegregation. Those dedicated to segregation but looking for more a more “civilized” resistance to the federal mandate with as little attention from the federal government as possible turned to

dubious legal arguments to protect segregation. Early on, many state legislatures embraced “interposition”—a legal theory that did little more than re-articulate nullification—hoping to assert state rights to avoid the “vulgarity” of the race issue while maintaining the racial status quo. Some states embraced a method scholar Anders Walker has termed, “strategic constitutionalism” that attempted to find various legal work-arounds to the mandate of integration by officially cracking down on outward acts of racism, but doing the absolute bare minimum when it came to the integration of schools. As these methods began to break down, however, whites desperate to preserve segregated education for their children had to turn away from the public school systems and find a way to educate their children privately. The challenge of starting and maintaining private schools, particularly financially, led to some creative action by state legislatures and local schools districts. In order to route funds to private schools dedicated to segregated education, tax revenue was shifted away from public schools, public buildings were repurposed for private use, and “donations” of public classroom materials were allowed to private schools. As these practices faced challenges in the court system and were each in turn declared illegal, many secular private schools struggled to stay afloat.

Two court cases in the mid-1960s, however, created an inadvertent connection for whites between the issues of race and religion in the public schools. Increasingly uncomfortable with the change in the place of religion and race in the public schools, many Southern whites looked to private education for their children that reflected the “values” they held dear. The *Engle v Vitale* (1962) and *Abington v Schempp* (1963) decisions, which outlawed prayer and Bible reading in school, dovetailed with the
increasingly enforced practice of desegregation. As secular private schools struggled, 
private religious institutions (that had already established academies or planned to) able 
to promise parents that their schools did or would uphold both the religious and racial 
values held by their parents, had the opportunity to flourish.

Resistance to Desegregation

The *Brown v. Board of Education* (1954) decision was indisputably a landmark 
outcome for the NAACP legal defense fund, whose pursuit of legal equality through the 
court system had been a long and piecemeal process.² *Brown* declared that “separate 
educational facilities are inherently unequal” and that segregation in schools deprived 
students of “the equal protection of laws guaranteed by the fourteenth amendment.”³ 
Though *Brown* is considered by many as a galvanizing moment for the civil rights 
movement, it has also been framed by some scholars as a toothless constitutional 
doctrine, at least initially.⁴ The evidence for this perspective on *Brown* can be seen in 
the campaign of massive resistance that led to the complete shutdown of school 
systems in some parts of the country and a willful ignorance of the mandate to integrate 
in others.⁵ The NAACP’s Legal Defense Fund had been seeking several avenues 
through which to attack segregation and unequal treatment of blacks under the law. In

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⁴ See Klarman, *From Jim Crow to Civil Rights*, 442. Klarman argues that although the *Brown* decision did little to actually desegregate schools, it was crucial to inciting change because, “only the violence that resulted from *Brown’s* radicalization of southern politics enabled transformative racial change to occur as rapidly as it did.”

the first half of the 1940’s, the NAACP focused their legal efforts on voting rights, labor rights, and public and private instances of unequal treatment: direct violations of *Plessy v. Ferguson*.⁶ The initial lawsuits against education facilities did not ask for total desegregation, but instead looked to prove that school systems were in violation of the mandate to provide “equal” facilities and educational experiences to both black and white students in their respective schools. If the black schools were worse than white schools (which they almost inevitably were) then the NAACP would demand the state live up to the legal obligation of “equality,” but did little to challenge the premise of separation that kept white and black students apart.

In 1950, the Legal Defense Fund changed their strategy with regard to educational equality and pursued desegregation of the public school system. With the success of the *Brown* decision, however, the legal focus of their litigation turned away from the New Deal oriented understanding of civil rights that focused on “collective labor rights…governmental provided security…, and economic equality” and toward the “liberal understanding of individual rights.”⁷ Having established a precedent and intent on building on their legal success, the route of individual rights seemed an obvious choice. The problem with this strategy, however, proved to be the defuse nature of individual rights on a larger scale.⁸ The legal strategy of the NAACP would come under debate in the near future. In the immediate, however, this trend of “individualized”

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⁶ See Risa Goluboff, *The Lost Promise of Civil Rights*, (Harvard University Press, 2007)
⁷ Goluboff, *The Lost Promise of Civil Rights*, 3, 12
solutions to the problem of racial justice was potentially devastating when it came to the integration of localized public education systems throughout the nation. The Brown decision left much about the method of desegregation ambiguous. When would the schools be desegregated? Who would be in charge of desegregation’s implementation? How much desegregation was enough to satisfy the schools’ legal obligation? Would the federal government monitor the ratios of blacks and whites in each school? Brown II was brought before the Court the following year in an attempt to address some of the shortcomings of the initial Brown decision. Instead of clarifying questions about Brown’s implementation, however, the Court’s mandate to implement desegregation with “all deliberate speed,” proved ambiguous enough to facilitate the resistance to integration by many different methods.⁹ A powerful thread in the rhetorical and practical resistance to desegregation was the contest over the appropriate relationship between state and local authority and the federal government. The constitutionality of the federal government’s mandate to integrate was questioned by those hoping to keep segregation alive for violating the police powers of the state.

In the wake of the Brown decision, a political movement sprung up in Virginia spearheaded by a pamphlet self-published by a Virginia lawyer, William Old. Virginia in particular viewed itself as a state committed to “civilized” segregation where whites maintained dominance not through extralegal violence, --like the “unruly” deep South— but instead “through the exercise of governmental power to legislate, segregate, impoverish, imprison, and execute,” as organized, legal, and exacting guardians of the

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black population in the state.\textsuperscript{10} \textit{Brown} was viewed as a challenge to local and state control, not only over the schools systems, but also over their racialized legal order. William Old’s popular pamphlet promoted the resistance of integration via a campaign of “interposition.”\textsuperscript{11} Interposition advocates encouraged Southern state legislatures to exercise their “right” to “interpose” state sovereignty and resist what they understood to be an overstep of the federal government’s constitutional authority. Interposition was framed as necessary in order to resist federal threats against their (white) state citizens.\textsuperscript{12} Interposition advocates believed only direct confrontations with government mandates, such as closing schools or purposeful defiance of court orders would leave the government with little recourse but to accept the South’s perpetuation of segregation. “Locked public schools, resistance leaders felt, would demonstrate to the Courts and to the nation that white Southerners would not accept desegregation, and just as noncompliance had led to the reversal of the Eighteenth Amendment and the Volstead Act, so the South would nullify the \textit{Brown} decision.”\textsuperscript{13}

Interposition as a strategy received a significant boost in the public consciousness when Senator Henry Byrd’s mouthpiece in the segregationist newspaper \textit{Richmond News Leader}, James Jackson Kilpatrick, released a series of editorials. These editorials by Kilpatrick drew upon quotes from Jefferson and Madison, referenced

\textsuperscript{10} Titus, \textit{Brown’s Battleground}, 11-15


\textsuperscript{12} “The original documented mention of the term “interposition” came from ”The Committee of ’52,” a South Carolina supremacist group issued a declaration of principles that included interposition in August 1955.” George Lewis, \textit{Massive Resistance: The White Response to the Civil Rights Movement}. (New York, NY: Oxford University Press 2006), 62

\textsuperscript{13} Bartley, \textit{The Rise of Massive Resistance}, 128
the Kentucky-Virginia Resolutions and used these historical writings to legitimate the duty of states to defend their rights or suffer the end of the federalist system forever.\textsuperscript{14} Senator Byrd, well known for his call to massive resistance and his involvement in the creation and promotion of the “Southern Manifesto” which decried the \textit{Brown} ruling, compiled a group of likeminded politicians and influential community members to resist integration. By 1956, Virginia, Alabama, Georgia, South Carolina, Mississippi, Louisiana, and North Carolina all had resolutions passed by their legislatures that nodded to their acceptance of interposition as a legal right of the states. Despite the phenomenon the editorials by Kilpatrick had throughout the state, the entire South, and nationwide, these resolutions were little more than a re-articulation of state’s rights doctrine. Interposition presented the Southern states with what Kilpatrick and Byrd (and many others) perceived to be a “high ground of constitutional principle, away from the muck of the race issue.”\textsuperscript{15}

Ultimately, the use of interposition as a united legal campaign by the Southern states collapsed because nullification and states’ rights doctrine were legally untenable and were ruled so by the Supreme Court in \textit{Cooper v. Aaron} (1958). In the \textit{Cooper} decision, the Court not only overturned the state of Arkansas’s request to postpone desegregation efforts in the wake of the violent and disruptive reaction to the Little Rock Nine events, but more importantly squashed any revival of the nullification doctrine by stating that:

\begin{quote}
It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such
\end{quote}

\textsuperscript{14} Lewis, \textit{Massive Resistance}, 62-65

\textsuperscript{15} Lewis, Massive Resistance, 64
responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws… The principles announced in that [Brown] decision and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth.\textsuperscript{16}

Though interposition as a legal strategy failed to provide the South with a “respectable” legal basis with which to resist integration, local school systems did not shy away from exercising what they saw as their local authority to prevent desegregations in their schools based in interposition’s basic principles even after the Cooper v. Aaron (1958) decision.

Several schools were closed in areas throughout the South to avoid integration. The Louisiana State Legislature closed their public schools and re-opened them as “private schools.”\textsuperscript{17} Jimmie Davis, then-Governor of Louisiana, called an “Extraordinary Session” of the Louisiana Legislature to act on the issue of state education and to preserve and protect state sovereignty. Act 2[3] came out of that emergency session which allowed public schools under desegregation orders to become “private schools.” These newly formed “private schools,” however, operated in the same buildings, with the same staff, the same furniture and materials, and the same funds as the public schools. The school board remained in charge of providing lunches to the students,

\begin{itemize}
\item \textsuperscript{16} Cooper v. Aaron, 358 U.S. 1 (1958), 19-20
\item \textsuperscript{17} Hall v. St. Helena Parish School Board, 197 F. Supp. 649 (E.D. La. 1961), 651
\end{itemize}
coordinating bus schedules and, approving grants-in aid to the white children attending the newly “privatized” schools.\textsuperscript{18}

Virginia’s governor declared several schools closed in Warren County, Charlottesville, and Norfolk to resist mandatory integration. Prince William County, Virginia’s decision to shut down its entire school system for five years, from 1959-1964, is an extreme example of this resistance, but it speaks to the legal wrestling match over states’ rights and government authority. The closure of the Prince Edward County School system was not only the most long-lived closure, but also resulted in a court decision that once again overruled the states’ rights claims and bolstered \textit{Brown} by invalidating school closings for violation of federal integration law.\textsuperscript{19} Prince Edward County schools were closed by the local school board in 1959 to avoid integration. The county stopped collecting school taxes and a private school system was set up for white children while the African American population continued to fight for integrated schools. By the following year, the county had set up a system of tuition grants to subsidize the private segregationist schools with state funding.\textsuperscript{20} The Supreme Court description of the case laid out the progression of events in Prince Edward County, starting with a declaration in 1956 by County Supervisors that no public schools in the county would operate “wherein white and colored children are taught together.”\textsuperscript{21} In 1959, the first year the public schools closed, the Prince Edward School Foundation, a private group, was formed to run the operations for white schools. In the same year, the county offered

\textsuperscript{18} Ibid

\textsuperscript{19} Titus, \textit{Brown’s Battleground}, 176

\textsuperscript{20} \textit{Griffin v. School Bd. of Prince Edward Cty.}, 377 US 218 (1964), 222-224

\textsuperscript{21} \textit{Griffin v. School Bd. of Prince Edward Cty.}, 377 US 218 (1964), 222
to provide private schools for black students. The black community rejected the offer and backed the group *Negroes of Prince Edward's* effort to fight the closure of county public schools in the courts. From the years 1959 through 1963, no formal education was available to black students in Prince Edward County. The county's white private schools were funded privately during the 1959-1960 school year. The following year, however, the county found a way to redirect public funds to the private white schools;

In 1960 the General Assembly adopted a new tuition grant program making every child, regardless of race, eligible for tuition grants of $125 or $150 to attend a nonsectarian private school or a public school outside his locality, and also authorizing localities to provide their own grants. The Prince Edward Board of Supervisors then passed an ordinance providing tuition grants of $100, so that each child attending the Prince Edward School Foundation’s schools received a total of $225 if in elementary school or $250 if in high school. In the 1960-1961 session the major source of financial support for the Foundation was in the indirect form of these state and county tuition grants, paid to children attending Foundation schools. At the same time, the County Board of Supervisors passed an ordinance allowing property tax credits up to 25% for contributions to any "nonprofit, nonsectarian private school" in the county.

The tuition grant program was challenged by *Griffin v. School Board of Prince Edward County* (1962) and resulted in “the District Court enjoin[ing] the county officials from paying county tuition grants or giving tax exemptions and from processing applications for state tuition grants so long as the county’s public schools remained closed.” In 1964, the Supreme Court decided *Griffin v. County School Board of Prince Edward County* (1964) which ultimately made the closure of the schools illegal. The decision written by Justice Hugo Black ordered the schools to reopen and the county to levy taxes for education. Black wrote, “the District Court may, if necessary to prevent further racial discrimination, require the Supervisors to exercise the power that is theirs

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22 *Griffin v. School Bd. of Prince Edward Cty.*, 377 US 218 (1964)
to levy taxes to raise funds adequate to reopen, operate, and maintain without racial
discrimination a public school system in Prince Edward County like that operated in
other counties in Virginia."23 The ruling in *Griffin* rested on the equal protection clause of
the Fourteenth Amendment. The level of intervention by the federal government into
local affairs was a controversial adjudication for some, including the two dissenting
justices, Clark and Harlan, but cases that invalidated the tactics of Southern legislatures
succeeded in narrowing the methods by which Southern states could perpetuate
segregation.

In an attempt to avoid the direct confrontation from the federal government that
massive resistance garnered, moderate governors in segregationist states worked to
avoid integration without violating the Supreme Court orders. Many modelled their
resistance on the work of groups such as the 1955 Gray Commission, the more
successful Pearsall Plan from North Carolina, and 1956 Stanley Plan from Virginia that
proposed several legislative actions aimed at "smoothing" the transition to integrated
schools systems by slowing down the process. The Gray Commission report did not
result in any of the recommended legislation being passed in the 1956 Virginia special
legislative session—the legislature went a much more direct route in its resistance.24
The recommendations of the report, however, did influence the action of several more
moderate states as massive resistance became unattractive to some states for the
national attention it garnered. Southern states saw how the path of massive resistance

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23 *Griffin v. School Bd. of Prince Edward Cty.*, 377 US 218 (1964)

24 Governor Thomas Stanley managed to push though a bundle of bills which centralized resistance in the
state by taking integration decisions away from the local school boards and "placing them instead in the
hands of the governor [giving him] the authority to close and schools under direct court order to
desegregate and to cut off state funds to any school threatening to integrate upon reopening." Lewis, *Massive Resistance*, 53.
in states like Virginia had a profound effect on localities—school systems were left in
shambles, state legislatures were engaged in direct conflict with federal authorities, and
federal intervention resulted in careful observation of the state by the federal
government. The Gray commission and its successors provided a way to preserve what
they viewed as the natural order without harm to their states. First, the commission
prosed “that the school boards be authorized to assign pupils to particular schools and
to provide for appeals in certain instances.”25 The commission proposed that such
assignment would be based on the welfare of the individual student as well as the
welfare of the students already in attendance at the school. The state would base its
placement decisions on “availability of facilities, health, and aptitude of the child and
availability of transportation.”26 Under the typical pupil assignment law, a black pupil who
wished to be transferred from his segregated school would apply to the local school
board or a state pupil assignment board. These laws placed the burden of
desegregation on black children and their families. Instead of affirming the duty of the
state to provide circumstances that would propagate and facilitate integration, the state
relied on fear and the financial and physical burden black families would have to
undertake to allow their children access to white schools. Even if families did endure the
application process for their children’s transfer to integrated schools, the state could find
any number of reasons to deny their admittance.

The commission also recommended redirecting state money into financial aid to
private segregated schools in an attempt to maintain segregation. The commission

25 Public Education Report to the Commission to the Governor of Virginia, Senate Document #1,
Commonwealth of Virginia, (Division of Purchase and Printing, Richmond, 1955), 8

26 Public Education Report, 9
proposed tuition grants, supplemental funding for private schools through levying taxes in those counties where no public school was operating, and loosening restrictions surrounding the use of money designated for public schools.\textsuperscript{27} The Pearsall Plan, drawn up in North Carolina by the State Board of Education encouraged similar ideas to prevent integration. The Pupil Assignment Act, based on the Pearsall Plan, allowed: tuition grants for white children placed in integrated schools, allowed districts to deny transfer waivers of black students into white schools for “neutral” reasons, removed mandatory school attendance requirements from students who were assigned to integrated schools but did not have access to private schools, and allowed communities to vote to shut down schools deemed “intolerable.”\textsuperscript{28} The Stanley Plan, based on the Gray Commission’s ideas, eliminated funding from integrated schools, gave the governor power to close any school in the state, created a Pupil Placement Board, and authorized tax money formerly allocated to public schools into tuition grants for private education. These committees found ways to (mostly) fulfill legal obligations and circumvent the \textit{Brown} ruling to maintain segregated schools. Moderate resistance methods were notorious for compelling individual blacks to resort to lengthy “administrative remedies;” eventually forcing them to bring their grievances to federal court.

Three moderate governors in Mississippi, Florida, and North Carolina\textsuperscript{29} are particularly illustrative examples of state leaders who tried to encourage peaceful and

\textsuperscript{27} Public Education Report, 10

\textsuperscript{28} “Pearsall plan to save our schools”, 1956, Civil Rights Greensboro Collection, Rare Book, Manuscript, and Special Collections Library, Duke University.

\textsuperscript{29} J. P. Coleman of Mississippi, Luther Hodges of North Carolina, and Leroy Collins of Florida
compliant implementation of token integration in order to modernize their states, consolidate state power, and gain acceptance from Northern states. These governors, according to historian Anders Walker engaged in “strategic Constitutionalism” which worked by subverting the results of the judicial decisions from within instead of attracting attention and national ire by defying them outright. The governors made many outward attempts at compliance through crackdowns on racial violence, the creation of “neutral” placement laws that judged students on scholastic and moral aptitude, and the centralization of state control over localities to create uniform integration policies. All of these actions, however, were in the service of maintaining segregation through “lawful, peaceful and constitutional means.” As Walker notes, “Although their work to end racial violence benefited blacks, many of their efforts to help African Americans discreetly shifted the burden of constitutional change onto black shoulders, held them responsible for their plight, and meanwhile exaggerated the extent to which they suffered from illegitimacy, immorality, and other social ills.” Soon cases like *Evers v. Jackson Municipal Separate School District* (1964) which struck down voluntary pupil assignment statutes and *Goss v. Board of Ed.* (1963) which struck down maintenance of segregated schools despite rezoned districts made these efforts at passive resistance illegal.

This continual game of legal leapfrog, where states passed segregation-friendly legislation and the state’s courts struck them down, was finally reconciled through *Green v. New Kent County School Board* in 1968. *Green* put an end to Freedom of

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Choice Plans and Pupil Assignment policies by requiring an affirmative duty to desegregation by all states. States doing the minimum to end forced segregation would no longer be enough to pass constitutional muster.\textsuperscript{32} The \textit{Green} case originated in New Kent County, a small, rural town in Eastern Virginia with a small population of approximately 4,500 that was evenly divided by race. The town itself was not residentially segregated, likely due to the rural nature of the area, but the county maintained two public schools located on opposite sides of town; New Kent school to the east and George W. Watkins school on the west side.\textsuperscript{33} The county relied on the Pupil Placement Act passed by the Virginia legislature in 1964 which took student school assignment decisions out of the hands of the local school board and centralized that power in the State Pupil Placement Board. All petitions for school changes were sent to the State Board and decided there. The year the Act was passed not one black student from New Kent County applied for admission to the New Kent School through the state board, nor had any white students applied for admission to Watkins.\textsuperscript{34}

In April 1965, the initial suit which led to the \textit{Green} decision was filed, and in response, the school board, worried about the threat to their federal funding, adopted a “freedom of choice plan” to supersede the pupil assignment system. Under this new plan, students entering the first and eighth grades were required to affirmatively choose the school they wished to attend. At the beginning of each subsequent year, students were given the opportunity to request a switch in schools, but were automatically

\begin{itemize}
  \item \textsuperscript{33} \textit{Green v. County School Board of New Kent County} 391 U.S. 430 (1968), 431
  \item \textsuperscript{34} \textit{Green v. County School Board of New Kent County} 391 U.S. 430 (1968), 433
\end{itemize}
reassigned to their previous schools if they made no request to change. The District Court approved this new plan with some added requirements about teachers and staff nondiscriminatory assignments. The Supreme Court, however, in reviewing the case, found the “freedom of choice” plan still supported a racially binary school system and struck down the law. Simply to offer black students the possibility to transfer schools while the school board retained power to “discharge obligation by adopting a plan by which every student regardless of race, may ‘freely’ choose the school he [sic] will attend” failed to embrace the intent of *Brown*. *Brown* required, “the transition to a unitary, nonracial system of pupil education [which] was and is the ultimate end to be brought about.” The *Green* case provided an important precedent for desegregation efforts by ruling that school boards were charged with an “affirmative duty to take whatever steps necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.” Black families provided with “the potential opportunity” to place their individual children in an integrated school, while allowing a dualistic system to perpetuate, was not enough.

This ruling was immediately confirmed by the outcome of *Alexander v. Holmes* (1969) which functioned to reverse the “all deliberate speed” edict from *Brown II*. Deciding on whether to overturn a delay on an order by the Fifth Circuit Court of Appeals for plans to desegregate thirty-three Mississippi schools districts, the Court directly tackled the ineffectual nature of the phrase “all deliberate speed” used in *Brown*

35 *Green v. County School Board of New Kent County* 391 U.S. 430 (1968), 433-434
36 *Green v. County School Board of New Kent County* 391 U.S. 430 (1968), 436
37 *Green v. County School Board of New Kent County* 391 U.S. 430 (1968), 437-8
Il and labeled the statement a “soft euphemism for delay.”\textsuperscript{39} Citing Griffin v. County School Board (1964) and Green v. New Kent County (1968), both of which used the phrase “the time for mere deliberate speed has run out,” the Court sought to clarify any language in those decisions that might allow for further attempts at delay.\textsuperscript{40}

Language used in Green was of particular concern to the Court. The Holmes decision was careful to disabuse Southern school boards of the possibility that Green “might be interpreted as approving a ‘transition period’ during which federal courts would continue to supervise the passage of the Southern schools from dual to unitary systems.”\textsuperscript{41} Exchanging “all deliberate speed” for “transition period” would result in nothing but the same passive resistance tactics that had allowed the dual school system to persist in the South fifteen years after the Brown decision. The strong rhetoric and careful precedent setting language in the decision diverged from the practicalities of the case. Justice Black decided that the delay in the case of Mississippi would be granted in order not to further jeopardize the transition to a unified school system. Despite the possible conflicts within the decision, these cases did create a strong base from which future cases challenged the strategic constitutionalist legal gymnastics that had kept segregation going for more than a decade. The legal mandate of “affirmative duty” to integrate was only one of several judicial and legislative initiatives that began to convinced white segregationists that the public school systems could not be “salvaged” from the scourge of desegregation.

\textsuperscript{39} Alexander v. Holmes County Bd. of Ed., 396 U.S. 19 (1969), 1219

\textsuperscript{40} Alexander v. Holmes County Bd. of Ed., 396 U.S. 19 (1969),1220

\textsuperscript{41} Alexander v. Holmes County Bd. of Ed., 396 U.S. 19 (1969),1221
Potentially the most destressing decision for segregationists was made by the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education* (1971). In 1965, the NAACP Legal Defense Fund brought the case to court on behalf of six-year-old James Swann, the child of a theology professor, and nine other families. The suit claimed that Mecklenburg county was subverting the *Brown* ruling by failing to enact measures to integrate. The Court ruled that the state had done its due diligence by opening some integrated schools, closing some all-black schools, and relying on the pupil assignment laws of the state as sufficient action.\(^{42}\) The *Green v. New Kent County School Board* (1968) ruling three years later provided an opportunity for the case to be re-filed. The school board was then ordered to submit an affirmative plan of desegregation. Unable to produce a comprehensive plan within the deadline assigned by the District Court, an education expert, Dr. John Finger, was assigned by the court to provide a competing affirmative plan. In February of 1970, now with a completed plan from the school board and a proposed plan prepared by Dr. Finger, the District Court had to make a decision about which would fulfill the requirements now set by *Green*.

The Board’s plan did little more than shift school districts around, and ultimately resulted in most schools in the district maintaining 75%-100% of their previous racial make-up. The Finger plan also engaged in some rezoning, but additionally created what he called “satellite zones” which for junior high and high school students involved sending inner city students to outlying white school. This “satellite zone” plan operated differently for young children. For elementary school students the plan, “desegregat[ed] all the rest of the elementary schools by the technique of grouping two or three outlying

This plan involved bussing both black and white students out of their original zones in an attempt to end the identification of some schools as “black schools” and some as “white.” The school board, under protest, implemented the Finger Plan and immediately appealed the case. When the case was reviewed by the Supreme Court, the written opinion addressed several points of constitutionality within the Swann decision. Chief Justice Burger, in his majority opinion noted that within the issue of student assignment, the Court consider the issues of

(1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;

(2) whether every all-Negro and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;

(3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and

(4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.

Despite tackling all of these issues, the take away from the case for white parents anticipating the decision was that bussing was constitutional and that soon their children would be the ones taken out of their suburban white schools and into inner city black schools. The negative reaction by whites to bussing is well-documented in both

the North and South.\footnote{Particularly the bussing implemented in Boston in 1974. See: Ronald P. Formisano, \textit{Boston Against Busing: Race, Class, and Ethnicity in the 1960s and 1970s}. (Chapel Hill, North Carolina: University of North Carolina Press, 1991)} The bussing decision loomed even larger for segregationists as the courts also began to strike down the legality of several different areas of operation within the newly opened private schools throughout the South.

**Reforming the Mission of the American Public School**

Race was not the only issue creating controversy in the school system at the time. While solutions to segregation were sought through strategic constitutionalism, the rise of private schools had just begun due to the confluence of two major legal changes in public schools. Integration mandates from the \textit{Brown} decision certainly triggered panic about the public school systems and the ability of communities to maintain the racial status quo for their children. Private school systems meant to provide safe havens for racial segregation did emerge in places like the aforementioned Prince Edward County. In the early 1960s, however, another issue dovetailed with the desegregation resistance to launch the creation of private schools and the increased migration of white students to these private institutions throughout the South. In 1962 \textit{Engle v. Vitale} outlawed prayer in school and the very next year \textit{Abington v. Schempp} (1963) banned Bible reading. These rulings made many white parents question not only the racial environment in which their children would be educated, but also the loss of Christian morality as a part of their children’s education. Though public schools were ostensibly secularized, religion remained integrated into the daily routine of public schools.

The tradition of public education in the United States is infused with religious controversy that helped—or perhaps forced—the shape of the generally secularized
system that exists today. The history of public education in the United States begins with the Protestant dominated school system that eventually gave birth to the public schools in the U.S. colonial and early national schools had no distinction between the concept of public or private. That distinction began in the 1830s with the Common School Movement, from which the current U.S. public school system descends.

The development of the American public school system has been influenced by several social and historical trends. Its development also brought into public debate questions about what constituted the national value system in the United States and its expression in education. The Second Great Awakening, which promoted a non-sectarian Protestantism, led to an integration of the non-sectarian concept in common schools. Non-denominational, but generally Protestant, schools were understood to be inclusive to all beliefs (for Protestants). The public school system, far from being a secular establishment, was often created and perpetuated by evangelical Protestants who believed they could create a non-denominational (Protestant) education that served

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46 Lloyd P. Jorgenson, *The State and the Non-Public School, 1825-1925* (Columbia: University of Missouri Press, 1987), vii; but not all historians agree on what these roots meant for the development of modern public schooling. One of the early assessors was R.F. Butts in the 1950s, who was a staunch believer in history informing the creation of policy and wrote a history of public education that never explicitly argued, but certainly promoted the concept that original intent should inform the formation of the church/state/school relationship. Butts used founding documents, court cases, and writings by founding fathers to attempt to prove that direct aid or support to religious schools by federal or state governments was aid to a religious institution and thus unconstitutional and that the principle of separation of church and state in education prohibited the use of public funds for many kinds of religious schools as fully as it prohibits the use of public funds for a single kind of sectarian school. Of course, Butts was writing in the heyday of court challenges by parochial schools to access funds from the state to support their school systems, which his book was clearly challenging. His work also displayed anti-Catholic leanings when taken in context of the liberal intellectual movement calling for separation in the face of parochial encroachment. For Butts, though the roots of parochial schooling originated in Protestantism, the founding values of the nation dictated the necessity of maintaining a separation of government funded schools from religious matters. Lloyd P. Jorgensen, less interested in originalism and more interested in the historical narrative of public school creation in the U.S., wrote on the origins of what motivated the political and legal principles that non-public schools are ineligible to receive public funds and that Bible reading and prayer are forbidden in the public school.
to create good American citizens while keeping faith integral to that project. According to scholar Emma Long,

“The public school movement was spurred on by Protestant Christian groups (in the early nineteenth), mainly Baptist and Methodists, who believed in making education available for all. Although not intended as places of religious dogma, elements of Protestant religious belief and practice permeated the schools, whether intended to preserve order in the classroom, mould the good character of their (largely Protestant) students or simply to recognize the wonder and power of God…The public schools thus became a symbol of the history of anti-Catholicism in the United States, an image which persisted into the twentieth century.”

The large waves of immigration in the nineteenth and twentieth centuries led to a perceived threat of an increase in the number of Catholics. Catholics were seen as not only a threat to the make-up of American democracy, but also to the Common schools. Many localities distributed educational funds to all educational institutions and the rising number of Catholic academies threatened to divert funds away from the public (Protestant) schools. This fear of Catholics—and immigrants more generally—was perpetuated by the rise of bigotry in political and social movements such as nativism. Nativist groups like the Know-Nothing Party, attached themselves to the traditionally Protestant common school goals and promised to keep Bible reading in school and stop public aid from going to Catholics schools. Additionally, the dominant role of Protestant clergy in the school movement, many of whom were reluctant to accommodate Catholics and eager to promote their own school systems, resulted in attempts to make public school attendance mandatory. Mandatory attendance failed in the context of

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Common Schools, but found new acceptability when the school systems became community and government run.

The anti-Catholicism, rampant in the school debates of the nineteenth century represented something much more profound, not only for religion in schools but also for greater national values undergoing debate during this time. Anti-Catholicism was directly connected to the defense of national Protestant values and fears of foreign challenges to liberty and individualism in the U.S. Catholics were seen by Protestant-Americans as being under papal control. They feared the influence of Pope-directed Catholics in a U.S. democratic system whose functionality was reliant on citizens free of coercive powers. This fear played out in several venues, one of the most contentious being the public school system in the nineteenth century.

Steven Green argues that “the school question” of the nineteenth century arose, not as a result of anti-Catholic bigotry, but instead over; a) the issue of universal education, b) the duty of the government in promoting religious values, c) the connection between moral virtue and civic participation, d) the role of religious institutions in civil society and most importantly, e) the compatibility of religious diversity within a republican system largely based in Protestant traditions. In other words, the school question was fundamentally about the place of religion in the public sphere of the United States. This debate was far from reconciled during the nineteenth century, and set the stage for the legal windfall of the 1940s on issue of the church/state relationship in the United States.

The *Everson v Board of Education* ruling in 1947 set the precedent for the *Engle* and *Shempp* decisions. *Everson v. Board of Education of Ewing Township* (1947) involved a challenge to a statue originating in the New Jersey legislature that "allowed local boards of education to reimburse parents for the cost of bus transportation to and from school. Students attending both public schools and Catholic parochial schools were eligible for this program, since only schools operating for a profit were excluded by this statute."\(^50\) Justice Black’s ruling in *Everson* drew upon founding documents and ideologies to rule that the First Amendment non-establishment clause disallowed government support of religion and constitutionalized for the first time the concept of “separation of church and state.” Justice Black’s famous statement, “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach,”\(^51\) opened the door for rulings like *Engle v Vitale* (1962).

*Engle v. Vitale* (1962) decided against the authorization by the Board of Regents for the State of New York to allow a short, voluntary non-denominational prayer at the beginning of each school day. All students were present for the prayer, but were not required to pray. The defense presented the open nature of the prayers as applicable to religious students regardless of their religious affiliation, using the example, "Almighty God, we acknowledge our dependence upon Thee, and beg Thy blessings upon us, our teachers, and our country."\(^52\) The Court ruled that even such non-denominational

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\(^{51}\) *Everson v. Board of Education*, 330 U.S. 1 (1947), 18

\(^{52}\) *Engel v. Vitale* 370 U.S. 421 (1962), 422
prayers functioned as approval of a religion by the state of New York. Some Christians viewed *Engle* as undermining the time-honored practice of, not only schools giving basic religious lessons, but also of the responsibility of the U.S. schools system to produce moral citizens. With *Engle*’s ruling that “New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer . . . [to be] a religious activity… [and] it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government,”[53] the battle over the relationship between religion and education in the United States was revivified.

Close on *Engle*’s heels, *Abington v. Shempp* (1963) provided further evidence for some Christians that religious morality was being stripped from the public school system. Abington Township in Pennsylvania required all of their students to read ten Bible verses and recite the Lord’s Prayer each morning in their public school classrooms. Parents could send a note for their children to opt out of the requirement. The Supreme Court once again struck down religious practice in public schools, stating that, “the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools…”[and

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that] the exercises and the law requiring them are in violation of the Establishment Clause."\(^{54}\)

The reaction by religious institutions to *Schempp* was mixed. Some religious group leaders, like W. Hubert Porter, the associate general secretary of the American Baptist Convention supported the decision. Porter noted that he believed “the decision is thoroughly consistent with the historic stand of the American Baptist Convention relative to religious liberty and the separation of church and state.”\(^{55}\) More common were reactions like that of John J. Hurt, editor of the *Christian Index* (a Baptist journal based in Atlanta) who wrote an opinion article after the ruling titled, “Supreme Court edicts Tragic for God and Morals.” In the Op-ed, Hurt bemoaned that the decision “may have dug the grave for every reference to God in every government forum, in the military, the prisons and all else.”\(^{56}\) Many Evangelical and Fundamentalist Christians felt a sense of panic that the Christian traditions within their public institutions were under attack. The two issues of desegregation and secularization of schools, which both experienced a legal clampdown seemingly simultaneously created a demand for private academies that could provide the remedy for the preservation of these two intimately related practices in the history of U.S. education: white and Protestant schools.

**Rise of Segregation Academies**

The major spike in segregation academies occurred in the final years of the 1960s and continued to skyrocket through the 1970s. The question of why the number of private segregated schools increased so significantly during this time-period and not

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\(^{54}\) *School Dist. of Abington Tp. v. Schempp* 374 U.S. 203 (1963), 223

\(^{55}\) *Report from the Capital*, July-August 1962

\(^{56}\) *Report From the Capital*, July-August 1962, 3
immediately after Brown, can be answered by some of the history traced above. The initial success of massive and passive resistance to integration helped maintain the status quo within the majority of Southern school systems for over a decade. But several events in the mid-1960s began to convince whites that they were losing the battle to preserve the “Southern way of life” when it came to education. First, the slow trickle of decisions by state and district courts that overturned freedom of choice plans and student placement laws convinced whites that they had lost control over their public school systems. Additionally, the Civil Rights Act of 1964 frightened segregationists who had heretofore avoided federal intervention with its promises to enact: “the termination of or refusal to grant or to continue assistance under any such program or activity to any recipient as to whom there has been a finding of a failure to comply,” meaning that funds for non-integrated public schools (and therefore vouchers for private institutions) would soon evaporate.\(^57\) The parallel, but not unrelated blow of removing religious ritual from public schools encouraged an increased suspicion of the values found in public education. Finally, a string of federal court cases dismantled, one by one, all of the passive resistance tools that states had relied upon to circumvent integration and declared constitutional some of the most aggressive methods to bring desegregation to fruition. All of these factors had the effect of sky-rocketing the creation of private schools long after the initial call for desegregation.

One of the first cases to dismantle the use of state money for segregated private schools as a passive resistance measure was Coffey v. State Education Finance Commission (1969). The fear of financial retribution on school districts violating

desegregation orders promised by the language in the Civil Rights Act became a reality in with the *Coffey* decision.\(^{58}\) *Coffey* decided a case for of the state of Mississippi in which black parents challenged the constitutionality of state tuition grants given to students—from kindergarten through college—to attend private schools. The tuition grants were approved by the Mississippi state senate in the 1964 legislative session.\(^ {59}\) It was no coincidence that this particular legislative session was the one to pass the tuition grant bill. By December of 1964, the Department of Health, Education, and Welfare had adopted regulations outlined by Title VI of the Civil Rights Act “requiring public schools to initiate desegregation for the forthcoming school year in order to qualify for federal financial assistance.”\(^{60}\)

*Coffey* documented the growth of private schools in the state of Mississippi, which grew considerably in the wake of the Civil Rights Act and subsequent tuition grant program by the state. While only two new private schools opened that accepted state grants in the 1964-65 school year. The following year, twenty new private schools opened to take advantage of the tuition grant program. The U.S. District Court for the Southern District of Mississippi noted that all of these schools were found in districts that were either voluntarily desegregating or under court order to desegregate. Between May of 1964 and Sept. of 1965, fifty-two corporation charters were issued to groups in


the state of Mississippi seeking to form private schools. In *Coffey*, the District Court ruled that the state tuition grants were crucial to the viability and survival of these private schools and were primarily motivated by the desire to preserve segregated schooling.

This assessment was borne out by the effect total dependence on parental donation and tuition had on the religious academies. School policies that promised to eject problem students were often unenforced with respect to the child(ren) whose parents paid full tuition or made large donations. A majority of the schools subsisted from tuition period to tuition period—relying heavily on stable and growing enrollment. This reliance on tuition and fundraising also had an effect on the quality of education. Robert E. Bills in his study of private religious academies in the 1970s noted that;

> In some of the private schools there is a fear of reprimanding children because of parents' reactions and possible loss of tuition. Children often are present in the halls of some of the schools and it is difficult to determine in some schools when the day begins and ends. In one school it took 20 minutes to settle down to the task of taking the tests, in another the time was 45 minutes, and in some, children were in the corridors throughout the testing periods…” During testing, “grade 8 sent for six pencils. They had not started testing at that time. The reason was discovered later. The children were selling magazine subscriptions for the parent-teacher organization to help finance the school. The quota for each grade was $300. Grade three had raised $52 and was in difficulty. The parents say that they brought the magazine last year and did not want them now. There were definite signs of pressure. The specific purpose of this project was to purchase lockers—there were none in the school.

Though Bills preserved the anonymity of the schools he profiled, he indicated that the stories he recounted were typical for many institutions involved in the study.

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62 Ibid

63 Nevin and Bills, *The Schools That Fear Built*, 43

64 Nevin and Bills, *The Schools That Fear Built*, 44
The financial situation of most of these small schools was such that they often were only able to afford one teacher per grade, which meant that varied learning styles or paces were unaddressed. These schools also lacked the special education programs or the range of instructors that many parents had relied on for their children in the public schools.\footnote{Nevin and Bills, \textit{The Schools That Fear Built}, 101} Additionally, counter to the hopes and intentions of Christian and non-Christian parents who transferred their children to these religious academies out of fear that integration would jeopardize the quality of their children’s education, the private Christian schools showed little improvement over public schools of student test scores. Parents paying high tuitions and hoping for a better education for their children were left unhappy with the instruction their children received.

Dissatisfaction and anger from parents led to increased incidents of conflict between the private school administrators and the parents whose money they needed to keep the institutions afloat. The precarious financial situation of the schools ended up giving parents a significant amount of power over the form and function of the administration. The complaints and low confidence of parents surrounding the people or person in charge of the private school often resulted in the administrators’ dismissal. The ingrained distrust of professional administrators lured from public schools to run the academies (many of whom the parents associated as being the harbingers of integration) may have been at the root of this problem. As a result, the private religious schools experienced a much more rapid turnover in administration than public schools, which ultimately resulted in hiring inexperienced administrators. As Bills noted, “They hire headmasters without much background and then are dismayed when problems..."
develop." These dynamics contributed to an untested personnel and financial instability that made any source of funding or assistance crucial to the ongoing operation of these private religious academies.

With little funds to work with, newly opened private academies in the South had to find ways to support the cost of teacher salaries, facilities, classroom furniture, and educational materials, (among other myriad costs) for a swelling number of white children sent away from public schools by parents who often could not afford high tuition rates. The private schools relied on vouchers for a time, but as cases like Coffey eliminated that avenue of funding, nascent private schools attempted to keep these segregationist academies alive by taking advantage of donated public buildings, salary supplements for private school teachers, and textbook “loans” from public schools. Once again, however, the courts challenged any support by the state of private means of segregation.

Norwood v. Harrison (1973) directly challenged the use of textbook loans given by the state to these private academies. Long before the issue of segregation academies confronted the education system, Mississippi implemented a program in 1940 that provided textbooks to all schools, both public and private throughout the state. The original intent of the program was to improve educational facilities and

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66 Nevin and Bills, The Schools That Fear Built, 45


68 The regulation for distribution of state-owned textbooks from 1940 through 1970 provided as follows: “For the distribution of free textbooks the local control will be placed in the hands of the County Superintendent of Education. All requisitions for books shall be made through him and all shipments of books shall be invoiced through him. At his discretion he may set up certain regulations governing the distribution of books within the county, such regulations not to conflict with the regulations adopted by the
materials throughout the state. The state of Mississippi only had seventeen documented non-Catholic private schools before 1963, many of which were geared toward special education needs. As noted in the Norwood decision, “The total enrollment was 2,362 students. In these nonpublic schools 916 students were Negro, and 192 of these were enrolled in special schools for retarded, orphaned, or abandoned children.”69 With the explosion of private academies in the late 1960s into the early 1970s, the policy that allowed these segregationist academies to benefit from the program by acquiring textbooks at no cost to the academy, regardless of whether they were segregated became a legal problem. The parents of four students in Tunica County, Mississippi filed an injunction against the textbook lending program and argued that the rise of discriminatory private schools caused the program to be in direct violation of the Coffey v. State Education Finance Commission (1969) decision that prohibited direct state aid to discriminatory schools. 70 They also argued that the textbook program was by

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69 Ibid

70 Hamburger describes Everson as a definitive moment in the ideological understanding of America as a nation based in values protecting the separation of church and state. Until the Everson decision, the phrase “separation of church and state” had been popular jargon; a call to arms by activists advocating separation. “Only in 1947, however, did the Court clearly make separation the basis for a decision—opining that the First Amendment required separation, that the Fourteenth Amendment applied it to states, and that New Jersey’s subsidized school busing for both public schools and private schools did not violate the First and Fourteenth Amendments. In this way, the Court recognized separation as a part of American constitutional law.” Philip Hamburger, Separation of Church and State (Cambridge: Harvard University Press, 2002), 455. Board of Education v. Allen 392 U.S. 236 (1968) challenged a New York education law that provided textbooks on loan to all students, free of charge, in public and private K-12
extension hindering the move toward full integration of public education and therefore a violation of their constitutional rights under *Brown*.\(^{71}\)

The Supreme Court found in favor of the appellants, ruling that free textbooks constituted a tangible form of financial aid that benefited private discriminatory schools and was therefore unconstitutional. Because the vast majority of these schools were religiously affiliated, the *Norwood* decision had the potential to contradict the rulings made in *Everson v. Board of Education* (1947) and *Board of Education v. Allen* (1968) concerning aid to parochial schools. The Court was careful, however, to distinguish between the limited educational assistance allowed to parochial schools that served the function of facilitating the secular education within those schools and the use of state resources to support discriminatory treatment which the court argued “exerts a pervasive influence over the entire educational process.”\(^{72}\) The same year that textbook donations from the state were ruled off limits, the Supreme Court and the Fifth Circuit Court also ruled that the use of private buildings to house discriminatory educational programs and the use of empty or donated public buildings to house newly formed private discriminatory schools was unconstitutional.\(^{73}\)

The ruling in *Gilmore v. City of Montgomery* (1974) prevented racially segregated private schools from using public buildings to hold their educational or after-school

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\(^{71}\) *Norwood v. Harrison*, 413 US 455 (1973)

\(^{72}\) *Norwood v. Harrison*, 413 US 455, (1973)

programs. The case was a revalidation of a series of decisions beginning in 1959 and based in the District Court of Montgomery Alabama that ordered the desegregation of the city’s public parks. After a 1959 ruling that banned segregated public parks was affirmed by the Court of Appeals, the City of Montgomery circumvented the courts' decisions in several ways. First, the city funded segregated recreational programs but moved the programs onto the private grounds of the YMCA. The city also closed public swimming facilities to avoid integrating them. Finally, the city neglected upkeep of recreational facilities in African American neighborhoods. In an attempt to force the city to comply with the 1959 ruling, black residents of Montgomery brought suit against the YMCA in 1970 and demanded reprieve against this “coordinated effort” to keep the city’s parks and recreation services segregated. The Smith v. YMCA (1970) ruling provided black citizens in the city of Montgomery with a legal basis on which to file a “Motion of Supplemental Relief” in 1971 to target the city’s continued segregation practices. The motion protested the use of public facilities by racially segregated schools and other racially segregated private groups and clubs. The injunction was upheld by the District Court and the decision affirmed that the “exclusive use” of public buildings by segregated private schools “created, in effect, ‘enclaves of segregation’” promoted and supported, if not directly created by the state.

74 Gilmore v. City of Montgomery, 176 F.Supp. 776 (MD Ala.1959)  
75 Gilmore v. City of Montgomery, 277 F.2d 364, 368 (1960)  
77 Smith v. Young Men's Christian Ass'n of Montgomery, 337 F.Supp. 22 (MD Ala.1972)  
78 Use of the term "exclusive use" implies that an entire facility is exclusively, and completely, in the possession, control, and use of a private group, and also implies, without mandating, a decision-making role for the city in allocating such facilities among private and public groups, the city's policy of allocating facilities to segregated private schools, in the context of the 1959 order and subsequent history, created,
With public buildings declared off limits for the extra-curricular activities of segregationist academies, the next issue legal activists took aim at was the “donation” or leased use of empty public buildings to house the segregationist academies themselves. In *U.S. vs. State of Mississippi* (1974), argued in front of the Fifth Circuit U.S. Court of Appeals, the U.S. Department of Justice filed a complaint against the Smith Country, Mississippi Board of Supervisors who leased an unused public school facility to an educational association that then used the facility to house a private segregation academy by the name of Sylvarena Baptist Academy. Required to use a number of its public buildings for the benefit of public education, the Board of Supervisors for the Smith County School District negotiated a lease in 1968 with the Sylvarena Civic Center Association (SCCA) for twenty-five years, at a rental rate of five dollars a year. The SCCA initially intended to use the space as a meetinghouse for community activities and public events, but the summer of 1970 brought systematic desegregation to the Smith and neighboring Jasper County districts and created demand for private school facilities. In response, residents negotiated with the SCCA to use the public building as a site for a private religious academy which would serve as a segregated alternative to the integrating public schools. Material, labor, and furnishings were donated by white community members to revitalize and repair the building. The Sylvarena Baptist Academy was ready for the fall semester of 1970. It provided an educational institution created to avoid desegregation and could not have come to fruition without the full support of the white community and the benefit of a

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79 *U.S. v. Mississippi* 499 F.2d 425 (5th Cir. 1974)
leased state facility at the cost of five dollars per year. The Fifth Circuit Court determined that the states and schools districts under their purview “have an emphatic duty and responsibility to assure that their relationships or undertakings with private parties in no respect encourage, aid, facilitate, or result in the establishment or operation of private segregated schools.” This kind of preferential donation and/or leasing of state buildings was prohibited by the ruling of the Fifth Circuit Court.

One by one, the circuitous methods states used to channel funds and resources to private segregationist academies were being eliminated by the courts, just as it had been for similar efforts to preserve segregation in the public schools. There was substantial and significant support for continued segregation from white community members, however, that legal institutions could not control. Private religious academies were given generous private donations to get up and running. Community members like Rev. Don Grice of Louisville, Kentucky donated buildings for use by segregationist schools. Grice renovated and then donated his entire church building for use as a segregated school during the weekdays. Labor from community members was often donated to bring these buildings up to state code required for schools. Local members of the building trades would donate time and resources: the founder of a private religious school in Charlotte, North Carolina, who was himself an electrical contractor, wired the entire school and recruited other tradesmen in the community to donate their labor.

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80 U.S. v. Mississippi (5th Cir. 1974)

81 This decision was supported by the precedent of Wright v. City of Brighton, Alabama, (5th Circuit. 1971) and McNeal v. Tate County School District, (5th Cir. 1972) both of which dealt with the sale of former public school facilities to private discriminatory academies which was allowed as long as the sale price was appropriate, there was no leasing of the property involved, and that the sale did not interfere with the desegregation of the public school system. U.S. v. Mississippi (5th Cir. 1974)

82 U.S. v. Mississippi (5th Cir. 1974)
services as well. The worth of the buildings often became much more than what the schools paid for them because of these community efforts. The Ellison Baptist Academy in Memphis, Tennessee purchased their building for $350,000 dollars in the late 1960s. The building was subsequently appraised at $750,000 after all the pro bono work donated by the community to improving the property. Not all schools were financially solvent, however, and many struggled to stay open after revenue streams from the state were closed by the courts.

As the courts eliminated state money flowing to private academies, secular private schools that did not qualify for tax exemption suffered financially. The failure of secular private segregationist schools to thrive in the South might be linked to the whittling away of state funds and support which those schools relied on early in the segregationist private school movement. Religious academies, however, held the advantage of tax-exempt status that provided a financial buffer and often saved them from insolvency. This is not to say, however, that churches had no theological investment in the project of segregated education. Tax-exempt status was a benefit, but not a motivator for churches to open schools as havens of segregation for white families. The convergence of increasing restrictions on segregation work arounds and the removal of Protestant religious practice from public schools in the mid-1960s created an opportunity of theological junction where religious academies could put two long-held beliefs into practice together. Their status as religious institutions and

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83 Nevin and Bills, The Schools That Fear Built, 28-29

84 Nevin and Bills, The Schools That Fear Built, 30
educational institutions, however, made the religious segregationist academies a legally complicated entity.

The long history of the federal government providing tax-exemption to religious institutions began in the 1960s and 1970s to conflict with court decisions that reinforced the duty of the government to withdraw any form of support from discriminatory educational institutions. The issue arose that if tax-exemption could be considered a form of support, religious academies that discriminated would be next on the list for legal challenges to their tax status. Challenges to their right to tax exemption, however, would come up against religious free-exercise precedent that held contradictory messages about the potential success of a legal challenge.
CHAPTER 4
BATTLE OF THE RIGHT TO FREE EXERCISE


The case was brought by the Browns, an African American family that attempted to enroll their two children, Valerie and Jacquelin, in the Dade Christian Schools on July 25, 1973. When arriving at the school with her daughters, Mrs. Brown was handed a card that read: “Dade Christian Schools 6601 N.W. 167th Street Hialeah, Florida 33015. We are sorry... But the policy of the school is one of non-integration and we would request that you respect this policy. School Administration”

The school later claimed that this policy derived from theological precedent and that the decision to not admit black children was based in their religious beliefs that were protected by the First Amendment free-exercise clause.

The ambiguity, of course, lay in the card handed to the Browns that gave no official reason for the policy. Additionally, no literature was produced by the school that outlined the source and nature of the church’s belief in segregation. Therefore, it became the job of the courts to identify whether the claim to segregation via belief was a) legitimate and b) if it was indeed legitimate, was segregation of the races central to the belief system of the church. The majority decision by the Fifth Circuit Court

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2 “We do not hold that a belief must be permanently recorded in written form to be religious in nature. However, the absence of references to school segregation in written literature stating the church’s beliefs, distributed to members of the church and the public by leaders of the church and administrators of the school, is strong evidence that school segregation is not the exercise of religion. Five days prior to the filing of this suit, the minutes of the church disclosed the following: Dr. Janey explained to the congregation the decisions that had been made by the church in previous years in regard to integration. He also explained that he would follow the previous dictates of the church in this area unless instructed otherwise by the membership.” *Brown v. Dade Christian Schools Inc.* 556 F.2d 310, 321 (5th circuit, 1977, cert denied, 434 U.S. 1063 (1978), 312
ultimately made the determination that segregated education was a value the school pulled from current events and not from a longstanding and theologically based religious belief; "We agree with the trial judge that the indication that the contested belief would be subject to change upon the direction of the congregation comports with the social or political nature of the exclusionary policy."³

What is interesting, however, is the way the majority decision of the Fifth Circuit Court determined that the religious nature of the church’s racial discrimination was derived solely from the reaction to desegregation on a national scale. The lower courts found (and the Fifth Circuit confirmed) “that as social conditions changed and the issue arose, a policy was formulated by the school leaders. While a religious belief may be of recent vintage or formed instantaneously, the trial judge’s conclusion that school segregation was nothing more than a recent policy developed in response to the growing issue of segregation and integration was amply supported by the evidence.”⁴

Fifth Circuit Court judge, Justice Goldberg, strongly disagreed in his concurring opinion with the court’s determination that discriminatory admission was not a “true” religious belief of the congregation. Instead, he urged the court to take the discriminatory religious belief of the church seriously and take equally seriously the job of the court to find the dictates of the thirteenth amendment as precedential over the dictates of the free-exercise clauses (which he noted were written in the spirit of tolerance, not intolerance). Further, he argued that people, not institutions, have religious beliefs and that the courts’ job was to find the root of belief through the people


of the congregation, not the official party line of the church. “The problem, then, is to
determine the relevant religious beliefs of the students, their parents, the teachers, or
the church members.”\(^5\) Goldberg pointed to statements made during depositions from
members of the church and school officials, and argued that these statements offered
plenty of evidence to suggest that non-integration was a religiously held ideal. He
quoted several people such as Dr. Arthur E. Kreft, the school’s principal, John M.
Kalapp, Dade Christian’s original vice president, and Dr. Janney, the church pastor and
president of Dade Christian Schools, Inc, who all connect the possibility of integration
within their school as “endangering the practice of [their] religion.” Goldberg noted that,
“Religions can have abhorrent principles; most religious practices are benign,
benevolent and beneficent. But we should not judge a religion by its practices. One
era’s spiritual error is another’s heralded religion.”\(^6\)

In recognizing that Dade Christian Schools Inc, had a legitimate reason to defend
their free-exercise rights and that their racist beliefs were indeed religious, Goldberg
went on to lay out the reasons why the state had a compelling interest to deny their
free-exercise claims. It was not the validity of the claim, but rather the centrality of the
belief that undermined the Dade Christina School’s claims:

That religious practice was characterized by Mr. Kalapp as a “very minor”
part of the religion. Departure from the practice, although constituting
disobedience to God, would not endanger salvation. While these factors
do not sap the free exercise defense of vitality, they make clear that
overriding that defense will not endanger the church’s survival…\(^7\) Further,

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the Brown v. Board decision, has freed then church from culpability (in the eyes of God, who knows, but certainly in the eyes of parents whose children attend the school) of allowing desegregation. They must allow black students to enroll, in accordance with congressional mandate of § 1981, but they can continue to believe and teach the necessity of segregation regardless of the composition of their student body.\textsuperscript{8}

Goldberg’s concurrence is a window into the complex legal landscape that informed First Amendment free-exercise jurisprudence as it applied to religious segregationist academies trying to defend their tax-exempt status through the government. These schools faced tests of religious definition, centrality, and the challenge of compelling state interest, but perhaps most importantly, they faced the question of whether their beliefs made them religious insiders or outsiders in the civic landscape of the United States.

The Brown v. Dade Christian Schools (1977) case faced a long strained and contradictory free-exercise history; one that would also face the Goldsboro Christian Schools, Bob Jones University, and the myriad other private religious academies that attempted to circumvent the mandates of Brown v. Board of Education (1954) through arguments for the protection of their religious beliefs in racial separation. Foremost the schools faced the oldest and most often invoked challenge to religious free-exercise: supremacy of state interest. Case precedent on state interest, however, was not absolute and these schools entered litigation with the expectation that their religious beliefs would be recognized as worthy of protection under the First Amendment.

\textsuperscript{8} The sole basis of Dade Christian’s claim is therefore the “very minor” religious practice of preserving racial segregation in activities that constitute “socialization.” If such activities extended to eating in restaurants, shopping in stores, or watching the Miami Dolphins, I suppose no one would contend the religious scruples would justify segregation of the activities. The government’s interest in enforcing its policy of racial equality in such areas is clearly sufficient to override any free exercise defense. 322 But that belief occupies a minor position in its adherents’ religion and is based largely on the prospect of interracial marriage, a prospect that no government proposes to require. Brown v. Dade Christian Schools Inc. 556 F.2d 310, 321 (5th circuit, 1977, cert denied, 434 U.S. 1063 (1978), 322
The discriminatory private schools, however, faced courts concerned about too liberal applications of free-exercise accommodation. As inclusion and recognition of the free-exercise rights of more diverse religious traditions found their way into legal precedent, the courts simultaneously worked to find ways to place boundaries around legitimate religious practice as recognized by the state. They created legal “tests” to set these boundaries by asking whether 1) the belief in question could be considered religious, 2) if the belief could be considered “central” to the religion, and 3) if state intervention would be a direct burden on religious practice. The religious action in question would need to pass these tests in order to prevail over state interest. The subjective and contested nature of these questions, however, led to inconsistent decisions ahead of the Dade and Goldsboro cases.

Less obvious, however, was the effect that insider and/or outsider status of the groups making free-exercise claims had on the results of the case law. This status often played a definitive role in determining which groups would pass the tests of “belief,” “centrality,” and “undue burden.” Whether the religious group in question retained subtle alignments with perceived American norms and values informed how defendants’ claims were perceived under law. For Dade Christian Schools and academies like them, all these issues were under scrutiny. As mentioned above, even the concurrency within the Dade case disagreed as to whether the Christian schools passed the “belief” test, although both “centrality” and “undue burden” were roundly rejected. In the end, this allowed the state interest in the desegregation of education, codified in the Brown v. Board of Education (1954) decision, to prevail, marking segregated education as outside the prevailing understanding of the United States system of values and norms.
Dade County Christian Schools, Inc., and school systems like them, claimed their right to educational discrimination based on how they understood and interpreted free-exercise law. But free-exercise precedent was a complex and inconsistent beast. On the one hand, these schools held certain markers of insider religious status that had worked in favor of defendants who had won past free-exercise judgements, but they also had a difficult time passing the three tests of legitimacy set forth by the court. Perhaps most importantly, however, they were losing on the issue that had been so successful in winning the “insiders” their free-exercise cases; being seen as inhabiting the core values of the United States which, at this time, were seen to include—at least rhetorically—racial equality. Chapter 4 outlines the legal precedent within free-exercise jurisprudence that effected litigation brought by religious segregationist academies and the limitations confronting their constitutional claims.

The Supremacy of State Interest

Segregationist academies and their affiliated religious groups were far from the first to argue in a court of law that their right to practice the tenants of religion freely was being violated by the U.S. government. Free religious practice had always been a sticky issue in the courts. What kind of religious expression should be accommodated, in what way, and to what extent, were (and are) constantly in flux as new legal challenges arose and new justices were instated on the bench to decide on answers. Particularly contentious within free-exercise cases was the acceptability of exemption for religious practices from generally applicable laws. Legal exemption for religious bodies and individuals when in violation of a national or regional law is a formidable issue continually under investigation and revision within the court system. The most famous
parent case addressing this issue at the federal level was *Reynolds v. United States*, (1878) which tackled the issue of Mormon polygamy and its legal status in the United States. *Reynolds* was a key precedential case weighing claims of religious liberty concerning the right to exercise the Mormon tradition of plural marriage and the direct conflict such practice encountered with the moral/legal landscape of the United States government.  

Based on a revelation of founder Joseph Smith thirteen years after the birth of the movement, polygamy entered into the theological rubric of the Mormon Church in 1843. Based in the biblical precedent of Abraham's three “marriages” to wives, Sarah, Hagar, and Keturah, the revelation made plural marriage the duty of leaders in the Mormon community. Not for the neophyte, plural marriage was considered appropriate only for those with dedication, the ability to sacrifice for the faith, and an exalted place in the latter days. Plural marriage was a reflection of the divinely created “celestial marriage” that one would encounter when progressing through the stages of heaven into eventual godhood. If one were truly on the path to being a Saint within the Mormon cosmology, then plural marriage was a necessary step along the way. As the practice of polygamy came steadily under attack both socially and legally in the second half of the nineteenth century, Mormon groups became more sophisticated at articulating

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9 *Reynolds v. United States*, 98 U.S. 145 (1878)

10 Genesis 16:1-3, Genesis 25:1


counter arguments in defense of the practice. Most fundamental, perhaps, was their claim that God’s law took precedent over the laws of man. Even while making this claim, however, the community grappled with current constitutional law and used complex constitutional claims to defend their free-exercise rights. Mormons declared polygamy a central tenant of their faith and claimed the constitutional protections of the First Amendment’s religion clauses. Simultaneously, they advanced a legal argument tied to popular sovereignty, which highlighted their rights under the American system of Federalism.\textsuperscript{13}

In building a defense in the Reynolds case, the attorney for the Mormon Church, George Washington Biddle, relied on the issue of popular sovereignty to defend the rights of the Mormon Community in Utah. He claimed that the government would be overstepping its bounds through regulation of polygamy. Though it was government’s right to regulate territories on issues of “General Government,” popular sovereignty dictated “leaving necessarily the enactment of all laws relating to the social and domestic life of its inhabitants, as well as its internal police, to the people dwelling in the Territory.”\textsuperscript{14} Despite Utah’s status as a territory, therefore, its Mormon citizens could not be treated as a colonized population who received rules and governance from on high, but instead must be considered sovereign citizens able to govern their own community as they saw fit.\textsuperscript{15} This was more than just a technical legal issue for the Mormon community. Their cosmology tied itself closely to the American experiment. They viewed

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\textsuperscript{13} Gordon, \textit{The Mormon Question}, 89
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\textsuperscript{14} Brief of the Plaintiff in Error, \textit{Reynolds v. United States}, 98 U.S. 145, (1879) 55. Quoted in Gordon, \textit{The Mormon Question}, 123
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\textsuperscript{15} There is precedent for this line of argumentation in the constitutional provisions behind the Missouri-Compromise and the Dred Scott decision.
\end{flushright}
the United States as an ideological precursor to the ultimate heavenly kingdom.

According to Orson Pratt, a highly influential Mormon theologian, “the sovereignty of the people was related directly to the people’s acceptance of the sovereignty of God, and of the council of God’s representatives in the restoration...The participation of the people...constituted ‘a sanction, a strength and support to that which God chooses.’”

The right to exercise their religious tenets freely, therefore, was fundamental to Mormon understanding of their constitutional rights as United States citizens. The Mormon community embraced their national identity as Americans because they saw the U.S. Constitution as designed by God to fulfill the first step toward His plan of the perfect government to be instituted in the millennial age; a theocracy.

Despite the sovereignty-based argument made by Biddle in his brief, Chief Justice Waite, in his majority opinion, instead viewed the case as raising a question of knowing violation of law in the service of religious belief. In his opinion, he concluded that the Mormon community understood “God’s constitution” as a protective document of their right to practice polygamy. Using Thomas Jefferson’s “Letter to the Danbury Baptists” (among other writings by Jefferson), Waite determined that “religious freedom meant that Congress was prohibited from legislating on questions of ‘mere opinion’ but was free to address overt actions if they violated “social duties” or were “subversive of good order.” This doctrine known as ‘belief-action distinction,” allowed Waite to determine that Mormons were perfectly free to believe in plural marriage, but could validly be punished for committing acts of polygamy.”

16 Gordon, The Mormon Question, 93

17 Gordon, The Mormon Question, 133 The passage relied on for the decision was Jefferson’s description of the First Amendment in the Danbury Baptists letter which stated: “Believing with you that religion is a
This decision was a major blow to the Mormon community, which believed that their persecution on religious grounds would be handily overturned by a Court who they trusted understood that a central tenant of the faith, like polygamy, was well within their rights of free exercise. The understanding of this right was based not only in their interpretation of constitutional law, but also reflected a more general national belief that religious practice was a private undertaking that the government did not have jurisdiction over. What Mormons failed to take into account, however, was the close tie the Court continued to recognize between common law and biblical meaning of marriage.\textsuperscript{18} Mormons understood the Constitution as “itself protect[ing] religious liberty and must include protection of all Christian doctrines—especially polygamy…the Constitution contained a mandate for polygamy. Laws prohibiting plural marriage were evidence of corruption in constitutional interpretation and enforcement.”\textsuperscript{19} Not only did more traditional forms of divine law that made plural marriage a sin bleed into the common law parameters around appropriate marriage forms, but the states’ vested interest in the protection of marriage was being established at this time. Legal arguments that framed marriage as a private contract between two people were failing in court (mostly due to challenges to interracial marriage law), which gave rise to a recognition of marriage as “a relationship of public significance and under the state’s

\textsuperscript{18} Gordon, \textit{The Mormon Question}, 68

\textsuperscript{19} Gordon, \textit{The Mormon Question}, 91
“Reynolds” set the precedent for supremacy of state interest as a key concern in free-exercise adjudication. In order to determine in what circumstances state interest could trump religious practice, however, the courts still had to grapple with how to define what constituted “genuine” and “essential” religious tenets and what did not.

The Court Defines Religion

The Court engaged in several iterations of defining religion that has contributed to the precedent consequential to the free-exercise adjudications for religious discriminatory academies, starting with a strictly theistic view of religion in *Davis v. Beason* (1890). Subsequently, the limited scope of what constituted a religion articulated in *Davis* was challenged by *United States v. Ballard* (1944). In *Ballard*, the Court ruled that “unusual” religious belief was eligible for and worthy of constitutional protection. The broadening of what religion could be (in a legal sense) in the wake of *Ballard*, resulted in an effort to rein in the definition of religion so as not to oblitera completely. This led the courts to ask questions in individual cases about whether the relevant belief under consideration was in fact “religious.” The courts further narrowed their boundaries by asking questions about whether the belief could be considered “central” to the religious faith. If the religion would excuse non-compliance of the matter

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under consideration, then the courts determined the practice was not central and found that no direct or indirect infringement on religious practice occurred. All of these legal questions served to more narrowly define which were acceptable and which were “outsider” religious practices in the newly acknowledged environment of religious pluralism in the U.S. Each of the defendants in these cases had their own understanding socially, legally, and constitutionally of the protections they were afforded in their religious belief and practice. More often than not, their constitutional interpretation came into conflict with how the court interpreted their status as religious actors and the protections the Constitution afforded them.

The Supreme Court’s first foray into the creation of parameters around what constituted religion came at the end of the nineteenth century. The Court in *Davis v. Beason* (1890) operated under a very traditional view of what constituted religious practice. Concerned with the issue of polygamy in the territories, *Davis v. Beason* addressed the actions of Samuel D. Davis, a devotee of the Mormon Church, who, voting in the 1888 election in the Idaho Territory, signed a required oath confirming that he was neither a polygamist nor a member of any organization that promoted polygamy. He was later discovered to be a member of the Mormon Church and was


25 § 501 of the Revised Statutes of Idaho Territory: “any person who is a bigamist or polygamist or who teaches, advises, counsels, or encourages any person or persons to become bigamists or polygamists, or to commit any other crime defined by law, or to enter into what is known as plural or celestial marriage, or
indicted in April of the following year for falsely swearing the oath. After he was convicted, Davis appealed on grounds that the requirement of such an oath violated his free exercise rights under the First Amendment. The Supreme Court ultimately upheld the conviction, citing *Reynolds*, and strongly emphasized the issue of state interest. In his decision, Justice Field noted,

> “Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.”

Justice Field's decision contained an argument that defined two issues concerning religion and the law: what constitutes religion generally, and what religious actions are outside the parameters of constitutional protection. His analysis makes several references to “outsider” religious practices. Human sacrifices, though not necessarily an issue coming before the U.S. Supreme Court at the time, was not an entirely foreign concept to the cultural memory of Americas. Aztec culture was famous for its human sacrifice, but perhaps closer to home, Native American groups such as

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who is a member of any order, organization or association which teaches, advises, counsels, or encourages its members or devotees or any other persons to commit the crime of bigamy or polygamy, or any other crime defined by law, either as a rite or ceremony of such order, organization, or association or otherwise, is permitted to vote at any election, or to hold any position or office of honor, trust, or profit within this Territory.” *Davis v. Beason*, 133 U.S. 347, (1890)

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the Iroquois practiced rites of human sacrifice after warfare. Field also referenced the Hindu practice of Sati in his discussion of Mormon polygamy. What is interesting about these references to what the court considered unlawful, unprotected religious actions is that (excepting the Mormon polygamy) they represent non-Abrahamic, polytheistic, and what would then be considered "primitive" religious forms. Field implied that the "Christian world in modern times" had moved beyond such allowance under the watchful eye of government regulation and protection. Additionally, Field's decision defined religion for the Court stating, "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter."

The parameters Fields set around religion were not overly detailed, but clearly reflected the ideas of monotheism in general and Christianity in particular (as is evidenced by his use of the term "Christian world"). Viewed from that perspective, the Church of Jesus Christ of Latter Day Saints enjoyed some markers of insider status as

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28 "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man." *Davis v. Beason* (1890), 343

30 "And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretence that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance." *Ibid*

31 *Davis v. Beason*, 133 U.S. 347 (1890), 342
a monotheistic, Abrahamic and non-"primitive" religion. But Field's opinion makes it clear that the Court did not believe the Mormons were in line with the prevailing religious norms and values of the time. Polygamy was sufficiently deviant that it warranted outlawing the practice. Further, Field indicated that in his estimation polygamy was a practice that did appear to be based in religious belief at all. As Field put it, calling the practice of polygamy religious, "offends the common sense of mankind." The definition of religion outlined in *Davis* was informed by several state decisions made in the mid-nineteenth century that grappled directly with the definition of religion and which—with some notable exceptions—identified religion as something more or less in line with conventional Christianity. *Davis* presented a quite narrow view of protected forms of religion and an even narrower concept (in line with the precedent of *Reynolds*) of what

32 Ibid

33 South Carolina and Virginia Courts both attempted to define religion in 1848 and 1846 respectively. South Carolina "relied upon a definition of religion provided by former NJ governor and founding father William Livingston. The court interpreted religion as "an habitual reverence for, and devotedness to the Diety, with such external homage, public or private, as the worshipper believes most acceptable to him...this abolition of disabilities on the basis of religion extended to the 'Christian, Isrealite, Mahometan, Pagan, and Infidel, [for] all stand alike, in the Government and people of South Carolina." Similarly in Virginia, "The Court described religion as 'the duty which we owe to our Creator, and the manner of discharging it. By safeguarding religious liberty, the court indicated that the Virginia Constitution declared "to the Christian and the Mahometan, the Jew and the Gentile, the Epicurean and the Platonist, (if any such there be amongst us,) that...all are equally objects of its protection; securing safety to the people, safety to the government, safety to religion." Jeffery Omar Usman, "Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study Including Theology, Psychology, Sociology, The Arts, and Anthropology" *North Dakota Law Review* vol. 83, 123 (2007):166.

34 Though states were not subject to the regulation of the First Amendment at this time, state decisions were of interest to the Supreme Court and provide insight into local, and regional definitions of what constituted a religion and a religious practice. "Thus, the constitution of New York of 1777 provided as follows: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: Provided, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." Article xxxviii, 2 Charters and Constitutions, 1338. The same declaration is repeated in the constitution of 1821 (Article vii, Section 3, Id. 1347) and in that of 1846, (Article I, Section 3, Id. 1351,) except that for the words "hereby granted," the words "hereby secured" are substituted. The constitutions of California, Colorado, Connecticut, Florida, Georgia, Illinois, Maryland, Minnesota, Mississippi, Missouri, Nevada and South Carolina contain a similar declaration." *Davis v. Beason*, 133 U.S. 347 (1890), 348
religions *actions* might be protected by the Court. This approach, which allowed the Court pick and choose which religious practices were legitimate and/or central to a belief system remained a persistent feature of free-amendment case law.

There were few federal First Amendment free-exercise cases to speak of for fifty years after *Ballard*. This gap in case law can be attributed to the lack of federal jurisdiction for most free-exercise cases. The scope of the Supreme Court’s jurisdiction changed in 1940 when *Cantwell v. Connecticut* (1940) allowed federal litigation against states in religious clause claims for the first time.\(^35\) With broader jurisdiction, the Supreme Court had more opportunity to hear free-exercise cases and develop a more robust precedent for free-exercise law. As a result, narrow definitions by the Court about what constituted religion began to change in the twentieth century. In 1944, in *United States v. Ballard* (1944) the Court ruled that “unusual” religious belief was eligible for and worthy of protection by the Constitution.\(^36\)

*United States v. Ballard* (1944) provided an important case precedent for free-exercise cases that claimed the protection of unconventional religious beliefs. Challenging precedent in *Davis, Ballard* raised questions about whether an established definition of religion within the courts would function to violate religious freedom in that it would dictate to religions past, present, and future what they must look and act like in order to receive constitutional protection. *Ballard* was a fraud case involving the I AM Movement founded in the early 1930s.\(^37\) Begun by Guy Ballard and his wife Edna, the

\(^{35}\) *Cantwell v. Connecticut*, 310 U.S. 296 (1940)

\(^{36}\) *Torcaso v. Watkins*, 367 U.S. (1961), acknowledged that belief systems could be non-theistic and still considered religion

\(^{37}\) Also known as the Ascended Master Teachings religious movement, the I AM Movement was a descendent of Theosophy. The movement’s name was a nod to Exodus 3:14 when Moses asked God to
movement “blend[ed] Ascended Master teachings with a high level of patriotic fervor, Ballard’s movement expressed a belief in America’s “cosmic destiny,” an idea synthesizing elements of Theosophy and American Nationalism.” Ballard, who claimed to be in contact with the spirit of St. Germain, preached that St. Germain had declared the U.S. as the chosen place in which to “begin the development of a new civilization to serve as the model for the entire human race.” The I AM philosophy relied heavily on a discourse of American exceptionalism that theologized a special relationship between the Ascended Masters and the U.S. and the nation’s key role in the divine plan of God. The movement was brought up on fraud charges by the federal government in the 1940s for using the federal mail system to send misinformation and misrepresentations of the group’s intentions via recruitment and solicitation pamphlets. The justices in this case engaged in a debate over how the Court should approach determinations on the legitimacy of religious belief. Using lower courts criteria to make a determination on what constituted religious fraud, Justice Douglas writing for the majority, came to a

reveal his name to which He replied “I Am the I Am” (according to most English Bible translations most notably the King James Version). Based in Madame Blavatsky’s Theosophist beliefs, the I AM Movement theology was based in a belief of a hierarchy of supernatural beings who have lived multiple lives through reincarnation, have over time become advanced souls, and have ultimately reached “Ascension” to become immortal. Bradley C. Whitsel, *The Church Universal and Triumphant: Elizabeth Clare Prophet's Apocalyptic Movement*, (Syracuse University Press, 2003): 23-26.

38 Whitsel, *The Church Universal and Triumphant*, 23
39 Ibid
40 At the time of making all of the afore-alleged representations by the defendants, and each of them, the defendants, and each of them, well knew that all of said aforementioned representations were false and untrue and were made with the intention on the part of the defendants, and each of them, to cheat, wrong, and defraud persons intended to be defrauded, and to obtain from persons intended to be defrauded by the defendants, money, property, and other things of value and to convert the same to the use and the benefit of the defendants, and each of them; *United States v. Ballard*, 322 U.S. 78 (1944), 80
decision that implemented what has been called “religious reservation.” Douglas argued that the First Amendment commands the exclusion of evidence as to the truth or falsity of religious claims, therefore the examination of religious truth is forbidden by the Constitution. Religion, according to the decision in Ballard, could not be categorized as simply true or false. Douglas pointed out that despite the truth or falsity of the leaders of a religious movement, the belief of the followers of charlatans could be genuine belief. Because the First Amendment prevented the courts from establishing religious standards to evaluate religions or the degree of belief involved, traditional standards of fraud did not apply in such cases,

All schools of religious thought make enormous assumptions, generally on the basis of revelations authenticated by some sign or miracle. The appeal in such matters is to a very different plane of credulity than is invoked by representations of secular fact in commerce… The wrong of these things, as I see it, is not in the money the victims part with half so much as in the mental and spiritual poison they get. But that is precisely the thing the Constitution put beyond the reach of the prosecutor, for the price of freedom of religion or of speech or of the press is that we must put up with, and even pay for, a good deal of rubbish. Prosecutions of this character easily could degenerate into religious persecution … I would dismiss the indictment and have done with this business of judicially examining other people’s faiths.

This decision opened up the narrow definitions of religion that constituted Court precedent since the Davis and Reynolds decisions. Like the Church of Jesus Christ of Latter Day Saints, the I Am Movement was considered peripherally Christian because of

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41 Weiss, “Privilege, Posture, and Protection,” 598. Weiss notes that Douglas’ decision rejected what he calls the “deceitful defendant position” which argues that the group lied about their belief to obtain money—which he noted engaged in measuring belief, and the “clearly culpable” position which argued that religion cannot block the ability to investigate “factual fraud.” Factual fraud argues that if events claimed to have occurred by the religious representative can be proven false (such as claims to meeting with St. Germain at a certain time and place, when it can be proven the defendant was elsewhere), then those representatives can be judged false and religious fraud can be ruled to have occurred.

42 Weiss, Privilege, Posture, and Protection, 599

its inclusion of Jesus in the pantheon of Ascended Masters. Despite this connection to Christianity, however, Ballard presented a tradition peripheral enough that the ruling did give non-traditional and divergent religious groups protected status under the First Amendment.44

Ballard also explored the issue of sincerity of belief, an issue that would be invoked again and again in cases that dealt with outsider religious groups that made legal challenges for their right to free-exercise. Finding a practice sufficiently classifiable as “religious” did not always remove the question as to whether those professing the belief held those ideologies sincerely. These inquiries can be seen in many free-exercise cases, including Sostre v. McGinnis (1973) discussed in the next section, and again in discriminatory religious academy cases where the law often approached the religious belief in segregation suspiciously and instead aligned it with reactionary behavior to current events, as did in the majority decision in the Dade case.

Ballard expanded “belief” beyond the theistic definition set up by Davis, but what did these expanding protections mean for defining religion and the limitations of its protection? Some justices saw this expansion of the category “religion” as too broad,

44 The court went further by protecting non-theistic religion, twenty years later with the Torcaso v. Watkins decision. Torcaso v. Watkins dealt with the refusal of the defendant, Roy Torasco, to sign an oath of office after he was appointed as a notary public by the Governor of the State of Maryland. The oath Torasco was required to sign included the statement; “I, Roy R. Torasco, do declare that I believe in the existence of God,” beneath which was a line requiring his signature. Torasco, an atheist, brought suit under the First and Fourteenth Amendments arguing that forcing a declaration of faith violated his constitutional rights. The Supreme Court found in his favor, with Justices Black—whose decision in Everson v. Board of Education introduced the constitutionality of the separation of church and state—stating: “We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person “to profess a belief or disbelief in any religion.” Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers,[10] and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs… This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him.” Torcaso v. Watkins, Clerk, 162 A. 2d 438 (Md: Court of Appeals 1960), 53
and in need of some kind of parameters. Ballard decided that beliefs could not be
defined as true or false by the court, but without some kind of restriction around
protected religious practice any number of philosophical ideologies could claim religious
status. The court attempted to compensate for these broad definitions in the second half
of the twentieth century by introducing questions used to determine criteria of free
exercise exemption. Questions about whether the relevant belief under consideration
was in fact “religious,” as well as questions about whether the belief could be
considered “central” to the religious faith were efforts by the Court to determine if there
existed direct or indirect burden on religious practice. If the religion would excuse non-
compliance in the circumstances under consideration then state interest would likely
prevail.

By considering the results of the Black Muslim prisoner cases of the 1960s,
which I highlight in the next section, the courts’ ability to determine “sincerity” of belief
was often influenced by the social status of the group claiming rights. Cases like In re
Ferguson (1961), Pierce v. LaVallee (2d Cir. 1961), and Sostre v. McGinnis (1964)
provided legal discussions on the questions of centrality and sincerity in religious belief
that the courts struggled with in light of the racial and legal status of the incarcerated
Black Muslims petitioning for their right to practice their religion in prison. Centrality as a
legal precedent was eventually codified by Frank v. Alaska (1979), but the discussion
around centrality and sincerity can be seen in negotiation throughout many “outsider”
free-exercise adjudication. Likewise these issues arise in successfully fought free-
exercise cases I discuss in the next section like Sherbert v. Verner (1963) and

45 Frank v. Alaska, 604 P.2d 1068 (1979)
Wisconsin v. Yoder (1971), though for these successful cases, the question of the state overburdening religious practice was the focus of adjudication.\textsuperscript{46}

**Insiders and Outsiders in Pursuit of Free-Exercise**

The above technicalities concerning the definition of religion were key issues of legal precedent, but did little to confront the issue of insider/outsider status in operation in free-exercise case law. By the 1960s, Protestantism, Catholicism, and Judaism had reached the status of insider religion once held by Protestantism alone. One of the seminal works that promoted the cultural coherence and moral import of a Judeo-Christian based religiosity of the United States was the essay *Protestant, Catholic, Jew* by Will Herberg. Herberg wrote about the “triple melting pot” of the American religious landscape that encompassed Protestantism, Catholicism and Judaism as traditions which dovetail with the “American Way of Life.” According to Herberg, “The three great religious communities—Protestant, Catholic, and Jewish—constitute the three basic subdivisions of the American people in the American society that is emerging today. The three great religious communions—Protestantism, Catholicism, and Judaism—constitute the three great American religions, the religions of democracy.”\textsuperscript{47} The creation of a “Judeo-Christian” foundation for the nation had a profound influence on the way Americans viewed their religious heritage and impacted both legal and social arenas. Protestants, Catholics, and Jews were categorized by Herberg as groups that held insider status and upheld and adhered to “the American way of Life.” Perhaps expectedly, religious groups operating outside of these traditions faced a greater


challenge in getting successful claims to their right to free-exercise. But religion was not the only dynamic operating in the outsider religion cases, race often played a role as well. Ian Hanley-Lopez, in his book *White By Law*, highlights how law can hide racial biases under neutral language. Though certainly not always conscious, judges, legislators, juries, and executors of law are victims of their own internalized racism.\footnote{Ibid} The 1960s Black Muslim and prisoner rights cases of the 1960s, *Sherbert v. Verner* in 1963,\footnote{*Sherbert v. Verner*, one of the most influential free-exercise cases, resulted in the “Sherbert test” which the courts subsequently used to determine violation of free exercise. The test assesses four criteria of free-exercise violation in two stages. First, the court must determine a) whether the person has a claim involving a sincere religious belief, and b) whether the government action is a substantial burden on the person’s ability to act on that belief. Second, the government must prove that, a) it is acting in furtherance of a “compelling state interest”; and b) it has pursued that interest in the manner least restrictive, or least burdensome, to religion. That this test was a result of an “insider” free-exercise case comes as no surprise. As free-exercise adjudication increasingly framed “official” adjudicatory tests, implicit categorizations were operating in assessing the validity of free-exercise claims: insider/outsider status of claimants and the claimants’ alignment with American norms and values. As religiously discriminatory schools worked their way through lower courts these norms were influencing precedential free-exercise jurisprudence. *Sherbert v. Verner*, 374 U.S. 398 (1963)} and the *Wisconsin v. Yoder* case of 1971 provide stark examples of how the insider/outsider status could work for or against a group that sought affirmative free-exercise adjudication depending on their religious and racial status—identities that often could not be easily separated.

The fight for legal protection of free-exercise by members of the Nation of Islam in prison provides an instructive example of an outsider group fighting for legal recognition of their status as a religion. Incarcerated Black Muslims claimed that their right to free-exercise had been unduly burdened by the state. Doubts about the validity of the group’s theological beliefs and religious practices, however, were of central importance to the decisions made by lower courts. Self-identified outsiders, the Nation of Islam was based in the fundamental rejection of the political and racial system in the
United States. The Nation promoted the idea that African Americans must reject the social structures and governmental bodies of the United States and sometimes went further to assert that blacks should emigrate back to Africa in order to achieve true liberation. The fight to win the right of free-exercise for prisoners who were members of the Nation of Islam directly confronted the court’s insider/outsider approach to religion.

As Christopher E. Smith points out in his article “Black Muslims and the Development of Prisoners’ Rights,” legal action by Black Muslim inmates required some measure of cognitive dissonance because “litigation requires careful, calculated strategies according to specific rules designed by the government itself. By initiating litigation, Muslim prisoners consciously participated in governmental processes that their professed philosophical doctrines regarded as illegitimate.” Because of their incarcerated status, however, these members of the Nation of Islam were subject to these institutions and their hierarchies. Legal remedies were the only practical way to alter their situation.

These cases began to reach the courts in the early 1960s, spearheaded by the California case of In re Ferguson (Cal. 1961). In re Ferguson was brought by Jesse L. Ferguson and nine other members of the Nation of Islam incarcerated in Folsom State Prison. The nine inmates asked for the restrictions placed by the prison on their religious practices to be removed and asked for the right to speak with attorneys about “illegal restraints” perpetrated by prison officials. Ferguson had tried several times to communicate with a lawyer about violations of Muslim inmates’ rights, but each time his


51 In re Ferguson, 55 Cal.2d 663 (1961)
letters were confiscated. Ferguson was subsequently punished for “abuse of the mail privilege.”

Another petitioner in the case, Haynes, made four attempts to purchase a Qur’an and was told the book was not approved by the warden for use. Muslim religious literature already in the possession of Nation of Islam inmates was reportedly confiscated and destroyed by prison officials. Officials admitted that these restrictions were only enforced against Muslim inmates. Official policy informed this discrimination.

According to the California Supreme Court opinion,

The general policy of the Department of Corrections is to encourage religious activities by inmates. Some time prior to February 1958, the Director of Corrections considered the question of whether the Muslims should be classified as a religious group. It was determined that they were not entitled to be accorded the privileges of a religious group or sect at that time. Such is the present policy of the Department of Corrections toward Muslims, and this policy was approved by the State Advisory Committee on Institutional Religion in January 1961. Other religious groups are allowed to pursue religious activities, but the Muslims are not allowed to engage in their claimed religious practices.

Because the policy within the prisons had already denied them status as a religious group, incarcerated devotees to the Nation were forced to “seek judicial assistance to have any practical hope of obtaining a remedy.”

Adherence to the Nation of Islam had more than just religious significance for its members, but was intrinsically connected to racial pride and advancement. As quoted in the decision, adherents

“…believe in the solidarity and supremacy of the dark-skinned races, and that integration of white and dark races is impossible since contrary to the laws of God and nature. They appear to be strongly convinced of the truth of their form of what they characterize as a religious belief and in its superiority over other religions. Concerning their relationship to the prison officials, petitioners state that "It is a maxim Dogma and order of our God

52 Ibid

53 Ibid

54 Smith, Black Muslims, 135
that we kneel to no one except him. Because we as a religious group do not kneel before some one [who] does not believe in our God."  

For that reason, the racialized nature of their religious practice had a profound influence on the court’s interpretation of the limits of their religious free exercise. The petitioners argued in California Supreme Court that their rights under the Fourteenth Amendment were being violated and also pointed to the rights guaranteed by the California Constitution for the “free exercise and enjoyment of religious profession and worship, without discrimination or preference” being infringed upon. The members of the Nation of Islam at Folsom Prison alleged,

that they are not allowed a place to worship, that their religious meetings are broken up, often by force, that they are not allowed to discuss their religious doctrines, that they are not allowed to possess an adequate amount of their religious literature, and that their religious leaders are not allowed to visit them in prison. They allege that Protestant, Catholic, Jewish and Christian Scientist groups are allowed the above-enumerated privileges. Petitioners seek to be permitted religious privileges equal to those allowed to the other prison religious groups, or that religious privileges be denied to all prison religious groups of whatever faith, or, that they be discharged from prison so they may pursue the beliefs and practices of their Muslim faith.

The prison officials did not deny these claims, in fact, they claimed that such discriminatory practices were necessary to ensure the “health, safety, welfare and morals of the prison.” The prisoners, they claimed, used their commitment to black supremacy to defy the hierarchical authority of guard and prisoner by rejecting the control of any member of the white race. This philosophy led to such disruptive practices as “displaying verbally and physically their hostility to the prison staff,

55 In re Ferguson, 55 Cal.2d 663 (1961) (1961)
56 Article I, section 4, of the California Constitution [55 Cal.2d 670]
57 In re Ferguson, 55 Cal.2d 663 (1961) (1961)
interfering in the disciplinary proceedings of other inmates and the alleged doctrines advocated, present a problem in prison discipline and management."

The legal challenge brought by Black Muslim prisoners faced more than just the obstacle of religious discrimination; they also faced a confrontation with the traditional relationship between courts and prison officials. Courts had traditionally deferred to correctional administrators in their assessments and methodology when it came to control of prisoners and prison populations. Black Muslims not only fought for the right of an “outsider” religious group to practice their tenants of faith freely, but also challenged the traditional relationship between prisons officials and court control. Ultimately, the California State Court ruled in favor of the prison restrictions in order to prevent what they understood as a threat to the order, security, and safety of the prison. Other courts followed suit. The results of In re Ferguson (1961) did little more than reinforce the traditional relationship between courts and prisons, but was legally significant in that Black Muslims set precedent for claims to the right to free-exercise protections while incarcerated. More legal challenges by Black Muslims followed.

The following year, a case brought in a New York District Court, Pierce v. LaVallee (1962) resulted in a similar opinion. Just as in Ferguson, the complainant in Pierce claimed that his constitutional rights were being violated because “(1)…he had been denied permission to purchase the Koran; (2)…he was subjected to solitary

58 Ibid

59 "[E]xcept in extreme cases, the courts will not interfere with the conduct of a prison, with the enforcement of its rules and regulations, or its discipline," Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963) (citing many supporting cases).[3] A prisoner has only such rights as can be exercised without impairing the requirements of prison discipline. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948). For more on this see: Erik O. Wright, The Politics of Punishment: A Critical Analysis of Prisons in America. (New York: Harper & Row, 1973), Chapter 14.
confinement, or other punishment, because of his religious beliefs; and (3) he was denied permission to establish contact with a spiritual adviser on the ground that such person was not on the approved correspondence list. The judge on the case determined that Black Muslims fostered in their religious group secretive plans to disrupt the order between guards and prisoners and therefore posed a threat to the health and safety of those in the prison. The *Pierce* decision could be considered somewhat of a victory for Black Muslims, however, in that the U.S. District Court for the Northern District of New York acknowledged that the Nation of Islam was recognized as a religion eligible for constitutional protection.

This change in status did little to win them rights in subsequent suits, but it did give members of the Nation of Islam a legal classification as a religion that required the legal system to engage in some problematic maneuvers to get around finding for Black Muslims in free-exercise complaints within the prison system. For example, the prosecution in *Sostre v. McGinnis* (1964) framed Black Muslims as fundamentally dangerous, a perception accepted by the Second Circuit Court of Appeals that once again supported the precedent of deference to correctional facility authorities in their assessment and treatment of “threatening” groups. The *Sostre* decision used very telling language. The issues of centrality and sincerity were being implicitly negotiated in the case. The case centered around the challenge to restrictions on free-exercise by a Black Muslim group in the New York Attica State Prison. The decision acknowledged

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60 *Pierce v. LaVallee*, 293 F.2d 233 (2d Cir. 1961), *Sostre v. McGinnis*, 334 F. 2d 906 (1964)


62 Again, inmates claimed violation of religious rights in “have[n] been denied certain rights with respect to the practice of their religion, including the right "to attend together congregational worship," the right to communicate with ministers of their faith and to have such ministers visit the prison and the right to have
the Nation of Islam as a religion, as all other cases did, but made a distinction between particular actions and beliefs of the group. Like the Mormons before them in Reynolds, some ideas and practices were considered religious by the courts, some not.\textsuperscript{63} The authoritative work at the time, Charles Eric Lincoln’s \textit{The Black Muslims in America}, published in 1961, identified approximately 100,000 members of the religious group in the United States, practicing in 69 temples or missions in 27 states. The court accepted Nation of Islam as a religion, though often labeled it a “religious sect” to distinguish its status from the “more legitimate” religious tradition from which it derived.\textsuperscript{64} The ideology within Nation of Islam that dictated African Americans must wrest their black power from “white devils,” however, was labeled by the courts as non-religious group doctrine. The possibility that such an ideology could have been a synchronistic theological development between traditional Islamic beliefs and the revelations of their spiritual leader Elijah Muhammed, was not taken into consideration by these cases. Black Muslims therefore inhabited a liminal space in the legal system—both religious group and dangerous radical racial group. Any exploration of violations to their right to free various religious publications and to carry these publications outside their cells.” \textit{Sostre v. McGinnis}, 334 F. 2d 906 (1964)

\textsuperscript{63} “However, it is obvious from the evidence in the record that the activities of the group are not exclusively religious”, As a recent note in the Harvard Law Review says: “[T]he group cannot be classified as purely religious in nature: “Although the Black Muslims call their Movement a religion, religious values are of secondary importance. They are not part of the Movement’s basic appeal except to the extent that they foster and strengthen the sense of group solidarity.” [Lincoln, The Black Muslims in America 27 (1961.)] The central doctrine of the movement is black supremacy and the equation of the white race with ‘total evil.’ [Worthy, The Angriest Negroes, Esquire, Feb. 1961, p. 102.] The Black Muslims’ exact political aspirations are nebulous, although vague statements have been made concerning the establishment of a separate Black Muslim state in America, estimated to include from one to ten of the present states. How this territory is proposed to be acquired is a matter of mystery. There is within the movement an elite army, called the Fruit of Islam, whose activities have been shrouded in secrecy.” “Constitutional Law-In General-Right to Practice Muslim Tenents in State Prisons.-Pierce v. LaVallee (1961); In re Ferguson (Cal. 1961).” \textit{Recent Cases, Harvard Law Review} vol. 75 (1961-1962): 837-840.

\textsuperscript{64} Recent Cases, \textit{General-Right to Practice Muslim Tenents in State Prisons}, 837, 838-9.
exercise was tempered with an eye to continued control. The decision in *Sostre* explicitly downplayed the rights of these prisoners in the face of prison order: "No romantic or sentimental view of constitutional rights or of religion should induce a court to interfere with the necessary disciplinary regime established by the prison officials." None of these cases ever made it to the Supreme Court for review. The lower courts’ decisions therefore stood as precedent for incarcerated groups whose beliefs were considered threatening to prison order.

The racial aspect of this can hardly be ignored. At the height of the civil rights movement, when social norms were threatened around the country, religion was a well-known and popular force in operation in discourse on both sides of the fight. The traditional Christianity of groups like the SCLC which supported non-violent action was a very powerful ideology (and generally acceptable to white allies) around which to organize and spread the movement. A religion that sanctioned black power, however, and promoted violence met with violence was difficult for the courts and the public to accept. Even white allies to civil rights sometimes framed the Nation of Islam as not much more than a domestic political terror group that had integrated some ritualized aspects of Islam into its ideology.

Similarly, the courts had difficulty accepting most aspects of the religious devotion of Black Muslims as genuine. Even in *Sostre v. McGinnis* (1964) when the Second Circuit Court was willing to acknowledge the Nation of Islam’s religious status, that status was subsequently undermined through court references to an article published by the Harvard Law Review. This article concluded that for the Nation of

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65 *Sostre v. McGinnis*, 334 F. 2d 906 (2nd Circuit 1964)
Islam, “religious values are of secondary importance. They are not part of the Movement’s basic appeal except to the extent that they foster and strengthen the sense of group solidarity.”

Referencing that analysis, the Second Circuit Court directly questioned the group’s status as a legitimate religion and therefore made the movement’s constitutional protections indeterminate.

The racial bias in these Black Muslim court decisions are more clearly revealed when compared to other cases involving less mainstream but predominantly white sects and religions decided in the same time-period. The results of Sherbert v. Verner (1963) indicate that suits from white Christians, even those in unconventional denominations, were more likely to be recognized as legitimate religious claims. The Sherbert case concerned Adele Sherbert, a white Seventh Day Adventist working in a textile mill in South Carolina. When then mill switched from a five-day work week, to a six-day work week, Sherbet expressed her inability to work on Saturdays because of her faith. Seventh Day Adventists consider the Saturday as the Sabbath and their faith prohibits work on that day. As a result, Adele Sherbert was fired. When applying for unemployment benefits, she was denied because the firing was considered to be a result of her actions and not her employer’s. Both the state trial court and the South Carolina Supreme Court affirmed the denial of benefits, but the U.S. Supreme Court reversed the decisions.

Justice William Brennan, for the majority, recognized that in the past the Court had “rejected challenges under the Free Exercise Clause to governmental regulation of

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67 Sostre v. McGinnis, 334 F. 2d 906 (2nd Circuit 1964)
certain overt acts prompted by religious beliefs and principles,” but concluded that failure to accommodate religious practice when it posed no threat to health and safety had unduly burdened religious practitioners. Therefore, as in Sherbert’s case, if the state laws resulted in such a heavy burden for religious practitioners, there had to be an ironclad justification via “compelling state interest in the regulation of a subject within the State’s power to regulate.” The *Sherbert* case resulted in the Court’s creation of a “compelling interest” test that the government was required to adhere to when a law inadvertently burdened the religious practices and beliefs of one of its citizens.\(^68\)

Much has been made about the *Sherbert v. Verner* (1963) decision and its historical context. Justice Brenner’s loosening of free-exercise standards has been linked with the successful civil rights litigation of the 1950s and 1960s and an increasing awareness within the courts that issues connected to “fundamental rights” required the state to show that any law curbing those rights was for the health, safety, and welfare of the people.\(^69\) Though the rise of rights-based legal victories cannot be ignored, in the case of *Sherbert* it is important to note that Seventh Day Adventism was (and is) a religious tradition based in traditional Protestant Christian theological teachings. Its only outsider aspect arose from its historical connections to millennialism, Christian mortalism, investigative judgement, and a belief that Saturday, not Sunday was the Sabbath.\(^70\) The Supreme Court barely scrutinized the centrality of the Adventist practice

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\(^68\) *Sherbert v. Verner*, 374 U.S. 398 (1963), This test was later eliminated in the *Employment Division v. Smith* 494 U.S. 872 (1990) decision.

\(^69\) [http://www.firstamendmentcenter.org/free-exercise-clause](http://www.firstamendmentcenter.org/free-exercise-clause), accessed 12/22/2017

\(^70\) Seventh Day Adventism grew out of the Millerite movement of the mid-nineteenth century which was a millennialist group predicting the end of the world and the return of Christ in 1843, when the event failed to materialize, the group broke into different factions, of which SDA was one. The SDA believe in a mortal soul (Christian mortalism) and that all true Adventist believers in Jesus (living and dead) will be brought to
or the sincerity of their beliefs because the edicts of Protestantism were familiar ground and the Seventh Day Adventist tradition had been a part of the American religious landscape for a century. For these reasons, the Adventist's insider religious status could be easily affirmed.

*Wisconsin v. Yoder* (1971) was another unusual case of direct support of free-exercise by the Court. In *Yoder*, the Supreme Court ruled on the right of the Amish to remove their children from public education before the age of 16 (the legally approved age of withdrawal by the state of Wisconsin). In contrast to *Reynolds*, where the Court ruled that a compelling state interest over the form and function of marriage as a social institution trumped the religious rights of Mormons, and *Ferguson, Pierce*, and *Sostre* which ruled for safety and order as a matter of state priority, the *Yoder* decision echoed *Sherbert*'s finding and further solidified the “test” used by the Court to determine the legitimacy of religious practice and belief.

Legally, *Yoder* engaged in what came to be classified as a test of doctrinal pedigree. The test proved to be a controversial action by the Court. The Court categorized the Amish system of belief as legitimate based in three issues; 1) their faith is shared by an organized group, 2) it is derived from scripture71 3) it is long held.72 The

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71 “Religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through strictly enforced rules of the church community.” *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

72 “they and their forbearers have adhered to for almost three centuries”. In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), 219
Court first determined as per precedent that the Amish tradition was not merely a philosophy, but instead a religious ideology:

We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school-attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forebears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clauses. 73

The group dynamic of shared belief was highlighted by the Court as a requirement of religious legitimacy. Burger's decision also more explicitly noted the organized nature of their religious tradition.

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living. 74

The scriptural roots of the Amish way of life were also used as proof by the Court.

73 Wisconsin v. Yoder, 406 U.S. 205 (1972), 215-16

74 Wisconsin v. Yoder, 406 U.S. 205 (1972), 216
That the Old Order Amish daily life and religious practice stem from their faith is shown by the fact that it is in response to their literal interpretation of the Biblical injunction from the Epistle of Paul to the Romans, "be not conformed to this world . . . ." This command is fundamental to the Amish faith. Moreover, for the Old Order Amish, religion is not simply a matter of theocratic belief. As the expert witnesses explained, the Old Order Amish religion pervades and determines virtually their entire way of life, regulating it with the detail of the Talmudic diet through the strictly enforced rules of the church community.75

The longstanding existence of their tradition in the United States, and the efforts they made to preserve it, were also used as examples of its legitimacy.

The record shows that the respondents’ religious beliefs and attitude toward life, family, and home have remained constant—perhaps some would say static—in a period of unparalleled progress in human knowledge generally and great changes in education. The respondents freely concede, and indeed assert as an article of faith, that their religious beliefs and what we would today call "life style" have not altered in fundamentals for centuries. Their way of life in a church-oriented community, separated from the outside world and "worldly" influences, their attachment to nature and the soil, is a way inherently simple and uncomplicated, albeit difficult to preserve against the pressure to conform.76

All of these characteristics made the Amish community a religious group easily recognizable as insiders on the American religious landscape. The decision in the Yoder case, however, broke with the dominant inclination of the courts to defend religious belief, but restrict religious action that violated law.

Both the Sherbert and Yoder decisions came in contrast to what Mark Tushnet calls the previously prevailing jurisprudential trend of the “reduction” principle. Based in Jefferson’s Danbury letter which had Jefferson “Believing with you that religion is a matter which lies solely between man and his God…” and John Locke’s “Letter on Tolerance” which defined belief as subjective opinions to be confined to the private

75 Wisconsin v. Yoder, 406 U.S. 205 (1972), 216
76 Wisconsin v. Yoder, 406 U.S. 205 (1972), 217
sphere, the “reduction” principle, according to Tushnet, functioned in Supreme Court
decisions to treat religion as a private act of individual conscience that could not be
suppressed, but could neither be used to protect undesirable and/or illegal action. Belief
itself was free and protected for all, but acting on those beliefs could result in legal
consequences. To give selective exemptions from the law to all those who violated the
social code for religious reasons would result in a subversion of civil order. These two
cases, however, challenged the reduction principle and altered a long-held precedent in
operation behind the reductionist principle. Sherbert used the language of “compelling
state interest” as the only possible justification to deny those who sought the right to
practice religion freely (a concept begun in Reynolds and used in subsequent cases)
but what made the Sherbert case significant was that it placed the burden on the state
to prove that its aims could not be achieved with less restrictive parameters. Yoder
followed suit by affirming the Sherbert decision. Justice Burger, in his majority opinion,
wrote that “the State’s interest, in universal education, however highly we rank it, is not
totally free from a balancing process when it impinges on fundamental rights and
interests such as those specifically protected by the Free-Exercise clause of the First
Amendment…”

The Amish defendants argued their case under the First and Fourteenth
Amendments and framed their argument in much the same vein as Reynolds. The
Amish claimed that being forced to keep their children in school past a certain formative


78 “Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities,” Yale Law

point would violate the dictates for their religion and “endanger their own salvation and that of their children” because the dictates of their religion required “life in a church community apart from the world and worldly influence.”\(^{80}\) The state interest in education, however, could have been ruled sufficiently compelling if the Court saw fit. Schools provided children, not only with rudimentary educational skills, but also with lessons in how to be a U.S. citizen. For these reasons, school attendance was mandatory in every state in the U.S. by 1918.\(^{81}\) According to the Court, however, the Amish could be exempt from compulsory school attendance after a certain age because they already fulfilled these civic obligations. The Amish not only put their children through the public school system in primary school, but they also already provided for their children—through their belief system—many of the traits public schools were trying to impart.\(^{82}\)

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\(^{80}\) *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

\(^{81}\) As Hilary Moss noted in her article, “the schoolhouse… was an agent of Americanization, an institution whose central purpose was to create a loyal and homogeneous citizenry. As immigrants flooded the new nation’s ports of entry, schooling for citizenship assumed an even greater urgency.” Hilary J. Moss, “The Tarring and Feathering of Thomas Paul Smith: Common Schools, Revolutionary Memory and the Crisis of Black Citizenship in Antebellum Boston,” *New England Quarterly* vol. 80 (2007): 218-221.

\(^{82}\) The school systems had a long and complicated legal and social history with religion—particularly in the nineteenth century—that some scholars argue set the stage for religion clause jurisprudence in the twentieth century. See Green, *The Bible, The School, and The Constitution*, 8, which seeks to demonstrate that modern church-state jurisprudence cannot be understood without examining the development of the “School Question” during the nineteenth century. This controversy, erupting immediately after the Civil War resulted in a state Supreme Court striking down Bible reading and nonsectarian prayer for the first time. Competing amendments over preserving the Protestant nature of the nation or preserving the secular nature of the government arose, and politicians proposed their own amendments, the drive of which became the “Blaine Amendment.” This discussion, though ostensibly about Bible reading and parochial school funding, was actually about “the promise of universal public education; the duty of government to promote religious values; the connection between moral virtue and civic participation; the role of religious institutions in civil society; and the compatibility of religious diversity with a republican system that had arisen in a nation with a relatively common Protestant stock,” according to Green. The School Question became a proxy for a debate over America’s cultural and religious identity at a crucial time. “This public discussion on the meaning of Church and State, both base and profound, laid the foundation for future church-state controversies and the resulting decisions of the Supreme Court. Green is refuting scholars like Hamburger who claim that the 1947 et al decisions were nothing but a liberal anti-Catholicism manifest in Court record. Instead, these bigoted nativist movements of the nineteenth century over school issues were actually manifestations of democracy at work in a majority rule movement that demonstrates the ways in which the people’s democracy can be messy. Green calls
The language in *Yoder* is particularly telling. Chief Justice Burger characterized the Amish as reflecting some of the most fundamental values of American society. For Burger, they exemplified “Jefferson’s ideal of the ‘sturdy yeoman’ who would form the basis of what he considered as the ideal democratic society.”\(^83\) This assessment not only eliminated the Amish from the category of “outsider” religion, but indeed labeled them as representatives of core and original U.S. values that one of the most looked to founders in the realm of legal originalism sanctioned and promoted. Soothe by the willingness of the Amish to allow the education of their children through grade eight, and going even further to declare that they hardly needed the later education years because they already embodied the values that the state intended to encourage through mandatory school attendance, the Court failed to find compelling state interest to limit their religious practice. The Amish represented for the Court a “minority” religious group, but also signified American-ness in its purest form—the ultimate “insider,” stating; “even their idiosyncratic separateness exemplifies the diversity we profess to admire and encourage.”\(^84\) This detailed discussion by the Court of how the Amish tradition could be easily identified as religious and therefore deserved constitutional protections was later roundly criticized by those who cautioned that such “tests” to prove religious legitimacy

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\(^83\) *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

\(^84\) *Wisconsin v. Yoder*, 406 U.S. 205 (1972)
“failed to recognize that the right of a religion to change or interpret its doctrine is itself protected by the First Amendment.”

Analysis of the Court’s effort to grapple with what boundaries belonged around the right to free-exercise illuminates the insider/outsider delineation in operation within the Court and its decisions through the 1970s. The perceived threat presented by Mormon polygamists and members of the Nation of Islam was not the same threat to the state that Amish—the living embodiment of Jefferson’s yeoman farmers—presented to state interest. Each case weighed the importance of state interest, the ability to categorize a religion or religious practice as legitimate, and the sincerity of the beliefs held by the defendants. Ultimately, the wider lens that operated within all of the determinations made by the courts on protected free-exercise was focused on whether the groups who brought legal challenges to defend their right to practice were religious insiders who were aligned with the perceived dominant values of a white Protestant (Catholic, Jewish) America.


86 And interestingly, Native American traditions. Of the free-exercise cases decided in lower courts over the decade of the 1970s, those that succeeded were either a part of the Protestant, Catholic and Jewish Traditions, or a Native American tradition. This, however, could in some way support the concept of an importance placed on “American values” in a more geographical sense where the court considered Native Americans the original Americans and therefore categorized their values as inherently American. “See, e.g., In re Jenison, 375 U.S. 14 (1963) (exemption from jury duty required to accommodate religious belief); Native Amer. Ch. of New York v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979) (exemption for religious use of peyote available to any bona fide religious organization); Michaelson ex rel. Lewis v. Booth 437 F. Supp. 439 (D.R.I. 1977) (exemption from jury duty required to accommodate religious belief); Stevens v. Berger, 428 F. Supp. 896 (E.D.N.Y. 1977) (religious believers exempted from requirement of obtaining social security numbers for their children); Geller v. Sec’y of Defense, 423 F. Supp. 16 (D.D.C. 1976) (religious use of peyote available to any bona fide religious organization); People v. Woody, 61 Cal.2d 716 (Cal. 1964) (exempting Navajo sect’s use of peyote from criminal drug laws). In addition, numerous courts have found various prison regulations unnecessarily restrictive on prisoners’ religious beliefs regarding: diet, see, e.g., Kahane v. Carlson 527 F.2d 492 (2nd Cir. 1975); Chapman v. Kleindienst, 507 F.2d 1246 (7th Cir. 1974); observance of holy days, see X v. Brierley, 457 F. Supp. 350 (E.D.Pa. 1978); and hair, see, e.g.,
These patterns of adjudication for free-exercise cases effected religious segregationist academies like Dade County Christian Schools and those like them in interesting ways. Their ability to inhabit an insider status for the Court was complicated by the conflicts they held with prevailing social values. These schools held certain advantages as religious insiders. They held traditional Protestant beliefs and were interested in educating their own (white) children in a way that they saw fit as dictated by their religion—an argument the *Yoder* decision had accepted in the past. Though public schools that attempted to preserve segregation throughout the 1960s had slowly lost the battle in the courts, private religious academies had the perceived support of decades of state and local legislation that endeavored to slow down desegregation by finding ways to fund private discriminatory educational efforts with public money. This insider status, however, came into direct conflict with the shifting norms of U.S. cultural and civil values by the 1970s. Equality of the races, rhetorically if not practically, had been absorbed into the cultural consciousness of what the United States stood for as a nation.

Religious segregationist academies potential legal success was also affected by the courts’ efforts to parse out what constituted a belief “central” to the religious faith in order to determine if direct or indirect infringement on religious practice had occurred. If the religion would in fact tolerate non-compliance, then the belief was considered not “central” to the tradition in question and therefore did not necessitate constitutional protection when in violation of civil law. The use of the centrality test was a way to protect the shifting social values of equality from the wide protections of insider religious

traditions afforded by *Yoder*. This legal exercise was used in *Brown v Dade County Schools* (1977) by Justice Goldberg when he determined that the belief in racial segregation among discriminating religious academies was of minimal importance because disobedience would not endanger salvation.\(^87\) Centrality of religious practice had been floating around in judicial decisions since *Reynolds* when Mormon defendants made a point to identify polygamy as a central tenet of their faith. Though the decision in *Reynolds* made little of the "centrality" issue, *Brown v Dade Christian Schools Inc.* (1977) brought the issue of centrality to the forefront of the decision.\(^88\) In *Dade*, the Fifth Circuit Court determined that the importance of belief in racial segregation could be minimized because disobedience would not endanger salvation.\(^89\) There was flexibility within the parameters of faith, deemed the Fifth Circuit Court, which made some religious actions central to practice and belief and others more peripheral.

That religious practice was characterized by Mr. Kalapp [John M. Kalapp, Dade Christian's original vice president] as a "very minor" part of the religion. Departure from the practice, although constituting disobedience to God, would not endanger salvation. While these factors do not sap the free exercise defense of vitality, they make clear that overriding that defense will not endanger the church's survival.\(^90\)

The protection of "central" practices within a religious belief system did not receive precedential status for two more years in *Frank v. Alaska* (1979), which further

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\(^87\) *Brown v. Dade County Schools Inc.* 556 F.2d 310, 321 (5th Circuit, 1977, cert denied, 44 U.S. 106 (1978) (Goldberg, J. concurring)

\(^88\) Though centrality did not gain precedential purchase until *Frank v. Alaska* in 1979 where the majority of justices concluded that having fresh moose meat for a funeral potlatch was central to Athabascan religious practice.


\(^90\) *Brown v. Dade Christian School, Inc.* 581 F.2d 472 (1977)
restricted insider/outsider status not only to white Protestant, Catholicism, or Judaism, but also to an insider religious alignment with value norms.  

Examination of court development of tests used to measure the sincerity and centrality of religious belief and action is key to understanding how religiously-affiliated academies were assessed by the courts and why their claims to protected tax exemption status were denied. The insider status they might once have shared with the *Yoder* and *Sherbert* defendants was compromised by the legal precedent and social recognition of racial equality as a national value. This change was important, not only within the court system, but also for the assessments made by the IRS when creating policy about the tax exemption status of discriminatory academies and determining how stringently to assess their racial admissions policies. For Dade County Christian Schools and other institutions like it, the IRS was the government agency tasked with making decisions about whether religious groups claiming tax exemption for their discriminatory schools were making genuine or spurious claims. The IRS could look only to precedential governmental guiding principles concerning what constituted a religion and a valid religious belief to guide its policy.

In considering this precedent, the IRS had decades of free-exercise case law and legal tests leading up to the *Dade* case. The courts had created a set of standards through which to determine if there was compelling enough state interest to impose state will over religious practice. The IRS had the opportunity to follow the judicial practice of determining the validity of a belief, the centrality of that belief to a religious

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91 Or native American-ness.

tradition, and whether the cessation of the religious action associated with that belief would be a direct or indirect infringement of religious practice; tests which can all be seen at work in the *Dade* decision.\(^93\) Making such determinations, however, was far from a scientific endeavor. Scholars of religion have spent careers debating what constitutes religion and religious practice, so it is little wonder that government agencies and the courts struggled to provide concrete definitions of what constituted religion under the protection of the free-exercise clause. The difficulty of these decisions and the implicit bias operating within these agencies and the courts themselves were perhaps what ultimately led insider/outsider status to being a greater indicator during this period of time for how the court decision would result. But while free-exercise challenges by groups like the Nation of Islam fell victim to this legal bias, so eventually did religiously discriminatory groups like segregationist academies who became outsiders to the prevailing civic understanding of racial relations.

Religious academies as segregationist institutions experienced a dramatic increase during the 1960s and 1970s. Non-Catholic, Christian academies numbered only about 123 in all of the United States at the time of the Brown decision and enrolled only about 12,000 students. By 1981, however, that number had grown to 18,000 Christian academies with over 2 million students enrolled. The majority of these schools were evangelical, often Baptist or Presbyterian. Legally, religious institutions were (and are) allowed to control for admission to those who adhere to their religious beliefs.\textsuperscript{1} Constitutionally, churches had (and have) the right to discriminate on the basis of creed. But the traditional theology that informed racialized belief systems and effected the racial composition of certain churches can not be removed from the equation. The churches, regardless of their publically professed policies, often had a theological commitment to racial segregation that was taught in classrooms and during mandatory school chapel services.

The rapid growth of private religious academies and their connection to discriminatory practices forced all presidential administrations from Johnson through Reagan to tackle the problem of government subsidies in the form of tax exemption to

\begin{footnotesize}
\textsuperscript{1} Title VII of the Federal Civil Rights Act prohibits employers engaged in commerce and having at least 15 employees from discriminating in any employment decision on the basis of race, color, national origin, gender, or religion. Churches, however, were exempt from this requirement in certain cases and were legally permitted to discriminate when accepting people into membership, in naming spiritual leaders, in hiring employees who perform principally religious or spiritual functions, and in the provision of functions of a spiritual or religious nature. For example, it would violate the First Amendment for courts to apply such laws to compel the ordination of women by the Catholic Church or by an Orthodox Jewish seminary.\textsuperscript{2} For the Hosanna-Tabor Church v. EEOC (2012) case. Religious organizations could successfully defend against employment discrimination claims in those circumstances by invoking the constitutional right to freedom of association—a right “implicit” in the First Amendment. Roberts v. United States Jaycees, 468 U.S. 609 (1984). See: Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. _____ (2012)
\end{footnotesize}
these religious institutions of education. Religious discriminatory academies, which boomed in the second half of the 1960s were about to experience a protracted confrontation with the federal government in the 1970s over their status as tax-exempt religious institutions. The previously effective methods used by anti-integrationists to skirt federal requirements had been chipped away at through the 1960s. Secular private institutions of education that had used the support of state and local government through vouchers and/or tax money that allowed white parents to keep their children in segregated classrooms had been ever more restricted in their public funding sources via a series of court decisions. Ultimately, private segregationist educational institutions were denied direct state aid in the Green v. Kennedy (1970) decision. But because substantial numbers of these private academies had religious affiliations, denying them all forms of state “aid” was a bit more complicated.

Chapter 5 analyzes the continuous back and forth between the courts, Congress, and presidential administrations over the status of private religious segregationist academies. At stake in these intragovernmental conflicts was a struggle over how the constitutional conflict operating between racial equality in education mandated by Brown and the deeply held constitutional commitment to freedom of religious practice would be resolved. Though ostensibly procedural and tedious, an examination of the battles over tax law as related to the private religious segregationist schools can illuminate several issues at play in how the legal bodies and the public viewed the role of government in its duty toward racial equality, religion, and intervention. The courts legally driven interpretation of religious free-exercise (seen in case law), did not necessarily reflect the same interpretation members of Congress held about exactly how free a religious
organization should be to practice their belief, especially when those practitioners were religious insiders on the U.S. religious landscape. The court decisions did reflect, however, the rights-centric legal strategy employed by the families that experienced segregation and their allies who looked to the government to intervene in the promotion of racial equality in education. The denial of tax exemption to religious private schools that practiced discriminatory admission also raised more dynamic questions than just religion v. racial equality. Tax-exemption questions also led to discussions about government overreach—particularly in the case of religious institutions and the limits of non-legislative or judicial bodies like the IRS in making regulatory decisions. These issues were not so cut and dried and made for very ping pong-like policy between the different governmental bodies. While not unimportant, however, these questions often worked to downplay the importance of racism to these matters, or perhaps more nefariously, attempt to obscure racist motivation under the guise of protecting First Amendment rights and pearl-clutching over governmental hierarchies.

**Legal History of Battles Over Tax/Voucher Status**

The legal validity of church tax exemption in the United States was recognized by the Supreme Court in *Walz v. Tax Comm’n* when the Court noted that the practice had been in place “for more than 200 years of virtually universal practice imbedded in our colonial experience and continuing to the present.”\(^2\) The exemption was encoded in law in 1913 when the Revenue Act was passed to clarify the exemption of churches, charitable organizations, and non-profit organizations in the wake of the adoption of the

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\(^2\) *Walz v Tax Commission* 397 US 664, 678 (1970)
The IRC 501 (c) (3) provided exemption for charitable, educational, and religious organizations. Little was subsequently done to provide guidelines or alter the charitable exemption act except for two provisions to prevent non-profits from exerting influence on partisan politics. The first provision in the charitable exemption was introduced in 1934 and titled the Revenue Act. The Act was a piece of legislation that threatened loss of exemption to organizations with a "substantial part of ... activities ... carrying on propaganda, or otherwise attempting, to influence legislation." Dubbed the lobbying provision, the intent was specifically to stop the aggressive lobbying by the non-profit National Economy League in its efforts to increase benefits for veterans and more generally to prevent tax-exempt non-profits from engaging in partisan politics. The Revenue Act was modified once again in 1954 and dubbed “the Johnson amendment” after strong proponent and then-Texas Senator Lyndon B. Johnson. The new provision stated that a tax-exempt organization could "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."

Outside of these provisional restrictions on political lobbying, IRC 501 (c) (3) was a relatively open exemption that provided very little in the way of definitional restrictions about what constituted charitable or educational, but particularly religious organizational bodies. The privileged status for churches, conferred by IRC 501 (c) (3), came with “virtually no guidance” on how to define an organization as a church, leading the IRS to design criteria by which to judge whether or not an organization could be categorized as

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in violation of exemption or not. It was not until the late 1970s that, in order to curb abuse, the IRS created its own list of criteria for what constituted a religious organization. The proposed criteria included an organization having a recognized creed or form of worship; a distinct religious history; a literature of its own; established places of worship; and ordained ministers selected after the completion of prescribed studies. The Supreme Court reviewed the IRS criteria in American Guidance Foundation, Inc. v. U.S. (1980) and generally approved of the IRS definition stating, “At minimum, a church includes a body of believers or communicants that assembles regularly in order to worship. Unless the organization is reasonably available to the public in its conduct of worship, its educational instruction, and its promulgation of doctrine, it cannot fulfill this associational role.”

Considering court precedent, by 1980 this was a relatively conservative definition of religion, but the approval by the Supreme Court of the IRS definition allowed them to set boundaries around religious tax exempt organizations.

In evaluations of religious groups and their legitimacy, the IRS mostly challenged overt cases of abuse and fraud. Instances of individual families claiming church status, mail-order ministries, social/political clubs, and organizational income that went exclusively to an individual’s living expenses, among other violations, were all issues brought to the courts. But close examination of abuses concerning civil rights violations by religious organizations were low priority for the IRS before the mid-1960s. Attention from the legislative and executive branch to violations by private discriminatory academies throughout the 1950s and into the 1960s was equally inadequate. While the

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7 1981 EOCPE Textbook
Brown v. Board of Education (1954) decision made discriminatory education illegal and therefore made private schools engaged in segregation ineligible for benefits from the government, Brown’s mandate to desegregate public schools held greater priority for federal and state governments. Private academies and private church schools that emerged slowly in the early 1960s around the South benefitted from scarce scrutiny. By the time the Civil Rights Act was passed in 1964, however, private academies gained momentum and became a significant presence in the South as a popular tool to circumvent segregation.

The Civil Rights Act of 1964

Though action on desegregation of public schools had languished for a decade, the Johnson Administration finally succeeded in passing new and sweeping civil rights legislation. This legislation created new methods and new enthusiasm with which to enforce federal law when it came to desegregation. The Civil Rights Act of 1964, among many other laws, created three complementary mechanisms through which to kick-start the stalled project of desegregation. Under Title VI, federal funds could not be distributed to programs or activities that participated in discriminatory practices. Federal education funds, therefore were subject to the same restrictions. If schools failed to comply with desegregation measures, they faced “the termination of Federal education assistance following elaborate administrative enforcement procedures.” Title VI also took into account the potential that school systems might forego federal funding in favor of maintaining their segregated systems. In such cases, the Department of Justice was directed to file lawsuits that required segregated schools to comply with the law. Finally,

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Title VI provided for additional funding for training programs and technical aid to districts that engaged in the process of desegregation.

Johnson placed the Department of Health Education and Human Welfare (HEW) in charge of these provisions. As such, HEW became responsible for the identification of schools and districts in violation of the act and the implementation of sanctions on offenders. HEW developed guidelines on when to withhold funds from segregated schools. By the end of the first year of implementation of the Education Act, 60 school districts were found to be in violation of the Act and had their federal funds withheld over noncompliance. The Act soon became a controversial and politically double-edged policy. HEW soon realized that cuts to funding not only lost them any bargaining power to encourage integration, it also affected poor black children the most; the very population they were trying to create policy to help. So many districts were in violation, both in the North and South of the nondiscriminatory policy, that Democrats were caught in a trap between either forcing desegregation and causing a massive defunding of education or letting the strict enforcement of the law languish in order to fulfill their commitment to education.⁹ Adding to the stigma, Title VI compliance officers were continually accused of ignoring local issues, superseding the law, and refusing to negotiate when circumstances dictated. Alabama Congressmen James Martin lambasted Education Commissioner Harold Howe—a staunch supporter of civil rights—by stating that “Harold Howe has pressed down upon the brow of the South a crown of

thorns as cruel and as torturous as that pressed down upon the head of the Prince of Peace when they crucified Him on the Cross."\(^\text{10}\)

Perhaps ironic in light of Congressman Martin’s biblical rhetoric, the administration began to pursue private academies, often religiously affiliated, that did not receive their funding from the federal government. Investigations into private academy policies was an avenue through which the Johnson Administration could fulfill the punitive ambition of the Civil Rights Act without getting involved in the politically explosive issue of de-funding public education. On October 15, 1965, the Internal Revenue Service under the direction of the Johnson Administration began to review the applications for tax-exempt status by private schools with the intention to deny exemptions to segregated institutions. Though these reviews did not garner the attention that the potential of defunding public education received, the Johnson Administration still faced push back on this policy in Congress and from the public. As a result of this pressure, the IRS temporarily froze all applications of private schools suspected of being discriminatory until August of 1967 in order to “review the legal issues involved.”\(^\text{11}\) The freeze was terminated on Aug. 2, 1967. The IRS announced that tax-exempt status would only be given to schools not in violation of state aid restrictions.\(^\text{12}\) Discriminatory admissions policies, however, were still under debate by

\(^{10}\) Representative Martin (AL), “Title VI.” \textit{Congressional Record}, (October 5, 1966), 111:89 p.H25353


\(^{12}\) The Service stated that its general conclusion is that exemption will be denied and contributions will not be deductible if the operation of the school is on a segregated basis and its involvement with the state or political subdivision is such as to make the operation unconstitutional or a violation of the laws of the United States. Where, however, the school is private and does not have such degree of involvement with the political subdivision as has been determined by the courts to constitute State action for constitutional purposes, rulings will be issued holding the school exempt and the contributions to it deductible assuming
the IRS policy-makers questioning whether these schools could retain tax benefits from the government.

The IRS took consultation with the Treasury, Department of Justice, HEW and the White House in order to create a policy that addressed whether “pervasive racial discrimination was simply not charitable within the meaning and intent of the Internal Revenue Code.”13 The result of these consultations and the urgency these departments felt in implementing them would remain an unknown because as the consultations between these government agencies over the “meaning and intent” of tax exemptions were underway, Green v. Kennedy (1970) reached the U.S District Court of D.C. which enjoined the granting of tax exemption to discriminatory academies.14

**The Nixon Administration**

By the time Green’s effect on IRS policy was in place, the Nixon Administration had taken control of the federal government and its policy over segregation in education. The loss of the Johnson Administration and its policies and actions for equality in education concerned many who worked to desegregate schools. Well-known for declarations during his presidential campaign for being deeply opposed to bussing and judicial activism in desegregation efforts, Nixon’s administration was nonetheless crucial in the creation of real results in desegregating schools on a significant scale. At the conclusion of the Johnson Administration, with its strong commitment to civil rights issues and fifteen years of effort since the Brown decision, 68 percent of black children

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in the South still attended completely segregated schools. By fall 1970, a year into
Nixon’s presidency, only 18.5 percent still attended all black schools.\textsuperscript{15} Instead of a
moral stance as the Johnson Administration had taken, Nixon’s approach to integration
emphasized obedience to the law and the need to save the public school system in the
South.\textsuperscript{16} By conservative estimates, enrollment in private schools had reached nearly
400,000 by the 1970s.\textsuperscript{17} The growing problem of continued segregation through private
education was one that the Nixon administration, despite their best efforts, was forced
to confront.

Focused on finding resolutions to the “segregation problem” before it became
political ammunition for his opponents in the 1972 election, Nixon allowed Attorney
General John Mitchell, Department of Health, Education and Welfare (HEW) secretary
Robert Finch, and head of the justice department’s Civil Rights Division, Jerris Leonard
to handle the issue with instructions to “enforce the law but use your head and get the
damn school desegregation over.”\textsuperscript{18} Nixon was interested in avoiding the controversy
and litigation that the Johnson administration experienced because of the way it
handled HEW guideline implementation and enforcement. Nixon switched the
enforcement of school desegregation from HEW to the Justice Department. This switch
made lawsuits, not direct government intervention, the Nixon Administration’s primary


\textsuperscript{16} The Morning Record, May 22, 1970

\textsuperscript{17} The Bulletin, July 7, 1970. This too was a grossly underreported number. Nevin and Bills note that the
1970 census showed 947,229 children in private schools in the thirteen state area (segregated Southern
states) more than twice the estimate of published sources and 22 percent more than the department of
education total reported in 1970 of 777,561. Nevin and Bills, The Schools that Fear Built, 9

\textsuperscript{18} Davies, Richard Nixon and the Desegregation of Southern Schools, 369
strategy to achieve integration. Nixon told John Ehrlichman, counsel and Assistant to the President for Domestic Affairs, that he entirely sympathized with the South’s reaction to integration; “Whites in Mississippi can’t send their kids to schools that are 90 percent black. They’ve got to set up private schools.”19 The government relationship with these private schools, however, was something the Nixon Administration would have to confront.

Reliance on the courts and simple compliance with the law would not prove to be as clear-cut a plan as Nixon hoped. Almost exactly a year into his presidency, on Jan 12, 1970, the ruling on Green v. Kennedy—a case brought by several black families in Mississippi against the Secretary of the Treasury to end tax exemption for schools in Mississippi with discriminatory practices20—enjoined the IRS from approving any further applications for private schools in Mississippi unless they could find definitive evidence that the applicant was not a segregationist academy. Six months later the IRS was ordered to rescind exemption status from forty-one pre-approved schools. (Perhaps ill at ease with the idea that the IRS would be perceived as some protectorate of private school segregation practices, Tax Commissioner Randolph Thrower many years later qualified in his statement to the Ways and Means Committee that the Department only resisted suit in court to prevent an unlimited number of taxpayer to taxpayer litigation


20 Alleging that the revenue code for charitable institutions was unconstitutional in supporting these private schools through tax benefits, the families ultimately sought a permanent injunction to prevent the Treasury and the IRS from giving these schools “tax-exempt status under § 501(c) (3), and thus ensuring donors the right to deduct contributions to these schools from gross income under § 170(a) of the Code.”
that might arise from conceding to such a case, and not on the basis of opposing the results.\textsuperscript{21}

Whether they were prepared to do so or their hand was forced, the IRS released a statement in 1970 that a policy was being instituted under which “a school would not be recognized as entitled to tax-exempt status, nor its patrons to the deduction of contributions, unless it demonstrated, by its past and continued performance or by present and continued declarations, that it was open to the admission of students of all races.”\textsuperscript{22} The practical result of this policy was that private schools revised their corporate charters and by-laws and carefully placed public announcements that declared open admissions policies. The real effectiveness of these policies to curb either discriminatory admissions policies or the access of these academies to tax-exempt status was questionable. Unless complaints were lodged against these private schools, they were allowed tax-exempt status as long as they could prove via charters and advertisements that their policies were \textit{de jure} integrationist.

When the \textit{Green} injunction came down in January of 1970, Nixon assured Southern leaders that there would be no administrative assault against all-white private schools. The administration failed to cultivate or enforce a united front, however, because as Nixon was making these assurances, Robert Finch—secretary of the HEW wrote a letter to Treasury Secretary David Kennedy that formally asked for an end to

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\textsuperscript{21}Randolph W. Thrower, \textit{The Tax Lawyer}, 706 “As to the issue of standing of the plaintiffs to bring the action, the Service and the Department had long attempted, usually with success, to confine tax litigation to parties directly affected by the tax, that is, to taxpayers themselves. Even with these limitations, the ever growing volume of tax litigation threatened to become overwhelming; if the courts permitted persons to litigate about the tax liabilities of other taxpayers, no limit could be seen to the number of cases which would arise in the courts. Thus, the Department initially resisted the suit both on the merits and on the issue of standing.”
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\textsuperscript{22} Randolph Thrower, \textit{The Tax Lawyer}, 707
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exemptions for the growing ranks of the segregationist academies.\textsuperscript{23} Actions by the Justice Department deepened the confusion when on May 15, 1970 they filed a brief in the \textit{Green} case arguing that private segregationist academies should be allowed to keep their tax exemption status. The department argued that, “the recognition of tax exempt status is an act of benevolent neutrality.”\textsuperscript{24} The timing of this filing proved to be problematic. The brief was allegedly filed before the debate within the Administration about what steps to take about private academies was concluded.

As these actions suggested, two camps were operating within the Nixon Administration, each trying to convince the President how to handle segregationist private schools. Harry Dent, special assistant to the President and former aid to Strom Thurmond, Robert C. Mardian, general counsel of HEW and staff chief to VP Agnew’s Cabinet committee on desegregation, and Wilton Blount, Postmaster general and former head of the US Chamber of Commerce, all argued for the preservation of the tax exemption because they believed that “tax exemptions by their nature do not constitute support maintenance or sponsorship of the recipients.”\textsuperscript{25} Attorney General John Mitchell, HEW secretary John Fitch, advisors to the president Leonard Garment and Peter Flanagan, and Treasury Department and IRS Commissioner Randolph W. Thrower, however, advised the president that the decision the administration made on tax exemption could affect the future of public schools in the Deep South in perpetuity.

While the impact of tax-exemptions was downplayed by the latter group, the former group stressed that tax-exemption did benefit schools in the following ways;

\begin{footnotes}
\item[23] \textit{Toledo Blade}, July 7, 1970
\item[24] \textit{The Morning Record}, May 22, 1970
\item[25] \textit{Ibid}
\end{footnotes}
exemptions saved them from the burden of local real estate and property tax, but most importantly allowed sizable donations to their schools deductible as a charitable contribution on the donor’s tax returns. The private schools relied heavily on these types of donations to survive and donors contributed for both personal and financial benefits. Beyond direct tax issues, however, the exodus of white students from the increasingly all black public schools would result in white parents voting against bond issues of public facilities, and create legislators less likely to allocate funds to schools abandoned by whites.

By July of 1970, the administration ended their internal debate and ultimately decided that racially segregated private schools could not be considered charitable organizations and therefore must have their tax-exempt status revoked. The IRS held a press conference that announced the policy decision would result in nearly 10,000 private schools through all levels of education (higher education included) coming under review. Thrower noted in his statement that the IRS came to the decision because;

We ultimately concluded within the Internal Revenue Service that the decision to deny recognition of exemption to racially discriminatory private schools was compelled by law. It involved an issue whose time for resolution had come. We could no longer maintain the incongruity of treating as contaminated a racially discriminatory private school which had received state or local aid while, in effect, approving much more substantial federal aid to other discriminatory schools.26

The schools would have to prove that their admissions policy was nondiscriminatory, either through the demonstration of an integrated student body, or – reflecting the old standard—the release of a public statement of nondiscriminatory admissions. As before, the statement would be taken in good faith by the IRS. This

26 Randolph W. Thrower, The Tax Lawyer, 701
decision was a risky and unusual one for Nixon. Though Thrower made a point during the IRS press conference to note that loss of tax exemption was not a “Southern policy,” the decision nonetheless threatened Nixon’s southern strategy and was inconsistent with the decisions Nixon made about how his administration would handle school desegregation. The IRS, not just the courts, would now be involved in the project of school desegregation.

Complicating the matter, a large number of these private academies had religious affiliations. Religious Schools—parochial schools—were a particularly sensitive issue for the IRS. The IRS was not ignorant of the controversy involved in making determinations about whether a religious organization was genuine in its claims to integration. The IRS was also aware of the constitutional questions that their punishments for academies that claimed religious reasons for discrimination would raise. Many Congress members had already begun to hone in on the implications of the ruling for religious schools. William J Simmons, Treasurer of Mississippi’s Citizens Council School Foundation spoke against the decision, angrily stating “if the principle of race or religion is to become a factor in tax exemption, then every private school or church is in similar jeopardy.”

Randolph Thrower himself admitted in reflection:

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27 Toledo Blade, July 7, 1970

28 The largest private school system in the state of Mississippi. For more on the citizen’s council see: Neil R. McMillen, The Citizens’ Council: organized resistance to the second Reconstruction, 1954-64 (University of Illinois Press, 1971). The White Citizens Council was formed in July 1954 and functioned as an affiliatory umbrella for white supremacist groups in the U.S-particularly the South. In 1956, they changed their name to the Citizens Council and worked primarily against desegregation, but also against all forms of integration and worked to maintain voter suppression among African Americans. The group used tactics such as violence, boycotts, employment intimidation, and fearmongering campaigns to further their agenda.

29 Kentucky New Era, July 11, 1970
We also recognized in 1970 that the application of the new standards to religious schools could move us into a thorny thicket. Difficult questions arise when the first amendment rights to freedom of religion appear to clash with other important constitutional principles. We did conclude, however, that the mere fact of a relationship to a church or other religious organization could not throw the mantle of the first amendment around a racially discriminatory private school. More difficult questions arise where apparently sincere and long held religious beliefs affect policies of a school which assertedly are applied indiscriminately to members of all races.\(^{30}\)

An appeal that tried to discontinue the freeze on tax exemptions was denied by the Supreme Court in \textit{Coit v. Green} (1971).\(^{31}\) As the \textit{Green} case moved to the U.S. District court under the title \textit{Green v. Connally} (1971), the court reinforced the loss of exemption for private discriminatory academies, but also made an attempt to tackle the issue of religious academies without officially ruling on the issue.\(^{32}\) Justice Leventhal, in his decision, discussed the invocation of \textit{Walz v. Tax Commission} (1970) to defend tax exemption by religious schools. Leventhal noted that although the \textit{Walz} decision found tax exemption to be “indirect” and “passive” support that did not constitute establishment nor excessive entanglement,\(^{33}\) the following year in \textit{Lemon v. Kurtzman}

\(^{30}\) Randolph Thrower, \textit{The Tax Lawyer}, 711


\(^{33}\) \textit{Walz v. Tax Commission of the City of New York}, 397 U.S. 664 (1970) held that tax exemption (specifically property tax exemption in this case) for religious organizations does not violate the Establishment Clause of the First Amendment. \textit{Lemon v. Kurtzman}, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971); The \textit{Lemon v Kurtzman} decision introduced the Lemon test, which created a three prong test for the Court to help determine the constitutionality of a religious program. The first prong required a religious program receiving government funds to have a significant secular purpose. The second prong required that public funds had to be used in “secular, neutral, and non-ideological” way. The third prong required that the government avoid excessive entanglement with religion. The practical result of the Lemon test was that most programs of school aid were found unconstitutional. The logical option for states would be to stop any and all public aid to religious schools. Additionally, the Court began to employ the standard that an organization with government connections (monetary or otherwise) could not be “pervasively sectarian.” According to the “pervasive sectarian” standard, no government money could go any group “so religious in character and so permeated by religious attributes that nonreligious services could not be assured.” Religious groups were not seen as capable of disconnecting their
(1971), Walz was interpreted as “confining” rather than expanding ways in which the state should involve itself in religious organizations. In Lemon, the Court created a test to explore, with a “closer degree of scrutiny” how much the government was entangled with religious groups.\(^{34}\) In his opinion, Leventhal warned that, “All the opinions in Walz analyzed tax exemptions as providing an economic benefit, — “that exemptions do not differ from subsidies as an economic matter,”\(^{35}\) which implied that if the issue was pushed by groups defending tax exemption for religiously discriminatory schools, case law would not support their claims. Stating explicitly that “governmental and constitutional interest of avoiding racial discrimination in educational institutions embraces the interest of avoiding even the ‘indirect economic benefit’ of a tax exemption,”\(^{36}\) Justice Leventhal sent a message about potential religious legal challenges that had unnerved Thrower and the IRS.\(^{37}\)

The topic of religious rights did little to intimidate the U.S. District Court judge, however, and in his opinion, Leventhal not only pointed to Walz as a portent of what a legal challenge by religious segregation academies might bring, but also directly

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\(^{34}\) Lemon v. Kurtzman, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)

\(^{35}\) (Harlan, J., 397 U.S. at 699, 90 S.Ct. at 1427) referenced in Green v. Connally, 330 F. Supp. 1150 (DDC 1971)

\(^{36}\) Ibid

addressed those who might seek to bring claims about the First Amendment religious protections to the courts:

We add a final thought concerning intervenors’ claims of rights under the Bill of Rights. The provisions of the Bill of Rights were added to the Constitution in order to establish the union, to gain the support of reluctant states. The prohibitions against racial discrimination rooted in the Amendments added to the Constitution following the Civil War were the Nation’s response to preserve and continue the Union.

The freedoms of the Bill of Rights must be read not in opposition to the safeguards of the Amendments adopted after the Civil War, but in harmony with them, toward the objective of continued national union. This is cogently demonstrated by the long line of decisions confirming that the Amendments which embody the nation’s recognition of the special problems of the members of its black minority also embody assurances for them that the states will abide by the same principles of freedom and justice which those ratifying the Constitution besought as protection against the national government.

The case at bar involves a deduction given to reduce the tax burden of donors, a meaningful, though passive, matching grant, that would support a segregated school pattern if made available to racially segregated private schools. We think the Government has declined to provide support for, and in all likelihood would be constitutionally prohibited from providing tax-exemption-and-deduction support for, educational institutions promoting racial segregation.38

In May of 1975, eager to comply with the *Green v. Connally* (1971) ruling and reflect the statements made by Judge Leventhal in policy, the IRS released a new policy statement meant to eliminate what they considered “loopholes” in their tax exemption rules. Specifically, the IRS declared that tax exemptions for church-affiliated schools that discriminated because of religious belief would no longer be honored by the

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38 Ibid: Section 503 of the Model Anti-Discrimination Act, supra note 37, permits religious educational institutions “to limit admission or give preference to applicants of the same religion.” We are not now called upon to consider the hypothetical inquiry whether tax-exemption or tax-deduction status may be available to a religious school that practices acts of racial restriction because of the requirements of the religion. Such a problem may never arise; and if it ever does arise, it will have to be considered in the light of the particular facts and issue presented, and in light of the established rule, *see Mormon Church v. United States*, 136 U.S. 1 (1890), that the law may prohibit an individual from taking certain actions even though his religion commands or prescribes them.
agency. Exempted from scrutiny were religious schools that did not have discriminatory policies but were largely homogenous faiths—such as Orthodox Jews and the Amish—that only had negligible students of color due to the make-up of their religious adherents and not to racist views. Significantly, the release echoed the Green decision (and free exercise case law’s reduction principle) in noting that the First Amendment certainly protected belief, but not always action. The release stated,

That those responsible for a given course of conduct may sincerely believe that they have a religious duty to act in a certain manner does not alter the situation. The First Amendment, which provides in part that Congress shall make no law prohibiting the free exercise of religion, does mere religious beliefs and opinions, bar governmental interference with but it does not affect the legal consequences otherwise attending a given practice or action that is not inherently religious.39

The 1975 “Revenue Procedure” (a document released to set forth guidelines and fulfill recordkeeping requirements whenever an IRS policy change was implemented) stated that private schools that sought to keep their exempt status needed to meet the following requirements:

(1) Must formally state their nondiscriminatory policy in their organizational charter or similar instrument (Rev.Proc. 75-50, Sec. 4.01).

(2) Must set forth that policy in all brochures, advertisements, catalogues, fund solicitations and similar publications (Sec. 4.03);

(3) Must either effectively publish that policy under specified, detailed guidelines in newspapers (Sec. 4.03-1(a)), or broadcast media (Sec. 4.03-1(b)); or, in the alternative, they must be able to demonstrate that they in fact have a significant minority enrollment or have meaningfully sought to recruit such an enrollment (Sec. 4.03-2);

(4) Must have a nondiscriminatory policy with respect to faculty, school programs, and tuition and scholarship practices (Secs. 4.04, 4.05);

39 Rev. Rul. 75-231, 1975-1 C.B. 158, 4
(5) Must certify all of the above under penalty of perjury (Sec. 4.06);

(6) Must provide specified information to defendants regarding the racial composition of their faculty and staff, the nondiscriminatory character of their tuition and scholarship policies, and the policies regarding race discrimination held by their incorporators, founders, board, and donors (Secs. 5.01-1 through 5.01-4; see also Secs. 4.07, 4.08); and

(7) Must keep records for three year periods from the year of compilation regarding racial composition of faculty and students, nondiscrimination in scholarship and tuition, and as well as retaining copies of all brochures, catalogues, and the like (Sec. 7).

This controversial policy was pushed even further by the time the Carter administration was in the White House. In August of 1978, the new IRS Commissioner Jerome Kurtz proposed changes that took more proactive steps beyond simple requirements for religious schools to make formal statements of non-discrimination. The new protocols were a result of the filing of *Wright v. Blumenthal* (1976) that sought a permanent injunction that prevented the IRS from granting new exemptions or renewing existing exemptions for discriminatory schools. Further, the suit

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40 *Wright v. Miller*, 480 F. Supp. 790 (Dist. Court, Dist. of Columbia 1979), note 3

41 The Ford Administration was largely silent on desegregation issues, besides its desire to find alternatives to bussing. Though in 1976 he proposed the School Desegregation Standards and Assistance Act which would have "limited court-ordered bussing to no more than five years, established a bipartisan National Community and Education Committee to help communities prepare for desegregation and preclude violence" which ultimately failed in Congress, Ford's administration did subsequently challenge a bussing decision for ten suburban districts in Wilmington, Delaware by having the Justice Department file a brief with the Supreme Court alleging the court went too far in allowing bussing between the city and suburban school centers "During his time in office, however, the IRS continued strengthening their policy against private discriminatory schools, this time incorporating religious schools into the regulations. In an appearance on CBS-TV's "Face the Nation" on June 5, Ford seemed to defend racial discrimination in nonpublic schools. When asked, "Would you approve of a private school turning someone away on the basis of color?" Ford replied, "Individuals have rights. I would hope they would not, but individuals have a right, where they are willing to make the choice themselves, and there are no taxpayer funds involved." As Richard Parsons wrote five days later, Ford's position not only belled his defense of school desegregation, but contradicted his own Justice Department, and would be repudiated by the Supreme Court." Lawrence J. McAndrews, "Missing the bus: Gerald Ford and school desegregation." *Presidential Studies Quarterly* vol. 27, no. 4 (1997): 791 and *U.S. History in Context*. Web. Vol. 24 (May 2016), 8

pointed to the failure of the IRS to make the enforcement of discriminatory tax denial a nationwide policy and re-opened the *Green* case that alleged that the IRS did not comply with the Court’s injunction against Mississippi’s discriminatory private schools.\(^{43}\)

Listed in the complaint were sixteen schools used as illustrative examples of racially segregated private schools. Over one-third were either religiously affiliated or operated directly by churches; including the Catholic, Episcopalian, Methodist, and Southern Baptist churches. This prompted the IRS to turn a more guarded eye on private religious academies.

The *Wright* suit also provided recommendations for how to monitor the discriminatory status of schools and the IRS policy of 1978 reflected these recommendations. New oversight required suspected segregationist academies to meet an enrollment quota for minorities or to present specific evidence defined by the IRS as showing “good faith of a racially non-discriminatory basis” of operations.\(^{44}\) The IRS also switched the burden of proof onto the schools themselves, and required clear-cut and unambiguous evidence of nondiscrimination. Kurtz received over 126,000 letters protesting the decision and placed pressure on the IRS to create more flexible requirements.\(^{45}\) A Congressional hearing was held to look into the IRS policy and to investigate whether the IRS was overstepping their regulatory bounds.\(^{46}\)


\(^{44}\) News Release, Public Affairs Division of the Department of the Treasury Internal Revenue Service No. IR-2027, August  21,1978,

\(^{45}\) Which he did in February 1979. Written statement of James P. Turner, deputy assistant attorney general, Civil Rights Division, to the Committee on Finance, Subcommittee on Taxation and Debt, United States Senate, (May 14,1979), 25.

\(^{46}\) Neuberger and Crumplar, "*Tax Exempt Religious Schools Underattack*," 229-276.
The Hearing

Because of the public and political pressure, Kurtz was forced to all but backpedal on the stricter oversights implemented barely a year before. The new, more flexible standards required by the IRS would classify a private school as “reviewable” if it met three criteria: a) the school was formed or greatly expanded at the time desegregation was being implemented in its own community, b) its minority enrollment must be insignificant, c) its founding or expansion must be found to be directly related to the communities public school desegregation.\(^{47}\) The IRS would dedicate more time to reviews of the type of institution and whether its educational focus or religious affiliation would indeed create circumstances in which their racial makeup would be lower than the 20 percent standard that automatically categorized an institution as non-discriminatory. Despite these attempts at assurances by Kurtz, however, the increased scrutiny, particularly to religious schools, was a significant concern for conservative Congress members. The controversy stirred a reaction particularly from Senator Bob Dornan of California who called for Kurtz’s resignation in light of what he believed to be a violation of the schools’ First Amendment rights. “Contrary to our Anglo-Saxon legal tradition, a party was assumed guilty until proven innocent… People all over this land are sick and tired of unelected bureaucrats engaging in social engineering at the expense of our cherished liberties.”\(^ {48}\)


Held before the Subcommittee on Taxation and Debt Management of the Senate Finance Committee on April 29th, 1979, a hearing on IRS policy was called by Senator Harry S. Byrd, Jr. of Virginia and chaired by Senator Bob Packard from Oregon. The hearing was intended to address all private schools and their right to tax-exempt status in the face of discriminatory accusations. Freedom of religion and the freedom of parents to educate their children within a religious tradition and outside of the public school systems became the primary issue of concern and topic of discussion during the hearings. Prior to the start of the hearing Senator Orrin Hatch of Utah introduced three bills in response to the IRS’ actions. His intention in introducing these bills was, as he put it, to protect, “the rights of the American people to freely practice religion and to freely educate their children in whatever moral atmosphere they may choose. Such freedom of choice in religion is one of the corner stones upon which our republic was founded. We must act to preserve it.”

Under the sponsorship of Senator Hatch, S. 103 named Save Our Schools Act, proposed to push the enactment of the 1978 IRS regulations until December 31, 1979 so that Congress could examine the IRS policy. S. 449 named the Charitable Institutions Preservation Act, proposed “strip[ping] the IRS of their dubious legal authority” to determine whether schools tax exemption status is valid. Finally, the Private Schools Preservation Act was specifically designed to protect private religious schools by requiring Congress to give specific mandates before any religious schools tax status could be altered. The hearings were designed to provide review of IRS conduct and garner support for Senator Hatch’s bills. Senator Hatch viewed the

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IRS’ actions as a danger to representative democracy by, as he put it, “allow[ing] an administrative agency to set social policy.”

Senators Bob Dole of Kansas and Paul Laxalt of Nevada (who called Jerome Kurtz an “education czar” and stated that he believed that “the ugly spectre of racism has been used as a smokescreen for this usurpation of legislative authority by the IRS”) presided over the hearing and expressed concern on two fronts. First, the policies of the IRS were a threat to the religious free exercise of individuals and second, their actions revealed the problematic ability of the IRS to “make law” without having been granted the authority of elected officials. Time and time again discriminatory practices by schools were downplayed or ignored by those providing testimony and a profound concern with the interference by government into religious schools and their status in a nation founded on separation of church and state were highlighted.

When the Senators evoked the separation of church and state as a founding principle, they were simplifying a complex history of religion’s relationship to the state in the U.S. Philip Hamburger, in his thorough analysis of the history of separation, points out that “there is much reason to believe that modern suppositions about the wisdom and influence of Jefferson’s words regarding separation have developed largely as part of a twentieth-century myth—an account that has become popular precisely because it has seemed to provide constitutional authority for separation.” During the nineteenth century, there was no assumption within the courts or within public understanding that

50 Ibid
51 Tax Commission Hearing, 231
52 Hamburger, Separation of Church and State. 11-17, 195-391
53 Hamburger, Separation of Church and State. 11-17
the Constitution implicitly guaranteed separation. Activist groups that fought for separation amendments provided the nation with a newly developed discourse about the separation of church and state. They legitimated the cause of separation through the use of Jefferson’s “wall of separation” as supportive history for their cause. The prominence of this discourse set the stage for separationist efforts in “the twentieth century, after the amendment process had been abandoned,…[when] an interpretive approach prevail[ed] and by this means, separation became part of American Constitutional law.”

The road to the integrating of separation into constitutional law began with a controversy over the use of public education funds in religiously oriented instruction. Public funds for religious education emerged as a volatile topic in the American landscape in the early 1800s. New York State hosted early fights between Protestants and Catholics about publicly-funded, religiously-oriented schools, but over the next century the nation became a site for innumerable arguments of this nature. Protestant activists were uncomfortable with the idea of Catholic schools’ growth within the United States because of the perceived threat to the Enlightenment-inherited right to freedom of conscience in religious and social matters. The belief that Catholics derived all instruction in thoughts and deeds straight from the Vatican that left no room for personal will, threatened the freedom of conscience so crucial to an American democratic society. “They thereby developed an anti-ecclesiastical perspective, from which growing numbers of Protestants, whether or not theologically liberal, perceived the Catholic

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54 Ibid
Church as a threat to individual mental freedom.” At the same time, Catholics were unhappy that funds to the Protestant-influenced public school systems represented blatant examples of the prejudicial differentiation between acceptable forms of religious instruction. This century-long clash culminated in a Supreme Court decision that influenced all subsequent Establishment clause adjudication. The decisive moment that linked the idea of separation of church and state to constitutional law came in 1947 in a Supreme Court case concerning public education funds and religious schools, *Everson v. Board of Education of Ewing Township* (1947). Separation of church and state, therefore, was not legally enshrined until half way through the twentieth century.\(^56\)

Though the comments about separation of church and state during the hearing may have been a simple misunderstanding of the history of separation law in the U.S., there seemed to be intentional reluctance by the committee to truly review the incredible rise in private religious segregation schools in the South. The Congressmen that ran the hearing had little data on the growth rate of private schools or the demographics of these schools (neither did the IRS commissioner) or any way to link the implementation of desegregation geographically with the opening of private academies. The study on private schools included in an appendix to the hearing transcript was concentrated on New York State. New York was a state that no doubt experienced its own *de facto* segregation issues, but the data provided a tangential example when the size and scope of the private religious school issue in the South was the issue at hand. Likewise, the IRS policy under review was concentrated on schools opened during desegregation

\(^{55}\) Hamburger, *Separation of Church and State*, 195-391

\(^{56}\) Ibid; *Everson* “produced the Court’s first comprehensive analysis of the meaning of the establishment clause.”
implementation in *Southern* counties.\textsuperscript{57} Though the hearing included testimony from many groups that advocated for the more stringent IRS policies to prevent discriminatory schools from gaining tax advantages from the government, the ACLU testimony delivered by E. Richard Larson provided the only testimony with citations of studies and cases history that highlighted the direct connection between the proliferation of private academies and racial discrimination.\textsuperscript{58}

The explosion of private schools in the South was, however, not truly the focus of the hearing. Instead, the focus was on the violation of religious liberty and individual rights under the First Amendment, government overreach, and unauthorized law-making by an administrative body within the government. In fact, most of the representatives who spoke at the hearing felt the government had little right or responsibility to regulate racially discriminatory private schools, especially if they were religious institutions. The fact that religious schools were racially uniform made sense to them, as many argued that faith communities themselves were traditionally insular and alike.\textsuperscript{59} If the religious schools were truly discriminating against black students, then, as Representative Dornan of California noted, their punishment would come from a higher authority than the U.S. Government;

> racism is so ugly that any school that is founded in the name of Jesus Christ that practices this ugly process or uses Christ’s teaching as some sort of smoke screen to establish a racist system of education, they kill

\textsuperscript{57} Tax Commission Hearing, 231

\textsuperscript{58} Including The American Bar Association, Committee for Civil Rights Under Law, NAACP, Public Citizen’s Tax Reform Research Group, and the Assistant Attorney General from the Civil Rights Division of the Department of Justice. All these group were very concentrated on case law, and not as much on private school demographics like the ACLU. Tax Commission Hearing, 1

\textsuperscript{59} Representatives that asked questions and casually spoke in defense private schools during their interrogations included Senator James Sensenbrenner Jr. of Wisconsin, Senator Don Edwards of California, and Senator Harold Washington of Illinois, Tax Commission Hearings, 1-27
themselves from the very genesis of their organization by twisting the teachings of the Prince of Peace. And their own punishment is their own hypocrisy and they fall heavily of their own weight as any crusader in all of history that has killed or turned brother against brother in the name of Christ or any great leader.\textsuperscript{60}

Despite the fundamental misunderstanding of the relationship between race and religion in some denominational theologies, the analysis presented by Senator Dornan and shared by many committee members showed an interpretation of the case law leading up to the IRS regulatory changes that prioritized religious free practice above the directives to revoke exemption status to discriminatory schools. The interpretation by the Congressmen more closely reflected the insider leniency given in case law like \textit{Yoder} and \textit{Sherbert} and did not reflect the more common use of the reduction principle that had informed the courts for a century. Rightly, the Congressmen saw parents who enrolled their children in religious private school as concerned about more than just preserving segregated education. Parents that enrolled their students in religious private schools were likely worried about mixed race classrooms, but were also worried about the religious and moral instruction of their children.

Religious schools, however, were allowed exclusivity only when it came to the religious adherence of their student body and staff, not racial exclusivity. The Congressmen continued to pose questions about the reasons for the establishment of so many religious private schools in the mid-1960s. Enrollment in these religious private schools may have skyrocketed as desegregation began to proliferate the South, they posited, but also began to rise when the Supreme Court ruled against prayer and Bibles in school. How could the IRS be sure, they argued, that religious private schools were

\textsuperscript{60} Tax Commission Hearing, 33
racially discriminatory and not just religiously insular? What were the dangers of putting arbitrary (and indefinite) holds on the tax-exempt status of these institutions, therefore declaring the religious academies guilty until proven innocent?

The committee answered these questions through avoidance of the issue. Congress failed to pass any of the bills proposed by Senator Hatch prior the hearings. As such, they were able to avoid taking a strong legislative stand to protect schools that may practice religiously based racial discrimination. They did, however, prevent the IRS from enforcing policies that would revoke tax exemption from discriminatory private schools. In a bit of a backdoor move, Representatives John Ashbrook of Ohio and Robert Dornan of California managed to block the IRS’ efforts by quickly attaching a rider to a Treasury Department appropriations bill that prohibited the IRS from using funds to enforce the new rules. The Dornan and Ashbrook amendments were approved in 1979 and in the two subsequent congressional sessions.61

The hearings sparked a strong reaction from supporters of private religious academies, especially in the wake of the recent court decision that ruled churches exempt from the National Labor Relations Act. Only a month before the tax exemption hearings the results of NLRB v. Catholic Bishop of Chicago (1979) case determined that the National Labor Review Board did not have jurisdiction, not only over “completely religious” institutions—which had always been the case, but also over institutions that engaged in both secular and religious education when the institution itself was

61 One, known as the Dornan Amendment, deals specifically with the IRS guidelines proposed in August 1978 and February 1979; it provides that “[n]one of the funds available under [the] Act may be used to carry out [the IRS proposals].” The other, known as the Ashbrook amendment, provides more generally that none of the funds furnished pursuant to the Act shall be used for measures, other than those then in effect, that “would cause the loss of tax-exempt status to private, religious, or church-operated schools.” Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub.L.No.96-74, 93 Stat. 559 (1979)
The Catholic Church refused to recognize the unionization of its non-clerical faculty teaching in its parochial schools and failed to bargain wages, terms of employment, or conditions of employment with its lay teachers. Lay teachers and the NLRB fought the Catholic Church schools in the court over their rights of their employees to unionize. Citing the Lemon test of excessive entanglement by the government, however, the Burger Court ruled that the NLRB did not have jurisdiction over the lay employees of a religious institution.

For Christian authorities, this case heartened them in their claims that the IRS did not have the authority to come in and dictate the racial composition of their religious schools. Though the NLRB v. Catholic Bishop (1979) decision shared little in the way of case law, the sentiment of government’s over-involvement in the affairs of religious bodies had just been confirmed by the highest court of the land. The opening statement by the representatives of the hearing on the IRS acknowledged the recent support for church autonomy and declared their alarm at the IRS’ actions. Authorities from Christian Academies testifying at the hearing attempted to strengthen that narrative of government over-reach and the right of churches to non-interference in their testimony. Statements like those of William Kelly from the Association of Christian Schools International show the popular/personal interpretation of rights held by those that ran and supported private schools at odds with definite government powers:

Senator Packwood: Are you saying the IRS or the Congress would have no right to remove the deductibility of contributions to a church if the church consciously practiced racial discrimination?

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Mr. Kelly: Not being a constitutional attorney, I respond to that with personal conviction. I do not think that it would have that right.\textsuperscript{63}

Though Senator Packwood later clarified that Congress did indeed hold that power and could give the authority to the IRS, the actions of Congress after the conclusion of the hearing showed that it was not necessarily willing to use that authority when religious and individual liberty was weighed against “government interference” in the name of racial equity.

Despite the efforts by Congress to defund the IRS policies, the back and forth between the courts, the IRS, and the Congress continued almost immediately with an injunction by the U.S. District Court in \textit{Green v. Miller} (1980) that ordered the IRS to identify discriminatory schools—looking particularly at schools established during desegregation.\textsuperscript{64} A new dynamic to the ever more contentious argument over civil rights and religious rights in the form of tax law emerged with the presidential election in 1980.

\textbf{The Reagan Administration}

When the Reagan Administration took the reins in 1981, with a wave of support from the Religious Right, the concerns voiced by Congressmen and the public in the 1979 hearing began to receive executive support from the White House. The formation of conservative Christian political organizations in the late 1970s like the Moral Majority and the National Christian Action Coalition (NCAC) that helped propel Ronald Reagan into the White House are often connected to the increasingly morally charged issues of abortion, the ERA, and school prayer arising in the public imagination. But the tax exemption issue was, according to leaders of the Christian Right, one of the most

\textsuperscript{63} Tax Commission Hearing, 118

\textsuperscript{64} \textit{Green v. Miller}, No. 1355-69 (D.D.C. May 5, 1980)
significant and driving forces that motivated the organized and coordinated Christian political movement in the 1970s. Robert Billings and Paul Weyrich, founders of the NCAC and prominent leaders in the religious right movement pointed directly to the tax issue. Weyrich recounted his efforts to bring Christians into the political process by trying to press the importance of social issues but had little luck until he turned to the problem of school funding; "What changed their minds was Jimmy Carter’s intervention against the Christian Schools, trying to deny them tax-exempt status on the basis of so-called de facto segregation."  

Similarly, Billings noted, “Jerome Kurtz has done more to bring Christians together than any man since Apostle Paul.”

While campaigning, Reagan himself spoke to the issue on a radio address and warned that over reach by IRS policies “threatens the destruction of religious freedom itself with this action,” despite the fact that “virtually all such [private] schools are presently desegregated.” In the lead up to the election, the Republican Party Platform included a mandate drafted by Mississippi Representative Trent Lott to stop Jerome Kurtz’s “vendetta” against “independent schools.” Reagan’s campaign literature highlighted his opposition to “the IRS attempt to remove the tax-exempt status of private

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schools by administrative fiat." The Republican Party and Reagan’s statements were decisively directed at the concerns of the Christian Right, and the attention to the issue garnered significant support from the Southern, Christian vote by capturing 62% of their voting base even against the professed Evangelical incumbent Jimmy Carter.

Complicating matters, however, was the *Wright v. Regan* (1981) decision by the United States Court of Appeals, District of Columbia Circuit at the start of Reagan’s tenure as president that reinforced the duty of the IRS to revoke tax exemption for discriminatory schools. The decision sought to reconcile the issue that tax exemption regulations were still in place for Mississippi schools, but were blocked from being enforced for discriminatory schools around the nation. *Wright v. Regan* (1981) opened the door once again for exemption denial for schools nationally. The decision was upheld by the Supreme Court. The appeals court decision came into direct conflict with the Republican Party Platform and Reagan’s own campaign promises and soon the administration felt pressure from prominent Republicans to address the tax exemption controversy.

Concurrently, the Bob Jones case began to make its way through the courts. In November of 1970, when the IRS requested data on Bob Jones University (an Evangelical Christian institution) admissions policy, the University responded with a statement that they did not admit black students and had no plans to do so. Upon receiving this response, the IRS rescinded the University’s tax-exempt status and informed the school that they were responsible for sending unpaid back-taxes. In

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response, Bob Jones University sued to enjoin the IRS’ actions. Representative Lott sent a direct memorandum to President Reagan asking him to resolve the tax exemption issue before the Bob Jones case came before the Supreme Court and outlined the reasons why the tax exemption should stand. There are questions as to whether Reagan himself gave much careful consideration to the potential backlash to supporting Bob Jones’ position by delving into the contentious back and forth tax exemption for religious discriminatory private schools had undergone in the last decade. Perhaps he felt exemption reinstatement would be an easily deliverable promise (in a way overturning abortion legalization and reinstating prayer in schools were not) to the Christian Right that had supported his campaign. The administration ultimately took action strongly in favor of the private academies. In January 1982, the Treasury and Justice Departments reinstated Bob Jones University and Goldsboro Christian Schools tax-exempt status. The controversy stirred by this action was profound and ultimately resulted in a reversal by the Supreme Court in Bob Jones v. US (1983).

The continuous reversals by the courts, hearings by Congress, and re-considerations by presidential administrations point to the power of the constitutional conflict at work between the issue of racial equality in education mandated by Brown and the deeply held constitutional commitment to freedom of religious practice by both the public and the government. Following court decisions on the tax status of private religious segregationist schools demonstrates two points. First, the courts (naturally) had a very legally driven interpretation of religious free exercise that echoed case law and was not necessarily the same interpretation held by members of Congress.

Second, the issue contained more dynamic questions than just religion v. racial equality, such as government overreach—particularly in the case of religious institutions and the limits of non-legislative or judicial bodies like the IRS in making regulatory decisions. The complexity of these issues and the racial dynamic in operation in the push and pull on tax exemption policy created an unresolved and constitutionally contentious interpretation between the different government bodies trying to address the issue.

Despite all of these complex issues at work in the decisions about tax exemptions for religious academies in the South, it is hard to ignore the importance race played in the motivations behind both those working to protect church schools and those fighting against the tax status of discriminatory church schools. The language of separationism used by the Theodore Bilbos of the world was passing away and instead a language of individual rights, religious rights, and government over-reach was taking its place. At the same time, lawsuits brought before the courts pressed the issue of race. The courts continually recognized the racial component in the mission of the schools and the legal requirement the government had to fulfill to avoid support for those practices. Those fighting against the continuation of segregation, which by the 1970s had largely shifted into the realm of private schools, did not want the coded language of religious freedom to obscure the challenges they brought against racist institutions. Additionally, desegregation activists had First Amendment free exercise law on their side. Rarely did the courts find that free exercise could trump a vested interest of the government. Ending segregation, in light of the Brown ruling, was certainly one of those vested interests.
CHAPTER 6

CASE STUDY OF GOLDSBORO CHRISTIAN SCHOOL SYSTEM

Though many private Christian academies brought tax exemption suits to the courts in the 1970s and 1980s, one of the most fully litigated was the case brought by the Goldsboro Christian School System. The Goldsboro Christian School System was incorporated in the state of North Carolina in 1963. The timing of the incorporation was auspicious. Many white community members in Goldsboro, increasingly uncomfortable with the changes on religion and race in the public schools, looked to private education for their children that reflected the “values” they held dear. The Goldsboro case provides a fascinating and illuminating window into the direct conflict between the constitutional protections against racial discrimination and that of free religious practice in the United States. Goldsboro Christian Academy and its supporters believed that they had a fundamental right, protected by the Constitution and reinforced by the values they held dear as American citizens to practice their religious convictions as they saw fit. Religious convictions, however, do not exist in a vacuum. The pressures brought by changes to social norms necessarily highlighted certain theological ideas at key moments.

Goldsboro provides a comprehensive example of the convergence of the private religious school tax controversy because of its geographical situation, its racial demographics, the status of its public school system, and the timing of the founding of Goldsboro Christian Academy right at the nascent moments of the town’s push toward full integration of its schools. The Academy was established at a crucial moment in the rise of religious private academies whose discriminatory practices demonstrate the complex convergence of theological and social motivations. The government and the
courts wanted and needed to neatly categorize the actions of these private religious segregation academies as operating from a place of pure religious belief, or as deceptively using belief as a smoke screen for purely racist motives. The reality of the situation was much more complex. To untangle how much was religious conviction, and how much was reactionary prejudice to civil rights advances, was a fundamentally impossible task for governmental bodies.

Earlier efforts by the legislature and judiciary, had profound influence over the move by whites to private religious academies during this time. Court decisions had contributed to an environment where Christian fundamentalist schools became the primary location of segregated private education in the South. Three concurrent legislative and adjudicatory results led to this trend; 1) desegregation beginning to move forward in the mid-1960s 2) successful legal challenges to state funding sources of private schools 3) challenges to religious practices in public schools in the courts. For these religious academies, these were not separate issues; prayer in school, control over their communities’ school curriculum, and separation of the races all had a basis in religious belief and religious rights.

Chapter 6 will examine Goldsboro Christian School System as a case study for how these issues converged and collided with legal action against private religious academies. The Goldsboro Christian Schools provide a concrete case study into how race, education, and religious practice were highly integrated rights issues for these religious academies. The Goldsboro Christian Schools were both vocal about their belief in a religiously based separation of the races and were directly involved in a suit that argued for their religious rights that went all the way up to the Supreme Court. In
examining the history, rhetoric, and actions of this school system, the three influences I argue operated to perpetuate the increase in private religious schools systems in the South (and elsewhere) will be examined in a tangible setting.

**Segregationist Academies Proliferate**

The establishment of segregation academies throughout the 1960s and 1970s and the significant enrollment of white students they received throughout the South marked a departure from the role private schools had inhabited in that region before desegregation. Private schools were understood as primarily for Catholics or the wealthy prior to the 1960s. Though record keeping was inconsistent for private schools from state to state, several scholars made attempts to document the shift in private school attendance from the 1950s to the 1970s in order to point out the profundity of the rise in private schools in response to desegregation. According to David Nevin and Robert E. Bills who ran a study of segregationist schools in 1975 funded by the Ford Foundation and commissioned by the Task Force on Public Education for the Lamar Society (a group of progressive Southerners interested in “improving their society”), early segregationist schools tended to be secular.¹ These secular schools served countywide populations and tended to exist in more rural settings. These schools did not proliferate, often because of issues related to court challenges about how they acquired their funding which largely put a stop to the use of public funds. The schools that took off in large numbers and/or emerged in cities were Christian schools that they described as “sponsored by an evangelical Protestant church and heavily influenced by

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¹ Nevin and Bills, *The Schools That Fear Built*, 2
the fundamental theology which the more conservative evangelical churches follow.”

Scholarship from Virginia Davis Nordin and William Lloyd Turner that supported this claim argued that while Catholic school enrollment declined between 1965 and 1975, Lutheran schools remained consistent in their enrollment, and Adventist and Christian Reformed Schools declined slightly, Christian fundamentalist schools grew rapidly.

Nordin and Turner attempted to calculate the number of students enrolled in non-Catholic, nonpublic schools in the nation. Their best estimate noted an increase in attendance at these schools from 615,548 to 1,433,000 in the decade between 1965 and 1975. Nevin and Bills then tried to narrow the numbers to the thirteen Southern states that experienced desegregation. They claimed that approximately 300,000 Southern students attended private schools before the Swann decision in 1969, which increased to 750,000 by 1976. Despite the difficulty of finding exact numbers, both Nevin and Bills and Nordin and Turner found that student numbers more than doubled in private schools as desegregation progressed.

Goldsboro Christian Academy was founded right at the beginning of the trend described above that grew exponentially in coming years. In order to understand the environment into which the Goldsboro Christian school emerged, it is important to

2 Ibid

3 Nordin and Turner, “More than Segregation Academies,” 391-394 and Nevin and Bills, The Schools That Fear Built, 9

4 The state by state account that Nordin and Turner give is even more compelling as they note the number of schools and students, including the percentage growth regionally: “The number of fundamentalist schools in Kentucky had increased from eight in 1969 to 33 in 1978, or 313%. In Wisconsin the number increased from 5 to 26 during the same period—420%. Enrollments in Kentucky fundamentalist schools increased from 787 in 1969 to 4090 in 1978, or 420%. IN Wisconsin fundamentalist enrollments increased from 426 in 1969 to 1592 in 1978 or 274%.” Nordin and Turner, “More than Segregation Academies,” 392
understand the town of Goldsboro, its make-up, and how the town managed its transition to an integrated school system.

**Goldsboro’s Desegregation Plan**

Goldsboro was (and is) the county seat of Wayne County, a large agricultural area about fifty miles from Raleigh, the capital of North Carolina. Located in the coastal plains region, the city in the late 1960s and early 1970s was a crossroads for two railroads, eight trucking lines, and an interstate highway. The city showed only nascent signs of suburbanization, with a still-active commercial downtown, threatened only by one newly constructed suburban shopping center on the eastern edge of town.

Goldsboro’s agricultural industry was largely centered around tobacco. Its manufacturing industry was varied, encompassing textiles, furniture making, surgical supplies manufacturing and a foundry. Other large employers for the town included a military installation, a state mental hospital, and a branch of General Electric.5

Local government consisted of a mayor and five aldermen, elected every other year, and a city manager—selected by the city board—that ran municipal matters. Though almost 49% of the population of Goldsboro was black according to the 1970 census, only 11% were employed in “professional” jobs, the rest worked in unskilled farm or manufacturing jobs, domestic labor, or in the service industry. The unemployment rate for blacks in Goldsboro was nearly twice that of whites in 1970. More than seventy churches inhabited Goldsboro with a wide variety of denominations.

With a population of just over 26,000, that meant one church for every 370 people in the town.  

Goldsboro City schools had a reputation of being one of the top public school systems in the state at the time. Integration mandates, therefore, brought with them concern from whites in the community about maintaining the quality of schools after integration was complete. To understand the dynamics at work in the desegregation of Goldsboro, it is important to look at the demographic make-up of the town. The City of Goldsboro, according to the 1970 census, had a population of 26,810. The city’s population at this time was on the decline. The population had taken a 7.2 percent loss over the previous decade and census numbers indicate that whites were the majority of the population lost over that time period. The industry in Goldsboro drew young black families hoping to gain better wages and regular work. Therefore, although the town’s racial composition was 48.3 percent black to 51.7 percent white, the percentage of school age children (5-14 years old) in Goldsboro was 56.6 percent black and 43.4 percent white in 1970.

The loss of white population in Goldsboro was perhaps related to the town’s particular demographics that had a significantly larger black population than surrounding

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7 James Allen Buie, *An Investigation and Analysis of Selected Characteristics of Students Who Withdrew From the Goldsboro City Schools To Attend Independent Schools*, Department of Education, Duke University, 1971. Diss (Buie subsequently became Superintendent of Goldsboro City Schools)

8 Goldsboro had grown in population by 34.2 percent between 1950 and 1960, but decreased by 7.2 percent over the next decade. In 1960 the black population made-up 41.2 percent of the town’s population, but represented 48.3 percent of the town’s population by 1970. That shows an 8.7 percent gain in the black population and an 18.2 percent loss of the white population over that time period. Buie, *An Investigation and Analysis of Selected Characteristics of Students Who Withdrew From the Goldsboro City Schools To Attend Independent Schools*, 16
cities of comparable size. Blacks represented nearly half of the Goldsboro population compared to an average of about 34 percent in surrounding communities.9 “For the school year 1965-1966, the Goldsboro City schools had an enrollment of just over 9,000 students of whom 46.3 percent were black. By 1981-1982 the enrollment had dropped to 5,000 students of whom 77.7 percent were black.”10 It was under this trend of white flight that the private academies of Goldsboro began to flourish. Four total private academies, three of them religious schools, operated in Goldsboro by the time the city’s desegregation plan was implemented. The schools included: St. Matthew’s Catholic School founded in 1927; Hope Academy, a private Protestant school created in 196611; Country Day School, a secular private academy founded in 196812; and Goldsboro Christian Schools founded in 1963.13

Descriptions of race relations in Goldsboro during the transition to an integrated school system are a bit of a mixed bag. Goldsboro was the subject of two studies in the 1970s because of its reputation as having a proactive integration plan (though not an immediate one). In 1970, the city school system won a Thom McAn award for having one of the eight most progressive desegregation plans in the country. The first study, 

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9 Ibid


11 The timing of the school’s opening demonstrates that Hope Academy was founded to avoid the disruption perceived as coming to Goldsboro schools from the “Freedom of choice” plan implementation

12 The timing of the school’s opening demonstrates that the County Day School was founded in anticipation of the merger plan set out by the board for the more affluent community members

13 Goldsboro Christian Schools was opened only two years after the approval of the program by the Goldsboro School Administration to begin accepting individual requests from black students to transfer to white schools if individual hardship could be proven. Buie, An Investigation and Analysis of Selected Characteristics of Students Who Withdrew From the Goldsboro City Schools To Attend Independent Schools, 36
conducted from 1970-1972, was supported by the Urban Affairs Program of the Consolidated Program of the Consolidated University of North Carolina and was conducted by scholars from UNC-Chapel Hill, North Carolina Central University and the Educational Testing Service. The study was headed by Robert Mayer, an associate professor of city and regional planning at the University of North Carolina Chapel Hill.\textsuperscript{14} The second study, conducted from 1972-1973 was supported by the Office of Education and conducted by a team of scholars from Columbia University’s Teacher College in New York, led by Mary Ann Lachat, a professor of Education at Columbia's Teacher’s College.\textsuperscript{15} Each study had a different take on how race relations operated in the town. Mayer’s study took a top down approach by exclusively interviewing the city’s (white) leaders about the nature of race relations in the town. Mayer concluded from these interviews that the initiative taken by white leaders within the community to spearhead desegregation was what made the effort so successful. Also, in Mayer's interviews, white leaders boasted a longstanding good relationship between blacks and whites in the community, which they claimed, allowed desegregation to ultimately succeed.

Despite the positive picture of race relations in Goldsboro in these interviews, the white leaders of the town could sometimes only name one, and often not even one, strong black community leader and saw no organized community force in the black population of Goldsboro, noting;

\begin{quote}
The other peculiar feature is the apparent power vacuum in the black community. White community leaders were of the opinion that Goldsboro has a good record of race relations. The lunch counter sit-ins, for example, were responded to quickly and positively. White leaders, on the other hand, point to the lack of militancy within the
\end{quote}

\textsuperscript{14} Robert R. Mayer, Charles E. King, Anne Borders-Patterson, James S. McCullough

black community, a factor which they associate with reasonable demands for change which the white community has been able to meet.\textsuperscript{16}

The authors of the Mayer study took these reports at face value and even wondered what such a “power vacuum” from the side of the local black population would mean for advancing equality in the town. The sit-ins that occurred in the town get no further discussion. Who organized those sit-ins if there was no black leadership? Who negotiated the details of the demands for change within the town in their aftermath? The study seemed to have little interest in those questions.

The Office of Education, however, framed race relations a bit differently in Goldsboro. The author of the study, Mary Ann Lachat, noted that the “relationships between blacks and whites have been woven into a fabric of mutual expectations which has set definite limits upon communication, trust and understanding.”\textsuperscript{17} She explained that in dealing with the civil rights movement and its effect on public places and public schools, the white population in the town was forced to make efforts to reach out and work together with blacks to solve problems of equality. Black community members, however, pointed to the highway billboard in the outskirts of Goldsboro which read, “Welcome to Ku Klux Klan country,” as evidence that it was not smooth sailing in response to their demands for parity. In a statement that reflected the opposite of the white leaders’ accounts in Mayer’s study, Lachat stated that black community members credited involvement by black radicals within the city and in surrounding areas for putting the pressure on whites to respond to the demands of blacks. She quoted a black businessman as saying:

\textsuperscript{16} Mayer, \textit{The Impact of School Desegregation in a Southern City}, 28
\textsuperscript{17} Lachat, \textit{Desegregation in Goldsboro, North Carolina}, 9
We have fair race relations here. We have gotten our foot in the door. If there is a problem uptown, they will come and talk to the black community. It’s not all on one side now, and that was shown one time. Some black radicals almost burned up the town. They know now you can push us but so far. We have a little respect for each other now. With some, they respect us because they know if they flog us tonight, tomorrow we’re going to burn them up. We get along now.¹⁸

She also noted some direct action by black community members who demanded equality through the organization of groups to petition the Board of Alderman in the city to hire more black police and firemen. These actions resulted in a successful outcome.

The description by Lachat hardly sounds like a town with a “vacuum” of black leadership. The inability of white community leaders to name members of black leadership was more likely a result of black leaders’ limited (or nonexistent) access to community politics. This lack of political access for blacks can certainly be seen in the way Goldsboro implemented its desegregation plan.

Goldsboro schools made little effort at desegregation after the 1954 Brown decision. With little pressure from federal or state officials, the town waited seven years to even institute a program within the School Administration that would accept individual requests from black students to transfer from their schools, and only if individual hardship could be proven. By 1965, the Board of Education implemented a popular “freedom of choice” plan that dropped the “individual hardship” requirement from transfer applications and allowed black students to transfer to white schools for any reason as long as there was sufficient space available. Under this plan, about 650 black students entered all white schools by 1968.¹⁹ When the Johnson Administration put

¹⁸ Lachat, Desegregation in Goldsboro, North Carolina, 9
¹⁹ Lachat, Desegregation in Goldsboro, North Carolina, 15
freedom of choice plans under scrutiny via the Civil Rights Act, and the HEW racial
balance test became a marker of integration instead of legislated state policy, the city of
Goldsboro feared it would not be able to demonstrate that an appropriate percentage of
black students attended “formerly” white schools in the area. They were right. In a
January 1968 letter from Lloyd Henderson, Education Branch Chief under the HEW’s
Office of Civil Rights, the Goldsboro Education Board was informed that unless a unified
school system was established, they would be considered non-compliant with Title VI of
the Civil Rights Act. Henderson wrote:

Members of my staff indicated to you the areas of probable non-compliance during
the recent onsite visit as follows: faculty desegregation, student desegregation, free
choice failed to adequately desegregate your dual system, segregated busing
patterns, and failure to implement specific assurances.20

The Goldsboro City School Board adopted a plan in 1968 to merge the black and
white high schools in town by the beginning of the school year in 1969.21 Only three
years earlier, Goldsboro spent a million dollars to build a black middle school next to the
—relatively new—black high school in order to accommodate the “freedom of choice
policy” the board had recently implemented. In order to create a unified school system
during the 1968 plan, the new black schools were reassigned as an integrated middle
school and the white high school and white middle school (also adjacent to one another)
became the unified high school. The elementary grades were set for integration one
year after the upper schools, with grades one through five scheduled to open as a
unified school in the Fall of 1970. The Alexander v Holmes (1969) decision that called

20 Lloyd R. Henderson, Education Branch Chief, Office for Civil Rights, Letter of correspondence
addressed to Jerry Paschal, Superintendent, Goldsboro City Schools, (January 30, 1968). Quoted from
Lachat, Desegregation in Goldsboro, North Carolina, 16

21 Mayer, et. Al. The Impact of School Desegregation in a Southern City, 31
for immediate desegregation of Southern schools handed down in 1969, however, threatened to disrupt the school system’s plans.

The School Patron’s Study Commission, a thirty-two member commission convened by the Goldsboro school board to institute a desegregation plan, resisted a change to their timeline for the lower grades. The Board made a concerted effort to be inclusive when forming the advisory board by including community leaders, critics of the plan, and economically disadvantaged community members. Nearly half of the committee was black. In order not to polarize the community and facilitate a smooth transition, the board made an effort to give voice to all those in the community effected by the change.22

Despite being designated a “deferred” school system and its files being sent to Washington for prosecution, the Patron's Commission agreed that by the time their case was reviewed and sent through hearings, the school year would be over, allowing them to stay with the plan they had already scheduled for the lower grades.23 A greater problem, however, proved to be how they would actually integrate the elementary schools. The Commission was against bussing and hoped to keep elementary schools within walking distance for students, but the residential segregation of the town made realization of these expectations difficult. Having only two middle and two high schools—one black, one white each—made the integration of the upper grades logistically (if not practically) simple. There were, however, seven elementary schools in town; three black (Greenleaf Elementary, East End Elementary, and School Street

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22 Lachat, Desegregation in Goldsboro, North Carolina, 16

23 Mayer, The Impact of School Desegregation in a Southern City, 32-33
Elementary), two white (William Street Elementary and Edgewood Elementary) and two somewhat desegregated under the freedom of choice plan (Virginia Street Elementary and Walnut Street Elementary). The Commission considered a 40 percent white enrollment in the elementary schools the magic number to keep whites from exiting the schools en masse and perhaps to encourage those who had left to return. In order to accomplish the 40 percent goal, the Commission had to abandon their goal of no bussing and instead paired off four of the schools into attendance zones where students would be bussed (Edgewood to Greenleaf; East End to William Street). Virginia Street, being centrally located between black and white neighborhoods was allowed to remain a neighborhood-based school and School Street was not integrated, remaining a black school due to its isolated location.

In July 1970, the NAACP and the Justice Department filed suit against the State of North Carolina and 10 of its noncompliant school districts, of which Goldsboro was one. To solve the School Street problem, Goldsboro closed two elementary schools (Greenleaf and Virginia Street) and converted School Street into the system-wide fifth grade school. Following these adjustments, the federal suit was dropped against the town.\(^{24}\)

**The Incorporation of Goldsboro Christian Schools**

The smooth transition to integrated schools within the Goldsboro City System may have been a result of those most intensely involved in the white opposition leaving the system entirely. There was a significant decline in white attendance to Goldsboro public schools that began in 1962. Though only 33 black students had transferred to

\(^{24}\) The fifth grade magnet was opened in 1971. Mayer, *The Impact of School Desegregation in a Southern City*, 35.
white schools between the years 1962-1965, the reaction of the resistant white community spurred the quick creation of white private schools. From 1964-1968, the years of the freedom of choice plan, 598 white students left the school system. The implementation of total integration; particularly that of the elementary schools, resulted in an additional loss of about 520 white students from 1969-1970. The 1971-1972 school year brought an additional loss of about 800 students. This was a loss of nearly 2000 white students in the Goldsboro system beginning with freedom of choice. Some white students had defected to the surrounding counties that had larger white populations than Goldsboro. Many, however, enrolled in the private religious academies founded in town.\textsuperscript{25}

One of the most prominent academies was Goldsboro Christian School. Goldsboro Christian School was incorporated in 1963, in direct affiliation with the Second Baptist Church of Goldsboro. The church provided the facilities for the school and also shared staff support such as secretaries, janitors, and pastors. Dr. Ed Ulrich, pastor for the Second Baptist Church of Goldsboro from 1948 through 1975 was the driving force behind the creation of the religious academy and served as the President of the school until Reverend Donald Tice took over in 1975.\textsuperscript{26} In 1966, three years after the school was established, Goldsboro Christian had 274 students enrolled in classes. By 1970, when the city’s desegregation plan had been enacted for all grades, the school had grown enough to have classes for kindergarten through twelfth grade with an enrollment of over a thousand students. The school had in its employ forty-three

\textsuperscript{25} Lachat, \textit{Desegregation in Goldsboro, North Carolina}, 26

\textsuperscript{26} \textit{Goldsboro Christian Schools, Inc. v. US}, 436 F.Supp. 1314 (Dist. Court, North Carolina 1977)
teachers—the majority of whom taught elementary grades—and ran thirty-five busses. The school charged a registration fee of around $30 and yearly tuition ran each family $260 for one child, $450 for two children, $560 for three children and $600 for four or more children. With an average yearly income of $6200 dollars per household in 1970, finding funds to pay for a family’s tuition was no small issue. Though not the most expensive option (County Day School charged upwards of $1000 per year) the Goldsboro Christian School was by far the most attended private academy in the county. The second largest private academy in Goldsboro was the Faith Christian Academy with an enrollment of 352 students in the 1970-71 academic years, compared with Goldsboro Christian’s 1052.

The founding of Goldsboro Christian School can be explicitly linked to the decisions in the Engel v. Vitale (1962) and Abington v. Schempp (1963) rulings. The charter of the school makes explicit the mission of the school to engage in an “unqualifiedly affirming and teaching the inspiration of the Bible (both the Old and New Testament)” as well as daily prayer. Though chartered on the premise of resisting the removal of prayer and Bible reading from schools and never explicitly mentioning a theological basis for segregation, the school outwardly and purposefully denied black students’ admission.

27 Buie, An Investigation and Analysis of Selected Characteristics of Students Who Withdrew From the Goldsboro City Schools To Attend Independent Schools, 55-56, 60.


29 The School’s charter reads: “The General nature and object of the corporation shall be to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences, giving special emphasis to the Christian religion and the ethics revealed in the Holy scriptures; combating all atheistic, agnostic, pagan and so-called scientific adulterations of the Gospel; unqualifiedly affirming and teaching the inspiration of the Bible (both the Old and New Testament); the creation of man by the direct act of God; the incarnation and virgin birth of our Lord and Saviour Jesus Christ; His identification as the Son of God; His vicarious atonement for the sins of mankind by the shedding of His blood on the cross; the resurrection of His body from the tomb; His power to save men from sin; the new birth through the regeneration by the Holy Spirit; and the gift of eternal life by the grace
Goldsboro Christian officials were not shy about defending their racially discriminatory admission policy as a “matter of religious conviction.” Dr. Ulrich, founder of Goldsboro Christian Schools, gave an interview in 1982, years after he’d left the Goldsboro schools to become executive director of the North Carolina Association of Christian Schools in Lake Waccamaw, NC. In the interview he reflected on the policies of Goldsboro Christian and schools like it, stating; “school leaders *(him being one of them)* went in the right direction in barring blacks. Back in the early days of forced public school integration in Goldsboro in the late 1960s there were some pretty bad things going on in the public schools.” This interview, though short of giving theological reasons for promoting continued segregation, points to an explicit commitment to segregated education on the part of the Goldsboro Christian School. Ulrich was reluctant to give theological reasons for the school’s racist policies in the press. In his deposition for the *Goldsboro v. U.S.* (1977) case, however, he was willing to be more explicit about the theological ties the school made to maintaining segregated educational environments.

Taken in July of 1975, Ulrich stated in his deposition, “the School has accepted only Japethites. On a few occasions children have been accepted who have one Japethite parent and one Hamitic or Semitic parent. The School believes that if one of a person’s parents is a Japethite he may be educated as such.” His reference to Japethites indicated that the school admitted only the descendants of Noah’s son Japheth, who are of God. This charter shall never be amended, modified, altered, or changed as to the provisions hereinbefore set forth.” *Goldsboro Christian Schools, Inc. v. US* 436 F.Supp. 1314 (Dist. Court, North Carolina 1977).


31 *Daily News*, Bowling Green, Kentucky-Nov. 24, 1982

considered Caucasians. Though Ulrich was more willing to make statements about the biblical basis of the school's segregation in private depositions than with the media, his successor was not so shy. The theological connection was stated explicitly by the second president and principal of Goldsboro Christian School, Rev. Donald Tice, who took over for Ulrich. Stating that his church was a fundamentalist institution that believed in the literal interpretation of the Bible, Tice unambiguously noted that the theology of the congregation and school included the belief that God intended the races to be separate. Tice claimed that segregation was one of the school's policies and was quoted as saying, "I think all the way back to the Tower of Babel, God intended men to be separated."\(^{33}\)

This statement by Tice referenced a long-standing theology derived from passages in Genesis 10:32 and 11:1-9;

These are the families of the sons of Noah, after their generations, in their nations; and by these were the Nations divided in the earth after the flood", and "And the whole earth was of one language, and one speech...And they said, Go to, let us build us a city and a tower, whose top may reach until heaven; and let us make us a name, lest we be scattered abroad upon the face of the whole earth. And the Lord came down to see the city and the tower, which the children of men builded. And the Lord said, Behold, the people is one, and they all have one language; and this they begin to do: and now nothing will be restrained from them, which they have imagined to do. Go to, let us go down, and there confound their language, that they may not understand one another's speech. So the Lord scattered them abroad from thence upon the face of all the earth: and they left them to build the city. Therefore is the name of it called Babel; because the Lord did there confound the language of all the earth: and from thence did the Lord scatter them abroad upon the face of all the earth.\(^{34}\)

The idea of course was that this intentional act of God was meant to be maintained by the human race in order to fulfill His will. Therefore, schools like Goldsboro believed

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\(^{33}\) *Star-News*, Feb. 14, 1982

\(^{34}\) Genesis 10:32 and 11:1-9
the mission of their school was to honor God through the preservation of prayer and Bible reading in educational settings, but also to honor God’s will to maintain a white student body. (This became increasingly complicated; however, as the school allowed for the admission of some Asian-American students down the line, but still not black students). Despite explicit claims to segregation practices by Goldsboro Christian officials, the government could do little to prevent private, religious schools such as Goldsboro Christian from operating as havens from the desegregated public schools systems. Tax-exempt status was the only avenue through which the government could penalize the schools like Goldsboro Christian for their practices.

The Legal Case Begins

Goldsboro Christian School became involved in litigation after an audit by the IRS for the years 1969 through 1972. Because Goldsboro Christian School continued to grow during the tumultuous back and forth between the Johnson Administration and the Congress over freezing reviews of tax-exempt application from these types of schools, Goldsboro Christian School’s application for tax-exempt status was never reviewed during its initial years of operation. The lack of review meant that the school could operate as though it had received tax exemption. Upon the renewal of audits on discriminatory private religious schools, however, the IRS determined that Goldsboro could not be considered an organization eligible to benefit from Section 501 (c)(3) and therefore had to pay back taxes under the Federal Insurance Contributions Act (FICA) and Federal Unemployment Act (FUTA) and the Federal Employment Tax Act (FETA). The school was targeted under these specific acts because of the teachers’ yearly salaries, but also because the school provided housing and utilities at no cost to some teachers, nearly twenty-nine of them by the 1972 school year. Providing housing to
teachers was considered “additional remuneration” by the IRS and the Goldsboro was asked to pay $160,073.96 in back taxes.\textsuperscript{35}

Instead of paying the back taxes, Goldsboro introduced its own tax refund suit against the IRS for the amount of $3459.93 in federal withholding. The suit was filed in 1977 in U.S. District Court, Eastern District of North Carolina, Wilson Division. In the terms of the suit, Goldsboro sought qualification for federal tax exemption status as a “charitable” organization that would include exemption from FICA and FUTA taxes. The school also sought a decision on whether housing for their teachers could be considered taxable income, and how much of an “income” that housing could be considered in numerical terms.\textsuperscript{36} Goldsboro lost their case in District Court and was denied tax-exempt status on a couple of grounds. First, their racially discriminatory admissions policy violated federal policy on discrimination. Second, the claim by the Goldsboro Christian School that the denial of tax-exemption status by the federal government violated their rights under the Free- Exercise and Establishment Clauses under the First Amendment was dismissed. Under appeal, the Fourth Circuit Court affirmed the decision based on an “identity for present purposes” between the Goldsboro case and the Bob Jones University case, which had been decided shortly before Goldsboro’s by another panel of the same court.\textsuperscript{37} In his ruling, Judge Robert Witherspoon Hemphill adopted the IRS’ argument—essentially the one articulated by Judge Leventhal in \textit{Green}—that organizations that violated “clearly established” public


\textsuperscript{37} \textit{Harris v. Ingram}, 644 F.2d 879 (4th Cir. 1981)
policy were not “charitable” within the meaning of the statute.” Hemphill also rejected Goldsboro’s claim that the IRS’ construction violated the First Amendment and found that any burden on free exercise was justified in pursuit of the government’s secular, principal interest to combat racial discrimination in education. The Supreme Court granted a joint review of Bob Jones v. United States and Goldsboro Christian Schools v. United States on October 13, 1981.

**Bob Jones v. United States**

The Bob Jones case, though not identical, did share some key legal challenges with Goldsboro’s suit. Founded in 1927, Bob Jones University was the brainchild of Reverend Robert Reynolds Jones, one of the most well-known and lucrative evangelists in the U.S. at the time. Formed as a reaction to the perceived increase in secularity in higher education, Bob Jones University (BJU) was originally located in Florida and moved to Greenville, SC in the late 1940s. The charter of the school stated that the purpose of the University was “to conduct an institution or institutions of learning for the general education of Youth in the essentials of culture and its arts and sciences giving special emphasis to the Christian religion and the ethics revealed in the Holy Scriptures.”

The school was a segregated university at its founding. Echoing the logic of many segregationist religious and political leaders who made attempts to distinguish between support of inequality versus support of separation, Bob Jones professed a belief in the equal value of the races, but a scriptural mandate to prevent the races from “mixing,” i.e.; dating, marrying and procreating.

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39 Plaintiff’s Trial Exhibit 2, Certificate of Incorporation by the Secretary of State, *Bob Jones Univ. v. United States*, No. 81-3, J.A. 119
In November of 1970, when the IRS requested data on BJUs admission’s policy the University responded with a statement that they did not admit black students and had no plans to do so. Upon receipt of this response, the IRS rescinded BJUs tax-exempt status and informed the school that they were responsible for sending unpaid back-taxes under FICA and FUTA—demands that mirrored the policy applied to Goldsboro Christian. The legal action taken by BJU also reflected that of Goldsboro Christian Schools. “Claiming that the IRS’ actions were unlawful and would violate its constitutional rights of free exercise, freedom of association, due process, and equal protection, BJU sued to enjoin the IRS’ actions.”\textsuperscript{40} During their first trial in the district court for the District of South Carolina, the University’s claim was accepted. Judge Robert Chapman ruled the University a religious institution whose tax status could not be amended by a tax policy applicable to discriminatory schools. He further noted that even if BJU could be considered a school, its interracial dating policy was protected by the First Amendment and the school could not be penalized for exercising its First Amendment rights.\textsuperscript{41} This decision was the reverse of the summary judgement Goldsboro Christian School received from the federal district court in North Carolina.

This preliminary injunction was reversed by the Fourth Circuit court of appeals based on Judge Leventhal’s \textit{Green} opinion and the rulings in \textit{Norwood v. Harrison} (1973) and \textit{Runyon v. McCrory} (1976) all of which denied state and federal support to discriminatory schools. Though they attempted to continue their appeals, BJU reached an impasse in May of 1974 when the Supreme Court in \textit{Bob Jones v. Simon} (1974)

\begin{footnotesize}
\begin{enumerate}
  \item Johnson, \textit{The Story of Bob Jones University v. United States}, 12
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upheld the Fourth Circuit’s decision and ruled that the Anti-Injunction Act barred BJU from pursuing further appeals until their tax debt was paid. As the legal action between the IRS and the University advanced, the admissions policy at BJU was also shifting. In 1971, the University began to allow black students to enroll if married within their own race. Then, in 1973, single black employees of the University were permitted to enroll in courses. In 1975, a month after the revocation of its tax status went into effect and their case was denied by the Fourth Circuit, BJU began to admit all black students under the condition that there would be no interracial dating or marriage. These changes did little alleviate the actions by the IRS, who determined that the prohibition on interracial dating was “integral” to the racist admissions standards. As such, the IRS’s revocation of BJUs tax-exemption status went into effect in 1976, but was applied retroactively to 1970, requiring a substantial tax bill of BJU. The IRS demanded $490,000 in back taxes. The University stood firm on their interracial dating policy despite the cost and did not revoke the policy until the year 2000.

Goldsboro’s Theological Stance

After the Supreme Court granted a joint review of *Bob Jones v. United States* (1983) and *Goldsboro Christian Schools v. United States* (1977) on October 13, 1981, amicus briefs were presented to the court by the Justice Department, Lawyers for Civil Rights Under the Law, the NAACP, the North Carolina Association of Black Lawyers, the ACLU, the attorney’s for Goldsboro Christian Schools, and by the School itself. The school’s petition gives insight into the school’s view of itself as a segregationist

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42 Johnson, *The Story of Bob Jones University v. United States*, 13

43 Some have indirectly attributed the change in policy to a visit by then presidential candidate George W. Bush. Juliet Eilperin and Hanna Rosin, “Bob Jones: A Magnet School for Controversy, University’s Policies Haunt GOP Hopefuls” *Washington Post* (February 25, 2000); A06
institution and also insight into how the school understood its legal position and its claim to constitutional rights.

In the brief submitted by the school, several approaches were laid out to legitimate the school’s claim that a revocation of their tax-exempt status would violate their rights as a religious and educational institution. The brief challenged the role of the IRS through claims that the agency had no grounds to deny exemption status because: a) it was an administrative agency with no legislative authority, b) the agency was a part of the executive branch and was therefore in violation of separation of powers because it made decisions Congress should make, and c) denial of the school’s tax-exempt status was a violation of their right to free-exercise. The brief then acknowledged that free-exercise adjudication had set a high bar as to what constituted a violation of free-exercise by the government, but like many free-exercise petitioners before them, argued that the threat to religious freedom in their case was a much more serious consequence than the preservation of an inconsequential and ineffective tax regulation;

Goldsboro is a pervasively religious school that discriminates out of a firmly held religious belief that separation of the races is scripturally mandated. Application of the IRS’s policy to Goldsboro would severely burden the free exercise of that belief…. the secular value underlying the IRS policy sought to be enforced in this case is different in both kind and degree from those government regulations which this Court has found in the past to outweigh religious liberty. The IRS policy is not directed at any practice that poses a substantial threat to public safety, peace or order, and, more importantly, that policy has never been codified by Congress nor delineated by any court. Finally, the creation of a religious exemption to the IRS’s policy would have only a minor effect on the IRS’s goal of eradicating discrimination, and that goal could be pursued more directly through private actions under the civil rights laws.44

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Goldsboro Christian schools, however, seemed to want it both ways. They claimed that revocation of tax exemption for discriminatory religious schools would effectively destroy their ability to operate with financial solvency, but also claimed in the statement that the tax revocation would do little to reach the IRS’s goal to eradicate discrimination.

Again and again the brief pointed to the religious basis for Goldsboro’s discriminatory policy.45 The school claimed that segregated education was a central aspect of their belief system because “Scriptures reveal that God has mandated the separation of the races and that the intermixing of the races ‘destroys the fear of God in the hearts of men and will bring about the judgment of the entire human race.’”46 The results of this judgement would be eternal damnation. As evangelicals, however, the religious mission of believers was to save all souls from such a fate. If the government interfered with their finances, they argued, “a central and fundamental tenet of Goldsboro's religious beliefs -- the salvation of mankind -- is burdened by the IRS's denial of its tax-exempt status.”47 These segregationist practices were not a mere reaction to social or political events, argued the brief, but “Since the School’s inception, its admissions policy has been controlled by its religious belief that God set up racial barriers and that the mixing of the races is contrary to the teachings of the Bible. Based

45 “In this case, Goldsboro has been given the option of adopting a policy that is diametrically opposed to its firmly held religious convictions and publicly advertising that fact, see Rev. Proc. 75-50, 1975-2 C.B. 587, § 4.03, or of continuing to follow what it believes to be God's will as revealed in the Holy Scriptures and annually incurring substantial tax liabilities which would threaten its continued existence….Goldsboro sincerely believes that its educational mission must be conducted in a segregated setting …(J.A. 40). Bob Jones University v. U.S. (1982), Amicus Brief, No. 81-1, U.S. S. Ct. Briefs LEXIS 1346, (October Term, 1981), 15-16.

46 Ibid

on these religious beliefs, the School does not retain an open admissions policy to blacks or anybody else who would be unwilling to cooperate with the School in its Christian teaching and philosophy."

To prove these claims, the brief presented a statement of policy adopted by the board of trustees that read very differently from the Charter of the School discussed earlier which mentioned only the importance of keeping prayer and belief central to education and said nothing about any race separation as a tenant of the school’s belief system. The policy read:

It is the belief of the trustees and administration of Goldsboro Christian Schools that God is the Creator of all men. In the plan and purpose and wisdom of God, He separated mankind into various nations and races bearing distinct physical and emotional characteristics. It is our belief that the plan and purpose of God in the separation of the nations and races should be preserved in the fear of the Lord. In Goldsboro Christian Schools we would seek to discourage any kind of social intermingling by our students that could eventually lead to intermarriage of the races and a corresponding breakdown of distinctives established by almighty God. It is our conviction that since such a breakdown is contrary to God's plan, a co-mingling of races leading in this direction can only eventually breed racial disrespect rather than God-fearing racial respect... It is for these reasons that Goldsboro Christian Schools does not retain an open admissions policy to blacks or to anybody else who would be unwilling to cooperate with the school in its Christian teaching and philosophy.

This belief system was backed-up by the much more theologically detailed deposition given by the founder and principal of the Goldsboro Christian School, Ed Ulrich. Echoing the theology explored in Chapter 2, Ulrich laid out for the Court a

48 Ibid

49 “The "Statement of Policy of the Board of Trustees" was adopted on June 26, 1971, as the written statement of the Board's pre-existing policy. The purpose of committing the Board's policy to writing was to respond to indications at that time that the Internal Revenue Service was investigating the Goldsboro Christian School with the intent of denying the School tax benefits because it could not accept students of more than one race. The Board hoped that it might avoid problems with the Internal Revenue Service by demonstrating that the School's admissions policy was dictated by the will of God and, therefore, subject to constitutional protection.” Bob Jones University v. U.S. (1982), Amicus Brief, no. 81-1, U.S. S. Ct. Briefs LEXIS 1354 (October Term, 1981), Joint Appendix, 6
detailed account of how racial separation was a religious tenant of the Second Baptist Church of Goldsboro and the school it founded. Pulled from a sermon Ulrich claimed he had made to his congregation and the students in his school and adapted to be submitted at his deposition, Ulrich laid out the racial/national categorizations of the descendants of Noah, God’s actions at the Tower of Babel, God’s intention to keep the races “pure” by disallowing intermingling and intermarriage, God’s intention to keep them culturally “pure” by keeping their education, communities, and social activities separate, and the ongoing revelation received by the church through prayer that had informed their belief system which kept their school segregated. Additionally, the school noted that not only did Goldsboro base their admissions process on these beliefs, but the school also explicitly taught the beliefs to students as a part of their religious instruction; “Instruction to the effect that separation of the races for educational purposes is a fundamental religious belief is given in the School's chapel services and other special services, and Bible classes required of each student each year, and in a Christian ethics course that is required of all seniors at the School.” Goldsboro and schools like it often used this as a reason why the admission of black students would be harmful to those students as well as to the intrinsic values of the religious school.

50 “Attached hereto is a message on the general topic suggested by paragraph II c. of defendant's Interrogatories. It was delivered by Dr. Ed Ulrich from the pulpit of the Second Baptist Church in Goldsboro, North Carolina. The message was prepared and delivered during the time that Dr. Ulrich was involved in preparing the responses to defendant's Interrogatories. It is attached hereto and made a part of this response to paragraph 11 c.” Bob Jones University v. U.S. (1982), Amicus Brief, No. 81-1, U.S. S. Ct. Briefs LEXIS 1354 (October Term, 1981), Joint Appendix, 25


The Ulrich’s deposition and the board’s policy spoke to the basis of their legal claim. Discrimination against black students was not, they argued, based in hatred or political whim. They could not admit black students without violating the basic tenants of their belief system. They did not choose to exclude blacks; it was God’s will that they be excluded. Religion, according to their argument, was not a choice, but an obligation. If the government punished them for fulfilling an obligation of their faith, then the government violated the very spirit and purpose of the First Amendment religion clauses. From this basic interpretation of what the religion clauses were intended to do, however, the school (and more specifically their attorneys) had to grapple with the actual case law on the allowances and limits of free-exercise. As seen in Chapter 4, this issue was a tough sell to the courts, as rarely did the Supreme Court find that religious action superseded vested social/governmental interest. Though perhaps the Goldsboro Christian School saw that their status as religious insiders gave them a chance at success.

To address the issue, Goldsboro’s attorneys took the tact that early free exercise cases were the belief v. action cases, but that subsequent free-exercise decisions broke down the strict barrier between belief and action and allowed religiously-dictated action to be constitutionally protected…sometimes. They argued;

Recognizing religious liberty to be a "preferred" freedom, Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943), and the free exercise of religion to be a "transcendent value," Norwood v. Harrison, 413 U.S. 455, 469 (1973), this Court has held that the right to religious freedom should be "zealously protected, sometimes even at the expense of other interests of admittedly high social importance." Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). In this case, the IRS has attempted to reject any contention that its policy impinges on First Amendment rights. It relies on early Free Exercise Clause decisions in which this Court declared that only religious beliefs, not religiously-motivated actions, were constitutionally protected. See, e.g., Mormon Church v. United States, 136 U.S. 1
(1890); Reynolds v. United States, 98 U.S. 145 (1879). Reliance on these decisions is unfounded, however, because this Court has long since rejected the simplistic belief/action dichotomy and recognized that the First Amendment guarantees both the freedom to believe and the freedom to act, with the caveat that the latter is not absolute.\(^53\)

This theological and legal argument by the school ran into problems, however, during the deposition of Ron Helder, Principle of Goldsboro Christian School at the time of the interview. Pressed on the theological underpinnings of the Second Baptist Church of Goldsboro and what that meant for the school’s admission policy, Helder admitted to two different contradictions between the School's theological claims and their actions when it came to admitting students. The first was that the school only allowed Japheths (Caucasians) because other biblically designated racial groups were to be kept separate. Helder contradicted this claim when questioned during his deposition about an Indian student who attended the school. A series of questions from the attorneys for the government revealed the inconsistency:

Q. What was the occasion -- special circumstances that the Indian being admitted, can you tell me that?
A. They just came by and wanted to know if they could enroll her, and as far as I was concerned, there was no problem.
Q. Were the parents full-blooded Indians?
A. Yes, sir, both of them.
Q. What were they doing in Goldsboro, do you recall?
A. With the military here.
Q Are they Christians?
A. No, sir.
Q. Do you recall why they wanted their child to attend this particular school?
A. They were -- heard about our school, and they evidently heard of the conditions in the public schools in this area, and they wanted the child to get a good education. Evidently, -- I think they were influenced probably by some other folks who had probably put in a good word for us, although I don't know that for sure, but that's my own supposition, and so they came here and made an application.

Q. And you have admitted also children of mixed marriages, have you not?
A. Yes, sir.
Q. How many of those?
A. I don't really know offhand how many we have in. We have at least one or two, I would think,
Q. Are you talking about currently?
A. Yes, sir.
Q. And in the past you've also admitted them, have you not?
A. Yes, sir.
Q. Would that be -- what -- what other nationality or racial groupings did they come from?
A. (No answer.)
Q. One Caucasian -- one of the parents was Caucasian and --
A. (Interposing) Yes, sir.
Q. -- the other was what?
A. Japanese, I think most of them.
Q. Any others that you can think of?
A. No.
Q. Japanese was the Hamite, were they not?
A. Yes, sir.\textsuperscript{54}

Though the Japanese students might be excused under the theological testimony of Ulrich who noted that students with at least one Japethic parent could be admitted, the Indian student clearly did not fit the theological mandate. Helder also called into question the fundamental basis of the suit—that blacks were not admitted because of religious conviction. Instead, Helder stated that social prejudice or as he called it “the racial climate” or “racial problem” in the area, was a major influence that kept specifically black students out of the school.

Q. So then you would have no objections, I take it, to accepting one black into this school, is that correct?
A. I would have objection personally in the fact that you have a racial climate in the country and because of the problem in this area. In that sense I would, yes, sir. If it hadn't been for that, there would be no problem.
Q. Well, would that violate any fundamental religious doctrine you hold, or was that just a practical problem that you would have with admitting him?

A. It would affect the, as I explained earlier, it is geared to the basic principle that I stated, as I see it. Where -- because in my estimation, and again you're having to rely on my own experience, and this is the way I see it. There would be problems and it wouldn't work.

Q. Well, aren't there similar types of racial discrimination, and possibilities of ill will between Caucasians and Indians, for example?

A. There is not that climate in our country toward them, no, sir, as there is toward Negroes.

Q: So, in fact, the policy, in effect, bears only against the Negro and not against anyone but Negroes because of the climate that exists in this country?

A. There -- isn't against anybody in particular. It is just saying that where we in -- we get into a problem because of the climate in our country at the particular time and because of the geographical area. It's not a -- a matter of discrimination, and that's where we're having a hard time -- (Laughter.)

Q. (Interposing) No, but what I'm --

A. -- getting through.

Q. -- asking you that as a practical effect as applied, your policy, in effect, goes only toward prohibiting Negroes and any other racial grouping you will permit because there is not this feeling of -- of, in this nation and in this region, this feeling of ill will or possible problems developing, is that correct?

A. You might look at it that way,

Q. Well, I'm asking you how you look at it?

A. I don't -- I don't look at it that way because of -- of the circumstances. Of course, I realize we're being judged from the outside --(Laughter.) but from the inside, I feel sincerely this is the way it is.\(^5\)

This testimony gets to the heart of why evaluation of the religious schools’ theological commitment to separated education as genuine or spurious was so difficult.

Goldsboro had religious ideology front and center in their fight. They “preached” about the issue of racial separation sanctioned by God within classes and within the required chapel services at their school during school hours. They did however allow other races into the school as long as they were not African Americans (or Africans) whose racial/social group was in the middle of a political and social campaign for equality in the U.S. It was the social environment, claimed Helder, which precluded the admission of blacks. In order to be consistent with the argument Goldsboro Christian Schools made

about their motivation for segregated education, Helder could have said during his deposition that the subdivision of Hamites called Cannanites (those of African descent specifically) were specially meant to be punished in the eyes of God as servile people which would not apply to the rest of the races, therefore, Cannanites specifically would be disallowed by the school admission process. He possibly could have said, as Ulrich did in his deposition, that for a student to be admitted they would have to have a Japethic bloodline—even if only from one parent—to justify their admission. But he said none of those things. Instead, he admitted that religion provided the template for racial separation, but hundreds of years of social conditioning in the United States provided the specific prejudice against blacks. The admission by Helder that an Indian student with no connection to Christianity in cultural or faith practices was admitted into the school, when admission for black students was impossible, was a major problem for Goldsboro Schools when it came to their First Amendment claims. Their claims could not, then, be exclusively religious. They had to be categorized as religious and cultural.

Constitutional rights, as imagined and implemented by Goldsboro Christian Schools and its supporters, did not embody a conception of rights that transcended and clashed with the existing oppressive social order in the way of the rights-based legal fights of the civil rights movement. Instead, religious discriminatory academies' legal battles functioned to preserve spaces where they could maintain that oppressive social order under the protection of the widely supported constitutional concept of religious free-exercise. Hendrick Hartog and scholars like him argue for preserving attention to the importance of rights discourse by looking away from the “official” interpreters of constitutional rights among the legal elite—most particularly the Supreme Court—and
toward the “rights consciousness” of those who interpret and create constitutional law
and define rights from outside of these institutions. Equal important, however, is to
examine how the democracy of “rights consciousness” allows for a more diverse use of
rights discourse among groups with many different social motivations, but an equal
fervent commitment to creating constitutional law. The Goldsboro case provides a
fascinating and illuminating window into the direct conflict between the “rights
consciousness” of constitutional protections against racial discrimination and religious
practice in the United States. Goldsboro provides a good example of the convergence
of this controversy because it was a Christian school established at the crucial moment
in the rise of religious private academies whose discriminatory practices demonstrate
the complex convergence of theological and social motivations that the government
(and the courts to a certain extent) wanted to neatly categorize as either pure religious
belief or using belief as a smoke screen for purely racist reasons. In reality, those issues
could not be extracted from one another and indeed informed and shaped each other’s
development for religious discriminatory academies and the religious institutions and
people supporting them.

**Decision by the Court**

The timing of the *Bob Jones* and *Goldsboro* cases coming to the Supreme Court
was complicated by the political shift experienced by the country in the 1980s. In the
early 1970s when the IRS policies on segregated academies were implemented, the
reality of continued segregated school systems in the United States was immediate.
The federal government was actively engaged in legislation and policy-making toward

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total desegregation and looked for ways to achieve effective results. By the time Bob Jones made it to the highest court, “federal enforcement of school desegregation was politically contested.” Despite the cultural acceptance that segregation was bad and wrong, it was also considered by many whites to be “over.” A continued push toward more desegregation methods around the country became politically unpopular. The explicit connection between the private evangelical schools and racial segregation also became fuzzy in the imaginations of the public. Reagan’s election and the rise of the Religious Right, made the issue of integration passé and the issue of religious free-exercise a minefield.

In fact, the Reagan administration attempted to halt the Bob Jones case before it even reached adjudication by the Supreme Court. In January of 1982, the administration published a news release that indicated that IRS officials would be instructed to cease exemption revocations for all “religious, charitable, or scientific organizations on the grounds that they don’t conform with certain fundamental public policies.” Instead, the power would be returned to Congress alone and both Bob Jones and Goldsboro would be restored as tax-exempt institutions.

This decision was highly controversial both in and outside the government. Deputy Solicitor General Lawrence Wallace, a veteran of the Office of Solicitor General since 1968, publically opposed the administration’s decision and it did not take long for the courts to act on the policy. One month after the statement was released, Wright v Regan (1981) was decided by the Court of Appeals for the District of Columbia which

57 Johnson, The Story of Bob Jones University v. United States, 14

approved an injunction preventing the Department of Treasury and IRS from restoring exemption status to discriminatory schools.\(^{59}\) This injunction permitted the *Bob Jones v. US* (1983) case to proceed and in an 8-1 decision, the Court confirmed the authority of the IRS to deny tax-exempt status to religious segregationist academies and that doing so did not violate the First Amendment.

Reagan’s own words on the matter reflected the public perception of tax-exempt status as disconnected from the issues of race and segregation in the public imagination. In a speech given in May of 1982 at the Providence St. Mel High School—a predominantly black high school on the West Side of Chicago—Reagan stated that he “was under the impression that the problem of desegregated schools had been settled.”\(^{60}\) Reagan attempted to clarify for the audience that his reversal the then 11-year-old policy that denied tax exemption to discriminatory schools was in no way an endorsement by his administration of segregated schools. He explained that the policy reversal was not an endorsement of the segregation through private schools because, “Well, I didn’t know there were any. And maybe I should have but I didn’t. And it was a total turn-around of what I had intended,” which was to prevent the IRS from “harassing some schools, even though they were desegregated...and threatening to take away their tax exemptions if they didn’t, oh, set up scholarship programs or go out actively recruiting and take steps to try to increase their efforts at desegregation.”\(^{61}\) He claimed that his Administration knew nothing about the pending Bob Jones case when they applied their recommendations. This claim was not entirely true, as Trent Lott had long

\(^{59}\) *Wright v. Regan*, 656 F.2d 820 (D.C. Cir. 1981)  
\(^{60}\) *Gainesville Sun*, May 10, 1982  
\(^{61}\) *Gainesville Sun*, May 10, 1982
been active in attempts to push the administration to take a stance on the tax exemption issue in order to undermine the Bob Jones suit since the administration’s transition into the White House.\textsuperscript{62}

Despite the larger perception by some politicians and the public that desegregation had already been accomplished, however, Bob Jones and Goldsboro’s arguments were still struck down by the Supreme Court. The majority opinion, written by Chief Justice Burger, reviewed the history of charitable organization legislation and ruled that the original charitable exemption language and its subsequent addendums demonstrate that Congress intended to create a “common law requirement” that tax-exempt groups could only be considered such as long as they provided a public benefit.\textsuperscript{63} From there, the Court ruled that the government had demonstrated through legislation, adjudication and executive action that there was a vested interest and demonstrated public policy that sought to dismantle and eradicate racial discrimination.

Justice Burger’s opinion made clear that legal precedent rejected the claims by Bob Jones University and Goldsboro Christian Schools that denial of tax-exempt status violated the free-exercise rights of the schools. The IRS policy was ruled applicable to the educational institutions because of their policies of racial discrimination, which the Court ruled the government had a vested interest in eradicating. Determinations about what authority the government had to judge the sincerity of the religious motivation for discriminatory policies of private and/ or religious institutions was less clear. And perhaps intentionally so. Justice Burger’s only statement on the issue gave little weight

\textsuperscript{62} Johnson, \textit{The Story of Bob Jones University v. United States}, 16

to future religion clause or civil rights litigation. He simply noted that; "Whatever may be the rationale for such private schools’ policies, and however sincere the rationale may be, racial discrimination in education is contrary to public policy."\(^6^4\)

In response to the Court’s decision, Bob Jones University’s president ordered the national and state flags on campus flown at half-staff, stating “we’re mourning the death of freedom, religious freedom…It’s been murdered by the Supreme Court today.”\(^6^5\)

More than just their religious freedom, their fiscal solvency was also at stake. Indirect support from tax breaks amounted to more than a million dollars a year for Goldsboro and Bob Jones University. Jones said only that the University would “pay the taxes we have to pay, and trust the Lord to sustain this institution.”\(^6^6\)

**Results for Goldsboro Christian Schools**

Though the Reagan administration accepted the decision and made little fanfare about the reversal of their plan to restore tax-exempt status and undermine the *Bob Jones* suit, the event inspired little confidence by civil rights groups in the administration. Their relationship continued to sour as the administration put in place policies that opposed further public school desegregation methods, undermined affirmative action advances, opposed housing discrimination regulations, and supplanted members of the Civil Rights Commission with Reagan loyalists.\(^6^7\)

Goldsboro Christian School had to pay an ideological price in order to maintain its financial solvency. The school paid its back taxes and formally changed its admission


\(^6^5\) *The Daily Reporter*, Spenser, Iowa, May 25, 1983, 4

\(^6^6\) Ibid

\(^6^7\) Johnson, *The Story of Bob Jones University v. United States*, 25
policy to be non-discriminatory, and while rumored to have admitted a few black students to its school before the conclusion of its litigation, the yearbook from the 1981 school year still showed no black faces in any class. The school only lasted another few years and was closed by the church in 1987.\footnote{Goldsboro Christian School, *The Ambassador 1981*. (Goldsboro, NC: Graduating Class of 1981):1981 class rosters. Perhaps their admissions change led to a fall in enrollment and financial insolvency, though I have no data for that yet.} Bob Jones University, however, maintained all of their policies even in the loss of tax exemption. President of the school at the time, Bob Jones III stated, “We will never change beliefs that we base on the Word of God,” in response to the Court’s ruling.\footnote{Melton Wright, *Fortresses of Faith: The Story of Bob Jones University*, (Bob Jones University Press, 1960) 235.} Instead, the University started a pledge drive from donors and alumni to attempt a recoup of the lost funds.

The Bob Jones ruling gave the IRS authority to revoke and deny exempt status to more than 100 racial discriminatory private religious schools that had explicitly refused to adopt nondiscrimination statements. But the IRS was still beholden to the Dornan and Ashbrook amendments. Even upon the expiration of the amendments in 1982, the administration declined to allow the IRS to adopt the more probing 1978 and 1979 regulation proposals. The IRS was forced to remain mostly toothless by continuing to enforce only the 1975 policy. Even today, the IRS adheres to the 1975 policy that required schools to have a formal non-discrimination policy and to demonstrate non-discrimination in admission, hiring, and school programing in order to receive tax-exempt status. Only very few times has the IRS been able to revoke the existing status of a school whose nondiscrimination policy has conflicted with their actual practices.\footnote{Calhoun Acad. v. Commissioner, 94 T.C. 284 (1990).}
The lack of congressional and administrative support for investigations into schools and/or stronger non-discriminatory policy gave little power to the IRS to review biased admissions in private schools. Even with the return of civil rights advocates to the White House with the Clinton and Obama administrations, the faded memory of formal segregation in the public imagination resulted in little urgency to review the level of authority possessed by the IRS to truly pursue discriminatory schools.
CHAPTER 7
CONCLUSION

*Brown v Board of Education* in 1954 and its subsequent supportive case law set the groundwork for reactionary action by whites based in a fear of integrated education and an ever more integrated society. Clever work-arounds employed by states to comply with the letter of the law, without true desegregation of public schools, had allayed fears of integration for nearly a decade. These work-arounds began to receive challenges in the courts by the 1960s and convinced whites that they were losing the battle to preserve the “Southern way of life” when it came to education. Two court cases in the mid-1960s created an opportune connection for whites between the issues of race and religion in the public schools.¹ The *Engle v Vitale* (1962) and *Abington v Schempp* (1963) decisions that outlawed prayer and Bible reading in school, dovetailed with an increasingly enforced practice of desegregation. These simultaneous legal events had the effect of exponentially growing the creation of discriminatory religious private schools a decade after *Brown v. Board* made discrimination in education unconstitutional.

As secular private schools struggled, private religious schools able to promise parents that their institutions did or would uphold both the religious and racial values held by parents had the opportunity to flourish. This is the environment into which the

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¹ First, the slow trickle of rulings by state and district courts overturning freedom of choice plans and student placement laws convinced whites that they were losing control over their public school systems. Additionally, the Civil Rights Act of 1964 frightened segregationists who had heretofore avoided federal intervention with its promises to evaporate funding for public schools (and therefore vouchers for private institutions) that did not comply with desegregation mandates. The parallel, but not unrelated blow of removing religious ritual from public schools encouraged an increased suspicion of the values found in public schooling. Finally, a string of Federal Court cases dismantled one by one all of the passive resistance tools that states had relied upon for circumventing integration and declared constitutional some of the most aggressive methods to bring desegregation to fruition.
Goldsboro Christian School was born. Though chartered on the premise of resisting the removal of prayer and Bible reading from schools, Goldsboro Christian officials were not shy about defending their racially discriminatory admission policy as a “matter of religious conviction.” When their school system became involved in a court case concerning their tax exemption status because of their discriminatory policies, officials from the school system argued that the government had overreached their designated powers and that it was the School’s constitutional right under religious free-exercise to follow the dictates of their religious conscience in their admission decisions. As a religious and educational institution, they argued, the school had a right to tax exemption.

The Court disagreed. Rolled into the *Bob Jones University v. United States* (1983) case, the court ruled that the government did have the right to limit religious liberty when an "overriding governmental interest" was at stake. According to the Court, both Bob Jones University and Goldsboro Christian Schools *could* lose their tax status if their racially discriminatory policies conflicted with governmental interest. The Court declared that "not all burdens on religion are unconstitutional." The free-exercise precedent that influenced the outcome of this case was mixed. Though most Supreme Court cases until this point that argued for a right to religious free-exercise were adjudicated under the reduction principle, two key cases involving religious insiders had recently been victorious. Though the religious discriminatory academies did have the

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insider religious status that had helped the Amish community in *Yoder* and a Seventh Day Adventist in *Shirley* win their cases, their segregation policies were beginning to be perceived as outside of the rhetorical social norms and values held by the nation.

Bob Jones University, Goldsboro Christian Schools and the thousands of religious schools like them perceived the ruling against them by the Court in *Bob Jones* as a violation of their constitutional right to discriminate when dictated to do so by their religious beliefs. Far from a symbolic gesture, the loss of tax-exempt status did have a profound effect on many of the small operation schools that could not demand large tuition from families with limited incomes. Though the government could not come in and directly shut them down, the decision in *Bob Jones* that denied tax-exemption for religious all-white academies did affect the ability of some schools to continue to operate on what for many of these academies were already tight budgets that kept them barely hanging onto solvency. The tax breaks for many of these academies were the difference between being able to educate children within their theological belief system or having to return students to what they perceived as godless and God-defying integrated public schools.

Goldsboro Christian School, and other religious discriminatory schools like it, was a project based in a long-standing theological tradition that called for the separation of the races. The theology in operation within the schools’ philosophical and religious stance was not created haphazardly in the wake of *Brown v Board of Education* (1954) to justify segregation within these private religious academies, but instead derived from a long history in Christian thought reaching back to the era of global colonization. This dissertation has outlined the ways in which religion was a key element in the campaigns
to define whiteness, preserve segregation, and maintain a racial hierarchy seen by segregationist Christians as sanctified by God. The Bob Jones/Goldsboro case provides insight into how these two educational institutions and many like them understood their constitutional rights to religious free-exercise as sacrosanct, even in the face of court rulings and government action by agencies like the IRS that determined otherwise. The aftermath of the Supreme Court case ultimately worked to support their concept of rights despite their legal loss. The actions by the Reagan administration before the Bob Jones case to suspend the denial of tax exemption to religious discriminatory institutions reflected a popular will to protect a constitutional right to religious free-exercise.

By the 1980s, most white Americans considered segregated education a long-solved relic of a past time. This idea was borne out in the actions of the Reagan presidential administration and Congress in their attempts to undermine the efforts by previous administrations, government agencies, and judicial decisions that prevented private religious academies violating civil rights law from benefitting from government policy. Congress intervened to debate the issue and was unable to reconcile the constitutional issues in play; however, they did labeled the IRS as unqualified to make the kind of determinations necessary about which schools were overtly discriminatory and which were demographically unidimensional. The Reagan Administration, upon taking the reins of government declared investigations into civil rights violations by the private religious academies would cease. Though the Bob Jones v. U.S (1983) decision ultimately undid the Reagan Administration’s official policy, without the financial and
legislative support of the President and Congress, the IRS had few weapons with which to pursue investigations and dole out punishments to discriminatory academies.

Underlying all of the judicial, legislative, and administrative maneuvers clashing over the status of religious discriminatory academies were the ideological and rhetorical battles that operated within communities about which constitutional right took precedent. Rights discourse and popular interpretation of rights pushed the federal government in all branches to embody perceived national values upon which the nation was founded. Within this fight over religious discriminatory schools were the competing constitutional claims that: a) “all men are created equal and endowed by the creator with certain unalienable rights,” (in this case, equal access to education) and b) that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” (in this case, the free-exercise of a belief in God’s edict to separate the races). The question for the groups battling this out through government agencies was; which constitutional claim held precedent over the other? Certainly within the national imagination both religious free-exercise and the commitment to equality were (and are) considered fundamental values.

For those fighting the battle on the ground, weighing the merits of one constitutional principle against another was simple. Supporters of civil rights believed that the academies in question could not dodge the right to constitutional equality by hiding behind First Amendment rights claims. Supporters of segregated private religious schools believed that the right to enact the dictates of one’s belief system in a private educational setting without infringement from the government was a value upon which the nation was built. In the legal context, however, the complexity involved in balancing
these competing rights was much more demanding, but no less influenced by public ideas.

This project is an attempt to look at the rights consciousness of religious whites seeking to preserve their systems of privilege that began to receive challenges from the judiciary and the federal government in the 1960s and 1970s. To do as Hartog and scholars like him have suggested and engage in a greater consideration of the ways that groups and individuals have framed their constitutional struggles as legally and socially meaningful means to explore not only those fighting for the expansion of rights for all, but also those fighting to preserve a set of rights that would prevent that expansion. Constitutional rights, as imagined and implemented by Goldsboro Christian Schools and its supporters, did not embody a concept of rights that transcended and clashed with the existing oppressive social order, but instead functioned to preserve

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5 In an effort to bring constitutional studies back to the forefront of legal history and in an effort to address some of the criticism lobbed at “rights” by critical legal studies advocates, Hendrik Hartog in his article “The Constitution of Aspiration and ‘The Rights That Belong to Us All’” suggests a greater concentration on the ways that groups and individuals have framed their constitutional struggles as legally and socially meaningful. Constitutional rights, as imagined and implemented by these actors, embody a foundation of rights that transcended and clashed with the existing oppressive social order. Instead of legal ideological boundaries limiting their concepts of rights, Hartog argues that non-institutional sources bringing conflict over the characterization of rights have destabilized existing systems of rights perceived to be oppressive and supplanted these systems with new understandings of rights. Hartog points out that altered framing of rights seen as permanent is a regular feature of the American legal imagination. He notes, “Both the yearning for permanent statements of rights and the insistence on the contingency of present structures of authority are central features of American constitutional rights consciousness.” The language of rights in the historical context of the United States holds an inherent contradiction of both “immanence and plasticity” and must operate that way in order to hold in tension the desire for “permanent commitments to moral values and to serious dialogue within a conflict-ridden pluralistic society.” Because of this tension, he argues, CLR scholars highlight that legal conceptions of rights will produce distortions of the intended end and the value of rights themselves may even be called into question. This interpretation, according to Hartog, obscures the very real change and transformation that the struggle to obtain rights brings about. The challenge he poses is to shift the scholarly view of where constitutional rights and law derive. He advocates looking away from the “official” interpreters of constitutional rights among the legal elite—most particularly the Supreme Court—and toward the “rights consciousness” of those who are interpreting and creating constitutional law and defining rights from outside of these institutions. Hartog, Hendrik, “The Constitution of Aspiration and ‘The Rights That Belong to Us All’” The Journal of American History, Vol. 74, No. 3, (Dec., 1987): 1024-1032
spaces where they could maintain that oppressive social order under the protection of the widely supported constitutional concept of religious free-exercise.

Though free-exercise adjudicatory history by the courts left little room for success for these religious schools (despite all their markers of insider status that had succeeded in previous cases), the legislative and executive branches were much more receptive to the rights discourse deployed by religious segregationists. Rights-based law had become a powerful force on the American landscape, in no small part due to civil rights litigation. Little surprise then that although the courts had a more measured approach to rights claims, public opinion and elected officials took a broader view, especially when these rights could support the status quo of a racially oppressive system. The battle cry of rights by religious schools created real effects in Congress, in communities, and in policy (or lack-thereof). The constitutional conflict created by the contests between free-exercise rights and rights to desegregated education brought First Amendment religious rights roaring back to front and center in the 1980s with significant assistance from the rise of the Religious Right as a political player. Desegregated education was increasingly perceived as fully accomplished by the civil rights movement and was largely absent from the discussion. Despite the abysmal record of groups winning free-exercise claims in court, the public, Congress, and President Reagan framed those rights as bedrocks of American values and rhetorically supported that right over the right to equal education.

The perceived importance of some rights over others at different moments in history speaks to the shifting nature of rights protection and preeminence. Though rights are perceived as static because of their codification in the letter of the law, they are
dependent on the momentum behind actions by citizens to pursue and uphold them. The language of rights in the historical context of the United States holds an inherent contradiction of both “immanence and plasticity” and must operate that way in order to hold in tension the desire for “permanent commitments to moral values and to serious dialogue within a conflict-ridden pluralistic society.”6 Because of this tension, Critical Legal Studies scholars highlight that legal conceptions of rights will produce distortions of the intended end and the value of rights themselves may even be called into question. This interpretation, according to Hartog, obscures the very real change and transformation that the struggle to obtain rights brings about. The challenge he poses is to shift the scholarly view of where constitutional rights and law derive. He advocates looking away from the “official” interpreters of constitutional rights among the legal elite—most particularly the Supreme Court—and toward the “rights consciousness” of those who are interpreting and creating constitutional law and defining rights from outside of these institutions.

The intersection between civil rights desegregation law and religious clause protections of the Constitution extends beyond the reconciliation of legal language, and into historical and popular movements. What creates and shapes the interaction between these two conflicting constitutional issues is not just the letter of the law drawn from legislation and court decisions, but also the longstanding relationship between religion and race in American history and the manner in which this history has caused people to interpret their constitutional rights and the appropriate hierarchical relationship between these rights.

6 Hartog, The Rights That Belong to Us All, 1024
Though the issues of racial equality in education and the racist history of private religious education seem “resolved” in the courts, the underlying racial implications of education policies promoted by advocates of educational privatization are alive and well today. Voucher programs are continually proposed by politicians to give “parental choice” in education. Ostensibly these programs give parents the opportunity to avoid educating their children in “failing” public school systems. These programs, however, are a perfect example of the coding of policy that has direct racial implications.

Reframing racially meaningful issues into more mundane avenues echoes the actions of those like Harry Byrd, Jr. during the desegregation resistance who framed his cause (which was truly the preservation of Jim Crow systems in a re-constituted form) as a state’s rights argument. These re-framings have hardly faded away in the current era. Current Supreme Court precedent, however, defends “neutral” voucher programs for the time being.

Though state aid to discriminatory schools remains unconstitutional, Zelman v. Simmons-Harris (2002)\(^7\) ruled that government, according to the principles of neutrality, could allow funding to religious private schools indirectly but not directly from the state. Zelman determined that “if a program is neutral on its face and functions through ‘true private choices’ then the program is constitutional,” and the First Amendment, in such cases, has not been violated by the use of government funds.\(^8\) The Court, in removing government from having responsibility for an individual’s decision to use funding toward a sectarian institution, attempted to allow for free-exercise while still honoring

\(^7\) Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

disestablishment. "It is the private individual choice that makes a facially neutral program 'entirely neutral.'"9

Voucher programs, however, do work to redirect state funds to religious schools as well as to increasingly segregated charter schools, and to schools that fail to meet the educational standards achieved by public schools. Some private religious school systems have been saved by public funds through the voucher program. In the last decade, Catholic schools have lost large numbers in enrollment around the country and many Catholic school systems have faced closures. For example, dozens of schools have closed since 2010 in New York City, once the preeminent model of Catholic school system success in the nation. In some places, however, Catholic schools have been saving their school systems through voucher programs. Milwaukee recently saved their Catholic schools through the use of public vouchers. According to a study of the Milwaukee voucher program, nearly 90% of voucher recipients used their vouchers to attend a religious school. This is close to the national average, as reported in the 2007-2009 study of voucher programs nation-wide that noted 85% of vouchers users attended a religious school. About one million dollars per year went to the Milwaukee Catholic schools, far outstripping the money received in parish donations.10

This huge influx of public funds to religious private schools was a primary target of civil rights activists and litigators of the 1960s and 1970s and for good reason. Private schools in those decades, whether they were religious or secular, were more often than

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9 Ravitch, Masters of Illusion, 25
10 The Atlantic, Feb 16, 2017
not filled with white students. This trend can be seen returning today with the rise of charter schools.

Charter schools are also recipients of large amounts of voucher money. North Carolina, home to Goldsboro Christian Schools, had a surge in the number of charter schools between 1999 and 2012. By 2015, almost 70% of the charter schools were highly segregated, compared to only 30% of North Carolina public schools. Helen F. Ladd, author of the study “The Growing Segregation of the Charter School Sector in North Carolina,” noted that a reason for the difference is parental choice. Ladd is quoted saying that, “Parental preferences are part of the problem. The charter school admissions process is itself race-blind: Schools that are too popular conduct lotteries between their applicants. But if a school isn’t white enough, white parents simply won’t apply.”¹¹ Systemic inequality can also contribute to this trend. Parents who cannot drive their children to schools and need lunches provided for their children are often unable to send their children to charter schools that do not provide lunches or transportation. Studies have also found that there is no (and often negative) academic improvement in students attending charter schools.

Reflecting the tradition of religious segregation academies, a major study of Louisiana’s voucher program showed that students who used the vouchers to go to private schools did not have an improved education. Charter school students, in fact, had major reductions in math and no improvement in reading. The decline in math proficiency dropped so dramatically, from the 50th percentile to the 26th according to

standardized testing, that Martin West, a professor at the Harvard Graduate School of Education was quoted as saying that the decline “was as large as I’ve seen in the literature” in all the history of American education research. As similar result was reached by a study conducted by the Thomas B. Fordham Foundation of the Ohio voucher program which concluded that “students who use vouchers to attend private schools have fared worse academically compared to their closely matched peers attending public schools.” If academic improvement is not the draw for parents sending their children to charter schools, the question must be asked, what factors are influencing their decisions to remove their children from public schools?

The current move toward vouchers and charter schools runs the risk of further segregating an education system that over the last decade has already seen greater and greater losses to the legacy of school integration. As Patricia Gurin in her article, “The benefits of Diversity in Education for Democratic Citizenship,” has argued, an increasingly segregated education system can lead to increasing inequality and division in society. How and when these changes in education will come to the court system remains to be seen, but public education has often been a site on which the United States has fought out questions about the kind of society it wants to be. I expect this new era of federal bureaucrats pushing vouchers will result in some meaningful legal battles over what the public wants the American education system to reflect. The rise of vouchers and charter schools will force the United States to ask itself if it is still committed to an integrated, functioning, and funded public school system.

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14 Green, The Bible, The School, and The Constitution, 8
APPENDIX
EXCERPT FROM THE DEPOSITION OF ED ULRICH FOR GOLDSBORO CHRISTIAN SCHOOL, INC, V. U.S.

According to the Bible all men are descended from Noah. Race is determined by descendancy from one of Noah's three sons -- Ham, Shem and Japheth. God has endowed the descendants of each son with unique characteristics and functions. The three major races are further subdivided into descendants of the sons of each of Noah's sons. These divisions are provided in the ninth chapter of the Book of Genesis in the Bible, and in the chapters that follow. Races are subdivided into nationalities. Under the three main races, the following present-day groups might be classified by way of example: (1) Hamitic peoples: Orientals, Egyptians, Indians, Negros (2) Shemitic (Semitic) peoples: Hebrews (3) Japhethetic peoples (Japethites): Caucasian, German, Scandinavian, Greek, Roman, Russian.

The races are separate because God made them so. It is not necessary to know why He did so, or what His purpose was. God's revelation of His actions at the Tower of Babel (Genesis 11:1-9) reveals that the intermixing of races, culturally and otherwise destroys the fear of God in the hearts of men and will bring about the judgment of the entire human race. God's will is that each race should be concerned with its own cultural and characteristics and should seek to preserve the best of its heritage under God. The special characteristics of the three major races are demonstrated in the Book of Genesis (Chapter 9 ff.) Noah's two sons, Shem and Japheth, were specially blessed. And a special relation was to exist between God and Shem. The Semetic people were thus intended to be the prime spiritual and religious contributors to humanity. This is demonstrated by the call of Abraham and the building of the Hebrew people. The Japethites were intended to be leaders with special ability in political organization and leadership and military powers. Ham and his descendants were not specially blessed. This indicates that their prosperity as a race would come as the result of their drawing upon the spiritual leadership of the Semites and the political leadership of the Japethites.

God has ordained that there shall be separate races having separate functions, and He has commanded that they shall not mix -- culturally or biologically. Dealings may not be had between the races that would violate His command and lead to a dilution of the culture or characteristics that are special to each race. An important "level or category of commerce" in this regard is any occasion of sustained contact or intimacy between children or adolescents of different races. The problem of intermarriage is, of course, acute where the emotionally immature are brought together on a day-to-day basis, whether the occasion is schooling, community, athletic or social functions, or other similar situations. Apart from the problem of intermarriage and the necessity to protect against it, God's will is that the separate cultures of the races shall be preserved and shall not be mixed. His intention is that a people of one culture and religious heritage shall not absorb the ways of another.

This has obvious implications regarding dealings between races for the field of educations and for the cultural activities of persons of all ages in general (apart, of course, from certain religious activities, such as worship). In such areas the races should be kept separate. As far as most other matters are concerned, dealing between
the races that do not hinder the goal of separately preserved races and cultures, are not contrary to the will of God. An example would be commerce (in its narrow sense). Indeed, few dealings between responsible adults of different races would be objectionable apart from those that tend to erode cultural identity.

11. C. The sincere religious belief of the School is that integration of races in the sense indicated in the responses to paragraphs 11 a. and 11 b. is contrary to the will of God. To cross the racial barriers established by God in the manner discussed in the responses to paragraph 11 b. is thus to contravene and to disobey the will of God as revealed to the School. God's will is made known to man by means of revelation. The primary source of revelation is God's Word as set forth in the Holy Bible. (A representative but not exhaustive list of scriptures that reveal God's will on matters of race includes the following: Genesis 9:24-12:4; Numbers 24:1-18; Deuteronomy 7:1-11 and 17:14-20; Ezra 9 and 10; Nehemiah 13:1-31; Isaiah 2:1-5; Acts 17:24-38 and 15: 1-35.)

There are other sources of revelation. They are not contradictory to Biblical revelation, rather they supplement it providing the means whereby Christians can know God's will in situations not explicitly covered in scripture. One such source is the observable nature of the universe. Since God created it, His will may be revealed in the nature of His creation. Another such source is direct revelation from God to man which may occur through prayer and meditation, preaching, Bible reading, or a combination of those things. The School knows God's will on matters of race through each of these sources of revelation. It is most convenient to provide "a detailed statement of the religious doctrinal basis" for a religious belief through Biblical exegesis since in the case of exegesis the source of revelation is available in objective form for all to examine. Such an exegesis is included in this response to Interrogatory 11 c. But the School's beliefs rest also on the supplementary sources of revelation mentioned above. Indeed, in the last analysis religious belief resides in the souls of believers and no revelation -- regardless of its source -- is complete until it has been received through God's guidance by those who seek it. Therefore, a discussion of passages in the Bible that reveal God's will on matters of race is necessarily incomplete unless one realizes that the doctrine that follows therefrom is truly religious only to the extent that God has revealed correct interpretations to the reader.

As a matter of doctrine then, the Goldsboro Christian School believes that God created separate races, each having separate characteristics and each intended to play a separate role in His creation. The School further believes that any action by man that tends to erode the biological and cultural distinctions created between races is contrary to God's will. That God, having created separate races, wills them to remain separate is demonstrated repeatedly in the Bible. In the book of Genesis alone, for example, twice racial intermarriage or the threat of it caused God to intervene directly in human affairs; and another time it caused untold human misery. The three instances alluded to are, first, the great flood sent by God that destroyed all humanity save Noah and his family. That flood was a response to the arrogance and wickedness that developed in the world when the line of Seth intermarried with the line of Cain. (Genesis 6:1-6) Later, God intervened again in human affairs when the children of Noah's sons, who were and are separate races, undertook together to build the Tower of Babel. (Genesis 11:7-9) Again, it appeared that the product of race-mixing, whether biologically or culturally, was
arrogance and wickedness in the hearts of men. The third instance referred to above is
told in Genesis 16. There Abraham, a Semite, took a Hamitic handmaiden and caused
her to conceive. She bore a son, Ismael, who was, as a result of the interracial union,
wild man and whose descendants to this day are embroiled in warfare and unrest as is
discussed elsewhere in this response to Interrogatory 11 c.

Other passages might serve as well to demonstrate the same things. The clear
revelation to the School is that God's will is that there shall be separate races and that
they shall keep separate. This separation extends both to cultural and biological lines
because each race has a separate function and separately valuable characteristics.
Mixing dilutes distinctiveness and impairs performance of separate functions, and
moreover encourages wickedness and arrogance in the hearts of men. A
complementary revelation of God's will on the matter of race is in His creation. No
people who believe in a divinely created universe can believe that separate races were
created by accident. The separation of the races is a part of the order of creation.
Nowhere in the Bible does it say "Thou shalt not educate little children of different races
in the same school." But to do so would clearly contravene God's will as it is revealed in
the Bible because it would heighten the threat of intermarriage, dilute cultural
distinctiveness and foster arrogance. Of course, one need not expect that the Bible will
deal explicitly with every human problem.

Other sources of revelation demonstrate God's will in myriad human affairs. By
means of prayer, meditation and Bible reading, the School knows God's will in the
matter of interracial education. While there may be more than one rational interpretation
of a passage from the Bible, God's will is one. And the revelation of His will in applying
scriptures to human affairs does not lie in determining the most reasonable
interpretation of a given passage. Rather, God's will in a particular instance is revealed
through Bible reading, prayer and meditation; and the answer is identified as received
conviction, not rational deduction 12. The School has accepted only Japethites. On a
few occasions children have been accepted who have one Japethite parent and one
Hamitic or Semitic parent. The School believes that if one of a person's parents is a
Japethite he may be educated as such. 14. Yes. All students at the School have been
American citizens and Japethites (Caucasians in each case).

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