Private Schools and Public Money: Massive Resistance and the Foundation of Modern Conservatism

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M.A., University of Georgia, 2015
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A Thesis presented to the Graduate Faculty
of the University of Virginia in Candidacy for the Degree of
Master of Arts

Department of History

University of Virginia,
December 2017

Introduction

Most Americans have never heard of the Fuqua School. Tucked on a quiet side street in the small town of Farmville, Virginia, the school is located on a picturesque 60-acre campus. The classroom doors open out onto a grassy lawn. Teachers hang student artwork in their classroom windows, and students line their backpacks up along the sidewalks. The sprawling campus is complete with two libraries, three computer laboratories, an applied industrial technology workshop, a nature trail, expansive fields for every sport, and its very own pool. Inside the classroom, the school's offerings are similarly elite. The upper school offers everything from AP calculus to film studies. The school is named, as many educational institutions are, after a wealthy donor.[1] You would never know by the school's name or appearance that it was founded in 1959 to preserve white supremacy.

That obscuration is intentional. In 1993, a wealthy white businessman from Farmville, J. B. Fuqua, donated ten million dollars to Prince Edward Academy to buy out the school's racist past. The school was required to change its name, colors, mascot, and song, retire its headmaster, and, most importantly, set aside scholarships for minorities. In return, the financially struggling school would get a ten million dollar monetary lifeline. During the news conference announcing the donation, Fuqua proclaimed, "The School will be changed in its entirety. Prince Edward Academy will disappear."[2] The school itself did not disappear though; it grew, thanks largely to Fuqua's massive donation. What did disappear was any obvious evidence of the school's prejudiced origins.

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[1] http://www.fuquaschool.com/RelId/33637/ISvars/default/Home.htm (accessed April 24, 2016).

[2] Donald P. Baker, "A $10 Million Gift of Inclusion," *The Washington Post*," Aug. 24, 1993; "Big bucks bringing new name to facility," *Rome News-Tribune*, Aug. 24, 1993.

While few know of the Fuqua School, many Americans recognized the name Prince Edward Academy after it made headlines across the nation when local and state officials in Virginia opted to end public education in Prince Edward County rather than submit to court ordered school desegregation. Public schools in Prince Edward County remained closed for a total of five years as whites and blacks battled over the future of public schooling. White children went to Prince Edward Academy, and their tuition was paid for by state and local private school tuition grants. Black children did not have a school.[3]

Prince Edward Academy was not the only segregation academy, as the northern press came to call these schools, nor was it the first. All across the South, whites abandoned public education in favor of these new private schools in order to escape integration. Often, racist southern state governments legally and financially supported this method of white flight. Virginia was a leader among southern efforts to defy *Brown v. Board of Education* by privatizing education. According to historian Numan V. Bartley, "Virginia offered leadership to the peripheral South in a program of massive resistance" and "provided states of the Deep South with a theoretical basis for opposition to desegregation."[4] The Virginia state government demonstrated this leadership by passing a series of massive resistance bills known as the Stanley Plan, which essentially sought to dismantle public education and fund ostensibly "private" white academies instead.

The resulting blur between private schools and public money demonstrates the first thesis of this article, that the very notion of private in the segregation academy movement is a fallacy. From the very beginning, southern state politicians conceived of segregation

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[3] Jill Ogline Titus, *Brown's Battleground: Students, Segregationists, and the Struggle for Justice in Prince Edward County* (Chapel Hill, North Carolina, 2011).
[4] Numan V. Bartley, *The Rise of Massive Resistance: Race and Politics in the South During the 1950's* (Baton Rouge, Louisiana, 1969), 134.

academies as private in name only. In addition to publically supporting white flight to "private" academies, the Virginia government subsidized these schools through publically funded private school tuition grants, the reallocation of public resources, and substantial tax breaks. The Virginia state government even tried to keep segregation academy teachers on the public payroll. This history demonstrates that for southern state governments, private did not mean private funding, it meant exempt from federal laws and regulations.

In recent years, scholars like Matthew Lassiter, Andrew R. Highsmith, and Ansley T. Erickson have demonstrated that the de facto framework for understanding school segregation does not adequately acknowledge the degree to which local governments worked to perpetuate public school segregation.[5] This thesis shows that the framework of de facto segregation does not work for the supposedly private sphere either. Southern segregation academies have always benefited from government support and public money. Furthermore, this demonstrates that the private school movement in the South was not about the superiority of private education or an ideological commitment to small government, it was about who controls government. White Virginians shifted public money into allegedly private channels with the express goal of perpetuating white supremacy.

Just as Prince Edward Academy was not unique in its fight to escape federal law by privatizing education, it was not unique in its effort to hide its racial past. However, the seeds of this denial were planted long before Fuqua's donation in 1993. The process of

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[5] Matthew D. Lassiter, "Schools and Housing in Metropolitan History: An Introduction," *Journal of Urban History* Vol. 38, No. 2, (2012) 195-204. Ansley T. Erickson, "Building Inequality: The Spatial Organization of Schooling in Nashville, Tennessee, after *Brown*," *Journal of Urban History* Vol, 38, No. 2 (2012), 247-270. Andrew R. Highsmith and Ansley T. Erickson, "Segregation as Splitting, Segregation as Joining: Schools, Housing, and the Many Modes of Jim Crow," *American Journal of Education*, Vol. 121, No. 4 (August 2015), p. 563-595,

repudiation began twenty years earlier, when civil rights groups sued segregation academies for unlawfully preserving Jim Crow. When segregation academies came under consequent fire from the courts, their principals and patrons abandoned the openly racist rhetoric of massive resistance and instead began to portray themselves as innocent victims of an overreaching federal government. Segregation academies administrators and lawyers insisted that their schools were color-blind institutions that existed solely to deliver superior education, all while never acknowledging that superior, to many of their school patrons, meant white.[6]

The segregation academy movement's shift towards color-blind rhetoric had national political ramifications. In the 1970s, the Internal Revenue Service (IRS), pushed to action by recent Supreme Court rulings, attempted to investigate the racial admissions policies of these southern schools in order to determine if they were violating federal anti-discrimination policies. If schools were found to be racially discriminatory, they lost their tax-exempt status as non-profit institutions. Most segregation academies made little in the way of taxable income, because the vast majority of tuition was spent on routine expenses. Nonetheless, segregation academy advocates took a pointedly national stand against the IRS and the supposedly excessive federal regulation it represented. Segregation academy advocates argued that IRS regulation was not just a threat to southern segregation

[6] Educational scholars David Nevin and Robert E. Bills researched the state of these segregation academies in the 1970s and found that the majority of these schools operated "under severe handicaps" because of inadequate financial support, inexperienced staff, and a restricted curriculum. Despite the deficiencies these schools operated under, parents who sent their children to segregation academies reported very high levels of satisfaction with their children's education. These institutional handicaps, combined with the fact that these schools were founded at the precise moment of local public school desegregation, lead the authors to conclude that parents were satisfied with the schools primarily because of their all white students and staffs. David Nevin and Robert E. Bills, *The Schools that Fear Built* (Washington, D.C.: Acropolis Books LTD, 1976).

academies; it was a threat to Christian schools all across the nation. In making this argument, the private school movement helped develop, promote, and meld the two distinct philosophies of neoliberalism and Christianity into one political movement for a new Religious Right.

I am defining neoliberalism as an economic doctrine that promotes privatization, deregulation, and a free market that is largely exempt from government oversight.[7] It is important to note that while institutions like the Fuqua School presently make claims to superiority based on market logic, this logic occurred after these segregation academies were founded. Neoliberal doctrine is the symptom of these schools' existence, not the cause. The cause of these schools was white supremacy. Neoliberalism works as a way to legitimize white supremacist schools by grounding their histories in the color-blind doctrine of superior free enterprise. The ideology of neoliberalism claims to be about liberty and freedom, but historically it has been the perfect vehicle for racial discrimination. As Historian Nancy MacLean notes, "On both sides of the Mason-Dixon line, conservatives understood liberty—their cardinal virtue—in the manner of the nation's slave-owning founders and their Confederate heirs."[8] Liberty, as they understand it, privileges the right to private property and free association (of whites) within the framework of racialized capitalism above all else. While this neoliberal doctrine of education goes on to take a life of its own by implementing profit extraction within

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[7] David Harvey, *A Brief History of Neoliberalism* (New York: Oxford University Press, 2005), 2-3.

[8] Nancy MacLean, "Neo-Confederacy Versus the New Deal: The Regional Utopia of the Modern American Right" in *The Myth of Southern Exceptionalism* ed. Matthew D. Lassiter and Joseph Crespino (New York: Oxford University Press, 2010), 316.

privatized education across the country,[9] this study shows that it has important roots in the white South's effort to maintain segregated education.

This confluence of segregationists, Christians, and neoliberals proved to be a powerful deterrent to private school regulation. Despite numerous courthouse victories, civil rights activists ultimately failed to undo private school segregation. Federal courts agreed that private school segregation was illegal, but the federal government was never willing to commit the federal oversight necessary to dismantle private school segregation. The federal government did successfully get segregation academies to admit token numbers of minority students, but they remained just that, token, while many local public schools remained overwhelmingly black. Today, many segregation academies continue to perpetuate racial segregation undeterred by federal oversight or public condemnation, as the shift towards color-blind rhetoric allowed segregation academies to become naturalized and legitimized in the modern educational landscape. These schools often allege that a private education is a better education. But, as the history of the segregation academy movement shows, privatization and deregulation were not about the efficacy of private institutions in the South during the 1950s and 1960s; they were about private control of public resources in order to preserve white supremacy.

Massive Resistance and the Privatization of Education

[9] Clayton Pierce, "Mapping the Contours of Neoliberal Educational Restructuring: A Review of Recent Neo-Marxist Studies of Education and Racial Capitalist Consideration" in *Educational Theory* Vol. 65, No. 3 (June 2015), 283-298.

When the Supreme Court declared that segregated schools were unconstitutional in *Brown v. Board of Education of Topeka* in 1954, school integration became ground zero for white resistance to the Civil Rights Movement. While today Virginia is often seen as part of the peripheral South, Virginia, home to the capitol of the Confederacy, played a key role in fighting school desegregation and the Civil Rights Movement writ large. Virginian politicians helped create and lead a new countermovement called massive resistance, which was characterized by an absolute and unyielding commitment to white supremacy.[10] Virginia Senator Harry. F. Byrd coined the term "massive resistance" in a call-to-arms radio speech in 1954 where he declared, "If we can organize the Southern States for massive resistance to this order I think that in time the rest of the country will realize that racial integration is not going to be accepted in the South."[11] White politicians across the South embraced massive resistance by adopting interposition resolutions, which declared the *Brown* decision null-and-void as a violation of states' rights, and simultaneously passing legislation that would enable state governments to circumvent the *Brown* ruling by privatizing education rather than integrating it.[12]

In Virginia, massive resistance was enshrined into state law through the Stanley Plan. The Stanley Plan was passed in September of 1956 and named after then-governor Thomas B. Stanley. The Stanley Plan was a legislative package of thirteen bills passed in a

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[10] For more on Virginia's leadership in crafting interposition and giving southern states a theoretical basis for opposition to desegregation, see: Numan V. Bartley, *The Rise of Massive Resistance: Race and Politics in the South During the 1950's* (Baton Rouge, Louisiana, 1969).
[11] http://www.lva.virginia.gov/exhibits/brown/resistance.html
[12] For more on massive resistance see Numan V. Bartley, *The Rise of Massive Resistance: Race and Politics in the South During the 1950's* (Baton Rouge: 1969), Neil R. McMillen, *The Citizens' Council: Organized Resistance to the Second Reconstruction, 1954-62* (Chicago: 1971), and George Lewis, *Massive Resistance: The White Response to the Civil Rights Movement* (New York: Oxford University Press, 2006).

special legislative session called by the governor himself. The anti-integration bills included measures that would cut off state funding for integrated schools, require schools that integrated to be closed immediately, gave a three-person Pupil Assignment Board ultimate authority over local pupil placement, and finally, authorized tuition grants for all students assigned to closed schools to attend nonsectarian private education. The tuition grants were paid for by a combination of state and county government funds, and they entitled each student to collect a grant of up to $250 for elementary school students and $275 for high school students to attend a non-sectarian private school. The money for these tuition grants would come from local public school budgets that went untouched when public schools closed their doors. Thus, in essence, the Stanley plan simply shifted public school dollars to private, segregated alternatives, making those "private" schools private in name only.[13]

State legislatures across the South enacted similar private school plans, but Virginia was the first state to actually use publicly subsidized "private" education to circumvent the Supreme Court order to desegregate public schools. In 1958, the courts ordered schools in Charlottesville, Norfolk, and Warren County to desegregate. Governor J. Lindsay Almond, who had run for the governor's office in 1957 on a plank of saying "never" to integration, ordered local superintendents to close the schools rather than capitulate to court ordered

[13] "Anti-Integration Course is Charted by Assembly," *Richmond Times-Dispatch*, Sept. 22, 1956. Mary Ellen Goodman, "Sanctuaries for Tradition: Virginia's New Private Schools," in *NAACP Report on Private Schools in VA,* NAACP Papers. (Atlanta: 1961; Republished, Washington, D.C.).

desegregation. Local governments complied, and white schools shut down in Warren County, Charlottesville, and Norfolk in the fall of 1958.[14]

But white Virginians were not about to let their children go without education. Local white elites, often supported by members of local public school boards, immediately set about establishing new private schools to educate their children in every town under court order to desegregate its public schools. The first segregation academy to open its doors in Virginia was located in Front Royal, Warren County, which is located in the Shenandoah Valley region of Northern Virginia.[15] Front Royal's new private school, Mosby Academy, opened in the fall of 1958 to replace the closed Warren County High School. By 1960, the school was housed in a new cinder block building and served 483 white students.[16] Charlottesville's new segregation academies were divided by grade. Robert E. Lee School served white students in grades 1 to 7, with a total enrollment of 225 students by 1960 while Rock Hill Academy served students in grades 8 to 12, with a total enrollment of 420 students. Norfolk, the last town affected by the 1958 court order to desegregate, created Tidewater Academy, which taught 192 students in grades 7 to 12. It was housed entirely in a 26-room mansion. A smattering of other schools were housed in church basements across

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[14] Ira M. Lechner, "Massive Resistance: Virginia's Great Leap Backward," *Virginia Quarterly Review*, Vol. 74, Issue 4, (Autumn, 1998) 631-640.

[15] Warren County had a total population of 14,655 in 1960 with a total of 13,600 white residents, 1,054 black residents, and one Japanese resident, making black residents only 7.19% of the total population. 1960 census.

[16] Mary Ellen Goodman, "Sanctuaries for Tradition: Virginia's New Private Schools," in *NAACP Report on Private Schools in VA,* NAACP Papers. (Atlanta: 1961; Republished, Washington, D.C.). 1-2, 4, 11, 25.

the state in order to accommodate displaced white students who could not find space at any of the newly built, but generally small capacity, segregation academies.[17]

Public school teachers staffed these new segregation academies. Indeed, in the fall of 1958, private academy teachers in these new segregation academies remained on the public payroll.[18] In October 1958, a judge ruled that paying private school teachers with public dollars was unconstitutional. However, segregationists in the Virginia state government quickly adapted to the ruling. The Virginia Education Fund formed that same week for the express purpose of organizing a state wide fundraising effort to help pay the salaries of segregation academy teachers. Former Governor Thomas B. Stanley was elected chairman of the group's advisory board, demonstrating that even this private fundraising group had substantial connections to the Virginia political machine.[19] Furthermore, segregation academies continued to benefit from material public resources, such as desks, textbooks, and in the case of Prince Edward Academy, the high school football stadium's goal posts.[20] Virginia state tuition grants likewise remained in effect.

These historical origins of the private school movement in Virginia indicate that the move towards private education was never about education superiority or small government in Virginia, it was about white supremacy. Prior to the *Brown* ruling, the South had the lowest private school enrollment of any region in the nation, but the court

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[17] Mary Ellen Goodman, "Sanctuaries for Tradition: Virginia's New Private Schools," in *NAACP Report on Private Schools in VA,* NAACP Papers. (Atlanta: 1961; Republished, Washington, D.C.). 11.
[18] Al Wagner, "Private Group to Raise Funds for Schools" *Richmond Times-Dispatch* Oct. 10, 1958.
[19] Al Wagner, "Private Group to Raise Funds for Schools" *Richmond Times-Dispatch* Oct. 10, 1958.
[20] Kristen Green, *Something Must Be Done About Prince Edward County: A Family, a Virginia Town, a Civil Rights Battle* (Harper, 2015).

sanctioned efforts to dismantle Jim Crow made private schools seem increasingly inviting white southerners.[21] However, just because white southerners wanted to maintain Jim Crow segregation in schools, did not meant they wanted to pay the price of privatization. So, Virginia and other southern state governments developed a system of privatization that, in theory, would allow them to maintain state sponsored segregation.

The Legal Challenge to Privatized Education

The NAACP and other civil rights groups immediately challenged the legality of closing public schools and funneling public tax dollars and resources toward private education instead. The NAACP was already in the process of suing hundreds of county school districts for failing to comply with *Brown v. Board*, and after the Virginia legislature passed the Stanley Plan, the NAACP simply added legal challenges to the Stanley Plan to their preexisting local court cases. For instance, in October 1958, the NAACP announced a plan to expand their public school desegregation suit against the city of Norfolk to include a supplemental complaint challenging the legality of the privatization laws encompassed in the Stanley Plan.[22]

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[21] Sean F. Reardon and John T. Yun, "Private School Racial Enrollments and Segregation" (The Civil Rights Project, Harvard University, June 26, 2002), 4-5, 21, http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-school-racial-enrollments-and-segregation/Private_Schools.pdf.http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-school-racial-enrollments-and-segregation/Private_Schools.pdf.

[22] "Third Suit is Filed in Norfolk Situation," *Richmond Times-Dispatch,* Oct. 30, 1958.

Another unlikely ally joined black activists in their legal crusade: whites who opposed the abolition of public education for their children.[23] Organizers in Arlington started the Committee for Public Schools to contest the privatization of public schooling. The Committee for Public Schools avoided making any race-based arguments and instead simply fought to uphold public education. Furthermore, despite the fact that Numan V. Bartley classified the group as "urban professional," The Committee for Public Schools commonly used class-based arguments to promote the public school cause.[24] A flier written and distributed by the Norfolk branch of the Committee for Public Schools clearly pointed to the class dimensions of massive resistance. The flier urged citizens to "Vote for Public Schools" or "Only the wealthy will be able to educate their children."[25] Indeed, the tuition grants provided by the state government did not always cover the full cost of tuition at local private schools, and many poor white families had trouble making up the difference. White citizen from the Committee for Public Schools went so far as to sue the state of Virginia for the right to a public education in the case *James v. Almond*.[26] On January 19, 1959, the federal district court in Norfolk ruled in favor of the white children and their families and declared that the closing of mixed schools was a direct violation of the equal protection clause of the Fourteenth Amendment.[27]

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[23] Matthew Lassiter and Andrew B. Lewis, eds., *The Moderates' Dilemma: Massive Resistance to School Desegregation in Virginia* (Charlottesville, Virginia, 1998).
[24] Bartley, *The Rise of Massive Resistance*, 321.
[25] Norfolk Committee for Public Schools, "Vote for Public Schools," *The Papers of Margaret E. White*. MG 20, Special Collections and University Archives, Old Dominion University Perry Library, (Norfolk, Va.: 1958).
[26] Numan V. Bartley, *The New South, 1945-1980* (Louisiana, 1995), 244.
[27] *James v. Almond* 170 F.Supp. 331 (1959)

The Virginia State Government itself also filed a "friendly suit" in order to test the constitutionality of massive resistance.[28] On September 13, 1958, Sidney C. Day, the Virginia Comptroller, wrote the Attorney General of Virginia, Albertis S. Harrison, notifying him that "he would not issue warrants in payment of tuition grants authorized by these statutes until there had been a final adjudication of the validity of such enactments by the Supreme Court of Appeals of Virginia." Harrison consequently filed a petition with the court to force Sidney to issue the tuition vouchers. This friendly suit demonstrates that Virginian elites were willing to experiment with legal doctrine in order to find a constitutional framework that would support privatized white supremacist education. This puts men like Sidney C. Day in the class of "practical segregationists" identified by Joseph Crespino who were committed to finding "realistic approaches" to maintaining white supremacy that would "maintain good relations with local African Americans and minimize outside attention and federal interference."[29]Ultimately, the court sided with Sidney in *Harrison v. Day* and invalidated the legislation closing mixed schools because, according to the judges, cutting off state funds for public schooling was a violation of the Virginia Constitution.[30]

James v. Almond and *Harrison v. Day* signaled the decline of the massive resistance efforts to close public schools rather than desegregate. However, it did not end state efforts to maintain segregated educational spaces, it simply prompted them to bifurcate education into a public black realm and a private white realm. Public schools reopened in Charlottesville, Norfolk, and Warren County, but their respective private segregation

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[28] Robbins L. Gates, *The Making of Massive Resistance: Virginia's Politics of Public School Desegregation, 1954-1956* (Chapel Hill, North Carolina, 1962), 64.
[29] Joseph Crespino, *In Search of Another Country: Mississippi and the Conservative Counterrevolution* (Princeton, New Jersey: Princeton University Press, 2007), 19.
[30] *Harrison v. Day,* 200 Va. 439, 106 S.E.2d 636 (1959)

academies remained open to instruct the children of parents unwilling to capitulate to even token desegregation. The Southern Regional Council found ten segregation academies operating in Virginia as of October 1960 with a total enrollment of 2,695 students, and white private school enrollment would continue to grow over the next decade. Private tuition grants authorized by the Virginia State Government funded nearly all of the tuition paid to these "private" segregation academies, demonstrating the state of Virginia's continued commitment to privatizing white education.[31]

However, not all state-funded private tuition grants went to newly established segregation academies. In rural communities, the newly built segregation academies were usually the only private alternative to public education, but in cities like Norfolk, segregation academies competed for enrollment with previously established but, by virtue of being located in the South, always segregated private schools. The state of Virginia gave out a total of 5,057 tuition grants for the 1960-1961 school year at a public cost of $690,175. The new segregation academies had a total enrollment of 2,695 students that year, which indicates that at least half of the parents taking advantage of publicly subsidized white flight were moving their children to the limited number of elite southern private schools that were established before *Brown,* but were still very much segregated.[32]

Furthermore, the court decisions in *James v. Almond* and *Harrison v. Day* did not close the question of public subsidies for private, segregated education. *Harrison v. Day* ruled that private school tuition grants could not be funded by state money withheld from

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[31] Mary Ellen Goodman, "Sanctuaries for Tradition: Virginia's New Private Schools," in *NAACP Report on Private Schools in VA,* NAACP Papers. (Atlanta: 1961; Republished, Washington, D.C.).

[32] Mary Ellen Goodman, "Sanctuaries for Tradition: Virginia's New Private Schools," in *NAACP Report on Private Schools in VA,* NAACP Papers. (Atlanta: 1961; Republished, Washington, D.C.).

closed public schools because that would violate Virginia's constitutional mandate to provide free public education. However, *Harrison v. Day* upheld the right of the Virginia legislature to give out tuition vouchers to attend nonsectarian private schools as long as the funds came from elsewhere in the state budget.[33] Thus, in 1959 the Virginia legislature simply repealed the 1956 tuition grant law and replaced it with a new tuition grant program that drew its funds from the general state budget. This was part of their broader "freedom of choice" legislation package meant to replace any components of the Stanley Plan that had been struck down by the courts, indicating their continued commitment to segregated schooling in the face of court opposition.[34]

The NAACP immediately set out to bring the issue of publically funded private schools before the Supreme Court. *Griffin v. Board of Supervisors of Prince Edward County* was a NAACP suit that argued that Virginia's tuition grants program allowed county officials to maintain segregated education in private academies at public expense. The suit was directed at Prince Edward County and the lesser-known Surry County, which closed its only white school in 1963. Both districts followed the statewide trend of using tuition grants and local public tax dollars to fund private education for displaced white students. NAACP lawyers S. W. Tucker and Henry L. Marsh III declared that local school board officials in Surry County were deeply implicated in the development of the private school system, as they had "adopted, ratified, partially executed and made possible the complete execution" of the private school plan.[35] They noted that the school board "sought and accepted" teacher resignations so that school staff could take jobs at the private school. And

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[33] Harrison v. Day., 200 Va. 439, 106 S.E.2d 636 (1959)
[34] Acts, 1959 Ex. Sess., c. 53
[35] Allan Jones, "They Seek to Keep School Open," *Richmond Times-Dispatch*, Sept. 4, 1963.

when the school board shuttered the only white public school in the county, they "virtually compelled all of the white children of the county to attend the foundation's 'private school'" because there was no public school alternative for white families.[36]

There is some evidence that Prince Edward County's legal strategists were beginning to doubt the constitutionality of their decision to privatize public education in the face of the NAACP's challenge. With the case still waiting to go before a judge, Prince Edward County's lawyer, Segar Gravatt of Blackstone, Virginia, told the local board of education that they should repeal a 1960 ordinance that allowed county citizens to get tax breaks for donating money to private schools in the county. Gravatt told the board that they should repeal the ordinance "in order to strengthen the county's legal position."[37] On September 3, 1963, the Prince Edward County supervisors followed his recommendation and repealed the ordinance. This demonstrates that local white governments were just as committed to finding a flexible legal doctrine to support privatized white education as their state counterparts.

The Prince Edward County School Board was right to worry about the constitutionality of their decision to fund private education with local public money. When *Griffin v. County School Board of Prince Edward County* came before the United States Court of Appeals Fourth Circuit in 1964, the court unanimously held that closing public schools and providing vouchers to attend "private" schools in their stead was a violation of the

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[36] Allan Jones, "They Seek to Keep School Open," *Richmond Times-Dispatch,* Sept. 4, 1963.
[37] Henry McLaughlin, "Tax Credit Ordinance Is Repealed," *Richmond Times-Dispatch*, Sept. 4, 1963.

Fourteenth Amendment's equal protection clause.[38] The Supreme Court summarily agreed with the Fourth Circuit's decision when the case later that year.

By 1964, segregation academies were prevalent all across the South; accordingly, it is indicative of Virginia's leadership in the educational privatization movement that it was Prince Edward County and Surry County that came before the Supreme Court. A. E. Dick Howard, clerk for Supreme Court Justice Hugo Black when the *Griffin v. Prince Edward County* came before the high court, argued that Virginia's segregation academies were the ones to come before the Supreme Court because local segregationists in Prince Edward County had firm support from the Virginia state government and its legalistic tradition:

> Local officials who were committed to resistance were aided and abetted in every way by the Commonwealth of Virginia, by the political leadership, by the Byrd machine, which frankly was beginning to sort of lose hold and in some ways you'd have to say that it was the racial issue actually that gave the Byrd machine a further lease on life from the '50s into the '60s . . . and in Richmond the legislature was beginning to devise Massive Resistance, pupil-placement programs, freedom of choice. In many ways Virginia became the cockpit of legal devices for resisting Brown versus Board of Education. Obviously, tempers ran even higher in the Deep South as we discovered in the 1960s with the Civil Rights Movement. But, Virginia has always had this legalistic tradition and so interposition, which had died in the 19th century, was reborn. Jack Kilpatrick on the pages of the Richmond News Leader sort of rediscovered that doctrine. So, in Richmond there was this hot bed of how can we use the form of the law, the Virginia Constitution, the state statutes, litigation in the courts to put off desegregation and Prince Edward Country became the stage on which all of this was being acted out.[39]

Howard's quote indicates that the Supreme Court itself was aware of Virginia's unique role in leading the white South's resistance to *Brown* through the mode of legal doctrine. The segregation academy movement was sponsored by some of Virginia's most powerful legal

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[38] *Griffin v. School Board of Prince Edward County*, 377 U.S. 218 (1964)

[39] A. E. Dick Howard, interview by George Gilliam and Mason Mills, 2000, *The Ground Beneath Our Feet Project*, http://www2.vcdh.virginia.edu/xslt/servlet/XSLTServlet?xml=/xml_docs/modernva/modernva_transcripts.xml&xsl=/xml_docs/modernva/interview_modernva.xsl&level=single&id=Dick_Howard (accessed March 22, 2016).

minds. These lawyers and politicians worked through the apparatus of the state to craft a legal doctrine of privatization bent on preserving white supremacist education.

However, while *Griffin v. Board of Supervisors of Prince Edward County* forbade Prince Edward County and Surry County from using the state's tuition voucher program to prop up their private school system, the court upheld the constitutionality of private school subsidies in general. Chief Judge Sobeloff for the Fourth Circuit argued that tuition vouchers were only illegal in this case because "the involvement of public officials and public funds so essentially characterizes the enterprise in each of the counties that the Foundation schools must be regarded as public facilities in which discrimination on racial lines is constitutionally impermissible." However, Sobeloff wrote that his opinion did not extend his decision to other schools receiving tuition vouchers from the Virginia State Government, and he further specified "We do not deal here with the right of persons to send their children to segregated schools at their own expense."[40] Thus, the court only invalidated the total privatization of public schooling; it did not strike down smaller public subsidies for private schools. Nor did it invalidate the rights of white parents to pay for all-white educations for their children.

From Racist Rhetoric to Color-blind Conservatism

Thus, by the mid-1960s, the courts had dismantled massive resistance laws created for the express purpose of moving education into the private sphere in order to preserve segregation. Nonetheless, many whites did not give up on their goal of maintaining white

[40] Griffin v. Board of Supervisors of Prince Edward County, 339 F. 2d 486

supremacy. Instead, segregationists countered court pressure with a new tactic, denial. Segregation academy leaders and the state politicians who represented them began to frame the private school movement occurring in the South as one motivated by superior education, Christian values, and free enterprise. This fight for legitimacy moved into the realm of national politics, as the IRS took an increasingly long look at these academies. Segregation academy patrons looked for political protection from the newly suspicious IRS and found it in the Republican Party whose support for unregulated private enterprise dovetailed perfectly with white southern aspirations to maintain segregated private schooling.

The central question that surrounded private academies in the 1970s and 1980s was the significant but indirect subsidy of tax-exemptions. As 501(c)(3) corporations, private schools did not have to pay any corporate income taxes and all private donations to the schools were considered tax deductible. Tax write-offs for donations to segregation academies helped fuel the massive fundraising campaigns that kept yearly tuition relatively low and helped financed material items like classroom expansions and field trips. The U.S. Commission on Civil Rights, an independent commission established by Congress in 1957 to investigate and report on discrimination in American society and government, began petitioning the U.S. Government to end these tax exemptions in 1967. Theodore Hesburgh, the president of the commission, declared, "allowing these segregated schools, which are in reality public schools posing as private intuitions to operate on a tax-free basis is tantamount to federal subsidization of their efforts to avoid desegregation."[41] But it would

[41] "IRS still exempts segregated schools," *The Afro-American*, March 7, 1970.

take further challenges from civil rights activists to finally end the constitutionality of tax exemptions for private schools that discriminated based on race.

In 1969, the Lawyers Committee for Civil Rights decided to challenge the constitutionality of private school segregation, this time by targeting the legality of allowing segregation academies to obtain tax-exempt status from the IRS. Their class action lawsuit, *Green v. Connally,* had as its plaintiffs a group of black parents and children who sought to enjoin the IRS from according tax-exempt status to private schools in Mississippi that excluded black students on the basis of their race. In January 1970, a federal District Court in the District of Columbia issued a temporary injunction requiring IRS to suspend the income tax exemptions of 41 Mississippi academies until further review.[42] The *Green* injunction was an important victory, but it was fundamentally limited by the fact that it was limited to organizations operating private schools in Mississippi.[43] This was an important distinction, as it fed into perceptions that the Deep South, especially Mississippi, was the nexus of racial animosity, leaving peripheral South states like Virginia free of blame for the racialized doctrine of school privatization they had helped pioneer.

The temporary injunction prompted the IRS and the Nixon Administration to seriously consider whether they should update their tax policy regarding discriminatory private schools to stave off potential criticism and a potentially activist federal bench. On July 10, after much debate within the Nixon Administration, the IRS announced that it would no longer grant tax-exempt status to private schools that practiced racial

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[42] Green v. Kennedy, 309 F. Supp. 1127 (D.D.C. 1970). Green v. Connally, 28 Aftr 2d 71-5164 (330 F. Supp. 1150), (DC-CO); "Senator Accuses IRS of 'Deceptive Policy'" Richmond Times Dispatch (Aug. 22, 1970).

[43] IRS, "Update on Private Schools," 1982 EO CPE Text, https://www.irs.gov/pub/irs-tege/eotopici82.pdf.

discrimination anywhere in the South, nor would it treat gifts to such schools as charitable deductions for income tax purposes.[44] Nixon's Justice Department simultaneously asked a federal court to dismiss *Green* on the grounds that the IRS was already following the policy sought by the plaintiffs. The Justice Department argued "the issues raised in this action are now moot in that the policy of the Internal Revenue Service . . . provides plaintiffs with the relief sought in this action."[45] The federal court refused to dismiss the suit, and on June 30, 1971, the United States District Court, District of Columbia unanimously declared that the IRS could not grant tax-exempt status to private schools that discriminated on the basis of race.[46]

Following the ruling, the IRS released Revenue Ruling 71-447 and Revenue Procedure 72-54 to set forth the procedures that private schools would have to follow in order to demonstrate that they did not discriminate. Revenue Procedure 72-54 stated that if a school did not have a significant minority population, "they must take affirmative steps to demonstrate that it will so operate in the future" by adding nondiscrimination clauses to their charters. However, while this notice sounds good on paper, these procedures were far from ideal to civil rights activists. First, the procedural language, which emphasized minority enrollment only in the indeterminate future, was reminiscent of *Brown II,* which by this time was infamous for complicity allowing segregation to drag on into the 1960s by virtue of never setting a timeframe for compliance. Furthermore, the new revenue ruling

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[44] "Academy Suit Dismissal Asked" Richmond Times-Dispatch, Aug. 22, 1970; "Re-hearing urged on tax objections" The Afro-American, April 4, 1970.
[45] "Academy Suit Dismissal Asked" *Richmond Times-Dispatch*, Aug. 22, 1970.
[46] Green v. Connally, 28 Aftr 2d 71-5164 (330 F. Supp. 1150).

relied on private schools to self-report their nondiscriminatory intent, which left the door open for private schools to comply with the procedures in name only.[47]

The new revenue procedures were thus emblematic of the Nixon strategy. By releasing the initial ruling before the final decision in *Green* was announced, Nixon made it seem as if his administration was being proactive on the issue of private school segregation. However, the new procedure's lax definition of discrimination, which allowed private academies to nominally comply while still remaining segregated, pacified even some of the most strident segregationists, such as Strom Thurmond.[48] Elliot L. Richardson, The Secretary of the Department of Health, Education, and Welfare, admitted that the regulatory measure were lax but justified the administration's choice by saying that he "preferred permitting the schools to die a natural death rather than have the federal government move against them."[49] But with nationwide anti-bussing sentiment beginning to boil over in 1970, there was no indication that Richardson's belief that segregation academies would simply "die a natural death" was realistic.

In August 1970, Democratic Senator Walter F. Mondale called the Nixon administration's new private school tax policy a "fraud and a hoax." Nixon's own Internal Revenue Commissioner Randolph W. Thrower admitted that, "the IRS granted tax exempt status solely on the word of officials of the schools that minorities would be admitted."[50] Mondale called this policy of accepting the word of segregation academy officials "palpably

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[47] Revenue Ruling 71-447. Revenue Procedure 72-54.
[48] Joseph Crespino, *Strom Thurmond's America* (New York: Hill and Wang, 2011), 268-269.
[49] "Schools' Exemptions Criticized" *Richmond-Times Dispatch*, Aug. 13, 1970 © New York Times Service.
[50] "Schools' Exemptions Criticized" *Richmond-Times Dispatch*, Aug. 13, 1970 (Reprinted from *The New York Times*).

ridiculous."[51] Mondale also accused the IRS itself of adopting "a policy of deliberate public deception and circumvention of a federal court order."[52] He called on President Nixon to order the IRS to obey court order "and put an end to deceptive pronouncement that have led the public to believe these segregation academies are being denied tax support."[53] According to Mondale, the IRS "waited until September school enrollments were closed and classes were filled without a single black admission and then suspended exemptions of only those 11 schools which refused to promise they would open their doors to black students."[54] This strategic delay once again allowed segregation academies to ensure that enrollments for the 1970-1971 year would remain lily white before even nominally changing their admissions policies to admit blacks.

The greatest indication of just how disinterested the IRS was in enforcing its own policy is in the fact that it took another four years for the IRS to even begin enforcing the 1970 revenue procedures in Virginia. On January 16, 1974 the IRS announced for the very first time that it was placing twelve Virginia schools under review for refusing to adopt a racially nondiscriminatory policy.[55] However, three schools out of those twelve petitioned the IRS to keep their tax-exceptions based on the grounds that they had changed their racial admissions policies to fit IRS guidelines. All three of those schools received promises from the IRS in March that they would once again accept contributions to those schools as tax deductible. Among those three schools were Robert E. Lee School and Rock Hill

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[51] "Schools' Exemptions Criticized" *Richmond-Times Dispatch*, Aug. 13, 1970 (Reprinted from *The New York Times*).
[52] "Senator Accuses IRS of 'Deceptive Policy'" *Richmond Times Dispatch*, Aug. 22, 1970.
[53] "Senator Accuses IRS of 'Deceptive Policy'" *Richmond Times Dispatch*, Aug. 22, 1970.
[54] "Senator Accuses IRS of 'Deceptive Policy'" *Richmond Times Dispatch*, Aug. 22, 1970.
[55] Nicholas Brown, "Status of Schools Changed by IRS," *Richmond Times-Dispatch*, Jan. 16, 1974.

Academy, Charlottesville's two segregation academies. The two Charlottesville schools were re-awarded tax-exemption status on the grounds that their board of directors had voted to change their admissions policy to allow blacks to attend the school in December.[56] However, in March, when the school regained its tax exemption status, the schools' student bodies remained lily-white.

The failure of the revenue procedures to address all of the discriminatory practices within southern private schools was further highlighted in 1975 when two black families in Fairfax, Virginia sued two local private schools, Fairfax-Brewster School and Bobbe's School, after their children were denied admission because of their race. Neither of these schools was among the nine private academies in Virginia that had their tax-exemption status taken away for failing to adopt a racial nondiscrimination policy. It is significant that this case came out of Fairfax, a wealthy suburb of Washington D.C., as this once again decenters the Deep South in the history of privatized segregation. In April 1975, the U.S. Court of Appeals, Fourth Circuit ruled that the families were indeed illegally denied admission because U.S.C.A. § 1981 prohibited private schools from denying admission to qualified black applicants solely on the basis of their race.[57] However, despite the fact that the courts had essentially declared that these schools were discriminatory, neither one lost their tax-exempt status as a result of the ruling, indicating the total failure of the 1970 revenue rulings to end federal subsidies for private discrimination.

Runyon v. McCrary, as the case was named, was historic, as it marked the first time that a federal court declared that private school segregation was illegal even when the school in question was not supported by public funds. Yet the *Richmond Times-Dispatch* ran

[56] "IRS Reassesses Schools' Policies," *Richmond Times-Dispatch*, March 21, 1971.
[57] Runyon v. McCrary 427 U.S. 160.

an article proclaiming that "Private Schools See Little Effect" from the *Runyon* ruling. Tim Wheeler, the writer, reported that he had contacted ten area private schools and all of them asserted that their schools would not be affected in any way. Only one headmaster, Rev. Beverly B. McDowell, openly criticized the court order. McDowell called the IRS officials "outlaws" and said that while "I am personally not anti-Negro [and] neither is the school" he still "as a matter of principle, I wouldn't listen to them [the courts] if they had me up in front of a firing squad."[58]

McDowell was the only headmaster to openly defy the court, but that does not mean that the other school leaders used language that was welcoming to black applicants. Robert Toone of Hanover Academy declared that the school would "admit all on the basis of ability," but he also said that the academy's board had denied a black applicant admission in 1973 and voted to bar any future black applicants. Toone said, "that [policy] has been changed," but he also pointedly noted that the school still did not have any black students. Many other school headmasters stressed the fact that they had never had black applicants. This was a tactic favored by many segregation academies that came under IRS scrutiny, such as Chickahominy Academy and Huguenot Academy, but schools free from IRS scrutiny took this tactic as well. The James River Schools, for instance, still had their tax-exempt status, but the headmaster Cabell Howard, told the reporter that the court ruling would have "no impact" on the schools admissions policy and that "to the best of my knowledge, we have not received an application [from a black student]."[59] The very title of the article, "Private Schools See Little Effect" paired with multiple headmasters telling the writer that

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[58] Tim Wheeler, "Private Schools See Little Effect," *Richmond Times-Dispatch*, April 17, 1975.

[59] Tim Wheeler, "Private Schools See Little Effect," *Richmond Times-Dispatch*, April 17, 1975.

they did not have any black students, seems to suggest that segregation academy leaders had shifted from outspoken racial demagoguery to more subtle cues to white parents that all was well and white within their school halls.

In 1975, the U.S. Commission on Civil Rights publically criticized the IRS for failing to establish specific guidelines to identify schools that were discriminatory or adopting a thorough procedure to investigate such schools.[60] The combination of negative press from the U.S. Civil Rights Commission and the firm court ruling in *Runyon v. McCrary* put pressure on the IRS to establish stricter guidelines regarding their treatment of private schools. Following the ruling in the *Runyon* case, the IRS admits that, "Internal Revenue Service experience with private schools has shown a need for more specific guidelines to insure a uniform approach to the determination of whether a private school has a racially nondiscriminatory policy as to students."[61] The IRS's mention of a "uniform approach" also hints at the criticism they had received for focusing the bulk of their investigations on Mississippi after the *Green* ruling while ignoring blatantly discriminatory schools in other southern states.

The Service's answer was Revenue Procedure 75-50, which laid out a new procedure for evaluating private schools that applied to all states. The new procedures required all private schools to have a nondiscriminatory policy in their charter. They also required that schools put a statement of nondiscrimination in all of their brochures. Furthermore, schools were now required to place ads for their school in local newspapers that likewise included their statement of nondiscrimination. Schools were exempt from this publicity clause if they a) were a religious school and they routinely promoted themselves

[60] Crespino, *In Search of Another Country*.
[61] Rev. Proc. 75-50, 1975-2 C.B. 587, IRC Sec(s). 501.

in religious news outlets such as denominational newspapers or churches' fliers, or b) they drew from a large geographic community, worldwide or nationwide or c) they actually enrolled minority students in "meaningful numbers."[62]

These exceptions to the publicity clause allowed for a great deal of leeway for schools to prove that they promoted their nondiscriminatory policy. For instance, if they were a religious school they could simply place public advertisements in all-white churches that were affiliated with the school's stated denomination. The clause specifying that pulling from a wide geographic community constituted diversity meant that schools could develop exchange programs and draw from white communities abroad to fulfill their diversity requirement without admitting a single black student. Finally, the fact that a school could refrain from publicizing its nondiscriminatory admission policy if they enrolled a "meaningful number" of minority students was intentionally vague. In many cases, when a school accepted even one black student it could be considered to have "meaningful" minority enrollment by the IRS, even when the local county population was majority black.[63]

Civil rights groups were incensed at the IRS's continually lax procedures for investigating the discriminatory status of segregation academies. So, in 1975, the *Green* plaintiffs reopened their case asserting that the IRS had not adequately complied with the court's injunction to deny Mississippi private schools tax-exemption status. They also filed

[62] Rev. Proc. 75-50, 1975-2 C.B. 587.
[63] Rev. Proc. 75-50, 1975-2 C.B. 587.

a companion suit, *Wright v. Blumenthal*, arguing that the IRS's enforcement of racial equality was ineffective on a national basis.[64]

The Virginia Independent Schools Association (VISA) also brought a civil action suit against the IRS in 1976 because of the new Revenue Procedures, but for very different reasons. Some of VISA's member schools lost tax-exemption status because of the 1975 reforms. The Virginia Independent School Association sued the IRS in an attempt to procure internal IRS documents through FOIA requests. They planned to use these documents to demonstrate that the IRS investigations were "political" and not "fiscal" in nature. They lost the case, but their efforts demonstrate that segregationist institutions had begun to develop a new strategy for combatting the IRS. Segregation academy advocates portrayed themselves as innocent victims of an overreaching liberal government. They claimed that their schools no longer discriminated, and that these federal investigations were no more than a liberal witch-hunt.[65] This rhetoric of victimhood, paired with a deep distrust of the federal government, would have profound implications for the rise of a neoliberal Religious Right in the late 1970s.

Reform, Backlash, and the Making of the Religious Right

In May of 1978, an investigation by the U.S. Commission on Civil Rights found that several private schools, such as those in *Runyon v. McCrary,* still had tax-exemption status

[64] Green v. Miller, 45 AFTR 2d 80–1566, 80–1 USTC 9401 (D.D.C. 1980). Wright v. Regan, 48 AFTR 2d 81-5438 (656 F.2d 820), Code Sec(s) 501, (CA Dist Col 1981).
[65] Virginia Independent Schools Assn. v. Comm., 37 AFTR 2d 76-1157, (DC Dist Col, 1976).

even though the courts had found them to be racially discriminatory.[66] This criticism, combined with the renewed legal challenges of *Green* and *Wright*, forced the IRS to acknowledge that their revenue procedures were ineffective at rooting out discrimination. The IRS thus sought to remedy their methods with a dramatic overhaul of their system for determining if a private school was discriminatory. In 1978, the IRS released a proposal that would divide schools into three categories, "adjudicated to be discriminatory" schools, "reviewable schools," and "other schools." "Adjudicated to be discriminatory" schools were those schools that had been found to be discriminatory in any state or federal court or final administrative agency action. "Reviewable schools" were defined as schools that had been formed or substantially expanded during the period of local public school desegregation. Finally, "other schools" were defined as schools that were not formed or expanded during the period of public school desegregation and had never been subject to a civil rights lawsuit. Adjudicated and reviewable schools would automatically lose their tax exemptions, while other schools would retain their tax exemption and otherwise be exempt from the newly proposed revenue procedures.[67]

Adjudicated and reviewable school schools could refute the IRS allegations and retain their tax-exempt status one of two ways. First, they could demonstrate that they enrolled a significant number of minority students. A significant number were defined as twenty percent of the percentage of minority school-age children in the community. So, for example, if a school was located in a community where fifty percent of the population was

[66] Joseph Crespino, *In Search of Another Country.*
[67] Federal Register, Vol. 43, No. 163 (Aug. 22, 1978).

minorities, and the school had 200 students, the school would need to enroll at least 20 minority students.[68]

Schools could also rebut the IRS allegations if they fulfilled a number of good faith measures, such as: offering financial assistance on a significant basis to minority students, undertaking active minority recruitment programs, demonstrating an increasing percentage of minority student enrollment, employment of minority teachers or staff, participation with integrated schools in sports or other extracurricular activities, utilizing minority-oriented curriculum or orientation programs, or having minorities board members. However, the IRS did note that even if some of these good faith measures were met, the agency was still unlikely to grant tax-exemption if the school did not enroll a single minority student.[69]

Many of the segregation academies littered across Virginia, and indeed, the whole South, were secular institutions. In Virginia, virtually all of the segregation academies formed in the 1950s and 1960s were nonsectarian because the Virginia Constitution prohibited the state from giving out financial aid to religious schools. According to legal scholar Kathleen G. Harris, “Precedent cases, Attorney General opinions, and constitutional scholars” indicate that the Virginia Constitution "imposes greater restrictions than the establishment clause on governmental action that aids religion or church-sponsored education." Therefore, carefully crafted voucher initiatives aiding sectarian private schools might pass muster under the U.S. Constitution, but application of the Commonwealth's

[68] Federal Register, Vol. 43, No. 163 (Aug. 22, 1978).
[69] Federal Register, Vol. 43, No. 163 (Aug. 22, 1978).

constitutional requirements could warrant a different result.[70] Thus, opposition to the new IRS procedures did not come from the Christian day school community in Virginia. It came from secular segregation academies, and opposition to forced integration was their primary reason for opposing government oversight.

Nonetheless, the architects of the new Religious Right actively used the proposed IRS procedures to demonize Jimmy Carter and win evangelical voters across the nation to the Republican Party by arguing that the new IRS regulations were a nationwide attack on Christian education. Bob Billings, a principal at a private Christian school in Indiana, and Paul Weyrich, the founder of the conservative Coalitions for America, together founded National Christian Action Coalitions with the express purpose of defeating the new IRS procedures and using the issue to galvanize conservative political support among Christians all across America. Furthermore, their organization was not the only one formed to defeat the proposed IRS procedures. New conservative Christian organizations were founded all across the county, including the Christian School Action Committee, the Christian Legal Defense and Education Fund, the American Association of Christian Schools, and the International Association of Christian Educators. All of these organizations opposed the new IRS measures and placed the blame for the new regulation squarely on Jimmy Carter's shoulders.[71]

But born-again Southern Baptist Jimmy Carter did not have a problem with Christian education; he had a problem with racist education. Furthermore, IRS Administrators were consistent in their assertion that they were rolling out the new

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[70] Kathleen G. Harris, "Public Funding for NonPublic Education: School Vouchers Initiatives" *Richmond Journal of Law and Public Interest*, Vol 7. No. 1 (Jan. 2004), 20.
[71] Crespino*, In Search of Another Country,* 254.

Revenue Procedures because of the *Green* case and the broader *Wright v Blumenthal*, not as a result of a direct order from Jimmy Carter. During the 1979 congressional hearings, IRS Commissioner Jerome Kurtz said, "litigation prompted the Service to once again review its procedures in this area. It focused our attention on the adequacy of existing policies and procedures as we moved to formulate a litigation position. We concluded that the Service's procedures were ineffective in identifying schools which in actual operation discriminate against minority students, even though the schools may profess an open enrollment policy and comply with the yearly publication requirement of Revenue Procedure 75-50."[72]

In fact, when Carter was on the campaign trail in 1976, he actually told the National Conference of Catholic Charities he would try to find "ways to provide aid to parents whose children attend non-segregated private schools, so that those children can benefit fully from federal education programs."[73] But the distinction Carter drew between segregation academies and private schools in general was lost on the conservative populace as the architects of the new Religious Right launched their campaign to rally religious opposition to the proposed IRS reforms. Paul Weyrich, co-founder of the Heritage Foundation later recalled that, "what galvanized the Christian community was not abortion, school prayer, or the ERA. I am living witness to that because I was trying to get those people interested in those issues and I utterly failed. What changed their mind was Jimmy Carter's intervention

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[72] Tax-exempt status of private schools: hearings before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, Ninety-sixth Congress, first session. Hearings Held Feb. 20-March 12, 1979. http://search.lib.virginia.edu/catalog/002946977?full_view=true Part I (accessed March 24, 2016), 5.

[73] William Martin, *With God on Our Side: The Rise of the Religious Right in America* (New York, 1996), 155.

against the Christian schools, trying to deny them tax-exempt status on the basis of so-called de facto segregation."[74]

According to Weyrich, Christians may have been concerned about policies like school prayer, but they felt they could resolve it privately. However, after the IRS proposed monitoring private schools for segregation, "suddenly it dawned on them that they were not going to be able to be left alone to teach their children as they pleased. It was at that moment that conservatives made the linkage between their opposition to government interference and the interest of the evangelical movement."[75] The private school movement thus politicized Christians, particularly Evangelicals, and caused them to embrace both the Republican Party and the broader neoliberal doctrine of privatization and deregulation promoted by the party.

Scholars of the Religious Right have noted that conservative evangelicals "were motivated by feelings that their way of life was under attack. They saw themselves as victims of government and judicial overreach, forming their political identity on the basis of victimhood."[76] But this rhetoric of victimhood at the hands of an overreaching federal government was not new in the late 1970s. It was the same rhetoric massive resistance politicians had been employing for years. Furthermore, even in the late 1970s, conservatives continued to use this rhetoric of federal encroachment to defend non-Christian segregation academies.

The Richmond Times-Dispatch's President, Chairman, Executive Editor, Managing Editor, and Editorial Editor put together an op-ed in 1976 entitled "Civil-Rights Revenge"

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[74] Martin, *With God on Our Side*, 173.
[75] Martin, *With God on Our Side*, 173.
[76] Robert B. Horwitz, *America's Right: Anti-Establishment Conservatism from Goldwater to the Tea Party* (Cambridge, 2013), footnote 87.

which argued that the IRS was attacking private academies out of a revenge for past sins. The newsmen even defended the infamous Prince Edward Academy, arguing, "The academy maintains an open admission policy . . . An open policy is not enough to satisfy these zealots, however. They are interested only in numbers. How many blacks do you have on the rolls? How many women? How many Spanish-surnamed? If the extremist are successful in their suit against the IRS, a private school could no longer maintain its crucial tax-exempt status merely by being open to all comers who could meet non-racial admissions requirements. It would have to fill a quota and IRS agents would have to monitor compliance. In short, it would cease to be a private school."[77]

The writers' accusation that the federal government was trying to turn these academies into public schools seems ironic, as that is exactly why segregationist politicians created the private schools in the first place: to be a publically funded, ostensibly private alternative to court ordered integration. But it is not ironic when one considers what segregationists actually meant by private in the 1950s and 1960s. "Private" in the segregation academy movement did not mean privately funded, it meant private space to operate outside of government laws and oversight. The *Richmond-Times Dispatch*'s rhetorical emphasis on private space is rooted in the legal doctrine southerners crafted to justify massive resistance in the 1950s. However, it was at this historical moment they and other private school advocates merged the segregationist case for privatization/deregulation with the cultural idea that Christians were being persecuted by a menacing secular state. The private school campaign against the IRS helped propel Christian distrust of the federal government and lead them to support deregulation and

[77] David Tennant Bryan, Alan S. Donnahoe, John E. Leard, Alf Goodykoontz, and Edward Grimsley, "Civil-Rights Revenge" *Richmond-Times Dispatch*, Sept. 20, 1976.

privatization as a way to create the separate, conservative cultural spaces they valued. The segregation academy movement is thus fundamentally interwoven with rising support for neoliberalism and the Republican Party among Christians across the nation.

The New Religious Right was extremely successful in garnering national support for their movement to oppose the new IRS Revenue Procedures. In February, the IRS reversed its decision to investigate all private schools formed during integration after "what officials termed the most complaints in IRS history, 100,000 letters of protest."[78] Instead, the IRS proposed new, more lenient measures in 1979 to determine whether adjudicated and reviewable schools were, in fact, violating federal antidiscrimination law. The IRS announced, "unlike the earlier proposal, the new procedure does not require a minimum number of specified actions to be taken in every case. Rather, it provides greater flexibility for a school to show that it is operating on a racially nondiscriminatory basis."[79] Nonetheless, the procedures still would have made for a large shift in policy, as they still considered all schools founded or expanded during the time of public school desegregation with low minority populations to be automatically reviewable by the agency.

After being confronted with the public outrage of their constituents over the new IRS regulations, the House of Representatives' Congressional Subcommittee on Oversight under the Committee on Ways and Means set out to examine the new IRS policy. IRS director Jerome Kurtz testified before Congress on why he believed the new procedures were necessary, arguing: "a clear indication that our rules require strengthening is the fact that a number of private schools continue to hold tax exemption even though they have been held by Federal courts to be racially discriminatory. This position is indefensible. Just

[78] "IRS revises bias-rule plan for private schools" *Chicago Tribune* Feb. 10, 1979
[79] Ann. 79-38, 1979-11 IRB 33.

last year the U.S. Commission on Civil Rights criticized the Service's enforcement in the area as inadequate, emphasizing the continuing exemption of such adjudicated schools."[80]

But a newly conservative congress refused to hear Kuntz's plea. A series of appropriation riders, named the Ashbrook and Dornan Amendments after Republican congressional sponsors John Ashbrook of Ohio and Robert Dornan of California, were pushed through Congress in 1979, 1980 and 1981. The riders were attached to Treasury Postal Service bills and they expressly forbade the IRS from using funds to investigate private schools' admission policies. The IRS was still able to take away tax-exemption status from schools that openly defied IRS standards of nondiscrimination, but after Congress severed their funding, they were unable to launch a full investigation into all-white academies that were nominally compliant with the law. Furthermore, by 1979, the vast majority of segregation academies were not openly defying the IRS. Instead, they claimed to have an open door admissions policy and yet nonetheless maintained their all-white student bodies.[81] The fact that the two sponsors of the bill, Ashbrook and Dornan, came from non-southern states indicates the degree to which the segregation academy movement had successfully merged with a national conservative backlash against federal oversight.

The last hope that the IRS would be legally required to conduct more thorough investigations into these private schools lay in the still-pending case *Wright v. Blumenthal*. But in November 1979, the U.S. District Court for the District of Columbia dismissed *Wright v. Blumenthal,* arguing that the plaintiffs did not have standing. The issue of standing

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80 Tax-exempt status of private schools: hearings before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, Ninety-sixth Congress, first session. Hearings Held Feb. 20-March 12, 1979.

81 Randall Balmer, *Redeemer: The Life of Jimmy Carter (*Basic Books, 2014), 103-108.

represented a fundamental reversal in judicial opinion, as the *Wright* plaintiffs' relationship to the segregation academies in question was virtually identical to the relationship of the plaintiffs in *Green,* who were granted standing. *Green*, the companion case was not dismissed, but it was once again restricted to a narrow ruling on the state of Mississippi. Without funding from Congress or a judicial mandate, the IRS was forced to continue utilizing the 1975 Revenue Procedures that the IRS itself had declared to be ineffective at identifying discrimination.[82]

1980 was an election year, and conservatives capitalized on the newly generated Christian outrage over IRS private school regulations to win over Evangelical voters. Ronald Reagan made himself the champion of private schools across the South and nation. The 1980 Republican Party platform pledged to halt IRS investigations, and Reagan himself called the IRS guidelines "evil."[83] Once elected, Reagan made good on his promise to support private schools. On Jan. 8, 1982, Reagan declared that his administration would reverse the ten-year-old government policy of denying tax-exempt status to discriminatory private schools. At the time, 111 private schools were being denied tax exemption by the IRS. Furthermore, Reagan also announced that his administration would publically back Bob Jones University in their suit against the U.S. Government. Bob Jones University was suing the United States for the right to keep their policy against interracial dating in place while still maintaining their federal tax exemption. Reagan reportedly made the decision to completely eliminate federal oversight of private school discrimination after receiving a

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[82] Green v. Miller, 45 AFTR 2d 80–1566, 80–1 USTC 9401 (D.D.C. 1980). Wright v. Regan, 48 AFTR 2d 81-5438 (656 F.2d 820), Code Sec(s) 501, (CA Dist Col 1981).
[83] Crespino, *In Search of Another County,* 250-256.

letter from Trent Lott, a Congressional Representative of Mississippi, the state with the most segregation academies per capita in the nation.[84]

Reagan's decision to reverse ten years of private school public policy sparked so much outrage among civil rights activists and the broader liberal community that Reagan backpedaled. He claimed that he supported the idea of revoking private tax exemptions for discriminatory schools, but that he believed the IRS was doing so illegally because there had never been specific congressional legislation empowering them to do so. His administration then crafted a bill explicitly allowing the IRS to revoke discriminatory schools' tax-exempt status. However, the bill did not contain any strong enforcement measures and thus would not have enhanced the IRS's power to monitor the schools. Congress held hearings on the tax exemption topic in February, but the bill never made it past those hearings. Conservatives did not want to monitor private schools, and liberals did not agree with Reagan that such a bill was necessary to make IRS oversight of private schools legal.[85]

The next year, *Bob Jones University v. United States* came before the Supreme Court. The high court ruled that the religion clause of the first amendment did not prohibit the IRS from revoking tax-exempt status from religious schools.[86] The majority opinion, written by Warren Burger, argued " the Government has a fundamental, overriding interest in eradicating racial discrimination in education . . . which substantially outweighs whatever burden denial of tax benefits places on [the University's] exercise of their religious

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[84] Press Release, U.S. Department of Treasury, Treasury Establishes New Tax-Exempt Policy (Jan. 8., 1982). http://www.nytimes.com/1982/02/02/us/reagan-tax-exemption-bill-assailed.html. Crespino, *In Search of Another Country*.
[85] Stuart Taylor Jr., "Reagan Tax Exemption Bill Assailed," *The New York Times*, Feb. 2, 1982.
[86] Bob Jones University v. United States, 461 U.S. 574

beliefs."[87] The highest court in the nation would not allow religion to serve as a veil for segregation. Bob Jones University continued to pay federal taxes as a result of the case, because the school refused to comply with the court and give up its ban on interracial dating. Indeed, Bob Jones University retained its ban on interracial dating until 2000, when a visit from Republican presidential candidate George W. Bush sparked renewed controversy over the school's policy.[88]

The Ashbrook and Dornan Amendments expired at the end of 1982, making 1983 the first year that the IRS could have conceivably pursued a more active policy for identifying and discouraging discrimination within private schools in the South. However, the Reagan Administration's IRS declined the opportunity to adopt the more stringent oversight measures proposed in 1978 and 1979. Instead, the Reagan administration continued to follow the 1975 Revenue Procedures, which attached good faith to the words of white segregation academy administers who said that their schools did not discriminate, even when said schools did not have a single black student enrolled.[89]

The Legacy of Private School Segregation

When Judge D. B. Marshall, a founder of Charlottesville's segregation academy foundation, looked back on his work founding Robert E. Elementary and Rock Hill Academy, he told interviewers:

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[87] Bob Jones University v. United States, 461 U.S. 574
[88] "Bob Jones University Drops Interracial Dating Ban," *Evangelical Press*, March 1, 2000.
[89] Tax-exempt status of private schools: hearings before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, Ninety-sixth Congress, first session. Hearings Held Feb. 20-March 12. 1979.

I think our efforts were not in vain. I think we accomplished something. Didn't accomplish everything we hoped to accomplish. But I don't have the feeling that it was entirely a lost cause. I've—a lot of my people have been involved in lost causes over the centuries, but I don't know that this was one. Because I think we're all better for the way it went.[90]

Indeed, Marshall and his fellow segregation academy founders and patrons did accomplish something. Many white parents never returned their children to public schools, and thus white flight remade education in the South. This is particularly pronounced in rural communities with large black populations, where public schools remain overwhelmingly black and private schools remain overwhelmingly white. In 1940, private schools enrolled just 3 percent of southern school children. By 2005, they enrolled over 10 percent.[91] Today, these private schools remain much more homogenously white than their public counterparts.[92] Furthermore, this racial disparity is not just a side effect of higher incomes among white southerners. At every socioeconomic level, white students are more likely to be in private schools than black or Latino students.[93] The Virginia state government itself

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[90] Barry Marshall. Interview by George Gilliam and Mason Mills, *The Ground Beneath Our Feet project,* http://www2.vcdh.virginia.edu/xslt/servlet/XSLTServlet?xml=/xml_docs/modernva/modernva_transcripts.xml&xsl=/xml_docs/modernva/interview_modernva.xsl&level=single&id=Barry_Marshall (accessed March 12, 2016).

[91] The Southern Education Foundation, *A New Diverse Majority: Students of Color in the South's Public Schools* (Atlanta, Georgia: Southern Education Foundation Inc., 2010), 11, http://www.southerneducation.org/getattachment/0c0e454a-b5d0-419b-9eec-bca28d8dddb5/a-new-diverse-majority-students-of-color-in-the-so.aspx.

[92] 3.1 percent of southern black students attend private school in the South, compared to 10.6 percent of white students. Furthermore, most black students that enroll in southern private schools are enrolled in schools that have a black majority. Sean F. Reardon and John T. Yun, "Private School Racial Enrollments and Segregation" (The Civil Rights Project, Harvard University, June 26, 2002), 4-5, 21, http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-school-racial-enrollments-and-segregation/Private_Schools.pdf.http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-school-racial-enrollments-and-segregation/Private_Schools.pdf.

[93] Reardon and Yun, "Private School Racial Enrollments and Segregation," 5, 22.

funded and supported this white flight to the new, supposedly private educational sector in the 1950s.

The "lost causes" D. B. Marshall identifies also have sustained cultural capital in these institutions. Segregation academy patrons built a robust vocabulary of coded rhetoric to justify the creation of their school beginning in the 1960s. In doing so, they built upon familiar symbols of the past, from the Lost Cause to traditional teaching pedagogy. But they also reshaped the meaning of those familiar symbols to build a national case for supporting private education. The rhetoric of choice and free market enterprise, the symbolic power of the Lost Cause and the Confederacy, the appeal of teaching for business training, and the legitimacy of the role of the church in education all proved to be powerful tools for the resurgent conservative movement in the 1970s and 1980s, and they continue to resonate with conservatives today. Thus, in the process of seeking symbolic and legal legitimization for white supremacy in education, the segregation academy movement helped build a popular ideological base for conservatism, school privatization, and free market economic systems writ large.

Awareness of this legacy is vital to today's educational politics. In the last few years, a minority majority has come to dominate public schools in the South.[94] Southern state governments have responded by putting more public funds in the hand of private institutions, schools that are often built on racially exclusive principles. In recent years, there has been a renewed movement to funnel public funding to private schools through tuition vouchers. In 2012, Virginia enacted the Education Improvement Scholarships Tax Credits Program, which offers a 65 percent tax credit to individuals and businesses that

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[94] The Southern Education Foundation, *A New Diverse Majority.*

donate to private school scholarship foundations. Thus, even businesses can now donate a portion of their public tax dollars to private schools. All citizens of the state suffer from this public subsidy for private white flight, as those public tax dollars would have otherwise gone to projects like road building, public health programs, and public schools.

Marshall and his fellow segregationists accomplished another feat as well. The backlash against IRS oversight of private academies was the spark that ignited an alliance between southern segregationists and Christians across the nation to create the new Religious Right. Conservative groups like the National Christian Action Coalition, the Christian School Action Committee, and the Christian Legal Defense and Education Fund, the American Association of Christian Schools, and the International Association of Christian Educators rallied Christians across the nation in opposition to the 1978 Revenue Procedure Reforms even in states like Indiana, where the black population was so small that local private academies would not have come under federal scrutiny according to the new measures. The 1980 GOP platform "promised to end the government 'vendetta' against private schools," and Christians abandoned their born-again Democratic president, Jimmy Carter in the election of 1980 to vote for Ronald Reagan in record numbers.[95]

The backlash against the IRS measures from the private school community was tremendously successful. Today, the IRS continues to adhere to the 1975 procedures that they themselves admitted were ineffective at rooting out private school discrimination. As a consequence, many southern communities, especially those in counties with high black populations, continue to be racially divided along public/private lines. Public schools in these communities teach a disproportionately large percentage of local students of color,

[95] Angie Maxwell and Todd G. Shields ed., *Unlocking V.O. Key Jr.: "Southern Politics" for the Twenty-First Century* (Arkansas, 2011), 146.

while local private schools remain almost entirely white. Patrons at these private academies are prone to fall back on the neoliberal logic of market superiority to justify their educational choices, but, as this article shows, historically whiteness has been the greatest asset of Virginia's private academies.