

Racialized Religious School Segregation

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ABSTRACT. *Carson v. Makin* has several implications for the future of school-choice programs. This Essay explores one possibility: an increase in sectarian schools participating in state-funded school-choice programs, causing new forms of school segregation based on race *and* religion and impairing the democracy-enhancing functions of public education.

INTRODUCTION

In *Carson v. Makin*, the Supreme Court required Maine to allow schools providing religious instruction to participate in the state's tuition-assistance program.¹ While the issues in *Carson* are unique,² the decision may pave the way for school-choice programs to proliferate. Proponents of school choice often position the issue in terms of racial equality. Their story goes: Inadequate funding, dismal facilities, latent racism, and poor educational outcomes are hallmarks of

1. 142 S. Ct. 1987 (2022).

2. The Maine Constitution requires the state to provide free education to all students residing in the state. However, students in many rural areas do not have access to a public school. Maine therefore provides tuition assistance to local municipalities lacking a public school to pay for children within those municipalities to attend either a public school in another municipality or a nonreligious private school. The Maine program is thus not a voucher program that allows citizens to choose between public and private schools but, rather, a funding mechanism used to allow the state to meet its obligation to offer a free education to all students. Nonetheless, the Supreme Court's opinion and reasoning in *Carson* could prohibit states with voucher programs from excluding schools with religious curricula from receiving vouchers.

the public-school experience for many Black and brown³ students.⁴ Parents are looking for alternatives.⁵ School choice is a viable alternative because it will enable parents to “vote with their feet” and select a school where their children can get an education tailored to their needs and interests.⁶ Some choice proponents even say religious schools are uniquely positioned to help Black and brown students hailing from communities suffering from disinvestment.⁷

These claims by choice advocates focus on the education of the individual student to advance racial equality as the end goal. Yet the focus on racial equality gives short shrift to racial justice. Racial justice requires collective group-based liberation and the elimination of group-based racial hierarchies.⁸ While racial

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3. The term “brown” is ambiguous and contested in its scope. See, e.g., Kat Chow, *Ask Code Switch: Who Can Call Themselves ‘Brown?’*, NPR (Dec. 11, 2017, 4:38 PM ET), <https://www.npr.org/2017/12/11/569983724/ask-code-switch-who-can-call-themselves-brown> [https://perma.cc/GAG4-5WS5]. I use the term “brown” within this Essay inclusively to mean nonwhite groups such as Latinos, Arabs, Middle Easterners and North Africans, and Southeast Asians.
 4. See Laura Meckler, *Study Finds Black and Latino Students Face Significant ‘Funding Gap,’* WASH. POST (July 22, 2020, 7:31 AM EDT), https://www.washingtonpost.com/education/study-finds-black-and-latino-students-face-significant-funding-gap/2020/07/21/712f376a-caca-11ea-b0e3-d55bdao7d66a_story.html [https://perma.cc/F26R-HC9P]; *Public Education Funding Inequity in an Era of Increasing Concentration of Poverty and Resegregation*, U.S. COMM’N ON C.R. (Jan. 2018), <https://www.usccr.gov/files/pubs/2018/2018-01-10-Education-Inequity.pdf> [https://perma.cc/55KW-RQ55].
 5. See Amaarah DeCuir, *Inequality Has Long Driven Black Parents to Pull Children from Public Schools*, WASH. POST (Feb. 24, 2022, 6:00 AM EST), <https://www.washingtonpost.com/outlook/2022/02/24/inequality-has-long-driven-black-parents-pull-children-public-schools> [https://perma.cc/9W2F-UMGL] (describing Black parents’ historical quest to find alternatives to public schooling).
 6. See, e.g., David J. Dent, *African-Americans Turning to Christian Academies*, N.Y. TIMES (Aug. 4, 1996), <https://www.nytimes.com/1996/08/04/education/african-americans-turning-to-christian-academies.html> [https://perma.cc/YMX4-JF6C] (describing the rise of predominantly Black private Christian schools and parents); *id.* (“There are a lot of things that go on in these schools that do resonate with many African-American[s] . . . There is the sense of order and discipline. Segregated black schools were highly disciplined, highly structured schools and a lot of older black teachers were teaching religion and values.” (quoting Jacqueline Jordan Irvine, a professor of urban education)).
 7. See, e.g., Jennifer Wilson, Opinion, *Catholic Schools Are Invaluable for African-American Children*, AL JAZEERA AM. (Oct. 3, 2015, 2:00 AM ET), <http://america.aljazeera.com/opinions/2015/10/why-catholic-schools-are-invaluable-for-african-american-children.html> [https://perma.cc/W6A5-ULS6]; Sol Stern, *The Invisible Miracle of Catholic Schools*, CITY J. (Summer 1996), <https://www.city-journal.org/html/invisible-miracle-catholic-schools-12133.html> [https://perma.cc/R59A-XVCS].
 8. *What Is Racial Equity?*, RACE FORWARD, <https://www.raceforward.org/about/what-is-racial-equity-key-concepts> [https://perma.cc/7T7R-VXL4] (explaining the difference between racial equity and racial justice and noting that racial equity is “necessary, but not sufficient, for racial justice”).

equality can occur at an individual level, racial justice must occur at a group level.⁹ Effectuating racial justice in education is important because it holds the key to stabilizing what is currently a nascent and fraught multiracial democracy. Racially integrated public schools can effectuate racial justice by facilitating equal access to educational opportunities, teaching tolerance, and—most importantly—cultivating political equality among citizens.¹⁰ Examining the role of *public* schools in supporting American democracy can illuminate the importance of racially integrated schools for stabilizing America’s multiracial democracy.

From America’s inception, an educated citizenry was recognized as necessary to make democracy work.¹¹ Initially, citizens received education through private-society charters and religious schools.¹² Over time, a system of public education was created that provided a common nonsectarian education to some citizens.¹³ Notably, since American democracy was initially one of racial exclusion rather than inclusion, states unevenly meted out public education based on race.¹⁴ This exclusion created racialized, status-based hierarchies that marked whites as the exclusive in-group within American democracy’s conception of citizenship. Nonwhites were cast as out-groups, excluded as citizens but necessary inhabitants for providing labor.¹⁵ This arrangement furthered racial capitalism¹⁶ and

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9. See, e.g., Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1127 (2014) (explaining the ways school choice falls short of advancing racial justice, noting that “[e]ven assuming [choice] improves academic outcomes for a small fraction of the population, that fraction enjoys the achievement at the expense of many”).
 10. See, e.g., Richard D. Kahlenberg & Clifford Janey, *Putting Democracy Back into Public Education*, CENTURY FOUND. (Nov. 10, 2016), <https://tcf.org/content/report/putting-democracy-back-public-education> [<https://perma.cc/DU9E-ABDE>].
 11. E.g., DEREK W. BLACK, SCHOOLHOUSE BURNING: PUBLIC EDUCATION AND THE ASSAULT ON AMERICAN DEMOCRACY 12-14 (2020) (describing the Founding Fathers’ commitment to education for purposes of maintaining American democracy and the stark contradictions in excluding formerly enslaved Africans from public education).
 12. See Diane Ravitch, *A Brief History of Public Education*, in PUBLIC EDUCATION: DEFENDING A CORNERSTONE OF AMERICAN DEMOCRACY 21, 22 (David C. Berliner & Carl Hermann eds., 2022) (describing the ways citizens received education before the implementation of public-school systems).
 13. *Id.* (describing the evolution of American public-school systems).
 14. BLACK, *supra* note 11, at 14.
 15. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1716 (1993) (arguing that whiteness was a form of property and that “the *interaction* between conceptions of race and property . . . played a critical role in establishing and maintaining racial and economic subordination”).
 16. This Essay uses the term racial capitalism to mean “capital accumulation that requires racialized systems of exploitation and extraction.” Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1264 (2022).

produced “fractured and unequal forms of social existence” for Black and brown persons.¹⁷

Although education is now ostensibly available to all, public schooling still helps perpetuate racialized status-based hierarchies. It assigns students to schools using race-neutral structures that afford white students better educational opportunities than those afforded Black and brown students.¹⁸ This inequality primarily results from public-school assignments that are linked to residence despite the sordid history of discriminatory state housing policies that have caused residential segregation.¹⁹ However, courts construe segregated residential-housing patterns as the product of private choices made by individuals rather than state action; thus, they do not outlaw school segregation caused by residential segregation.²⁰

Parents as private actors, then, choose segregated and unequal schools by selecting where to live.²¹ While these choices certainly impede racial integration of schools, the state can use certain tools to mitigate the pernicious effects of these choices in public schools. With pernicious private-school choices, however,

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17. Clayton Pierce, *W.E.B. Du Bois and Caste Education: Racial Capitalist Schooling from Reconstruction to Jim Crow*, 54 AM. EDUC. RSCH. J. 23S, 28S (2017).
 18. See, e.g., LaToya Baldwin Clark, *Barbed Wire Fences: The Structural Violence of Education Law*, 89 U. CHI. L. REV. 499, 519-23 (2022) (arguing that Black children are subject to unequal and inequitable schools that subordinate them for life); Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1439-46 (2004) (describing historic and modern subordination of Latino students in segregated and unequal schools).
 19. See Paul A. Jargowsky, *Segregation, Neighborhoods, and Schools*, in CHOOSING HOMES, CHOOSING SCHOOLS 97, 114-31 (Annette Lareau & Kimberly Goyette eds., 2014) (describing the connection between housing policies that caused residential segregation and school segregation.).
 20. See *Freeman v. Pitts*, 503 U.S. 467, 495 (1992) (“Where resegregation is a product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts.”); see also *Bd. of Educ. v. Dowell*, 498 U.S. 237, 249-50 (1991) (articulating the standard for releasing a school district from federal-court supervisions of “whether the vestiges of past discrimination had been eliminated to the extent practicable” and finding that residential segregation that is result of private choices made by individuals is beyond the scope of the articulated standard).
 21. See Erica Frankenberg & Genevieve Siegel-Hawley, *Public Decisions and Private Choices: Reassessing the School-Housing Segregation Link in the Post-Parents Involved Era*, 48 WAKE FOREST L. REV. 397, 403-07 (2013) (describing the mutually reinforcing nature of residential and school choices that lead to segregation in both housing and schools); Annette Lareau, *Schools, Housing, and the Reproduction of Inequality*, in CHOOSING HOMES, CHOOSING SCHOOLS, *supra* note 19, at 198-200 (describing a study revealing that parents choose homes to get access to schools based on socioeconomically homogeneous networks in ways that reproduce inequality in schools).

the state has fewer remedial tools.²² Moreover, outsourcing education to the private sector limits the reach of public schools' modeling American democracy.²³

The central claim of this Essay is that racial integration of *public* schools—though much maligned—is indispensable to moving America's democracy away from its exclusionary origins and into a well-functioning, racially inclusive democracy. Choice in the private market exacerbates inherent and unresolvable tensions between school choice and racial integration. School choice generally operates against a backdrop of racial pluralism, racial subordination, and racial power imbalance that puts choice in tension with principles of equality, tolerance, and universal citizenship. Expanding school-choice options to include private religious schools is likely to exacerbate these tensions in ways that threaten the possibility of moving into a functioning multiracial democracy.

This Essay explores these themes further. Part I makes the normative case for public schools generally and racially integrated public schools specifically to American democracy. Part II analyzes the tensions between school choice and racial integration of schools. It suggests America's racial pluralism, particularly at the metropolitan level,²⁴ makes it difficult for the two concepts to coexist. Part III argues that expanding school-choice programs to include religious schools will create new forms of racialized religious segregation that are difficult to remedy as a matter of law. Part IV concludes by articulating the specific harms to democracy posed by racialized religious school segregation.

I. THE IMPORTANCE OF RACIALLY INTEGRATED PUBLIC SCHOOLS TO AMERICAN DEMOCRACY

A. *Public Schools and Democracy*

What role should public schools play in a well-functioning multiracial democracy? Elizabeth Anderson offers a helpful three-pronged definition of democracy.²⁵ She describes democracy as 1) a membership organization with “universal and equal citizenship” for all members of the society; 2) a “government for the people, carried out by discussion among equals”; and 3) a culture that involves “free, cooperative interaction of citizens from all walks of life on terms of

22. See *infra* Section I.B.

23. See *infra* Section I.A.

24. This Essay conceptualizes racial pluralism in school selection at the metropolitan level because research shows parents make choices about schools on a metropolitan-wide level. See, e.g., NAT'L RSCH. COUNCIL, GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AMERICA 28-32 (Alan Altshuler, William Morrill, Harold Wolman & Faith Mitchell eds., 1999).

25. ELIZABETH ANDERSON, THE IMPERATIVE INTEGRATION 89 (2010).

equality.”²⁶ The three prongs are symbiotic: each is necessary for democracy to fully function.

Public schools lay the groundwork for the prongs to work together. They produce a citizenry with the critical-thinking skills necessary to participate in democracy as a mode of governance.²⁷ They also provide citizens with the skills needed to obtain financial means, political wherewithal, and practical abilities. These skills give citizens the autonomy to “lead the kind of life [they] ha[ve] reason to value,”²⁸ which enables them to live as equal members of the democracy and effectuate democracy as a membership organization.²⁹ Finally, public schools inculcate democracy as a culture. They provide citizens with the intergroup contact necessary to cultivate trust, empathy, and community amongst a diverse array of citizens.³⁰

One might reasonably question whether public schools actually accomplish these goals. Public schools face well-documented problems with educating all students³¹ and combating racial segregation.³² However, public schools can and do offer high-quality education when provided adequate state funding and resources; in particular, teacher compensation and class size substantially factor into student outcomes.³³ The same is true for the states’ ability to create schools

26. *Id.*

27. See BLACK, *supra* note 11, at 54-57 (describing the Founders’ understanding of the importance of cultivating an educated citizenry capable of participating in self-governance).

28. AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 87 (1999).

29. See BLACK, *supra* note 11, at 91 (describing the importance of education to formerly enslaved Africans because it would allow them to “control their own lives on a daily basis – politically, economically, and practically” – to live as equal citizens rather than subordinates).

30. See 2 CHARLES SUMNER, *Equality Before the Law: Unconstitutionality of Separate Colored Schools in Massachusetts*, in *THE WORKS OF CHARLES SUMNER* 327, 372 (BOSTON, LEE & SHEPARD 1870) (“[S]chool[s] derive[] strength from the unity and solidarity of all classes beneath its roof. . . . Prejudice is the child of ignorance. It is sure to prevail, where people do not know each other. Society and intercourse . . . remove antipathies, promote mutual adaptation and conciliation, and establish relations of reciprocal regard.”); *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (describing public schools as a “symbol of our democracy and the most pervasive means for promoting our common destiny”).

31. See generally *Class Action Complaint, Gary B. v. Snyder*, 313 F. Supp. 3d 852 (E.D. Mich. 2018) (No. 16-CV-13292) (alleging that the State of Michigan failed to provide students in Detroit public schools with an education that included a basic level of literacy).

32. See Sequoia Carrilo & Pooja Salhotra, *The U.S. Student Population Is More Diverse, but Schools Are Still Highly Segregated*, NPR (July 14, 2022, 5:13 AM EST), <https://www.npr.org/2022/07/14/1111060299/school-segregation-report> [<https://perma.cc/6PE5-DRHB>].

33. See, e.g., Bruce D. Baker, *Does Money Matter in Education? Second Edition*, ALBERT SHANKER INST. (Apr. 2019), <https://www.shankerinstitute.org/resource/does-money-matter-second-edition> [<https://perma.cc/DLV8-G9XV>].

that have racial diversity and in which intergroup contact occurs. States can foster intergroup contact by implementing intentional policies to foster racial and socioeconomic diversity.³⁴

Public-school failures of both quality and integration stem directly from state and local policy choices about funding, structuring, and delivering education. For example, states and localities continue to rely on school-funding schemes that create gross disparities in school funding; cut teacher salaries; and resist implementing school-assignment plans that create more diverse schools.³⁵ Individual parental choices about where to live or which school-choice program to use only compound the inequality state policies have fostered.³⁶

The problems public schools face are arguably political. Therefore, one might reasonably wonder whether private schools could better serve the same democracy-enhancing functions since they are not mired by the same political challenges hampering public schools. Public schools, however, offer two significant advantages over private schools in serving a democracy-enhancing function – their purpose and their design.

The Founders believed that an educated citizenry was necessary to produce competent citizens who had the knowledge and wherewithal to maintain American democracy.³⁷ To that end, the citizenry was originally educated by a mix of public, religious, and philanthropic schools.³⁸ However, the religious and ethnic pluralism of the citizenry led the Founders to believe that, in order for American democracy to survive, citizens needed to be inculcated with a shared civic virtue.³⁹ The Founders thought a system of publicly operated schools would be the

34. See generally RUCKER C. JOHNSON, *CHILDREN OF THE DREAM: WHY SCHOOL INTEGRATION WORKS* (2019) (presenting empirical evidence of successful school-integration programs); Halley Potter & Michelle Burris, *Here Is What Integration in America Looks Like Today*, CENTURY FOUND. (Dec. 2, 2020), <https://tcf.org/content/report/school-integration-america-looks-like-today> [<https://perma.cc/5X2C-MYQX>] (describing state and local efforts to foster school integration through redistricting school-attendance zones, implementing magnet schools, and adopting interdistrict transfer policies).

35. See, e.g., Kevin Carey, *Rich Schools, Poor Schools and a Biden Plan*, N.Y. TIMES: UPSHOT (June 9, 2021), <https://www.nytimes.com/2021/06/09/upshot/biden-school-funding.html> [<https://perma.cc/BX4N-6NH7>] (describing disparities caused by local school-funding policies and resistance to changing such policies).

36. See generally Erika K. Wilson, *The New White Flight*, 14 DUKE J. CONST. L. & PUB. POL'Y 233 (2019) (arguing in favor of reconsidering the legal and normative viability of regulating racial segregation in public schools caused by white parents' choices).

37. See, e.g., DAVID TYACK, *SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY* 9 (2007).

38. *Id.* at 164.

39. See e.g., JOHANN N. NEEM, *DEMOCRACY'S SCHOOLS: THE RISE OF PUBLIC EDUCATION IN AMERICA* 8-9 (2017) (describing leaders' concerns about how to coalesce ethnically and religiously diverse citizens and the need for citizens to work together to serve their common good).

best vehicle for melding students from a wide swath of backgrounds, inculcating shared civic virtues, and turning young persons into competent and virtuous citizens.⁴⁰ Thus, the original purpose of public schools was producing citizens who could sustain American democracy. While the purposes of public schooling expanded over time to include preparing workers to advance the American economy and promoting social welfare, public schools fundamentally have remained geared towards serving American democracy.⁴¹

The goal of serving American democracy also influenced the way in which public schools were designed. They were designed to model democracy by enabling citizens to engage in collective self-rule through local control and governance of schools.⁴² Public schools are thus governed by publicly elected officials at both the state and local levels.⁴³ This governance structure allows for broad-based citizen participation, representation, and deliberation. All citizens, even those without children in public schools, can determine how students will be educated. While the advantaged can, at times, coopt the structure in their own favor,⁴⁴ the governance structure that allows for public influence and input models democracy in both its good and bad aspects.

Conversely, the goals and structure of private schools substantially differ in ways that make it more challenging for these schools to be the primary vehicle for educating citizens to sustain American democracy. Structurally, private schools situate education as benefiting only the individual students who attend the school and their parents. There are no mechanisms for citizens who are not parents or students to provide input into education policies at private schools.

Private schools' purpose is also driven by market ideology. Private schools market and differentiate themselves to appeal to specific audiences, limiting

40. Ravitch, *SUPRA* NOTE 12, AT 21.

41. See, e.g., Justin R. Long, *Democratic Education and Local School Governance*, 50 WILLAMETTE L. REV. 401, 405-13 (2014) (describing the primary purposes of public education and noting the democracy-enhancing role of each purpose).

42. See TYACK, *supra* note 37, at 165-66 (2007) (describing the origins and continued commitment to a system of locally controlled and governed common schools); NEEM, *supra* note 39, at 2 ("Committed to self-rule, American citizens wanted public schools that were funded by local taxes, overseen by locally elected trustees, and closely tied to the communities that they served.").

43. See generally MICHAEL W. KIRST, *Turning Points: A History of American School Governance*, in WHO'S IN CHARGE HERE? 14 (Noel Epstein ed., 2004) (discussing the role of public officials in school governance); Julie A. Reuben, *Patriotic Purposes: Public Schools and the Education of Citizens*, in THE PUBLIC SCHOOLS 1 (Susan Fuhrman & Marvin Lazerson eds., 2005) (same).

44. See, e.g., Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 167-70 (2016) (explaining that predominantly white, affluent municipalities in county-based school districts use voting-referenda processes to secede from racially and economically diverse school districts).

admission to their desired clientele.⁴⁵ This consumer-oriented model necessarily requires prioritizing consumer sovereignty in making education-policy choices. Indeed, private schools are incentivized to meet the needs of tuition-paying parents and students, even if the parents' requests do not inure to the greater societal interest in building virtuous citizens.⁴⁶ The consumer-oriented model also allows private schools to serve as "opt-out" landing places for families that disagree with government policies intended to benefit the common good.⁴⁷

More critically, private schools cater to those with similar religious beliefs, academic abilities, and social statuses.⁴⁸ While private-school parents may claim to prefer diversity and inclusion, private-school enrollment remains racially and socioeconomically homogenous, even at private schools that hold progressive values or promote social justice.⁴⁹ The reasons for this are varied, but one potential explanation is that parents may value benefits such as academic prestige and exclusivity more than they value diversity.⁵⁰ More specifically, parents are more likely to act in ways they believe advance their own children's best interest than in ways that advance the greater good. The consumer-driven private-school market can cater to these priorities, making it more challenging for private

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45. For example, religious schools can exclude students who do not share the same faith-based beliefs and practices the school espouses. See, e.g., Scott Michels, *Court: Christian School Can Expel Girls Over Alleged Lesbian Relationship*, ABC NEWS (Jan. 28, 2009, 12:26 PM), <https://abcnews.go.com/TheLaw/story?id=6749659> [<https://perma.cc/9XGG-824K>].
46. See, e.g., Caitlin Flanagan, *Private Schools Have Become Truly Obscene*, ATLANTIC (Mar. 11, 2021), <https://www.theatlantic.com/magazine/archive/2021/04/private-schools-are-indefensible/618078> [<https://perma.cc/8QXN-VYBU>] (describing how private schools are financially incentivized to prioritize parental demands).
47. See, e.g., Ruth Graham, *Christian Schools Boom in a Revolt Against Curriculum and Pandemic Rules*, N.Y. TIMES (Oct. 19, 2021), <https://www.nytimes.com/2021/10/19/us/christian-schools-growth.html> [<https://perma.cc/6JH8-5YY7>] (describing the boom in enrollment in Christian private schools by families opposed to racial inclusion and public-health mandates).
48. See, e.g., Peter W. Cookson Jr., *New Kid on the Block? A Closer Look at America's Private Schools*, BROOKINGS INST. (Dec. 1, 1997), <https://www.brookings.edu/articles/new-kid-on-the-block-a-closer-look-at-americas-private-schools> [<https://perma.cc/6BDN-2ZFH>] ("Private schools are status communities. Families are attracted to them because of certain special interests, including religious orthodoxy, social snobbery, academic specialty, or educational philosophy.").
49. See, e.g., Jere Downs, *Is There a Lack of Diversity in Private Schools?*, U.S. NEWS & WORLD REP. (Oct. 20, 2021, 10:02 AM), <https://www.usnews.com/education/k12/articles/is-there-a-lack-of-diversity-in-private-schools> [<https://perma.cc/N3HU-B76U>].
50. See, e.g., Margaret A. Hagerman, *White Progressive Parents and the Conundrum of Privilege*, L.A. TIMES (Sept. 30, 2018, 4:05 AM), <https://www.latimes.com/opinion/op-ed/la-oe-hagerman-white-parents-20180930-story.html> [<https://perma.cc/5QRE-WRUL>] (explaining that white parents may prioritize competing values over diversity in ways that contribute to school segregation).

schools to facilitate the diversity and intergroup contact necessary to move America's multiracial-democracy project forward.

Admittedly, parents in public schools make similar choices, choosing to live in areas that will enable their children to attend the most resource-rich schools, which are often also predominately white and affluent.⁵¹ Unfortunately, race still colors parents' perceptions of school quality and desirability.⁵² The more nonwhite students enrolled in a school, particularly the more Black students, the more the school's academic quality is perceived to be poor, no matter the school's test scores or other objective measures of performance.⁵³ White parents' avoidance of schools with large populations of students of color arguably drives persistent school segregation.⁵⁴

Parental school selection in both the private- and public-school context is influenced by race and socioeconomics. Yet private schools can cater to the worst tendencies in parents with the schools' consumer-oriented focus, ability to set admissions standards, and limited number of stakeholders. While parents can make similar exclusionary choices in public schools through their residence decisions, the state has the power to enact policies that make it more difficult for parents to act on their segregationist tendencies. Further, the state can mitigate the effects of parents' choices on the racial composition of schools.⁵⁵ It is a matter of political will to do so.

All in all, public schools are a preferable vehicle for imbuing students with the tools needed to be citizens and furthering America's burgeoning multiracial democracy for the following reasons: the power of the state to legislate racially integrated public schools; public schools' common-good purpose; and their democratic design. As discussed in the following Section, directly addressing

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51. See, e.g., Michele Lerner, *School Quality Has a Mighty Influence on Neighborhood Choice, Home Values*, WASH. POST (Sept. 3, 2015), https://www.washingtonpost.com/realestate/school-quality-has-a-mighty-influence-on-neighborhood-choice-home-values/2015/09/03/826c289a-46ad-11e5-8ab4-c73967a143d3_story.html [<https://perma.cc/F5UB-D4DX>] (describing the connection between school quality and homebuyer choices).
 52. Jennifer Jellison Holme, *Buying Homes, Buying Schools: School Choice and the Social Construction of School Quality*, 72 HARV. EDUC. REV. 177, 192-94 (2002).
 53. See *id.* at 195 ("By equating children of color with low academic achievement, [white] parents were able to express their concerns about diversity not in terms of racial or class prejudice, but in terms of concerns about the academic and social needs of their own children.").
 54. See Dana Goldstein, *One Reason School Segregation Persists: White Parents Want It That Way*, SLATE (July 15, 2016, 5:51 AM), <https://slate.com/human-interest/2016/07/when-white-parents-have-a-choice-they-choose-segregated-schools.html> [<https://perma.cc/526L-7DXP>] (describing the role that the choices of white parents plays in propagating school segregation).
 55. See *infra* Section I.B.

racial segregation in public schools is preferable to adopting a choice-based private-school model.

B. Racially Segregated Public Schools Undermine Democracy

Despite the unique benefits of public schools, American public schools suffer from pervasive racial segregation,⁵⁶ which undermines their ability to fulfill the important roles needed to support democracy. Racial segregation especially impedes schools' ability to facilitate universal and equal citizenship. Universal and equal citizenship presupposes that all citizens receive access to an education that will "equip [them] with the tools to function as knowledgeable voters, motivate them for civic engagement, and give them a stake in promoting political stability and social harmony."⁵⁷ The research is clear: segregated schools provide vastly disparate educations. Predominately white elementary and secondary schools have greater resources and provide greater opportunities for their graduates.⁵⁸ Conversely, predominately nonwhite elementary and secondary schools have fewer resources and provide fewer opportunities for their graduates.⁵⁹ The unequal education rendered to the citizenry limits the ability of all citizens – white or not – to become fully informed members of the democracy on equal terms, thereby impairing schools' ability to facilitate democracy as a membership organization.

Moreover, segregated schools limit interaction among citizens in ways that are antithetical to establishing democracy as a culture. White students reared in predominately white schools may become imbued with a false sense of superiority that makes it difficult for them to engage in nonhierarchical interracial

56. This Essay uses the phrase "racially segregated public schools" to mean schools in which students are unevenly distributed relative to their demographic representation within a metropolitan area. Using this benchmark, some racially homogenous schools may not be racially segregated because the metropolitan area itself may be racially homogeneous.

57. Ravitch, *supra* note 12, at 36.

58. See Erika K. Wilson, *Monopolizing Whiteness*, 134 HARV. L. REV. 2382, 2400-04 (2021) (explaining that predominately white schools have greater educational inputs and facilitate better educational outcomes).

59. Linda Darling Hammond, *Inequality in Teaching and Schooling: How Opportunity Is Rationed to Students of Color in America*, in THE RIGHT THING TO DO, THE SMART THING TO DO: ENHANCING DIVERSITY IN THE HEALTH PROFESSIONS – SUMMARY OF THE SYMPOSIUM ON DIVERSITY IN HEALTH PROFESSIONS IN HONOR OF HERBERT W. NICKENS, M.D. 210 (2013) ("[S]chools that serve large numbers of students of color are least likely to offer the kind of curriculum and teaching needed to meet the new standards being enacted across the states and to help students attain the skills needed in a knowledge work economy.").

relationships.⁶⁰ School segregation also makes white students less tolerant and more likely to accept rigid stereotypes about and normalize violence against nonwhites.⁶¹ Critically, segregation can also lead white students to develop expectations of white superiority and “abandon[] a commitment to democratic norms if they believe democracy might elevate people of color’s station.”⁶² Even worse, white citizens steeped in segregation are more susceptible to embracing authoritarianism.⁶³ Black and brown students reared in racially segregated schools also suffer. Among other things, they face depressed educational outcomes⁶⁴ and even health inequities.⁶⁵ Simply put, segregated schools prohibit inculcation of democracy as a culture by creating racialized status-based hierarchies that further white supremacy.⁶⁶

Integrated schools can dismantle the culture of racial hierarchy and inequality endemic to segregated schools. Admittedly, the term “integration” is difficult to define precisely.⁶⁷ It is more than desegregation, the “elimination of

60. See Wilson, *supra* note 58, at 2404-05; SUMNER, *supra* note 30, at 370 (noting that white children educated in segregated schools are “[n]ursed in the sentiments of Caste,” “[t]heir characters are debased,” and they “become less fit for the duties of citizenship”).

61. See Appendix to Appellants’ Brief at 8, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 52-00001), 1952 WL 47265 (describing the impact of segregation on white students and noting that “[s]egregation not only perpetuates rigid stereotypes and reinforces negative attitudes toward members of the other group, but also leads to the development of a social climate within which violent outbreaks of racial tensions are likely to occur”).

62. Wilson, *supra* note 58, at 2405-06.

63. *Id.* at 2404.

64. See Emma García, *Schools Are Still Segregated, and Black Students Are Paying a Price*, ECON. POL’Y INST. (Feb. 12, 2020), <https://files.epi.org/pdf/185814.pdf> [<https://perma.cc/T5G5-MMGD>] (summarizing findings that schools that are racially segregated and are predominantly Black have depressed educational outcomes and wider performance gaps).

65. See Guangyi Wang et al., *School Racial Segregation and the Health of Black Children*, PEDIATRICS (May 2022), <https://doi.org/10.1542/peds.2021-055952> [<https://perma.cc/8DZL-H7YJ>] (finding that school segregation is associated with worse outcomes on several measures of well-being among Black children and contributes to health inequities throughout life).

66. I use the term “white supremacy” in the structural sense as defined by legal scholar Frances Lee Ansley to mean “[a] political, economic and cultural system in which whites overwhelmingly control power and material resources, and in which white dominance and non-white subordination exists across a broad array of institutions and social settings.” Erika K. Wilson, *The Legal Foundations of White Supremacy*, 11 DEPAUL J. FOR SOC. JUST. 1, 3 (2018).

67. See, e.g., Audrey G. McFarlane, *The Properties of Integration: Mixed-Income Housing as Discrimination Management*, 66 UCLA L. REV. 1140, 1175-76 (2019) (describing the varied definitions for integration); Cara Wong, *Would We Know ‘Integration’ if We Were to See It? Measurement and the Imperative of Integration*, 12 POL. STUD. REV. 353 (2014) (discussing the importance and challenges of defining integration).

discriminatory laws and barriers to full participation in American life.”⁶⁸ It is also more than racial balancing. While desegregation and racial balancing are necessary components of integration, they do not comprehensively define the term. Integration at its essence refers to “the nature of intergroup relations, to the quality of group treatment and interaction that exists.”⁶⁹ It “requires effective efforts to dismantle prejudices, to build common experiences around shared goals, and to assess success in terms of social ties across groups.”⁷⁰ Ultimately, integration effectuates “a transformation of the setting in which the identities of students are formed and form others.”⁷¹

Using those definitions as a baseline, this Essay uses the term “racially integrated schools” to mean schools that have student bodies that approximate the demographic makeup of the metropolitan area in which the school is located; offer a racially pluralistic curriculum; cultivate an environment that is inclusive and respectful of all; and provide access to tangible knowledge, cultural capital, and social capital. Empirical research shows that schools with some semblance of racial integration produce positive academic achievement and facilitate social cohesion among students.⁷² Such benefits are important because America’s democracy is currently frayed by racial and economic inequality, a lack of cross-racial empathy, distrust, extrajudicial violence against Black and brown citizens, and contestation over the desirability of a multiracial democracy.⁷³ All these phenomena threaten the three prongs of democracy.

68. LEONARD STEINHORN & BARBARA DIGGS-BROWN, *BY THE COLOR OF OUR SKIN: THE ILLUSION OF INTEGRATION AND THE REALITY OF RACE* 5 (1999).

69. NAT’L RSCH. COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 57 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989).

70. MARTHA MINOW, IN *BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK* 8 (2010).

71. John A. Powell, *The Tensions Between Integration and School Reform*, 28 HASTINGS CONST. L.Q. 655, 681 (2001).

72. See Janel George & Linda Darling-Hammond, *Advancing Integration and Equity Through Magnet Schools*, LEARNING POL’Y INST. 2-3 (May 2021), https://learningpolicyinstitute.org/sites/default/files/product-files/Magnet_Schools_REPORT.pdf [<https://perma.cc/PTT8-HHKA>] (summarizing empirical research showing that racially integrated schools increase the likelihood that students will graduate high school and attend college; increase wages for nonwhite students; foster more advanced social and historical thinking; reduce prejudice, negative attitudes, and stereotypes; and increase positive relationships and friendships across racial lines).

73. See, e.g., Christopher Ingraham, *U.N. Warns that Runaway Inequality Is Destabilizing the World’s Democracies*, WASH. POST (Feb. 11, 2020, 8:03 AM EST), <https://www.washingtonpost.com/business/2020/02/11/income-inequality-un-destabilizing> [<https://perma.cc/W45R-PFDS>]; Judith Hall & Mark Leary, *The U.S. Has an Empathy Deficit*, SCI. AM. (Sept. 17, 2020), <https://www.scientificamerican.com/article/the-us-has-an-empathy-deficit> [<https://perma.cc/H7TD-L2BZ>].

Racially integrated schools bring together citizens from all walks of life at an early age⁷⁴ and are perhaps the most vital spaces for rooting democracy at the formative stages of life. Racial segregation in housing and other facets of their lives is high, meaning schools are the one place where children obtain interracial contact⁷⁵ and find temporary escape from racially siloed lives. Racially integrated schools can engender the social cohesion and tangible knowledge that citizens must have for the three prongs of democracy to function effectively.

To be sure, valid questions exist as to whether school integration is realistic or desirable. White parents are often fiercely averse to integration despite their stated support and desire for integrated schools. The parental tendency to seek what they believe is best for their individual child leads white parents to flee racially diverse schools and neighborhoods.⁷⁶ It also leads them to fight vehemently against curricular and student-placement changes that would lay the groundwork for intergroup interaction and facilitate integration.⁷⁷ Given the force of white aversion to integration, critics reasonably question whether efforts would be better spent improving the conditions of schools for Black and brown students rather than chasing integration.⁷⁸

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74. See generally Linda R. Tropp & Suchi Saxena, *Re-Weaving the Social Fabric Through Integrated Schools: How Intergroup Contact Prepares Youth to Thrive in a Multiracial Society*, NAT'L COAL. ON SCH. DIVERSITY (May 2018), https://school-diversity.org/wp-content/uploads/2018/05/NCSD_Brief13.pdf [<https://perma.cc/7CT2-UZLW>] (describing the importance of intergroup contact and the positive benefits it yields for white students, benefits that carry into adulthood).
75. See, e.g., Ann Owens, *Racial Residential Segregation of School-Age Children and Adults: The Role of Schooling as a Segregating Force*, 3 RUSSELL SAGE FOUND. J. SOC. SCIS. 63, 76 (2017) (“Children of each racial-ethnic group are exposed to fewer whites and more minority children, particularly Hispanic, than adults are to adults of other racial groups.”).
76. See, e.g., Wilson, *supra* note 36, at 254-59 (surveying empirical literature demonstrating that whites choose racially homogenous schools through both choice in schools and choice in residential location); Wong, *supra* note 67, at 358 (“Most people find homophily comfortable; they tend toward familiarity and similarity in their social networks, their communities, their spouses and even their doctors.”).
77. See, e.g., Shani Adia Evans, “*I Wanted Diversity, but Not So Much*”: *Middle-Class White Parents, School Choice, and the Persistence of Anti-Black Stereotypes*, URB. EDUC. 4 (July 22, 2021) (“[Even within] the context of racially diverse schools and school systems, white middle-class parents advocate for their children to have access to advantaged, and often racially exclusive, tracks and gifted programs.”).
78. See, e.g., ROY L. BROOKS, INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUITY 1-2 (1996) (“[R]acial integration has been an unsuccessful civil rights strategy. It has not helped most African Americans achieve racial equality, by which I mean individual dignity and empowerment in American society.”); Doris Y. Wilkinson, *Integration Dilemmas in a Racist Culture*, 33 SOCIETY 27, 31 (1996) (noting that integration strategies failed to account for “the cultural chaos that would ensue for a disenfranchised and disempowered population accustomed to surviving under absolute ecological and institutional segregation”).

This critique, however, minimizes the role of courts, policymakers, and school administrators in constructing barriers to integration.⁷⁹ Public actors abandoned systemic efforts to achieve integration in places with rampant school segregation.⁸⁰ Yet policy mechanisms to create racially integrated schools still exist. At the local level, districts could eschew purely residence-based assignment plans and instead enact plans that seek to balance the number of students who receive free and reduced lunch. Owing to the connections between race and class, such a facially race-neutral plan can decrease racial segregation in schools.⁸¹

State legislatures⁸² could also redraw school-district boundary lines and attendance zones to decrease racial segregation.⁸³ At the federal level, Congress could use its funding power to incentivize states to engage in voluntary integration efforts.⁸⁴ Finally, all three levels of government could enact policies to make white flight more difficult. These policies could include drawing regional rather

79. See Gloria J. Ladson-Billing, *Can We at Least Have Plessy—The Struggle for Quality Education*, 85 N.C. L. REV. 1279, 1289 (2007) (describing federal court decisions that effectively rolled back *Brown*, “substantially dilut[ing]” the “power and impact of *Brown* on school desegregation”); Todd McCardle, *A Critical Historical Examination of Tracking as a Method for Maintaining Racial Segregation*, 45 EDUC. CONSIDERATIONS 1, 12 (2020) (describing curricular tracking and noting that, “[h]istorically, tracking practices in U.S. public schools have been employed to maintain a racially segregated society and limit academic and career prospects of students of color”).
80. See, e.g., Mandy McLaren & Olivia Krauth, *Segregated Again: Why Louisville’s Once Diverse Elementary Classrooms Are Disappearing*, COURIER J. (Feb. 10, 2021, 5:22 AM EST), <https://www.courier-journal.com/in-depth/news/education/2021/02/10/why-louisvilles-once-diverse-elementary-classrooms-are-disappearing/6069040002> [https://perma.cc/X5QS-X8ST] (noting that a Supreme Court decision, along with inaction by district administrators, led to resegregation in schools).
81. See, e.g., Deven Carlson, Elizabeth Bell, Matthew A. Lenard, Joshua M. Cowen & Andrew McEachin, *Socioeconomic-Based School Assignment Policy and Racial Segregation Levels: Evidence from the Wake County Public School System*, 57 AM. EDUC. RSCH. J. 258, 296 (2020) (finding that a Wake County public-school assignment plan that set a maximum target of forty percent of enrolled students eligible for free or reduced-price lunch in a given school substantially reduced the segregation levels faced by students who would have attended majority-minority schools under a residence-based assignment policy).
82. See Erika K. Wilson, *Toward a Theory of Equitable Federated Regionalism in Public Education*, 61 UCLA L. REV. 1416, 1426–29 (2014) (describing the legal authority that states have to draw school-district-boundary lines).
83. See Alvin Chang, *We Can Draw School Zones to Make Classrooms Less Segregated. This Is How Well Your District Does.*, VOX (Aug. 27, 2018, 8:46 AM), <https://www.vox.com/2018/1/8/16822374/school-segregation-gerrymander-map> [https://perma.cc/Q8UX-Q4ZM].
84. For example, Congress could pass the pending Strength in Diversity Act, which would create a federal grant program to fund state and local racial and economic school-integration programs. See Kimberly Ayudant, Comment, *A Call for Desegregation in Education: Examining the Strength in Diversity Act*, 89 FORDHAM L. REV. 60, 69–71 (2021) (describing the proposed legislation).

than municipal school districts,⁸⁵ changing school-district boundary lines every few years so that families could not purchase a home with the expectation that their child would gain access to a particular school,⁸⁶ or including financial penalties in federal legislation for schools that fail to make efforts to desegregate.⁸⁷

Critics also suggest that school integration requires students to assimilate, lose community ties and autonomy, and suffer emotional distress.⁸⁸ Assimilation is a form of cultural imposition that requires nondominant groups to abandon their identities and relinquish collective group-based power.⁸⁹ True integration, however, transforms group relationships from dominant and subordinate to equals. True integration eschews complete assimilation and loss of autonomy. It seeks to abolish racial segregation – but not racial identities – and recognizes that racial identification and race-conscious policies are not only necessary but desirable to achieve true integration.⁹⁰ True integration mitigates the very real and harmful effects of white supremacy.

School integration undoubtedly requires Black and brown students to bear heavy costs.⁹¹ But given the realities of white supremacy, the costs of *not* pursuing integrated schools are even greater. Pursuing integration sets a path toward disrupting the racial subordination that is inherent to segregation in America.

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85. Wilson, *supra* note 82, at 1476-79 (describing the possible permutations of regional school districts).
86. See Aaron J. Saiger, *The School District Boundary Problem*, 42 URB. LAW. 495, 532-34 (2010) (arguing for periodic school-district redistricting).
87. See, e.g., John R. Logan, Weiwei Zhang & Deirdre Oakley, *Court Orders, White Flight, and School District Segregation, 1970-2010*, 95 SOC. FORCES 1049, 1069-70 (2017) (finding that legal mandates were very effective in facilitating desegregation and that initial white flight happened after legal mandates slowed down once expectations were set); STEINHORN ET AL., *supra* note 68, at 218 (describing racial integration in the Shaker Heights, Ohio, community and emphasizing that it was the “result of a conscious and intentional policy . . . that costs money, provides incentives, and asks some to sacrifice personal choice for the greater good of the community”).
88. See generally ORLANDO PATTERSON, *THE ORDEAL OF INTEGRATION: PROGRESS AND RESENTMENT IN AMERICA’S “RACIAL” CRISIS* (1997) (detailing the paradoxes of integration); Irving Joyner, *Pimping Brown v. Board of Education: The Destruction of African-American Schools and the Mis-Education of African-American Students*, 35 N.C. CENT. L. REV. 160 (2013) (describing the consequences of eliminating the African American school system); Wilkinson, *supra* note 78 (discussing the dilemmas related to integration in a racist culture).
89. ANDERSON, *supra* note 25, at 114.
90. ANDERSON, *supra* note 25, at 183-190.
91. See, e.g., Joyner, *supra* note 88, at 190-191 (“The almost total destruction of the segregated African-American schools[, a product of integration], destroyed that bond of support, which African-Americans had with the school system, and that sense of trust has never been restored.”); ANDERSON, *supra* note 25, at 180-81 (noting that integration carries costs for African Americans including stress, feelings of alienation, hostility, and racial discrimination).

Because of America's history of white supremacy, segregation in America makes material and social equality impossible. Schools today that are racially segregated demonstrate as much.⁹² Without school integration, “no [education] reform can work effectively because it will not be distributed to all students[,] nor will it be done in an embracing and diverse environment.”⁹³

Segregation creates disparities in access to opportunity and widens racial inequities across multiple domains of social and economic life.⁹⁴ It impairs the physical health and well-being of Black and brown citizens.⁹⁵ If Americans accept a status quo of segregation and fashion solutions that take separation as a given, they will further entrench racial subordination. Though school integration is not a panacea, if America's multiracial democracy has any chance at surviving, integration is a necessary utilitarian policy choice that we must not abandon.

In sum, racially integrated public schools are critical to the functioning of American democracy. They have the power to disrupt the racial and economic inequality that is endemic to an American democracy founded upon white supremacy.⁹⁶ But as the following Part describes, pursuing racial integration of schools and providing families with unfettered choice in selecting the schools their children will attend are intractably in tension. So, a ruling like *Carson* inevitably prioritizes choice and deprioritizes racial integration.

92. See Wilson, *supra* note 58 (describing how predominately white school districts monopolize the educational inputs needed to construct a high-quality education).

93. Powell, *supra* note 71, at 696 (2001).

94. See, e.g., Margery Austin Turner & Solomon Greene, *Causes and Consequences of Separate and Unequal Neighborhoods*, URBAN INST., <https://www.urban.org/racial-equity-analytics-lab/structural-racism-explainer-collection/causes-and-consequences-separate-and-unequal-neighborhoods> [<https://perma.cc/RF2A-RAQV>] (detailing the import of residential racial segregation).

95. David R. Williams & Chiquita Collins, *Racial Residential Segregation: A Fundamental Cause of Racial Disparities in Health*, 116 PUB. HEALTH REPS. 404 (2001) (arguing that racial residential segregation is a fundamental cause of racial disparities in health).

96. HORACE MANN, TWELFTH ANNUAL REPORT TO THE SECRETARY OF MASSACHUSETTS STATE BOARD OF EDUCATION 59 (1848) (describing schools as the “great equalizer of the conditions of [people] – the balance-wheel of the social machinery”).

II. THE TENSION BETWEEN RACIAL INTEGRATION AND SCHOOL CHOICE

If the market prevails as the model for organizing U.S. education, the possibilities for strengthening democratic society and developing a democratic citizenry are ended.⁹⁷

School choice is supposed to reform public education by creating a marketplace of schools and allowing families to shop for a school.⁹⁸ But in doing so, it situates students as consumers rather than as citizens. It shifts the purpose of public education away from cultivating citizens for American democracy toward furnishing a marketplace through which individual consumers can gain economic, social, and political advantage. To the extent the school-choice model engages with democracy, it defines democracy through the lens of freedom, reasoning that democracy should afford citizens the freedom to choose schools free from state regulation.⁹⁹ School choice furthers values like liberty, autonomy, privacy, and competition.¹⁰⁰ In contrast, school integration furthers values like equality, tolerance, and citizenship training.¹⁰¹ The two concepts are inherently and intractably in tension.¹⁰² The tension breaks down in three ways.

First, under the school-choice model, parents are not required to consider how their choices impact the broader community. Parents instead select schools that fit their preferences, even if that preference is for a school that teaches discrimination, intolerance, or myopic American history.¹⁰³ Schools, in turn, are

97. MICHAEL ENGLE, *THE STRUGGLE FOR CONTROL OF PUBLIC EDUCATION: MARKET IDEOLOGY VS. DEMOCRATIC VALUES* 7 (2001).

98. *Id.* at 18-21.

99. See generally Amy Stuart Wells, Julie Slayton & Janelle Scott, *Defining Democracy in the Neoliberal Age: Charter School Reform and Educational Consumption*, 39 AM. EDUC. RSCH. J. 337 (2002) (explaining how the school-choice model implies a different conception of democracy than the public-school model with different underlying values and assumptions).

100. See, e.g., James, *supra* note 9, at 1119 (2014) (describing the incompatibility of the values undergirding school choice with the values undergirding integration and democratic equality).

101. See, e.g., Powell, *supra* note 71, at 658 (describing the citizen-equality, tolerance, and citizen-cultivation values undergirding integration); *Hobson v. Hansen*, 269 F. Supp. 401, 419 (D.D.C. 1967) (“[L]earning to live interracially is, or in a democracy should be, a vital component in every student’s educational experience.”).

102. As noted *supra* in Section I.A, choice exists within the public-school context as well and also leads to racial segregation in schools. The tensions are intensified in the private-school context because the private market caters to the most pernicious effects of choice; the state has less ability to enact policies to curtail these effects.

103. See, e.g., Katie Reilly & Madeline Carlisle, *The Supreme Court Could Let Religious Schools Take Taxpayer Money. LGBTQ Alumni Say That’s a Mistake*, TIME (Jan. 3, 2022, 6:30 AM), <https://time.com/6129283/bangor-christian-schools-lgbtq-carson-makin> [https://perma

incentivized to cater to parental preferences for education, even if those preferences run counter to the equality and tolerance values undergirding school integration.¹⁰⁴

Second, parents of different racial and socioeconomic groups use school choice differently. Parents select schools that reflect either their ability to exercise social privilege and power¹⁰⁵ or the limits of the institutional context in which their choices are being made.¹⁰⁶ Stated differently, parents make choices that allow them to ensure their children are in schools that further their racialized social status or fit existing constraints. For example, white parents often choose schools based on the social status of the other students in the school, preferring schools with high numbers of middle-class white students and fewer numbers of low-income students of color.¹⁰⁷ On the flip side, due to structural racism, parents of

.cc/PE3M-BAUC] (citing a former student who says that their school, which participates in Maine's school-choice program, teaches students that "LGBTQ people are sinners," "God created binary genders," and "transgender people needed to be prayed for and prevented from transitioning"); Rebecca Klein, *The Rightwing US Textbooks that Teach Slavery as 'Black Immigration'*, GUARDIAN (Aug. 12, 2021, 7:00 AM), <https://www.theguardian.com/education/2021/aug/12/right-wing-textbooks-teach-slavery-black-immigration> [https://perma.cc/F4VP-T6WZ] ("[P]rivate schools, especially Christian schools, use textbooks that tell a version of history that is racially biased and often inaccurate. . . . [Some] textbooks describe slavery as 'black immigration', and say Nelson Mandela helped move South Africa to a system of 'radical affirmative action.'").

104. See Helen F. Ladd & Mavzuna Turaeva, *Parental Preferences for Charter Schools in North Carolina: Implications for Racial Segregation and Isolation*, NAT'L CTR. FOR ANALYSIS OF LONGITUDINAL DATA IN EDUC. RSCH. 31-32 (Feb. 2020), <https://caldercenter.org/sites/default/files/CALDER%20WP%20196-0618-1.pdf> [https://perma.cc/784N-7PLC] (analyzing parental preferences and noting that white parents' preference for majority-white schools "generate[s] strong pressures for charter schools in North Carolina to end up racially imbalanced, with many charters serving mainly white students and other[s] serving mainly minority students").
105. See Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1128 (2014) ("[T]he ability to exercise choice, as less vulnerable and more privileged parents in the school system do, is actually about exercising privilege — privilege ultimately un-divorced from 'power and inequality or from the history that has created those inequities of power.'"); Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. PITT. L. REV. 363, 374-75 (1996) ("The priority paradigm rests on the belief that individuals' choices are purely personal, in the sense that they reflect only individual desires, fulfill the individual's unique meaning of self, and benefit the individual alone. This view, however, masks how whites' personal choices often are connected to oppressive social structures and constitute an exercise of power.").
106. See James, *supra* note 105, at 1106 ("[M]arginalized groups' schooling choices are . . . socially constrained and influenced in racially subordinating ways. School-choice policies mask this form of racial subordination.").
107. See Cory Koedel, Julian R. Betts, Lorien A. Rice & Andrew C. Zau, *The Integrating and Segregating Effects of School Choice*, 84 PEABODY J. EDUC. 110, 127 (2009) ("[Families] appear to use school choice programs to change their peer groups to be of higher socioeconomic

color are more likely to choose schools that allow them to work around constraints, considering factors such as transportation, free or reduced lunch, or walkability.¹⁰⁸ Parental perceptions of scarcity in high-quality educational opportunities heighten the stakes for families with greater race, class, or social-status advantage.¹⁰⁹ It makes them more likely to make choices they believe will further their advantages.¹¹⁰ The net result is exacerbating segregation in schools. Evidence from charter-school and voucher-choice programs supports this claim.¹¹¹ Thus, increased choice risks further entrenching racial hierarchy and inequality and impeding the ability of schools to foster the kind of equality, tolerance, and citizenship training necessary for individuals to operate as equals within America's democracy.¹¹²

standing[.] . . . [and] applicants use the choice programs to attend schools that are 'more white.');

); Holme, *supra* note 52, at 182-83 (finding that social networks and status concerns influenced white parental choices in schools and led them to reject schools with large numbers of students of color).

108. See James, *supra* note 105, at 1103 n.91 (“Distance from home and place of employment, access to public transportation, and sibling enrollment are just a few of the many factors considered in schooling choices that are less easily managed by minority, poor, or working-class families.”); Ladd & Turaeva, *supra* note 104, at 20 (examining charter-school segregation and finding that “some families may choose high-minority schools in part because those are the schools that provide the lunch and transportation services that they highly value and not simply because of their racial preferences”).
109. See Carolyn Sattin-Bajaj & Allison Roda, *Opportunity Hoarding in School Choice Contexts: The Role of Policy Design in Promoting Middle-Class Parents’ Exclusionary Behaviors*, 34 EDUC. POL’Y 992, 992 (2018) (finding that parents’ anxiety about the scarcity of high-quality educational options combined with the design of the choice policies facilitated pervasive opportunity hoarding).
110. See Osamudia James, *Risky Education*, 89 GEO. WASH. L. REV. 667, 691 (2021) (noting that in choosing schools, “parents are concerned about economic competition, the absence of a social safety net, and opportunities for their children’s ‘advancement’” and that school-choice policies elicit perceptions of scarcity even amongst privileged populations).
111. See Casey Cobb, *Do School Choice Programs Contribute to the Resegregation of American Schools?*, NAT’L COAL. ON SCH. DIVERSITY 2-3 (Mar. 2022), https://www.school-diversity.org/wp-content/uploads/NCSD_RB15.pdf [<https://perma.cc/9BV8-BEW7>] (summarizing research finding that most charter schools enroll students that are more racially and economically homogenous than the surrounding traditional public schools); Halley Potter, *Do Private School Vouchers Pose a Threat to Integration?*, CENTURY FOUND. (Mar. 21, 2017), <https://tcf.org/content/report/private-school-vouchers-pose-threat-integration> [<https://perma.cc/BW2M-79KL>] (examining the effect of private-school vouchers on school integration and finding that voucher programs on balance are more likely to increase school segregation than to decrease it or leave it at status quo).
112. MANN, *supra* note 96, at 59 (“If one class possesses all the wealth and the education, while the residue of society is ignorant and poor, it matters not by what name the relation between them may be called; the latter, in fact and in truth, will be the servile dependents and subjects of the former.”).

Finally, racialized power dynamics place true choice out of reach for marginalized Black and brown students.¹¹³ This is despite the Supreme Court’s ruling in *Pierce v. Society of Sisters*,¹¹⁴ which opened the door for school choice by holding that parents have a liberty interest in directing “the upbringing and education of children under their control.”¹¹⁵ While the liberty interest afforded in *Pierce* was once a shield parents wielded to protect their parental autonomy from incursions by the government, parents now use it as a sword to insulate their children from Black and brown children.¹¹⁶ Consequently, choice for white parents becomes a race-neutral mechanism for promulgating racial exclusion.¹¹⁷ By contrast, marginalized Black and brown students cannot realistically use school choice to access integrated private schools.

Choice that leads to racial exclusion harms American democracy by diluting social solidarity.¹¹⁸ Social solidarity is the “sense of fellow-feeling that extends beyond people with whom one is in personal contact.”¹¹⁹ It is the understanding that all within the polity are human beings who deserve the same basic human rights and dignity.¹²⁰ School choice that exacerbates segregation precludes children from obtaining the commonality of experiences necessary to build cross-

113. See generally James, *supra* note 105, at 1083, 1102-18 (describing the limits of school choice for parents and students of color). Some may argue that a well-designed voucher program could expand choice options for students of color. However, because private schools are not required to take all students, they retain the ability to exclude students of color based on race-neutral reasons such as special-education needs, disabilities, behavioral problems, poor academic performance, or the wrong religious affiliation. Further, voucher programs, no matter how well designed, cannot address structural impediments that limit choice for students of color, such as limited social networks.

114. 268 U.S. 510 (1925).

115. *Id.* at 534-35.

116. See *id.* at 1134 (“[S]chool choice is used to sanitize inequality in the school system; given sufficient choices, the state and its residents are exempted from addressing the sources of unequal educational opportunities for poor and minority students.”); Kimberly Jenkins Robinson, *Resurrecting the Promise of Brown: Understanding and Remediating How the Supreme Court Reconstitutionalized Segregated Schools*, 88 N.C. L. REV. 787, 807-08 (2010) (describing how freedom-of-choice plans were used to thwart desegregation efforts and keep Black students out of predominately white schools).

117. See generally Wilson, *supra* note 36 (describing how white parents use school-choice policies to form predominately white charter-school enclaves in racially diverse school districts).

118. See Brian Barry, *Social Exclusion, Social Isolation and the Distribution of Income*, CTR. FOR ANALYSIS OF SOC. EXCLUSION 15 (1998), <https://gsdrc.org/document-library/social-exclusion-social-isolation-and-the-distribution-of-income> [<https://perma.cc/HZA7-2P7B>].

119. *Id.* at 16.

120. *Id.* at 16-17.

racial social solidarity.¹²¹ In a multiracial democracy, social solidarity is critical because “the more attenuated the bonds of social solidarity become, the less inclusive the concerns of the median voter will be. The socially excluded will thus be failed by democratic politics.”¹²² One can see this with recent electoral politics and legislation that seemingly ignores or targets members of marginalized groups.¹²³

While some Black and brown parents may prefer schools in which they are in the majority, the voluntariness and implications of these choices cannot be divorced from America’s social context.¹²⁴ The choice cannot really be voluntary if it is a defensive reaction to the harms of white supremacy.¹²⁵ Thus, though there may be in-group benefits, even choices that produce predominately Black and brown schools impede equality and undercut the democratizing functions of public education.

The tensions between school choice and school integration are difficult to reconcile. Against a backdrop of white supremacy, increased choice facilitates exclusion, impedes equality, and hampers the ability of schools to facilitate social solidarity. As the next Part demonstrates, allowing school-choice programs to include religious schools is likely to worsen the problem by creating racial segregation contoured by religion.

121. See Tropp & Saxena, *supra* note 74, at 6–7 (summarizing research showing that white children who have contact with nonwhite children in schools are less likely to report prejudicial attitudes as adults and more likely to prefer to live in integrated places).

122. Barry, *supra* note 118, at 20.

123. See, e.g., *How Restrictive Voting Requirements Target Minorities*, PBS (Oct. 16, 2018, 6:35 PM EDT), <https://www.pbs.org/newshour/show/how-restrictive-voting-requirements-target-minorities> [<https://perma.cc/LP3X-HR97>] (describing how some state legislation suppresses minority communities’ votes); Kelsey Butler, *Anti-LGBTQ Proposals Are Flooding U.S. State Legislatures at a Record Pace*, BLOOMBERG (Apr. 8, 2022, 8:00 AM EDT), <https://www.bloomberg.com/news/articles/2022-04-08/mapping-the-anti-lgbtq-proposals-flooding-u-s-state-legislatures> [<https://perma.cc/6GLC-YH9U>] (describing state legislation aimed at retracting LGBTQ rights).

124. Barry, *supra* note 118, at 2 (“[W]e should always look at apparently voluntary self-exclusion with some scepticism. The evaluation of any voluntary act depends on the quality of the choices on offer: that the action chosen appeared to the agent preferable to the alternatives available at the time does not tell us much.”).

125. See, e.g., Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795, 810 (1996) (“Comparing all-white to all-black neighborhoods to justify why segregation might be good thus ignores the social context in which segregated neighborhoods were created and persist. . . . [B]ecause of the social context of the white power structure in which they are embedded, [all-black neighborhoods] face a harder time in gaining equitable resource allocation than all-white ones.”).

III. INTERSECTION OF SCHOOL CHOICE, RELIGION, AND SEGREGATION

A. Racialized Religious Segregation

In *Zelman v. Simmons-Harris*, the Supreme Court held that including religious schools in a state-funded school-choice program did not violate the Establishment Clause.¹²⁶ To date, the number of sectarian schools participating in such programs is limited, possibly because they do not want to be hampered by government regulations attached to public money.¹²⁷ Yet the Court in *Carson v. Makin* held unconstitutional Maine's prohibition on allowing schools that provide religious instruction from participating in Maine's tuition-assistance-program. In doing so, the Court reasoned that the status/use distinction Maine relied upon in barring sectarian schools from receiving public funds risked discriminating against sectarian schools based on their religious nature.¹²⁸ It emphasized that when Maine decided to allow parents to choose a school rather than operate and assign students to a public school, Maine could not deny parents the choice of a school that proffers religious instruction because it would interfere with the parents' right to free religious exercise.¹²⁹ The Court's reasoning portends that the permissible tentacles of state regulations over religious schools accepting public money are shrinking.¹³⁰ If so, the number of private religious schools participating in school-choice programs may increase. *Carson*

126. 536 U.S. 639, 644 (2002).

127. See James Forman, Jr., *The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics*, 54 UCLA L. REV. 547, 586-601 (2007) (arguing that participation in voucher programs by sectarian schools after *Zelman* was limited because "government intrusion is distinctly unappealing to a broad swath of the religious schools favored by evangelical Christians").

128. *Carson v. Makin*, 142 S. Ct. 1987, 2001 (2022) ("Any attempt to give effect to [the status/use] distinction by scrutinizing whether and how a religious school pursues its educational mission would also raise serious concerns about state entanglement with religion and denominational favoritism.").

129. See *id.* at 2000 ("Maine has decided *not* to operate schools of its own, but instead to offer tuition assistance that parents may direct to the public or private schools of *their* choice. Maine's administration of that benefit is subject to the free exercise principles governing any such public benefit program—including the prohibition on denying the benefit based on a recipient's religious exercise.").

130. For example, the Court's decision in *Carson* arguably obliterates the prohibition on public funds going to schools that make use of the funds to further religious curriculum. See *id.* The devolution of the status/use distinction may not only allow more state money to flow to sectarian schools but also make it difficult practically and legally for states to prohibit sectarian schools from proffering a wholly religious education funded with state money.

may also open the door for the establishment of religious charter schools.¹³¹ Either way, the *Carson* decision could result in a proliferation of state-funded religious private or charter schools. This scenario could potentially create new forms of “racialized religious segregation,” which this Essay defines as in-group homogeneity in both race and religion.

Racialized religious segregation could happen because race and religion are undeniably linked. Religion has historically played a significant role in “othering” nondominant groups and in justifying racial constructions and hierarchical orderings.¹³² Most churches and private sectarian schools are racially identifiable.¹³³ *Carson* might result in the creation of more church-affiliated schools, both private and charter. Given the racial segregation in churches, racialized religious segregation may well furnish the next frontier in school segregation.¹³⁴

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131. See, e.g., Emilia Otte, *Carson v. Makin Puts Religion and Charter Schools on the Table in Connecticut*, CONN. EXAMINER (June 26, 2022), <https://www.ctexaminer.com/2022/06/26/carson-v-makin-puts-religion-and-charter-schools-on-the-table-in-connecticut> [<https://perma.cc/YFJ3-HYRW>].
132. See generally ANTHEA BUTLER, *WHITE EVANGELICAL RACISM: THE POLITICS OF MORALITY IN AMERICA* (2021) (exploring the “racist and racial elements” that “imbue” the history of the evangelical movement); KATHRYN GIN LUM, *HEATHEN: RELIGION AND RACE IN AMERICAN HISTORY* (2022) (using the religious concept of a “heathen” to explore the conception of race throughout American history).
133. See Tom Gjelten, *Multiracial Congregations May Not Bridge Racial Divide*, NPR (July 17, 2020), <https://www.npr.org/2020/07/17/891600067/multiracial-congregations-may-not-bridge-racial-divide> [<https://perma.cc/M622-3RD6>] (describing the challenges of creating multiracial churches and white reluctance to join or remain in a church that is less than fifty percent white); STEPHEN P. BROUGHMAN, NAT’L CTR. FOR EDUC. STAT., U.S. DEP’T OF EDUC., NCES 2021-061, *CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2019-20 PRIVATE SCHOOL UNIVERSE SURVEY C-14 (2021)* (presenting private-religious-school demographics); Sean F. Reardon & John T. Yun, *Private School Racial Enrollments and Segregation 3-5* (June 26, 2002) (unpublished manuscript), https://www.civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/private-school-racial-enrollments-and-segregation/Private_Schools.pdf [<https://perma.cc/D566-Z8FV>] (finding that private sectarian schools are highly racially segregated).
134. See Robert K. Vischer, *Racial Segregation in American Churches and Its Implication for Vouchers*, 53 FLA. L. REV. 193, 201 (2001) (arguing that with an expansion of state-funded voucher programs that allow sectarian schools to participate, “[t]he true test of church-affiliated schools’ segregative tendencies comes in the voucher-driven market, where a Catholic school is competing for students not against the local public school, but against other churches”); see also Patrick O’Donnell, *Almost All of Ohio’s Voucher Cash Goes to Religious Schools*, CLEVELAND PLAIN DEALER (Mar. 12, 2017, 11:05 AM), https://www.cleveland.com/metro/2017/03/almost_all_of_ohios_voucher_ca.html [<https://perma.cc/NEK7-V3DU>] (finding that Cleveland’s voucher program attracted mostly Christian and Catholic private schools).

Further, religions are not organized solely around a collection of spiritual beliefs; many are also organized around social and political viewpoints.¹³⁵ For example, one study found that private Christian schools used textbooks that taught that “President Barack Obama helped spur destructive Black Lives Matter protests, that the Democrats’ choice of 2016 nominee Hilary Clinton reflected their focus on identity politics, and that President Donald Trump is the ‘fighter’ Republicans want.”¹³⁶ These social and political viewpoints coalesce with race in ways that increase the possibility of racialized religious school segregation.¹³⁷ The proliferation of political populism converging with race and racism has converted churches, mosques, and other religious spaces as centers for political organizing and galvanization.

Religion also serves as a mechanism through which racial identity is constructed and a racial hierarchy is maintained.¹³⁸ Adopting a Christian faith was once a “compelling criterion” for being deemed legally white and eligible to obtain U.S. citizenship.¹³⁹ Some groups practicing non-Christian religions were aligned with a nonwhite racial identity and barred from obtaining U.S. citizenship.¹⁴⁰ Even today, the concept of a “real American” is linked to being white and

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135. See, e.g., Randall Balmer, *The Real Origins of the Religious Right*, POLITICO MAG. (May 27, 2014), <https://www.politico.com/magazine/story/2014/05/religious-right-real-origins-107133> [<https://perma.cc/5ABN-UY4B>] (analyzing how conservative politics and evangelical Christianity merged); GARRETT FELBER, *THOSE WHO KNOW DON’T SAY: THE NATION OF ISLAM, THE BLACK FREEDOM MOVEMENT, AND THE CARCERAL STATE* (2020) (analyzing the intersection between a political struggle for Black liberation and the rise of the Nation of Islam as a religion).
136. Rebecca Klein, *These Textbooks in Thousands of K-12 Schools Echo Trump’s Talking Points*, HUFFINGTON POST (Jan. 15, 2021, 9:11 AM EST), https://www.huffpost.com/entry/christian-textbooks-trump-capitol-riot_n_600bce3c5b62c0057bb711f [<https://perma.cc/7LTZ-PFTS>].
137. “Two-thirds of Republicans (68%) identify as white and Christian, compared to 39% of Democrats. Among Republicans, 29% are white evangelical Protestants, 22% are white mainline Protestants, and 15% are white Catholics. Among Democrats, those numbers fall to 9%, 16%, and 13%, respectively.” *The American Religious Landscape in 2020*, PUB. RELIGION RSCH. INST. (July 8, 2021), <https://www.prii.org/research/2020-census-of-american-religion> [<https://perma.cc/4V3Z-D3DB>] (describing the intersection between race, religion, and party affiliation).
138. See Khaled A. Beydoun, *Faith in Whiteness: Free Exercise of Religion as Racial Expression*, 105 IOWA L. REV. 1475, 1504-15 (2020) (describing how was used as a metric for constructing white and nonwhite racial identity); Nagwa Ibrahim, Comment, *The Origins of Muslim Racialization in U.S. Law*, 7 UCLA J. ISLAMIC & NEAR E.L. 121, 126 (2008) (“[T]he racial and religious systems of domination defined by Whiteness and Christianity overlapped and became intertwined such that a group’s designation as an ‘inferior race’ was in part informed by its affiliation to an ‘inferior religion.’”).
139. Beydoun, *supra* note 138, at 1506 (“Christianity, more broadly, became the guardian of whiteness, used to determine who could become citizens at the border . . .”).
140. *Id.* at 1510-11.

Christian.¹⁴¹ Religion continues to be used for racial exclusion, serving a racial hierarchy that favors those deemed white; in some cases, religion is the very basis of racial-identity construction.¹⁴² Religion is also used as an interchangeable proxy for race in ways that harms groups of color.¹⁴³ Given this link between religion and race, it is perfectly possible for groups who want to self-segregate into racialized religious groups to do so.¹⁴⁴

Pro-voucher skeptics may argue that evidence from existing voucher programs enabling state funds to flow to sectarian schools does not support concerns of racialized religious segregation.¹⁴⁵ Empirical research from sectarian schools that receive vouchers shows either a neutral or slightly desegregative effect on racial segregation in schools.¹⁴⁶ However, most voucher programs for which data are available are limited by geography and income.¹⁴⁷ Removing

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141. See, e.g., Caleb Elfenbein & Peter Hanson, *What Does It Mean to Be a 'Real' American?*, WASH. POST (Jan. 3, 2019), <https://www.washingtonpost.com/outlook/2019/01/03/what-does-it-mean-be-real-american> [<https://perma.cc/4HZQ-CLBU>] (describing poll results in which twenty-five percent of respondents ranked being born in the United States or being Christian as essential to being American).
142. See Beydoun, *supra* note 138, at 1505 (analyzing the role religion, particularly Protestant Christianity, played both historically and recently in marking the formal and substantive bounds of whiteness); see also Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 IND. L.J. 119, 135 (1997) (“Since certain religions have been associated closely with particular ethnic/racial groups as a historical matter, it is not surprising that religious-outsider status has frequently gone hand-in-hand with racial- and ethnic-outsider status.”).
143. See, e.g., *Hassan v. City of New York*, 804 F.3d 277, 303 (3d Cir. 2016) (holding that the New York City Police Department impermissibly used “ethnicity as a proxy for faith” when targeting Muslims for surveillance).
144. To be sure, the history of private religious academies was rooted in resistance to integration. See generally Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973) (explaining this history).
145. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (allowing sectarian schools to participate in state voucher programs).
146. See, e.g., Jay P. Greene, Jonathan N. Mills & Stuart Buck, *The Milwaukee Parental Choice Program's Effect on School Integration*, SCH. CHOICE DEMONSTRATION PROJECT 2-3 (April 2010), <https://files.eric.ed.gov/fulltext/ED531968.pdf> [<https://perma.cc/4QUS-YLJ7>] (finding the Milwaukee voucher program neutral in its effect on racial segregation); Beth Ellyn Fry, *Racial Imbalance Between Communities and Public Schools in Cuyahoga County, Ohio: Non-Hispanic Whites Opting Out Amid Rising Black Enrollments* (May 2020) (Master of Public Administration thesis, Cornell University) (finding a correlation between the number of Black students enrolled in suburban Cleveland districts and white and Hispanic opt-outs for private or parochial schools, hypothesizing voucher program as enabling opt-out).
147. See *Milwaukee Parental Choice Program*, SCH. CHOICE WIS., <https://schoolchoicewi.org/milwaukee-parental-choice-program> [<https://perma.cc/C8FN-8RL2>] (noting that eligibility is limited to those who reside in Milwaukee and have a family income that is equal to or less than 300% of the federal poverty level); *EdChoice Scholarship Program*, OHIO DEP'T OF PUB.

these limitations may show a more significant impact on school segregation. Indeed, research in the context of scaled-up charter and magnet school-choice programs demonstrate that the race of the students within a school influences the choices parents make when given school choice.¹⁴⁸ Given the extent to which religion is racialized, choice programs that include religious schools heighten concerns about racialized religious segregation.

Skeptics may further contend that schools are already racially segregated and that the goal, therefore, should be providing Black and brown students with a quality education, even if it is in a racially homogenous school. However, research shows that students using vouchers to attend private schools, both sectarian and secular, do not fare much better academically than students attending traditional public schools.¹⁴⁹ Importantly, a myopic view of education that situates the benefits and costs as being borne only by the individual student misses the important democracy-enhancing functions served by public education in a multiracial democracy. Allowing students to continue to be educated in racially segregated environments harms both American democracy and the economy.¹⁵⁰

Finally, pro-voucher skeptics may also point out that public schools have a sordid history of forcing immigrants and those not raced as white to meld into a notion of citizenship that rejects the value of multiculturalism and propagates white cultural norms as American.¹⁵¹ In this vein, public schools have been an assimilationist, white-supremacist vehicle targeting nonwhite immigrants. For many immigrants and nonwhite students, the argument goes, public schooling means learning to think less of their own cultural norms.¹⁵² School-choice

EDUC., <https://education.ohio.gov/Topics/Other-Resources/Scholarships/EdChoice-Scholarship-Program> [<https://perma.cc/D7AR-YUV7>] (describing the program as providing “students from designated public schools the opportunity to attend participating private schools” and “low-income students who are entering kindergarten through 12th grade scholarship opportunities”).

148. See, e.g., George & Darling-Hammond, *supra* note 72, at 11-13 (describing racial segregation in choice magnet programs).

149. See Kevin Carey, *Dismal Voucher Results Surprise Researchers as DeVos Era Begins*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/upshot/dismal-results-from-vouchers-surprise-researchers-as-devos-era-begins.html> [<https://perma.cc/U3LM-YJQE>] (“Three consecutive reports, each studying one of the largest new state voucher programs, found that vouchers hurt student learning.”).

150. See Wilson, *supra* note 58, at 2404-09.

151. See Peter Smagorinsky, *The Great Equalizer of the Conditions of Humanity*, in PUBLIC EDUCATION: DEFENDING A CORNERSTONE OF AMERICAN DEMOCRACY, *supra* note 12, at 69, 76-80 (describing the assimilationist project of public schooling).

152. See, e.g., Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR (May 12, 2008), <https://www.npr.org/2008/05/12/16516865/american-indian-boarding-schools-haunt-many> [<https://perma.cc/YTG3-97Q5>] (describing how “students at federal boarding schools

proponents might contend that allowing students to attend private schools can protect Black and brown students from such harmful forced assimilation.

However, this argument misconstrues the ways in which private religious schools can operate. Rather than serving as sites of tolerance and diversity, private schools have used religion as a basis to require assimilation and to discriminate against characteristics associated with race, such as hair. Private schools can suspend or expel Black students for wearing natural Black hairstyles.¹⁵³ And some do, appealing to religion and a purported desire to prepare students to succeed in a country that equates professionalism with middle-class white norms.¹⁵⁴ Private schools that are predominately Black and run by Black administrators have done the same.¹⁵⁵ And private schools, unlike public schools, do not have to follow due-process norms or adhere to antidiscrimination laws. Consequently, private schools may not only fail to provide a safe haven, but they may also reify norms of white supremacy while leaving families with no legal avenue to challenge it as the next Section demonstrates.

B. Doctrinal Limits of Regulating Racialized Religious Segregation

There is no obvious vehicle for challenging a dual form of segregation occurring along the lines of race *and* religion. As other scholars have noted, antidiscrimination jurisprudence employs a “single-axis” analytical approach, which requires a plaintiff to demonstrate unlawful discrimination based on a single characteristic, not multiple characteristics that produce a distinct form of

were forbidden to express their culture – everything from wearing long hair to speaking even a single Indian word”).

153. See, e.g., Max Londberg, ‘*Supposed to Be Accepting*’: *Ohio Private School Forces Out Black Children with Locks, Parents Say*, USA TODAY (Aug. 18, 2020), <https://www.usatoday.com/story/news/nation/2020/08/18/ohio-private-school-discriminates-against-black-hair-styles-family-says/3389838001> [<https://perma.cc/6KVJ-U8FP>]; Zeke Hartner, *Rockville Catholic School’s Hairstyle Policies Face Scrutiny for Racial Discrimination*, WTOP (July 8, 2021), <https://wtop.com/montgomery-county/2021/07/rockville-catholic-schools-hairstyle-policies-face-scrutiny-for-racial-discrimination> [<https://perma.cc/3TGP-TR2G>] (describing a Catholic-school dress code banning braids, cornrows, twists, and locs as racially discriminatory).
154. See Gerren Keith Gaynor, *Hampton University Business School Bans Dreadlocks*, BLACK ENTER. (Aug. 23, 2012), <https://www.blackenterprise.com/hampton-business-dean-bans-dreadlocks> [<https://perma.cc/8PJ2-Y3UR>] (defending the ban on braids and locs because “the ban has been effective in helping students land corporate jobs[,] and . . . they should look the part when searching for employment”).
155. See, e.g., Londberg, *supra* note 153 (expressing disappointment with the school policy banning natural hairstyles because the school is “in the middle of a Black community, and it’s a predominantly Black school”).

segregation.¹⁵⁶ While scholars make compelling arguments regarding the viability of religion-related equal-protection claims,¹⁵⁷ the doctrinal path to successfully stating an equal-protection claim based on religion is fraught with challenges. The best path to successfully challenge racialized religious segregation would be demonstrating that the state is engaging in unlawful activity based on race under federal antidiscrimination laws¹⁵⁸ or based on religion under the First Amendment. Under either approach, plaintiffs would need to show that racialized religious segregation was occurring because students were being excluded from schools because of their race *or* religion. Attempts to demonstrate either would likely fail.

To begin with, it would be hard to demonstrate state action. Because families rather than the state would choose schools, racialized religious segregation might be linked to private choices rather than state action. Racial or religious patterns resulting from choices made by individuals is outside the remedial purview of the Constitution. The Supreme Court has made this clear in the contexts of both challenges to racial segregation and state establishment of religion in public schools.¹⁵⁹

156. See generally Devon W. Carbado & Kimberlé W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond “Either/Or: Approaches to Equal Protection*, 129 YALE L.J.F. 108 (2019) (examining how equal-protection jurisprudence silos claims into an either-or, single-axis claim).

157. See, e.g., Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause: Why the Constitution Requires School Vouchers*, 65 FLA. L. REV. 909, 912, 1031-34 (2013) (arguing that the Equal Protection Clause should be read to protect against discrimination on the basis of religion and that vouchers should go to religious schools); Susan Gellman & Susan Looper-Friedman, *Thou Shalt Use the Equal Protection Clause for Religion Cases (Not Just the Establishment Clause)*, 10 U. PA. J. CONST. L. 665, 666-67 (2008) (arguing that the Equal Protection Clause should be used to challenge government religious expression).

158. Private schools are not subject to Fourteenth Amendment constitutional challenges, but federal law prohibits race-based discrimination in private-school admissions. See *Runyon v. McCrary*, 427 U.S. 160, 173 (1976) (finding that racial discrimination in secular private-school admissions violates 42 U.S.C. § 1981, which provides that all persons within the jurisdiction of the United States shall have the same right to make and enforce contracts). While *Runyon* seemingly left an exception which could allow private sectarian schools to discriminate based on race, Title VI of the 1964 Civil Rights Act prohibits private schools, whether secular or sectarian, from receiving tax-exempt status if they engage in racial discrimination. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 595 (1983) (holding that a private religious university that practices racial discrimination does not qualify for tax-exempt status); *McGlotten v. Connally*, 338 F. Supp. 448, 461 (D.D.C. 1972) (“[A]ssistance provided through the tax system is within the scope of Title VI of the 1964 Civil Rights Act.”). This Essay thus assumes that a plaintiff challenging race-based discrimination in a private school would rely upon these federal antidiscrimination laws or state analogues modeled thereafter.

159. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995) (Thomas, J., concurring) (“The Constitution does not prevent individuals from choosing to live together, to work together, or to send their children to school together, so long as the State does not interfere with their choices on the basis of race.”); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (upholding the

Moreover, even if a plaintiff could demonstrate state action, larger doctrinal obstacles exist. Perhaps the plaintiff could bring a claim that they were being excluded because of their religion under the First Amendment. But although the First Amendment addresses claims of maltreatment due to religion, it primarily addresses government interference or coercion of religion. Students who voluntarily attend a religious school cannot claim to have experienced religious coercion.¹⁶⁰ The facts also would not lend themselves to a claim that racialized religious segregation amounted to state interference with religion. Thus, the First Amendment's Establishment and Free Exercise Clauses, while useful in protecting individual religious freedoms, are less effective for remedying group-based religious exclusion from a school.

Another possibility for challenging racialized religious segregation on the grounds of religion would be on equal-protection grounds—that the plaintiff was being treated disparately because of their religion. But the Supreme Court has not *explicitly* recognized religion as a classification subject to strict scrutiny under the Equal Protection Clause,¹⁶¹ and in practice, the Court has combined Equal Protection Clause language and frameworks with classifications pertaining to religion, making it unclear exactly what an equal-protection analysis might entail.¹⁶² Putting this question aside, the First Amendment could pose a barrier to a successful equal-protection claim. Private religious schools could persuasively argue that requiring them to admit students of a religion outside of the expressed religion of the school interferes with their own ability to practice religion as they see fit, violating the Free Exercise Clause. The Free Exercise Clause concerns are particularly pertinent given the Supreme Court's prior statements about private religious schools furthering religious ideology as a core part of

constitutionality of a prayer-release program where students voluntarily left the public-school classroom to attend a devotional course with all costs paid for by religious organizations).

160. *Zelman v. Simmons-Harris*, 536 U.S. 639, 662-63 (finding no Establishment Clause violation where a school-choice program “permits . . . individuals to exercise genuine choice among options public and private, secular and religious”).
161. *Hassan v. City of New York*, 804 F.3d 277, 299 (3d Cir. 2015) (“[N]either our Court nor the Supreme Court has considered whether classifications based on religious affiliation trigger heightened scrutiny under the Equal Protection Clause.” (footnote omitted)).
162. *See, e.g., United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (noting that discriminatory legislation should “be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment” if “directed at particular religious . . . or national . . . or racial minorities”); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (“[T]he decision whether to prosecute may not be based on ‘an unjustifiable standard such as race, religion, or other arbitrary classification.’” (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))).

their mission.¹⁶³ For these reasons, challenging racialized religious segregation on religious grounds is unlikely to be successful.

A race-based antidiscrimination claim would be similarly specious. Proving racial discrimination in violation of federal antidiscrimination laws requires exacting proof of intent to discriminate or segregate because of race.¹⁶⁴ As religion and race are so intertwined, any school facing a challenge could reasonably argue that homogenous demographics stemmed from disparate demographics in religious preference rather than any intent to exclude on the basis of race. This defense would likely succeed. Courts have declined to find intent to discriminate on the basis of race when the discrimination was expressly done because of an individual's religion or faith.¹⁶⁵

The doctrinal limitations of addressing racialized religious segregation stem from the hybrid nature of the segregation; a defendant school or State could always appeal to religion to defend against charges of race discrimination. It is akin to the interaction between geography and race that creates racially segregated schools. Even though geography was racialized by state action, geography is permitted to serve as a race-neutral mechanism for maintaining racial segregation in schools.¹⁶⁶ The same phenomenon may play out with religion, effectuating what Reva B. Siegel calls “preservation-through-transformation”: “a new cluster of rules and rhetorics . . . [that] enforces social stratification by means that

163. See, e.g., *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2064 (2020) (“[E]ducating young people in their faith, inculcating its teachings, and training them to live their faith are responsibilities that lie at the very core of the mission of a private religious school.”); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012) (noting that the job duties of a teacher at a private religious school included “conveying the Church’s message and carrying out its mission,” “lead[ing] others toward Christian maturity,” and “teach[ing] faithfully the Word of God, the Sacred Scriptures, in its truth and purity and as set forth in all the symbolical books of the Evangelical Lutheran Church” (alteration in original) (internal quotation marks omitted)).

164. See, e.g., *Washington v. Davis*, 426 U.S. 229, 239-45 (1976) (holding that plaintiffs challenging a facially neutral law must prove that the law was enacted with a racially discriminatory purpose to prevail on an equal-protection claim); *Gen. Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375, 389 (1982) (finding that 42 U.S.C. § 1981 reaches only purposeful discrimination); *Alexander v. Sandoval*, 532 U.S. 275, 284 (2001) (finding that a private plaintiff moving to enforce Title VI must show intentional discrimination).

165. See, e.g., *United States v. Clemmons*, 892 F.2d 1153, 1157 (3d Cir. 1989) (finding that a prosecutor’s use of preemptory strike against a juror for having brown skin that led him to believe he was Hindu was an appropriate race-neutral reason for exercising a preemptory strike); *United States v. Berger*, 224 F.3d 107, 119 (2d Cir. 2000) (finding that a prosecutor exercised a preemptory challenge for a race-neutral reason to strike a prospective juror who wore a yarmulke and identified himself as “an observant Jew”).

166. See, e.g., *Wilson*, *supra* note 82, at 1426-30 (describing the role of local, state, and federal government policies in creating residential racial segregation that leads to school segregation).

change over time.”¹⁶⁷ It could also perpetuate what I have previously called “second-order social closure”: “race-neutral methods and institutional arrangements that have the same impact as the race-conscious de jure laws,” serving to maintain racialized status-based hierarchies.¹⁶⁸ As the final Part describes, racialized religious school segregation would cause immeasurable harms to America’s fragile multiracial democracy.

IV. RACIALIZED RELIGIOUS SEGREGATION AND AMERICAN DEMOCRACY

American democracy is under attack. Though the attacks are multifaceted,¹⁶⁹ one of the largest threats is the rise of racial and religious balkanization. The Court’s decision in *Carson* may significantly exacerbate the balkanization. As Justice Breyer noted, allowing religion into the public-school system increases the risk of social strife and division.¹⁷⁰ Proliferation of school choice that creates racialized religious segregation will result in students being siloed, unexposed to the diverse array of persons that inhabit America. The net result will be a decrease in social solidarity and cohesion, elevating risks of internal upheaval and violence. Violence resulting from the insurrection at the Capitol,¹⁷¹ attempts to prohibit teaching about the history of race and discrimination in America,¹⁷² and

167. Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178 (1996).

168. Wilson, *supra* note 58, at 2397.

169. See, e.g., *Democracy Challenged*, N.Y. TIMES, <https://www.nytimes.com/spotlight/Democracy-Governments> [<https://perma.cc/4W4X-YT5J>] (examining a range of issues that present threats to American democracy).

170. See *Carson v. Makin*, 142 S. Ct. 1987, 2005 (2022) (Breyer, J., dissenting) (“People in our country adhere to a vast array of beliefs, ideals, and philosophies. And with greater religious diversity comes greater risk of religiously based strife, conflict, and social division.”); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 686 (2002) (Stevens, J., dissenting) (“Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy.”).

171. See, e.g., Editorial, *The Jan. 6 Capitol Attack Was, in Fact, a Violent Insurrection*, WASH. POST, (July 10, 2021, 8:00 AM EDT), <https://www.washingtonpost.com/opinions/2021/07/10/jan-6-capitol-attack-was-fact-violent-insurrection> [<https://perma.cc/23NJ-W67D>] (describing physical violence and property destruction during attack on the Capitol).

172. See, e.g., Dominick Mastrangelo, *2 Arrested at Virginia School Board Meeting on Critical Race Theory, Transgender Policy*, HILL (June 23, 2021, 7:53 AM ET), <https://thehill.com/homenews/559762-2-arrested-during-virginia-school-board-meeting-on-critical-race-theory> [<https://perma.cc/8Q8R-EG4M>] (describing a local school-board meeting in Virginia that turned unruly and led to arrests).

the protests over extrajudicial killings of Black people by the police¹⁷³ epitomize the dangers of existing balkanization. The insurrection at the Capitol wherein the participants made explicit calls to Christian nationalism presages how adding religion to the layers of balkanization could endanger America's democracy.¹⁷⁴

Further, school-choice supporters promise that school choice will produce a return on investment that traditional public schools cannot. The return on investment, however, occurs only when education is situated as a positional good, meaning its value is not inherent or static but depends on the value or use others derive from it.¹⁷⁵ Allowing school choice to be contoured by religion and race opens up the possibility for the dominant racialized religion to be used as a sorting metric that enhances the relative value of some students' education while devaluing the education of others. Put another way, certain kinds of religious education could become sought-after status markers that are unavailable to those who are not part of the dominant race or religion. This threat is ever present given the ways in which choice is operationalized in America to allow those with higher status and privilege to use choice as a stratification mechanism.¹⁷⁶ The practical effect would be creating opportunity gaps that worsen the already rising racial and economic inequality that currently threatens America's democracy.¹⁷⁷

Finally, the proliferation of school choice along the lines of race and religion engenders a myopic concept of citizenship that undermines America's multiracial, pluralistic democracy. Public education in a diverse democracy is supposed to allow for intergroup contact that facilitates empathy, understanding, and cohesion amongst all citizens. Situating students in schools delineated by race and

173. See, e.g., Hannah Schuster, *Violence Erupts Between Trump Supporters, Counter Protesters*, NPR (Dec. 14, 2020, 3:31 AM ET), <https://www.npr.org/2020/12/14/946189540/violence-erupts-between-trump-supporters-counter-protesters> [<https://perma.cc/7P9R-AA3Q>] (describing violent confrontations between racial-justice protestors and white-supremacist groups).

174. See PHILIP S. GORSKI & SAMUEL L. PERRY, *THE FLAG AND THE CROSS: WHITE CHRISTIAN NATIONALISM AND THE THREAT TO AMERICAN DEMOCRACY* 1-2 (2022) (describing the intersection between Christian symbols at the Capitol insurrection); Jack Jenkins, *How Christian Nationalism Paved the Way for Jan. 6*, RELIGION NEWS SERV. (June 9, 2022), <https://religionnews.com/2022/06/09/how-christian-nationalism-paved-the-way-for-january-6> [<https://perma.cc/J8DQ-3JD7>].

175. Alessa K. Durst, *Education as a Positional Good? Evidence from the German Socio-Economic Panel*, 155 SOC. INDICATORS RSCH. 745, 755 (2001).

176. See *supra* Part II.

177. See Adam Bienkov, *A Major New Report into Rising Inequality Warned that the Growing Gap Between Rich and Poor Is Now a Threat to Western Democracy*, BUS. INSIDER (May 14, 2019, 4:57 AM), <https://www.businessinsider.com/growing-inequality-is-a-threat-to-democracy-and-capitalism-ifs-study-2019-5> [<https://perma.cc/WZF8-LXD2>] (stating that low-earners' wages' stagnating is widening gaps between the rich and poor, undermining public trust in democracy and capitalism).

religion impedes that kind of intergroup contact. It enables students to see themselves through the lens of “them” and “us,” which can easily morph into “worthy” and “unworthy.” This dynamic is reflected in the growing movement of white Christian nationalism.¹⁷⁸ The movement uses religion to advance racial interests centered around making America a white Christian country. The ethos turns into legislative efforts to restrict political, economic, and social participation under the guise that only certain people are worthy enough to fully participate in civic life or call themselves Americans.¹⁷⁹ Public schools are supposed to stamp out this kind of tribalism, laying the groundwork for universal citizenship of all persons. Racialized religious segregation in schools could instead solidify tribalism and crystallize myopic views of citizenship in ways that pose an existentialist threat to America’s already fragile multiracial democracy.

CONCLUSION

The Supreme Court’s decision in *Carson* could open the door to a proliferation of religious schools participating in school-choice programs. Public schools are already undoubtedly highly racially segregated in ways that also threaten the stability and future of America’s burgeoning multiracial democracy. Adding private religious or religious charter schools to an already fragmented landscape will increase the likelihood of balkanizing the American landscape in ways that would be difficult to address as a matter of law. In a world of limited resources, more efforts should be spent on racially integrating public schools to fortify America’s burgeoning multiracial democracy.

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178. See generally ANDREW L. WHITEHEAD & SAMUEL L. PERRY, *TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES* (2020) (chronicling the connection between white Christian nationalism and antidemocratic attitudes and legislation).

179. See *id.* at 105–06, 163–64.