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# Killing Two Achievements with One Stone: The Intersectional Impact of *Shelby County* on the Rights to Vote and Access High Performing Schools

STEVEN L. NELSON, J.D., PH.D.\*

## Introduction

Although the pursuits of educational equity and access to the electoral franchise were both key components of the Civil Rights Movement, scholars often speak about educational equity and the right to vote as separate, coexisting efforts towards achieving civil rights. It is rare for scholars to discuss the intersection of educational equity and access to the electoral franchise as a combined approach to pursuing civil rights. The two are linked, however, given our country's propensity for electing school boards.<sup>1</sup> School boards are generally responsible for the operation and supervision of a jurisdiction's schools, and nearly all school boards in the United States are elected.<sup>2</sup> School boards, because of their unique position as the closest form of our representative republic to a direct democracy,

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1. See generally FREDERICK HESS, SCHOOL BOARDS AT THE DAWN OF THE 21ST CENTURY: CONDITIONS AND CHALLENGES OF DISTRICT GOVERNANCE (2002), <http://files.eric.ed.gov/fulltext/ED469432.pdf> [hereinafter NSBA REPORT].

2. *Id.* at 5.

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often open doors to future political pursuits for Black candidates, particularly in larger, more urban districts where Black candidates appear to be slightly overrepresented on elected school boards.<sup>3</sup> School board membership may give Black politicians a brand name, political experience, and perhaps, promote future political participation<sup>4</sup>—essentially, school board membership affords Black candidates a springboard into their political careers.

The Supreme Court's 2013 decision in *Shelby County v. Holder*,<sup>5</sup> though not ostensibly an educational equity and access case, has and will have tremendous effects on Black school board candidates' abilities to earn seats in some areas, and will impact their access to the peripheral benefits of serving on an elected school board. Moreover, the Court's decision in *Shelby County* has and will impact the ability of Black electors in majority-minority districts to impact education policy and the politics of education. This Article uses the rise of self-selected school boards managing charter schools in New Orleans, Louisiana—the epicenter of the charter school movement—to problematize the Court's *Shelby County* decision. In particular, this Article addresses the sometimes unstated connection between the right to vote and the right to equitable educational access. Specifically, this Article analyzes the data surrounding charter school board diversity efforts in New Orleans with a necessary discussion of the relationship between the accountability of popularly elected school boards and charter school academics. Finally, this Article makes recommendations for the implementation or reauthorization of charter school legislation.

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3. HESS, *supra* note 1, at 4.

4. Abe Feuerstein, *Elections, Voting and Democracy in Local School District Governance*, 16 EDUC. POL'Y, 15–36 (2002).

5. *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

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## I. A Brief History of the Civil Rights Movement's Cornerstones: The Electoral Franchise and Educational Access

Prior to the Voting Rights Act of 1965 (“the Act”), the federal government attempted to remedy Black Americans’ disenfranchisement.<sup>6</sup> However, these efforts produced little to no results in guaranteeing access to political participation through the electoral franchise.<sup>7</sup> Congress long resisted the implementation of more robust voting rights protections for Black Americans at the wishes of White southern politicians.<sup>8</sup> States also effectively continued to find alternate paths to exclude Blacks from the political process despite the fact that the 15th Amendment purported to assure protection from Black voter disenfranchisement.<sup>9</sup> Key anti-civil rights events<sup>10</sup> occurred in 1965 prompting the implementation of sweeping protections guaranteeing the electoral franchise for Blacks.

The Act included key provisions that aided in the prevention of Black voter disenfranchisement. The two greatest protections under

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6. The 15th Amendment, passed during Reconstruction, was previously the most notable attempt at remedying voter disenfranchisement. Though partially successful, the 15th Amendment’s effectiveness faded as the Reconstruction period ended. Due in part to extreme violence and intimidation, Black Americans—mostly former slaves and their descendants—remained largely unable to access the electoral franchise, *see generally*, Steven L. Nelson, *Balancing School Choice and Political Voice: An Analysis of the Legality of Public Charter Schools in New Orleans, Louisiana Under Section 2 of the Voting Rights Act* (Dec. 2014) (unpublished Ph.D. dissertation, Pennsylvania State University) (on file with author).

7. In particular, the southern region of the United States saw little-to-no results from previous voting rights activism; other parts of the nation saw little-to-no results, as well. *See* U.S. DEP’T OF JUSTICE, *HISTORY OF FEDERAL VOTING RIGHTS LAWS: THE VOTING RIGHTS ACT OF 1965*, <http://www.justice.gov/crt/history-federal-voting-rights-laws> (last updated Aug. 8, 2015) [hereinafter *HISTORY OF THE VOTING RIGHTS ACT*].

8. S. REP. NO. 97-417, at 12 (1982) (establishing that even after the Act many Southern states resisted compliance).

9. S. REP. NO. 97-417, at 5 (1982).

10. Bloody Sunday may have had the most impact in spurring Congress to act as images of Black citizens seeking the franchise—and being beaten for doing so—were spread, both nationally and internationally.

the Act were section 2 and section 5.<sup>11</sup> Section 2 of the Act had national applicability and generally banned the denial and/or abridgement of the right to participate in the political process.<sup>12</sup> In other words, section 2's prohibitions were not limited in the scope of state actions covered and could be applied generally to any effort to violate a citizen's right to vote.<sup>13</sup> Section 2 addressed the fact that little to no progress had been made at the national level in remedying voter disenfranchisement.<sup>14</sup> Unfortunately, section 2's protections were remedial in nature and required aggrieved parties to first allege some realized harm to file suit.<sup>15</sup> On the other hand, section 5 targeted jurisdictions with a history steeped in denying Blacks the right to the electoral franchise.<sup>16</sup> As such, it granted the Department of Justice increased oversight in the political and electoral processes in these jurisdictions since they were deemed more likely to create obstacles to obtaining or maintaining Blacks' right to vote.<sup>17</sup>

Section 5 was the most powerful provision of the Act. It granted the Department of Justice the power to directly attack the systematic disfranchisement of Black voters in covered jurisdictions. Section 5 required federal approval of all changes to voting schemes of all depths and breadths; its protections were preemptive.<sup>18</sup> Jurisdictions covered under section 5 were required to submit any changes to the jurisdiction's voting laws and procedures for preclearance by federal officials.<sup>19</sup> If a jurisdiction violated section 5's preclearance requirements, the new voting procedures would be deemed invalid

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11. Nelson, *supra* note 6.

12. U.S. DEP'T OF JUSTICE, SECTION 2 OF THE VOTING RIGHTS ACT, <http://www.justice.gov/crt/section-2-voting-rights-act> (last updated Aug. 8, 2015).

13. *Id.*

14. HISTORY OF THE VOTING RIGHTS ACT, *supra* note 7.

15. *See generally* Nelson, *supra* note 6.

16. U.S. DEP'T OF JUSTICE, ABOUT SECTION 5 OF THE VOTING RIGHTS ACT: THE *SHELBY COUNTY* DECISION, <http://www.justice.gov/crt/about-section-5-voting-rights-act> (last updated Aug. 8, 2015) [hereinafter ABOUT SECTION 5 OF THE ACT].

17. *Id.*

18. *Id.*

19. *Id.*

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and could be enjoined upon petition from private plaintiffs or the federal government.<sup>20</sup>

Section 4 of the Act provided a formula establishing the specific jurisdictions that were covered under section 5 and those jurisdictions' eventual bailout from section 5 coverage.<sup>21</sup> Effectively, a jurisdiction that was required to seek preclearance under section 5 could, after a decade without certain violations of the Act, be excused from the requirement to seek preclearance. The Supreme Court then disarmed section 5 of its powers in the *Shelby County* decision, the significance of which will be further discussed in Section I.A.<sup>22</sup> Thus, the remedial measures of section 2 are the only significant protections currently available under the Act for Black voters seeking to gain and assure racial representation on legislative bodies.<sup>23</sup> Section 2's remedial measures, however, may not provide adequate voting protections for Blacks to maintain, retain, or obtain political voice and participation under extant judicial precedent because section 2 does not expressly prohibit the vacillation between types of selection schemes that could impact minority representation.<sup>24</sup> In effect, jurisdictions may now be able to avoid racial diversity on legislative bodies by simply altering the selection or election scheme affecting groups formerly covered under section 5.

In the first seventeen years after the Act's passage, the law underwent several reauthorizations and amendments. Reauthorizations and amendments necessitated new interpretations of the Act. During the 1970s, the federal courts held that any voting scheme that diluted the voting power of Blacks violated the Act.<sup>25</sup> However, in 1980 that rule would change; the Supreme Court would conclude that only voting schemes that intentionally abridged or denied the voting rights of minorities would violate the Act.<sup>26</sup> This new standard, set

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20. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969).

21. *Id.*

22. *Shelby Cty.*, 133 S. Ct. 2612.

23. Nelson, *supra* note 6.

24. S. REP. NO. 97-417, at 6 (1982).

25. *See, e.g., White v. Regester*, 412 U.S. 755 (1973).

26. *City of Mobile v. Bolden*, 446 U.S. 55, 62-64 (1980) (plurality decision).

forth in *City of Mobile v. Bolden*, required proof of intent as opposed to result or impact, making it much harder for plaintiffs to prove their claims.<sup>27</sup>

In 1982, Congress moved to amend the Act after the Supreme Court's decision in *Bolden*.<sup>28</sup> Plaintiffs could once again prove their cases without proving that voting schemes were intentionally dilutive; the amendment reestablished the burden of proof that plaintiffs previously had to meet to establish a section 2 claim.<sup>29</sup> The Supreme Court took its first opportunity to consider the 1982 amendments in *Thornburg v. Gingles*.<sup>30</sup> The *Thornburg* Court found that the amended section 2 made clear that the appropriate test for a section 2 case was the "results test" as opposed to the "intent test."<sup>31</sup> The Court also concluded that the intent test had to be rejected because Congress believed the intent test was problematic for various reasons.<sup>32</sup> The Court held that that the intent test advocated for in *Bolden* pitted communities against each other. Under the intent test, charges of racism were frequently hurled against community members.<sup>33</sup> Furthermore, the Court found only that intent was excessively difficult for plaintiffs to prove and did not reach the root issue of section 2.<sup>34</sup> Thus, the Court held that an intent test might only regulate the most extreme cases of denial or abridgement.<sup>35</sup> Post-*Thornburg*, *Bolden's* intent test has been both rebuked and repudiated.<sup>36</sup> The language of section 2 of the Act, as of the 1982

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27. *Bolden*, 446 U.S. at 62-64.

28. See *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

29. *Id.* at 43-44.

30. *Id.* at 35.

31. *Id.*

32. *Id.* at 43-44.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 44. However, some courts have viewed the 1982 Amendments as an amendment to *Bolden*. E.g., *Brown v. Bd. of Comm'rs of Chattanooga*, 722 F. Supp. 380, 389 (E.D. Tenn. 1989) (holding that if a system was conceived for a discriminatory purpose and it continues to serve that purpose, the system is unconstitutional). In practical terms, this distinction is not material.

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amendments, was originally codified at 42 U.S.C. § 1973. That language now states, in part:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color....

(b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice....<sup>37</sup>

In addition to the section 2 protections, section 5 of the Act advanced voting rights protections for minority communities across the country, especially in the Deep South.<sup>38</sup> When the Supreme Court invalidated section 4 of the Act—practically ending section 5 enforcement—these communities were left with the remedial measures of section 2 in lieu of the preemptive measures of section 5.<sup>39</sup> States are now presumably free to gerrymander electoral districts to assure political victories for candidates that are not particularly in favor of the political ideals shared by many in the Black community. States may also be free to completely rid Black populations of opportunities to meaningfully participate in the political process

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37. 52 U.S.C. § 10301 (2015) (originally codified at 42 U.S.C. § 1973).

38. The following states were covered under section 5 prior to the Court's decision in *Shelby County* and were just recently bailed out of section 5 coverage in their entirety per the *Shelby County* decision: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia. The following states were partially covered under section 5 prior to the Court's decision in *Shelby County* and were just recently bailed out of section 5 coverage in their entirety per the *Shelby County* decision: California, Florida, Hawaii, Idaho, Michigan, New York, North Carolina, and South Dakota. See ABOUT SECTION 5 OF THE ACT, *supra* note 16.

39. Nelson, *supra* note 6.



through the nixing of popularly elected officials in favor of appointed boards so long as states' explicit racial animus is not evident in their actions.

Although then-Attorney General Eric Holder and the United States Department of Justice filed multiple actions under section 2 after the Court's decision in *Shelby County*,<sup>40</sup> political commentary from various sources indicate that ending section 5 enforcement has aided in the retrenchment of voting rights protections in the Deep South.<sup>41</sup> In her dissenting opinion, Supreme Court Justice Ruth Bader Ginsburg mentioned several instances of premature attacks on the voting rights of minorities.<sup>42</sup> Some states moved to restrict the voting rights of minorities even before or immediately after the dismantling of the Act's most powerful restrictions. To add to Justice Ginsburg's list, some other states attempted to pass restrictive identification requirements, which have been linked to the obstruction of political participation for minority voters.<sup>43</sup>

Louisiana completely disrupted and displaced the section 5-protected, predominately Black and popularly elected Orleans Parish School Board after Hurricane Katrina decimated its southeast coast.<sup>44</sup> The state of Louisiana took advantage of the evacuation of New

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40. See, e.g., Complaint, United States v. North Carolina, No. 13-cv-861 (M.D.N.C. Sept. 30, 2013).

41. Jason Zengerle, *The New Racism: This is How the Civil Rights Movement Ends*, NEW REPUBLIC (Aug. 10, 2014), <http://www.newrepublic.com/article/119019/civil-rights-movement-going-reverse-alabama>; Myrna Perez & Vishal Agraharkar, *If Section 5 Falls: New Voting Implications*, BRENNAN CTR. FOR JUST. (2013), [https://www.brennancenter.org/sites/default/files/publications/Section\\_5\\_New\\_Voting\\_Implications.pdf](https://www.brennancenter.org/sites/default/files/publications/Section_5_New_Voting_Implications.pdf).

42. *Shelby Cty.*, 133 S. Ct. at 2646–47.

43. See, e.g., *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015) (striking down restrictive provisions of a proposed Texas Voter Identification Law); but cf. Alice Ollstein, *After Alabama Enforces Voter ID, Shuts Down DMVs in Black Communities, Lawmaker Wants Investigation*, THINK PROGRESS (Oct. 6, 2015, 10:56 AM), <http://thinkprogress.org/politics/2015/10/06/3709020/alabama-dmv-voters/> (questioning the motives behind the implementation of voter identification requirements need in Alabama that occur just prior to the closure of facilities that produce the required forms of identification).

44. Nelson, *supra* note 6.

Orleans's predominately Black population to install an appointed, predominately White and state-run school board that gave way to self-selected, predominately White charter school boards.<sup>45</sup> The usurping of Black political and electoral power as pertaining to education policy in New Orleans occurred under the restrictive watch of section 5. Other reductions in Black voting protections and rights still occur even though Blacks in the Deep South continue to play a critical role in national politics.<sup>46</sup>

While Black Americans played a crucial role in electing the first Black President, President Barack Obama, to the White House, there are less obvious indicators of Black political involvement and influence.<sup>47</sup> In congressional elections, Black voters typically exercise political influence by electing moderate or liberal White politicians to office.<sup>48</sup> In Louisiana, Mary Landrieu, the former-Democratic Senator, relied on a large Black voter turnout to maintain her position in the United States Senate.<sup>49</sup> Some observers have, however, noted that Black voters are not encountering similar and sustained electoral success at the state and local level as they are at the federal level.<sup>50</sup> This is true in Louisiana where there has never been a Black governor,<sup>51</sup> even with a third of the state's population being Black. Moreover, the state of Louisiana has had a decorated past of denying the electoral franchise to minorities, even within the last decade.<sup>52</sup>

The crippling of section 5's robust and powerful protections adds to the list of cases that have retracted civil rights for minority groups. Arguably, it is no coincidence that these cases began with seeking

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45. Steven L. Nelson, *Gaining Choice and Losing Voice: Is the New Orleans Charter School Takeover a Case of the Emperor's New Clothes?*, in *ONLY IN NEW ORLEANS: SCHOOL CHOICE AND EQUITY POST-HURRICANE KATRINA* 237, 246–47 (Luis Miron, Brian R. Beabout, & Joseph Boselovic eds., 2015) [hereinafter *Gaining Choice and Losing Voice*].

46. Zengerle, *supra* note 41.

47. *Id.*

48. *Id.*

49. Nelson, *supra* note 6.

50. Zengerle, *supra* note 41.

51. Debo P. Adegbile, *Voting Rights in Louisiana: 1982-2006*, at 10 (2006), <http://www.protectcivilrights.org/pdf/voting/LouisianaVRA.pdf>.

52. *Id.*

educational equity in public primary and secondary schools. Closely scrutinizing the history of education law allows one to ascertain the true depth of possible retrenchment that resulted from the Court's holding in *Shelby County*. The Supreme Court began to show signs of exhaustion with the Civil Rights Movement as early as the mid-1970s. School desegregation had experienced a short peak in the two prior decades. Due largely in part to the Court's efforts at consensus building, previous Courts unanimously held in favor of Black plaintiffs seeking once limited, if not totally foreclosed, educational opportunities to Black students.

This era started in the 1950s when the Supreme Court held that the state of Texas violated the Equal Protection Clause of the Fourteenth Amendment when it created a law school for its Black students as a method of avoiding the integration of its all-White law school.<sup>53</sup> The Court then unanimously decided that under the same constitutional provision the state of Oklahoma could not mandate that a Black student, admitted to graduate school, be required to sit in the hallway near a classroom to prevent the integration of Black and White students.<sup>54</sup> This run of unanimity continued with *Brown v. Board of Education (Brown I)*.<sup>55</sup> *Brown I* overturned the separate but equal policy advanced in *Plessy v. Ferguson*<sup>56</sup> and explicitly required school districts nationwide to desegregate their schools.<sup>57</sup> *Brown I* and *Brown II*,<sup>58</sup> the latter of which required schools to desegregate with "all deliberate speed," have become stalwarts of desegregation efforts though some scholars have argued against such a solitary and restrictive method of achieving educational equity.<sup>59</sup>

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53. *Sweatt v. Painter*, 339 U.S. 629 (1950).

54. *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950).

55. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

56. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

57. Although the school desegregation cases had national affect and effect, the primary area of focus in desegregating schools was in the American South. Northern segregation was, to some extent, not viewed as a problem (see Gary Orfield, Prologue: Lessons Forgotten, in Erica Frankenberg & Gary Orfield, LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS 1-6 (2007).

58. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

59. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests*

Throughout the 1960s, the Court extended its run of unanimous rulings in favor of school desegregation and educational equity for minority students. In 1968, a unanimous Court ruled that minimalist desegregation strategies, or strategies that effectively maintained the status quo, were unsatisfactory under the order issued in *Brown II*.<sup>60</sup> In *Green v. County School Board of New Kent County*,<sup>61</sup> the Court established an integration checklist to determine if meaningful desegregation had occurred in a given school district. The *Green* factors consider the racial proportions of students, faculty, and staff assigned to specific schools, as well as absolute equality of transportation, facilities, and extracurricular activities.<sup>62</sup> Until the early 1990s, school districts were required to fulfill all of these requirements in relative temporal proximity to each other to escape federal district court supervision.<sup>63</sup>

In the early-to-mid 1990s, the Court issued a series of rulings that placed barriers in the path of meaningful efforts at desegregating the nation's public schools.<sup>64</sup> After *Freeman v. Pitts*,<sup>65</sup> school districts could fulfill these requirements individually or all at once, notwithstanding the time of each individual fulfillment.<sup>66</sup> When combining the implications of *Freeman* with the Court's decision on school

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in *School Desegregation Litigation*, 85 YALE L.J. 470, 470–516 (1976).

60. *Green v. Cty. Sch. Bd.*, 391 U.S. 430 (1968).

61. *Id.*

62. *Id.*

63. In 1992, in *Freeman v. Pitts*, 503 U.S. 467 (1992), school districts were generally thought to be required to fulfill all *Green* factors simultaneously to achieve unitary status. Post-*Freeman*, it was clear that the Court would allow school districts to fulfill the *Green* factors in a piecemeal fashion, and once all *Green* factors were fulfilled— notwithstanding the contemporaneous nature or lack thereof of the fulfillment(s)— school districts would be released from federal supervision.

64. See, e.g., *Freeman*, 503 U.S. 467 (1992); see also, *Missouri v. Jenkins*, 515 U.S. 70 (1995).

65. *Freeman*, 503 U.S. 467.

66. The piecemeal fulfillment of *Green* factors often resulted in regression to segregative practices, and that regression was a notable consequence to the evaluation of the fulfillment of other *Green* factors (see Gary Orfield, *Turning Back to Segregation*, in *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 1–22 (Gary Orfield et al. eds., 1996).

desegregation immediately preceding *Freeman*, school districts could address one *Green* factor at a time.<sup>67</sup> Once unitary status of each individual factor was achieved, school districts were completely free of federal mandates to address existing or prevent future school segregation.<sup>68</sup> Gary Orfield of the Civil Rights Project, a nationally recognized expert on school desegregation, has asserted that school districts were not only free of mandates to desegregate schools, but under federal cases, such as *Board of Education v. Dowell*, *Freeman* and *Missouri v. Jenkins*, school districts released from federal supervision were also free to commence plans that would revert to practices that led to the initially violative segregation of public schools.<sup>69</sup>

In the early 1970s, proponents of desegregated schools continued to win in federal court although to a lesser extent. The Court continued with unanimous decisions; as time progressed, however, judicial decisions became split, with consensus-building becoming less important than it was in the 1950s and 1960s. In *Swann v. Charlotte-Mecklenburg Board of Education*,<sup>70</sup> a unanimous Supreme Court upheld the busing of students to and from school as a remedy for *de jure* segregation. The Court, in *Swann*, reached a unanimous decision, but the Court's consensus began to dissolve by 1972. *Wright v. Council of City of Emporia*<sup>71</sup> and *United States v. Scotland Neck City Board of Education*<sup>72</sup> are both cases where proponents of school desegregation avoided attempts to resegregate (or maintain segregation) in public schools, but neither case enjoyed the consensus opinion won before previous Courts. In both *Wright* and *Scotland Neck*, all of the justices agreed in the result of the case, despite the fact that four justices in each case submitted varying rationales for reaching the holding in each case.

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67. *Freeman*, 503 U.S. at 490–91.

68. *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247–48 (1991).

69. Orfield, *supra* note 57, at 2.

70. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 30 (1970).

71. *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972).

72. *United States v. Scotland Neck City Bd. of Educ.*, 407 U.S. 484 (1972).

The cracks in the former consensus became insurmountable in the first *Milliken v. Bradley* decision.<sup>73</sup> In *Milliken I*, the Court limited school desegregation plans to only those districts previously guilty of *de jure* segregation.<sup>74</sup> A majority of the Court drew a line in the proverbial sand of desegregation and used artificial and arbitrary geographic boundaries to do so. Post-*Milliken I*, integration-minded school officials were left with the option to pursue equal educational opportunity as opposed to desegregation in effectuating educational equity.<sup>75</sup> In effect, *Milliken I* chilled efforts at school desegregation. Even state statutes pursuing integration became ineffective at remedying segregation.<sup>76</sup> Moreover, the guidance from the second *Milliken* decision and other legal remedies aimed at increasing financial capital for struggling minority school districts continued to be of no or very little avail in efforts to funnel more money into disproportionately poor and minority schools.<sup>77</sup>

As the Supreme Court reneged on its promise to desegregate the nation's public schools, there was a simultaneous return to segregated schools. Research by the Civil Rights Project stated that the only concentrated period of school integration was the decade immediately following the enactment of the civil rights legislation of the 1960s.<sup>78</sup> This same research reported statistics that supported the conclusion that schools became increasingly segregated over the

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73. *Milliken v. Bradley (Milliken I)*, 418 U.S. 717 (1974).

74. *Id.* at 752–53.

75. See *Milliken v. Bradley (Milliken II)*, 433 U.S. 267 (1977).

76. Steven L. Nelson & Alison C. Tyler, *Examining Pennsylvania Human Relations Commission v. School District of Philadelphia: Considering How the Supreme Court's Waning Support of School Desegregation Affected State-Based Desegregation Efforts*, 40 SEATTLE UNIV. L. REV. (forthcoming 2017).

77. Cf. Alison Morantz, *Money and Choice in Kansas City: Major Investments with Modest Returns*, in DISMANTLING DESEGREGATION, *supra* note 66, at 241.

78. GARY ORFIELD ET AL., CIV. RTS. PROJECT, E PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS 7–10 (2012), [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-doublesegregation-for-morestudents/orfield\\_epluribus\\_revised\\_complete\\_2012.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-doublesegregation-for-morestudents/orfield_epluribus_revised_complete_2012.pdf).

decades immediately following the 1960s.<sup>79</sup> Thus, efforts at school desegregation became regressive, and not simply static, following the end of affirmative civil rights legislation. In particular, there has only been significant progress in integrating the most segregated schools in the country—those schools that are almost exclusively filled with students of one race; the integration of all other schools has faltered severely since the 1960s.<sup>80</sup> This is unsettling considering the plethora of literature that supports the notion that students in integrated schools have better academic, social, and occupational trajectories than students in segregated schools.<sup>81</sup> The increasing number of charter schools only contributes to the already-increasing segregation in public schools,<sup>82</sup> which are now more segregated than they were during *de jure* segregation.<sup>83</sup>

Nonetheless, these schools may still provide adequate educational experiences for their chiefly minority student bodies even though judicial rulings continue to promote segregative policies. Some literature suggests that assuring adequate minority representation on school boards—at least in the traditional public school setting—is one method of providing for educational equity.<sup>84</sup> Further research is necessary to determine if this correlation also

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79. ORFIELD ET AL., *supra* note 78, at 76.

80. *Id.*

81. See generally Erica Frankenberg, *Introduction: School Integration—The Time Is Now*, in LESSONS IN INTEGRATION: REALIZING THE PROMISE OF RACIAL DIVERSITY IN AMERICAN SCHOOLS 7–27 (Erica Frankenberg & Gary Orfield eds., 2007).

82. ERICA FRANKENBERG ET AL., CIVIL RTS. PROJECT, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 37–38 (Jan. 2010), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenberg-choices-without-equity-2010.pdf>.

83. ORFIELD ET AL., *supra* note 78, at 76.

84. See MICHAEL BERKMAN & ERIC PLUTZER, TEN THOUSAND DEMOCRACIES: POLITICS AND PUBLIC OPINION IN AMERICA'S SCHOOL DISTRICTS (2010); Ted Robinson et al., *Black Resources and Black School Board Representation: Does Political Structure Matter?* 66 SOC. SCI. Q. 976 (1985); Kenneth J. Meier & Robert E. England, *Black Representation and Educational Policy: Are They Related?*, 78 AM. POL. SCI. REV. 392, 397 (1984); but see Joseph Stewart, Jr. et al., *Black Representation in Urban School Districts: From School Board to Office to Classroom*, 42 W. POL. Q. 287 (1989) (questioning the relationship between descriptive representation and substantive representation).

holds true for public charter schools.<sup>85</sup> Just as integrated schools are linked to better academic results for minority students, the presence of minority school board members is linked to better academic indicators (outside of test scores). Another study, in the context of New Orleans, found that a lack of political accountability has produced greater entry points into the school-to-prison pipeline for students.<sup>86</sup>

#### A. The Impact of Invalidating Section 4 of the Voting Rights Act of 1965

The Supreme Court issued its most important and groundbreaking decision on the Act in 2013. In *Shelby County*, the Court held that Congress' reauthorization of the coverage formula for section 4 of the Act was unconstitutional.<sup>87</sup> *Shelby County*, a section 5-covered jurisdiction in Alabama, challenged section 4(b) and section 5 of the Act as facially unconstitutional.<sup>88</sup> Despite the fact that two federal courts had found Congress' evaluation of substantial evidence in support of the Act's most extreme—and effective—provisions, the

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85. Compare Steven L. Nelson & Jennifer E. Grace, *The Right to Remain Silent in New Orleans: The Role of Self-Selected Charter School Boards on the School-to-Prison Pipeline*, 40 NOVA L. REV. (forthcoming Spring 2016) (finding links between better student outcomes and more traditional educational approaches) with Christine H. Roch & David W. Pitts, *Differing Effects of Representative Bureaucracy in Charter Schools and Traditional Public Schools*, 42 AM. REV. PUB. ADMIN. 282 (2012) (finding better links between better student outcomes and less traditional educational approaches, not looking at teacher representation which is weakly correlated to board representation).

86. Nelson & Grace, *supra* note 85 (finding that school boards in New Orleans that were not politically accountable were more likely to report dropout rates and disciplinary rates that exceeded Louisiana state averages and also finding that school boards that lacked political accountability were more likely to report college matriculation rates that lagged behind the Louisiana state average); see also, Kenneth J. Meier & Joseph Stewart, Jr., *The Impact of Representative Bureaucracies: Educational Systems and Public Policies*, 22 AM. REV. PUB. ADMIN. 157 (1992) (discussing the various methods of measuring substantive representation).

87. *Shelby Cty.*, 133 S. Ct. 2612.

88. *Id.* at 2621–22.



Court concluded otherwise.<sup>89</sup> The Court reasoned that enforcement of section 5 had become more stringent over time despite dramatic improvements among some measures of voting equality,<sup>90</sup> and that other states—some with similar breaches of voting protections for minorities—were also not covered under section 5.<sup>91</sup> This ultimately led the Court to agree with the findings of a dissenting federal appeals court judge: that coverage under section 5 was an indicator of greater, not lesser, political participation among minorities.<sup>92</sup>

The majority opinion in *Shelby County* discussed whether improvements in political participation, measured by voter registration and voter turnout gaps, were the product of section 5 coverage. This discussion, however, was limited to the past successes of section 5, not the continued need for section 5's protections.<sup>93</sup> The Court decided that the coverage formula of section 4, which had not been altered in recent amendments to the Act, was unconstitutional.<sup>94</sup> The Court issued its ruling in spite of the fact that the Court itself had recognized that voting discrimination still existed.<sup>95</sup>

While some have argued that Justice Ginsburg's dissent in *Shelby County* was scathing, the Justice's response to the majority opinion appears to reveal as much confusion as anger. Justice Ginsburg's dissent questions whether the Act's most effective tool to remedy voting discrimination was a victim of its own success.<sup>96</sup> Moreover, Justice Ginsburg's dissent argues there is more work to be done in the area of voting rights in the Deep South.<sup>97</sup> Justice Ginsburg also

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89. *Shelby Cty.*, 133 S. Ct. at 2621–23.

90. *Id.* at 2625–27.

91. *Id.* at 2629 (citing *Northwest Austin v. Holder*, 557 U.S. 193 (2009), to assert that section 5 must determine the coverage states in an equitable and sensible manner).

92. *Id.* at 2622.

93. *Id.* at 2624–28.

94. *Id.* at 2627–28.

95. *Id.* at 2633 (J. Ginsburg, dissenting).

96. *Id.* at 2633–34 (J. Ginsburg, dissenting).

97. *Id.* at 2612, 2645 (J. Ginsburg, dissenting) (The Deep South, including Texas, but excluding Florida and Arkansas, continues to lead the nation in the race for the dubious honor of having the most confirmed incidents of voting discrimination. In particular, Alabama was second only to Mississippi in successful section 2 challenges).

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discusses the changing nature of voting rights challenges, specifically: first-generation issues—access to the franchise—versus second-generation issues—accessing adequate and effective representation.<sup>98</sup> Justice Ginsburg’s confusion might originate from the fact that the majority opinion, to a great extent, agrees that there is work to do in promoting voting rights. The majority, in one watershed decision, chose to eliminate section 4 and restrict section 5, two of the Act’s most powerful provisions.

To be clear, the Court’s holding in *Shelby County* kept section 5 intact, but it is now practically unenforceable without a functioning section 4 because section 4 dictates which jurisdictions are to be covered under section 5. The Court also left open the door to reinstate the bail-in provisions of section 4. Once the Court issued its holding in *Shelby County*, scholars immediately began to analyze the holding’s prospective impact on elections of national import. The holding’s impact on local elections did not garner as much attention immediately upon the release of the Court’s decision.

Furthermore, another cornerstone of the Civil Rights Movement—equal educational access—was simultaneously undergoing substantial change in the form of the charter school movement. As the number of charter schools increased, the number of self-selected governing boards of those schools also increased. Presumably, an enforceable section 5 could be used to restrict these changes if the changes negatively affected minority voters in jurisdictions covered under section 5. However, the Court’s holding in *Shelby County*, in combination with the increased momentum of the charter school movement provided the perfect storm of confusion for the results of the Civil Rights Movement.

Two of the Act’s guarantees—protecting minority voting rights and integration, the preferred method of gaining access to equitable education—were at risk of retraction, if not outright defeat. While access to a charter school education has been framed as a civil right to a quality education,<sup>99</sup> the lack of electoral accountability for charter

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98. *Shelby Cty.*, 133 S. Ct. at 2635.

99. Janell Scott, *School Choice as a Civil Right: The Political Construction of a Claim*

schools,<sup>100</sup> the fact that charter schools may contribute to the school-to-prison pipeline,<sup>101</sup> and the fact that charter schools are more segregated than public schools<sup>102</sup> juxtaposes the concept of charter schools to traditional concepts of civil rights.<sup>103</sup>

In most areas of the country, charter schools encompass only a small share of the public school enrollment, so there appears to be very little need to address how the charter school movement affects voting rights and broadly defined political participation for Blacks on a national level. New Orleans, however, stands in contrast to the rest of the nation. Its predominately Black voting age population and almost entirely charter school educational structure provide the ideal case study for evaluating Black communities' ability to hold its policymakers and implementers politically accountable under a near exclusive, self-selected charter school governance regime. Assessing the impact of charter schools on Blacks' political power in New Orleans is also important because New Orleans's school reform movement has been touted as a miracle in urban renewal and a national model for urban school reform.<sup>104</sup>

A review of pertinent legal cases reveals that issues of educational equity and equal educational access have not been a top priority for the Supreme Court in recent years. The Court's decision in *Shelby County*, while not a decision about educational equity, may have practical effects on the ability of Blacks to obtain, maintain and retain political involvement at the local—especially school board—level. The remainder of this Article will examine whether state

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*and its Implications for School Desegregation*, in *INTEGRATING SCHOOLS IN A CHANGING SOCIETY: NEW POLICIES AND LEGAL OPTIONS FOR A MULTIRACIAL GENERATION* 32, 32–52 (2011).

100. *Gaining Choice and Losing Voice*, *supra* note 45.

101. Nelson & Grace, *supra* note 83.

102. See generally Erica Frankenberg, Genevieve Siegel-Hawley & Jia Wang, *Choice Without Equity: Charter School Segregation*, 19 *EDUC. POL'Y ANALYSIS ARCHIVES* 1 (2011), <http://epaa.asu.edu/ojs/article/view/779>.

103. Steven L. Nelson & Heather N. Bennett, *At the Intersection of the Voting Rights Act, the Equal Protection Clause and the School Choice Movement: Have the Courts Built a House of Cards?* 10 *DUKE J. CON. LAW & PUB. POL'Y* (forthcoming May 2016).

104. Nelson, *supra* note 6, at 24.

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constitutional provisions requiring elected school boards might provide additional protections for Black and/or Brown voters seeking to influence school board composition through the political process.

If this is not the case, the Court's holding in *Shelby County* could pose an additional obstacle to educational equity in New Orleans's public and almost uniformly chartered schools. In particular, New Orleans and most of Louisiana's public charter schools utilize self-selected governing boards with little local political accountability through the voting process. Thus, predominately Black school districts that are taken over by the state consequently lose the ability to impact education policy and the politics of education. These districts also experience a reduced ability to influence race relations in schools because minority school board members who might act to ameliorate race-related issues are no longer present. This is true because Louisiana is free to create alternative boards with more political power than the school board elected by the predominately Black electorate in New Orleans.

## **II. Charter Schools and the "New Civil Right:" Proven Issues, Debatable Achievement, and a Mirage of Accountability?**

It is important that scholars research the impacts of the charter school movement for various reasons. The rapid growth of charter schools cannot be contested. Charter schools have experienced substantial and exponential growth since their creation in 1991.<sup>105</sup> In just over two decades of existence, charter schools have faced an assemblage of legal challenges. These schools have, for the most part, survived those challenges and continued to thrive. At least one state, however, has found the funding formula for charter schools to violate

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105. FAILED PROMISES: ASSESSING CHARTER SCHOOLS IN THE TWIN CITIES, INST. ON RACE & POVERTY 3 (2008), <http://www1.law.umn.edu/uploads/5f/ca/5fcac972c2598a7a50423850eed0f6b4/8-Failed-Promises-Assessing-Charter-Schools-in-the-Twin-Cities.pdf>.

the state constitution since charter schools do not have elected governing bodies.<sup>106</sup>

Legislation that authorizes charter schools is now almost universally found across the United States even though charter schools did not exist a quarter of a century ago.<sup>107</sup> Currently, forty-four states and the District of Columbia have charter school legislation.<sup>108</sup> Charter schools are experiencing growth in the number of jurisdictions served as well as in both the number of operating schools and the number of students served. Nationally, charter schools account for about 6,500 schools<sup>109</sup> and serve well over 2.5 million students<sup>110</sup> with a near supermajority of charter schools reporting that they have students on a waiting list.<sup>111</sup>

While there is some evidence that states have sought to slow the pace of charter school growth by caps or moratoriums,<sup>112</sup> more states have started lifting caps on charter schools.<sup>113</sup> Federal legislation and

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106. See *League of Women Voters v. Wash.*, No. 89714-0 (Wash. Sept. 4, 2015), <http://www.courts.wa.gov/opinions/pdf/897140.pdf>.

107. *Choice & Charter Schools: Laws & Legislation*, THE CTR. FOR EDUC. REFORM, <https://www.edreform.com/issues/choice-charter-schools/laws-legislation/> (last visited Mar. 20, 2016) (noting that Kentucky, Montana, Nebraska, North Dakota, South Dakota, Vermont, and West Virginia do not have charter school authorizing legislation).

108. *Id.*

109. *School Choice & Education: By the Numbers*, THE CTR. FOR EDUC. REFORM, <https://www.edreform.com/2014/12/school-choice-education-by-the-numbers/> (last visited Feb. 18, 2016).

110. *Id.*

111. THE CTR. FOR EDUC. REFORM, ANNUAL SURVEY OF AMERICA'S CHARTER SCHOOLS, at 3 (2010). A more recent report, however, questions this waiting list data. In particular, the report alleges that the waiting list data is suspect because the numbers are too exact, unverifiable and do not adjust for a lack of backfilling. See KEVIN G. WELNER & GARY MIRON, WAIT! WAIT. DON'T MISLEAD ME!: NINE REASONS TO BE SKEPTICAL ABOUT CHARTER SCHOOL WAITLIST NUMBERS (2014), <http://nepc.colorado.edu/publication/charter-waitlists.pdf>.

112. SCHOOLS, MEASURING UP: NO CAPS, <http://www.publiccharters.org/law-database/caps/> (last visited Feb. 18, 2016) (listing some states, such as Maine, restricting charter schools statewide to a total of ten within ten years).

113. THREE STATES LIFTING CHARTER CAPS?, AM. SCH. CHOICE, <http://americanschoolchoice.com/three-states-lifting-charter-caps/> (last visited Mar. 12, 2016) (citing that more than half of states with charter school authorization legislation do not cap the

policy have also encouraged their expansion. For example, then-Secretary of Education Arne Duncan proclaimed that states that closed or limited charter schools' growth would encounter barriers in the competitive "Race to the Top" grant<sup>114</sup> application process.<sup>115</sup> Though some scholars argued that Race to the Top would not produce meaningful change due to political obstacles, it is unmistakably apparent that the federal pressure to enable charter schools was present and effective in the Race to the Top program.<sup>116</sup> Attesting to this argument's credibility is the fact that charter schools, while unproven in the areas of integration, and academic innovation and performance, receive significantly more money in the federal budget than do their more proven school choice counterparts—magnet schools.<sup>117</sup> Charter schools are not a passing fad; they are a part of the American educational system and will likely remain so for the immediate future.

Issues of race and equity crescendo concomitantly with the rise of charter schools. Charter school students are more segregated than their traditional public school counterparts, an important measure of educational equity.<sup>118</sup> Black charter school students are approxi-

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number of operating charters, and three more states are considering lifting caps on the number of operating charter schools).

114. "Race to the Top" was perhaps President Barack Obama's most important education policy prior to the recent passage of the Every Student Succeeds Act. Race to the Top sought to select only a few states for large grants to improve student achievement. In order to receive Race to the Top funds, states aspiring to the grant were required to adopt numerous items from the school reform agenda, including embracing school choice and teacher evaluations that embraced merit pay.

115. Arne Duncan, *Education Reform's Moon Shot*, WASH. POST (July 24, 2009), <http://www.ode.state.or.us/superintendent/yat/meetings/arne-duncan-announcing-the-guidelines.pdf>; Press Release, White House, States Open to Charters Start Fast in "Race to Top" (June 8, 2009), <http://www2.ed.gov/news/pressreleases/2009/06/06082009a.pdf>.

116. Patrick McGuinn, *Stimulating Reform: Race to the Top, Competitive Grants and the Obama Educational Agenda*, 26 EDUC. POL'Y 136, 152 (2012).

117. GENEVIEVE SIEGEL-HAWLEY & ERICA FRANKENBERG, REVIVING MAGNET SCHOOLS: STRENGTHENING A SUCCESSFUL CHOICE OPTION 5 (2012).

118. See Iris C. Rotberg, *Charter Schools and the Risk of Increased Segregation*, 95 PHI DELTA KAPPAN 28 (2014); Erica Frankenberg et al., *supra* note 102; David R. Garcia, *The*

mately twice as likely to attend a charter school that is 90–100% minority as their counterparts are likely to attend a similar traditional public school.<sup>119</sup> Erica Frankenberg and her colleagues found that half of Latino students in charter schools attended such apartheid schools.<sup>120</sup> Similarly, more than two of every five Black charter school students attended a school that was almost exclusively students of color.<sup>121</sup> These statistics are dismaying, at best, because higher concentrations of minority students are statistically connected to poorer educational, social and occupational opportunities, due in part to the availability of fewer human and financial resources.<sup>122</sup>

The continued proliferation of charter schools in minority-populated areas aids in further segregation of charter school students.<sup>123</sup> A 2010 study commissioned by the Civil Rights Project found that many charter schools operate in predominately minority areas and result in disproportionate minority subscription.<sup>124</sup> Other studies corroborate the findings of the Civil Rights Project.<sup>125</sup> These charter schools often start with idealistic and noble missions: to provide high-quality and equitable education to low-income, minority students.<sup>126</sup> The report from the Civil Rights Project, though attacked for its methodology,<sup>127</sup> identified charter schools as hyper-

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*Impact of School Choice on Racial Segregation in Charter Schools*, 22 EDUC. POL'Y 805 (2007); Yongmei Ni, *Are Charter Schools More Racially Segregated than Traditional Public Schools?*, 30 POL'Y REP. 6 (2007).

119. FRANKENBERG ET AL., *supra* note 82, at 6–7.

120. *Id.* at 26.

121. *Id.*

122. See RICHARD KAHLENBERG, BROOKINGS INST., ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE (2001).

123. FRANKENBERG ET AL., *supra* note 82.

124. *Id.*

125. Rotberg, *supra* note 118; Garcia, *supra* note 118; Ni, *supra* note 118.

126. See A SURVEY REPORT ON EDUCATION REFORM, CHARTER SCHOOLS, AND THE DESIRE FOR PARENTAL CHOICE, in THE BLACK COMMUNITY, BLACK ALLIANCE FOR EDUC. OPTIONS (2013), [http://scoter.baeo.org/news\\_multi\\_media/20130723-Survey%20Reort-EW%5B9%5D.pdf](http://scoter.baeo.org/news_multi_media/20130723-Survey%20Reort-EW%5B9%5D.pdf).

127. Gary W. Ritter, Nathan C. Jensen, Brian Kisida & Daniel H. Bowen, *Choosing Charter Schools: How Does Parental Choice Affect Racial Integration* (Nat'l Ctr. for the Study of Privatization in Educ., Working Paper 2012) (on file with author).

segregated as well hyper-isolated.<sup>128</sup> Even detractors of Choice Without Equity found that charter schools were more segregated than traditional public schools, although those same individuals questioned the extent and importance of racial segregation in charter schools.<sup>129</sup> Even assuming, *arguendo*, that the detractors are correct—charter schools are less segregated than leading research suggests—it is problematic that charter schools are more segregated than traditional public schools, which are themselves in a period of high segregation, especially if segregation is linked to lower student achievement.<sup>130</sup> Of course, this line of argument assumes that families who are racial and/or ethnic minorities are not self-segregating. A rebuking of self-segregation is a simple euphemism for telling parents who are racial and/or ethnic minorities how to best raise their children, a slippery slope of replacing parental decision-making on where and how to educate children from predominately minority populations.

Charter schools, despite their issues with segregation, have found tremendous support in minority communities. In a 2010 survey conducted by Harvard's Program on Educational Policy Governance and *Education Next*, a near supermajority of Black Americans supported charter schools while less than one in six Black Americans opposed charter schools.<sup>131</sup> Nationally, the number of supporters of charter schools is well short of half for all races combined.<sup>132</sup> The apparent affinity of Black Americans for charter schools is reasonable given their potential benefits.<sup>133</sup> Scholars have argued that charter schools—rather than traditional public schools—

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128. FRANKENBERG ET AL., *supra* note 82.

129. Ritter et al., *supra* note 127 (oscillating between city-based and metropolitan-based data to reach a conclusion that students in the Little Rock Metropolitan area are only slightly more racially isolated in charter schools).

130. ORFIELD ET AL., *supra* note 78.

131. WILLIAM HOWELL, MARTIN WEST & PAUL E. PETERSON, MEETING OF THE MINDS 23 (2011), [http://educationnext.org/files/ednext\\_2010\\_Survey\\_Article.pdf](http://educationnext.org/files/ednext_2010_Survey_Article.pdf) (finding that sixty-four percent of Black Americans support charter schools and only fourteen percent oppose).

132. *Id.*

133. ORFIELD ET AL., *supra* note 78.



may more effectively serve the needs of Black and Brown students.<sup>134</sup> Preston Green, of the University of Connecticut and Julie Mead, of the University of Wisconsin, leading scholars on school reform and civil rights, also highlighted the following potential benefits: charter schools are able to adopt educational themes that specifically address the educational needs of students of color, have small school sizes, and are more flexible in hiring teachers.<sup>135</sup> While some scholars have emphasized the negative and uncertain effects of charter schools,<sup>136</sup> Black and Brown parents, key stakeholders in movements for educational equity, appear to be choosing charter schools when that option is available.<sup>137</sup>

Given the resilient public relations teams supporting charter schools, it is not surprising that they are perceived as benefitting minority and low-income stakeholders. Pro-charter school organizations have convinced the general public that parental choice is a civil right.<sup>138</sup> This perspective combined with prevailing

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134. See Preston C. Green, III, *Preventing School Desegregation Decrees From Becoming Barriers to Charter School Innovation*, 144 EDUC. L. REP. 15 (2000); see also Robin Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375 (1997).

135. See PRESTON C. GREEN & JULIE MEAD, *CHARTER SCHOOLS AND THE LAW: ESTABLISHING NEW LEGAL RELATIONSHIPS* (2004).

136. See Preston C. Green, III, Erica Frankenberg, Steven L. Nelson & Julie Rowland, *Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?* 18 WASH. & LEE J. CIV. RTS. & SOC. JUST. 253 (2012); Erica Frankenberg, *Charter Schools: A Civil Rights Mirage?* 47 KAPPA DELTA PI REC. 100 (2011) [hereinafter *A Civil Rights Mirage*]; Pamela Frazier-Anderson, *Public Schooling in Post-Hurricane Katrina New Orleans: Are Charter Schools the Solution or Part of the Problem?* 93 J. AFR.-AM. HIST. 410 (2008); Luis Miron, *The Urban School Crisis in New Orleans: Pre- and Post-Katrina Perspectives*, 13 J. EDUC. FOR STUDENTS PLACED AT RISK 238 (2008).

137. HOWELL ET AL., *supra* note 131 (This study may be less accurate a picture in New Orleans since nearly all of New Orleans's public schools are now charter schools); see generally NAT'L ALLIANCE FOR PUB. CHARTER SCH., *MARKET SHARE REPORT* (2013), <http://www.publiccharters.org/wp-content/uploads/2013/12/Market-Share-Report-2013.pdf> (New Orleans has since chartered most of its remaining traditional public schools although not all public schools in the city are charter schools).

138. Jennifer Jacobs, *Ted Cruz in Iowa: School Choice is "Civil Rights Issue,"* DES MOINES REG. (Mar. 18, 2014), <http://blogs.desmoinesregister.com/dmr/index.php/2014/03/18/texas-republican-ted-cruz-speaks-to-iowa-homeschool-families>; Joan Kele-

narratives of failing public schools, dating back to *A Nation at Risk*,<sup>139</sup> has resulted in an attack on traditional public schools as being ineffective at their primary mission: educating students. The narrative of failing public schools has been targeted to specifically address the failure to educate perhaps the most vulnerable student populations: low-income and minority students.

Advocates for these students, unable to overcome the obstacles to educational equity that the Supreme Court constructed in *Milliken*, have now sought to overcome *Milliken* through methods that might result in or ignore the problems of segregated schools. This focus has been predominately on providing low-income and minority students access to quality schools or equal educational opportunity, regardless of the school's status as segregated, desegregated or integrated. The *Milliken I* decision effectively banned the incorporation of suburban districts in the desegregation efforts of urban districts because it could not be proven that suburban districts or the state produced policies that resulted in the segregation of schools.<sup>140</sup> The result of *Milliken I* was that desegregation was improbable, if not impossible, due to the lack of a sufficient number of White students to facilitate desegregation.

This "new civil right," school choice, has been framed as a self-actualization mechanism.<sup>141</sup> Beyond being such a mechanism, others

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her, *Parental Choice Is A Civil Rights Issue*, CHI. TRIB. (Apr. 2, 2013), [http://articles.chicagotribune.com/2013-04-02/opinion/chi-20130402-keleher\\_briefs\\_1\\_school-vouchers-parental-choice-other-school-choice-options](http://articles.chicagotribune.com/2013-04-02/opinion/chi-20130402-keleher_briefs_1_school-vouchers-parental-choice-other-school-choice-options); Reverend H. K. Matthews, *Alabama Accountability Act's Parental Choice is an Extension of the Civil Rights Movement*, AL.COM (Aug. 25, 2013, 2:04 PM), [http://www.al.com/opinion/index.ssf/2013/08/alabama\\_accountability\\_acts\\_pa.html](http://www.al.com/opinion/index.ssf/2013/08/alabama_accountability_acts_pa.html); Michelle Bernard, *School Choice is the Most Critical Civil Rights Issue of Our Time: It's the Modern Extension of Brown v. Board of Education*, U.S. NEWS (Feb. 1, 2011, 12:20 PM), <http://www.usnews.com/opinion/articles/2011/02/01/school-choice-is-the-most-critical-civil-rights-issue-of-our-time>; *Support Parental Choice in Education is Our Civil Right*, STAR LEDGER (Jan. 24, 2010), [http://www.nj.com/opinion/times/oped/index.ssf?base/news-0/1264315512\\_205100.xml&coll=5](http://www.nj.com/opinion/times/oped/index.ssf?base/news-0/1264315512_205100.xml&coll=5) [hereinafter *Support Parental Choice*].

139. NAT'L COMM'N ON EXCELLENCE IN EDUC., U.S. DEPT. OF EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (1983).

140. *Milliken I*, 418 U.S. at 746–47.

141. Keleher, *supra* note 138; Bernard, *supra* note 138.

suggest that school choice might be the pathway to the American Dream and, perhaps more importantly, move the nation towards admirable goals of “inclusion, integration and tolerance.”<sup>142</sup> Despite claims alleging the civil rights roots of the charter school movement being pushed to the forefront of discussions about education in the United States, little attention has been paid to the impact of this “new civil right” on existing rights, at least through a critical lens.<sup>143</sup> For instance, school desegregation and voting rights were part and parcel of the civil rights movement. Well before *Brown I*, starting in 1950 with *Sweatt* and *McLaurin*, civil rights advocates fought to exorcise the “separate but equal” doctrine espoused in *Plessy* and integrate public schools in the United States when it became clear that segregated schools were inherently not equal. Similarly, civil rights advocates have long thought that securing Blacks the right to the electoral franchise—and simultaneously, the right to political participation—was prominent.<sup>144</sup> The charter school movement has seemingly forgotten about, or perhaps ignored, the importance of these battles in the movement’s efforts to stage a new civil rights agenda: quality, yet segregated education—in other words, separate, but equal education.<sup>145</sup> Although there is no true or uniform national definition of the term “charter school,” charter schools are generally thought to be privately operated, yet publicly funded schools that contract with a state to provide greater academic results in exchange for greater autonomy.<sup>146</sup> Charter school research has been generally confined to consternations of student achievement<sup>147</sup> and student racial

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142. Bernard, *supra* note 138.

143. Scott, *supra* note 99, at 32–52.

144. See Gabrielle Chin, *The Voting Rights Act of 1867: The Constitutionality of Federal Regulation of Suffrage During Reconstruction*, 82 N.C. L. REV. 1581 (2004).

145. Jacobs, *supra* note 138; Keleher, *supra* note 138; Matthews, *supra* note 138; Bernard, *supra* note 138; *Support Parental Choice*, *supra* note 138; see also Derek Black, *Civil Rights, Charter Schools and Lessons to be Learned*, 64 FLA. L. REV. 1723, 1769–72 (2012) (Scholars, however, continue to consider the efficacy of charter schools to deliver universal educational equity and academic achievement).

146. GREEN & MEAD, *supra* note 135.

147. Black, *supra* note 145.

composition and segregation.<sup>148</sup> Although scholars are starting to focus more on charter school board composition and representation,<sup>149</sup> very little, if any, scholarship exists that explores the legal constructions that require board selection procedures based on accountability, particularly when contrasting self-selected boards against directly elected school boards' accountability in the context of school closures. If charter schools are given more autonomy than traditional public schools in exchange for higher accountability, scholars must determine how accountability, however it is defined, is best achieved. This investigation is made more paramount by the fact that charter schools enroll disproportionately poor and minority student bodies—often times resulting in double segregation.<sup>150</sup> Where poverty and segregation are strongly correlated with diminished academic achievement, multi-segregated students comprise our nation's most vulnerable student population.<sup>151</sup> This remainder of this Article explores the relationship between appointed charter school boards who operate under the supervision of popularly elected school boards and appointed charter school boards who operate without the supervision of popularly elected school boards.

### **III. Problematizing Public Charter School Management: Favoring Appointed, Predominantly White Charter School Boards over Elected, Diverse Boards**

At least one study has found that self-selected charter school boards in New Orleans are predominately and disproportionately White.<sup>152</sup> While some researchers suggest that the changes in the

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148. See generally Erica Frankenberg et al., *supra* note 102.

149. See MELISSA STONE ET AL., HUBERT H. HUMPHREY INST. OF PUB. AFF., CHARTER SCHOOL GOVERNANCE, FINANCIAL MANAGEMENT, EDUCATIONAL PERFORMANCE AND SUSTAINABILITY: RESEARCH PILOT STUDY REPORT (2012); see also Nelson, *supra* note 6; but see Roch & Pitts, *supra* note 85 (finding better links between better student outcomes and less traditional educational approaches, not including board representation).

150. *A Civil Rights Mirage*, *supra* note 136.

151. ORFIELD ET AL., *supra* note 78, at 5–8.

152. Nelson, *supra* note 6.

number of boards and the composition of those new boards impact the voting rights of Black parents<sup>153</sup> and the academic outcomes of students,<sup>154</sup> other scholars question whether charter school board representation has a significant impact on student achievement.<sup>155</sup> Notwithstanding those debates, it is important to address how state constitutional construction and interpretation affect greater academic accountability, a stated goal of the charter school movement.<sup>156</sup>

Charter school advocates assert that New Orleans's public charter school boards are seeking diversity, but these boards report very little emphasis on specifically achieving racial diversity. In a recent survey of all charter schools operating in the city of New Orleans in the 2012-2013 school year, only nine boards responded to requests for information on board composition, reflecting the private and insular nature of charter schools.<sup>157</sup> Only six of the nine boards answered questions regarding recruitment efforts for racial minority board members. Only three self-selected charter school boards in New Orleans reported efforts at recruiting racial minorities onto charter school boards. Of the three boards reporting minority recruitment activities, only one explicitly mentioned diversity, and did so in broad terms. Diversity efforts were the last priority listed for this board.

Two other boards did not directly mention minority recruitment. Those boards did, however, have structures in place that would recruit potential board members from racial minority backgrounds.

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153. Nelson, *supra* note 6.

154. Nelson & Grace, *supra* note 85.

155. *Id.* (finding links between better student outcomes and more traditional educational approaches); Roch & Pitts, *supra* note 85, at 282-302 (2012) (finding links between better student outcomes and less traditional educational approaches, not including board representation).

156. Danielle Holley-Walker, *The Accountability Cycle: The Recovery School District Act and New Orleans' Charter Schools*, 40 CONN. L. REV. 125, 128 (2007) (projecting that charter schools would become a significant policy initiative for school districts caught in the "accountability cycle," a cycle in which forced choice implemented in response to school reform policies results in reduced ability to achieve meaningful reformation of struggling educational systems).

157. See *infra* Table 1.

One of these two boards is the most representative self-selected charter school board when compared to the racial compositions of the student body of the schools the board manages, the student population of New Orleans's public schools, and the city's voting age population.<sup>158</sup> The limited data shows that charter schools were willing to share that self-selected boards—with policymaking and enforcement powers in New Orleans public schools—were predominately White boards that would effectively replace popularly elected, predominately Black school boards.<sup>159</sup> Although the state of Louisiana made inappropriate requests from the federal government to relieve the state of some section 5 restrictions following Hurricane Katrina,<sup>160</sup> the state has failed to return power to the popularly elected and predominately Black Orleans Parish School Board. In fact, it has done the opposite.

The state has altered regulations to allow the disproportionately White, self-selected charter school boards to unilaterally decide when they will return to the Orleans Parish School Board's supervision.<sup>161</sup> An enforceable section 5 would give Black citizens in New Orleans

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158. *Gaining Choice and Losing Voice*, *supra* note 45, at 237–66 (The charter school board of Algiers Charter School Association was not statistically different than the voting age population of the city of New Orleans, the student population or the composition of the Orleans Parish School Board. The charter school boards of the International School of Louisiana as well the Morris Jeff Community School were not statistically different than the student population or the composition of the Orleans Parish School Board, but was statistically different than the voting age population of the city of New Orleans. Both the International School of Louisiana and the Morris Jeff Community School are as disproportionately non-Black as compared to the student population of New Orleans Public Schools); *see also* Nelson, *supra* note 6.

159. *Gaining Choice and Losing Voice*, *supra* note 45, at 237–66.

160. *See* Damian Williams, *Reconstructing Section 5: A Post-Katrina Proposal for Voting Rights Act Reform*, 116 *YALE L.J.* 1116 (2007) (discussing how section 5 was not robust enough to account for the situation that Hurricane Katrina introduced to the predominately Black (sixty-seven percent) city of New Orleans).

161. Danielle Dreilinger, *Second Recovery Charter Votes to Return to Orleans Parish System* (Jan. 2, 2015, 5:48 PM), [http://www.nola.com/education/index.ssf/2015/01/second\\_recovery\\_charter\\_votes.html](http://www.nola.com/education/index.ssf/2015/01/second_recovery_charter_votes.html) (explaining that nearly ten years after Hurricane Katrina enabled the charter school takeover of New Orleans's public schools, only two of thirty-four "recovered" schools have elected to return to the system that is electorally accountable to the parents of New Orleans's predominately Black public school students).

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the tools for challenging the indefinite replacement of its elected school board with self-selected, predominately White boards created to run parallel, or even above, the predominately Black, elected school board. This is exactly the scenario that section 5 was designed to address.

Self-selected charter school boards in Louisiana, and more particularly New Orleans, are relatively unaccountable to any immediately affected stakeholders. The state of Louisiana has offered charter schools more autonomy in exchange for greater accountability, but very little accountability actually exists, especially for charter schools operating in the state's largest predominately Black city. There are numerous instances of the lack of supervision and accountability from the state of Louisiana for New Orleans's charter schools. For instance, during a federal hearing for *P.B. v. Pastorek*, the litigator for the state of Louisiana admitted that it had failed to effectively monitor New Orleans charter schools' compliance with special education requirements.<sup>162</sup> Additionally, Louisiana's former governor Bobby Jindal's administration has been charged with sharing charter school data regarding achievement with only those researchers who support the charter school movement.<sup>163</sup>

More immediately, New Orleans charter schools routinely decline to respond to information requests from the public. Specifically, they have refused to answer questions regarding board composition and efforts to recruit board members from diverse racial backgrounds in this study. Some boards responded that they lacked either the time or resources to discover the racial composition of their

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162. Interview by Steven L. Nelson with Jessica L. Carter, former Outreach Paralegal, Southern Poverty Law Center, in New Orleans, La. (Mar. 31, 2015).

163. Mercedes Schneider, *Good News, Transparency: Louisiana CREDO Data No Longer Exclusive to Credo* (Apr. 5, 2015), <https://deutsch29.wordpress.com/2015/04/05/good-news-transparency-louisiana-credo-data-no-longer-exclusive-to-credo/>.

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boards and make efforts to assure the diversity of those boards.<sup>164</sup> Other boards expressed a fear of discussing race.<sup>165</sup>

The experience with New Orleans charter schools' lack of accountability and transparency is not isolated to southeast Louisiana. There is a growing body of literature addressing the lack of accountability for charter schools in the United States because of a general lack of transparency.<sup>166</sup> The general lack of transparency, as well as the lack of supervision surrounding self-selected boards' expenditure of public funds is troubling from an ethical standpoint. Moreover, it is important to understand the impact of the charter school movement on accountability, which is the primary argument for the expansion of such schools. If charter schools are no more accountable than traditional public schools, there is no real need for them. The next Section will examine whether more or less direct accountability to voters produces more overall accountability by way of comparing two former section 5 jurisdictions.

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164. While time is a precious resource, charter school boards had well over four months to answer any of three emails regarding this matter. It is at least ironic that a board that had the time to inform the surveyor of its inability to answer a survey because of time constraints could respond in detail with the reasons for failing to answer the questions posed on the survey. There was apparently time to answer the researcher's email, but not the questions posed (which could generally be answered with one sentence answers or producing an already existing document).

165. It is important to note the difficulty often involved in discussing race in the United States; however, the students enrolled in New Orleans's public charter schools—who are ninety percent Black—are unable to ignore the fact that they are Black.

166. See THE CTR. FOR POPULAR DEMOCRACY & THE ALL. TO RECLAIM OUR SCH., *THE TIP OF THE ICEBERG: CHARTER SCHOOL VULNERABILITIES TO WASTE, FRAUD AND ABUSE* (2015), [http://populardemocracy.org/sites/default/files/Charter-Schools-National-Report\\_rev2.pdf](http://populardemocracy.org/sites/default/files/Charter-Schools-National-Report_rev2.pdf); see also THE CTR. FOR POPULAR DEMOCRACY & THE COAL. FOR CMTY. SCH., *SYSTEM FAILURE: LOUISIANA'S BROKEN CHARTER SCHOOL LAW* (2015), [http://educationvotes.nea.org/wp-content/uploads/2015/05/Charter-Schools-Louisiana-Report\\_web2.pdf](http://educationvotes.nea.org/wp-content/uploads/2015/05/Charter-Schools-Louisiana-Report_web2.pdf); see also Susan DeJarnatt, *Keep Following the Money: Financial Accountability and Governance of Cyber Charter Schools*, 45 URB. LAW. 915 (2013).



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#### IV. State Protections of the Electoral Franchise in Local School Board Elections: Disparities in Louisiana and Florida

The entire state of Louisiana and some portions of the state of Florida were under section 5 coverage before the Supreme Court's decision in *Shelby County*.<sup>167</sup> Therefore, any and all electoral changes in any jurisdiction in the state of Louisiana and all electoral changes in some jurisdictions in the state of Florida required preclearance from the federal government before those electoral changes could take place. In essence, section 5 of the Act protected all Black voters in Louisiana and some Black voters in Florida from voting power dilution.

Black voters in the state of Louisiana and the state of Florida, however, were ostensibly covered under state constitutional protections requiring the election of local school boards when the Court issued the *Shelby County* decision. State constitutional provisions did not protect Black voters in Louisiana; however, they did protect Black voters in Florida. The remainder of this Article will discuss the impact of these state constitutional decisions on the ability and political will to hold charter schools accountable in each state.

The Louisiana state constitution requires that the state legislature establish popularly elected school boards in each parish<sup>168</sup> of the state of Louisiana.<sup>169</sup> Subsection 9(A) of Article 8 states that "the legislature shall create parish school boards and provide for the election of their members."<sup>170</sup> In *Triplett et al. v. Board of Elementary and Secondary Education and Louisiana Department of Education*,<sup>171</sup> a Louisiana Court of Appeal addressed whether the Louisiana constitution allowed for

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167. ABOUT SECTION 5 OF THE ACT, *supra* note 16.

168. Parishes are the Louisiana political subdivision equivalent of a county in other states.

169. LA. CONST. art. VIII, § 9, cl. A.

170. LA. CONST. art. VIII, § 9, cl. A.

171. *Triplett v. Bd. of Elementary & Secondary Educ.*, 21 So. 3d 401 (La. App. Ct., 2009).

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the state legislature to establish nonelected, parallel school boards within some, but not all, parishes. Analyzing Article VIII § (9)(A) of the Louisiana constitution, the Louisiana state appellate court held that the state may establish alternate, nonelected school boards so long as the state established the required elected school boards.<sup>172</sup> In particular, the court reasoned that the plaintiffs in the case needed to identify a specific constitutional provision that bars—or otherwise limits—the state legislature from enacting the law at issue.<sup>173</sup> The court ruled that the provisions of the state constitution are limitations, as opposed to grants of permission, on the otherwise plenary powers granted to the states.<sup>174</sup> After *Triplett*, nonelected school boards were permitted in Louisiana. Thus, the legislature was free to create school boards with any variety of selection schemes. Not only are school boards allowed to be statewide with an appointed board; these additional school boards are allowed to be self-selected if the state legislature deemed such selections appropriate.

The state legislature exercised improper power in establishing the Recovery School District—a statewide school district with an appointed governing board according to the state court.<sup>175</sup> Louisiana, in ratifying its constitution, made great efforts to protect the right of local citizens to manage, control and supervise public schools; Louisiana citizens thought this protection so important that the protection was placed in the state’s constitution.<sup>176</sup> The court’s decision in *Triplett* may seem logical when considering the schools were taken over by the Recovery School District in 2009.<sup>177</sup> The Recovery School District took control of only eight schools in Baton

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172. *Triplett*, 21 So. 3d at 405.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. The schools prompting the state constitutional challenge in *Triplett* are located in East Baton Rouge Parish, the seat of state government. At that time, only a small portion of East Baton Rouge Parish’s schools would be under the control of the state’s appointed school board if the state were allowed to take over the soon-to-be affected schools in East Baton Rouge Parish.

Rouge at that time.<sup>178</sup> Even this minimal encroachment on local control prompted a legal challenge that was entertained by the state courts.<sup>179</sup> The court's reasoning that the Louisiana constitution does not forbid the creation of additional, nonelected school boards loses its credibility—if not its rationality—in the context of New Orleans public schools.

In the New Orleans context, the Recovery School District seized nearly every school and nearly every student under control of the popularly elected Orleans Parish School Board.<sup>180</sup> The constitutionally mandated and popularly elected Orleans Parish School Board maintained very little authority over the schools in Orleans Parish. The court might be perceived as having approved of the takeover circumstances in New Orleans although it was not tasked with resolving New Orleans's scenario. Whatever the case, the court's conclusions as applied to New Orleans appear outlandishly absurd. The state must establish elected parish-level school boards.<sup>181</sup> These school boards can, however, have little or no political power to operate and manage the parish's schools or any substantial proportion of the parish's schools.<sup>182</sup> It appears that the requirement to have elected school boards is a mere formality and requires only the illusion of power over education policy or involvement in the politics of education. Such a conclusion may, in fact, be barred by rules of statutory and constitutional interpretation in Louisiana.<sup>183</sup>

The Recovery School District assumed direct supervision of a few schools in Baton Rouge; the East Baton Rouge Parish School Board, an elected school board, still exercised considerable power of policy and

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178. *Triplett*, 21 So. 3d at 405.

179. *Id.* at 405–06.

180. Holley-Walker, *supra* note 156, at 128.

181. *Triplett*, 21 So. 3d at 413.

182. *Id.* at 410.

183. Article 9 of the Louisiana Civil Code mandates that statutes be construed in a manner that is sensical (*see Fontenot v. Chevron*, 676 So. 2d 557 (1996)). It is at least arguable that to require elected school boards to govern parish schools, but also allow more powerful boards that are not elected to govern a greater portion of those same schools is absurd. In this case, what is the function of a constitutionally required school board that can exercise little or no power over the jurisdiction's school?

politics. This was not the case in New Orleans, where the popularly elected school board has little to no power over policy and politics. Moreover, the Recovery School District chartered many of the takeover schools in New Orleans.<sup>184</sup> In chartering the schools, the Louisiana state legislature and the Recovery School District granted the self-appointed school boards the right to determine if those schools would ever return to the Orleans Parish School Board's supervision, where the schools might be more accountable to New Orleans's voters.<sup>185</sup> More than ten years after the state takeover, only two school boards have agreed to return the popularly elected and predominately Black local school board.<sup>186</sup> Recently, two additional schools have agreed to "conditionally return" to public accountability.<sup>187</sup>

Just as the state courts in Louisiana have confronted legislative attempts at establishing parallel school boards in school districts, the state courts of Florida have also confronted these issues. In *Duval County School Board v. State Board of Education*,<sup>188</sup> a Florida state appellate court found legislative attempts to install a separate statewide authorizer of charter schools a violation of the state constitution.<sup>189</sup> According to the constitution of the state of Florida, district school boards are required to be elected<sup>190</sup> and are required to "operate, control and supervise all free public schools within the

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184. Miron, *supra* note 136, at 244–46.

185. Danielle Dreilinger, *Recovery Schools Back to Orleans Parish? House Panel Says OK*, 9-8 (May 12, 2015, 6:41 PM), [http://www.nola.com/education/index.ssf/2015/05/bill\\_returning\\_rsd\\_schools\\_to.html](http://www.nola.com/education/index.ssf/2015/05/bill_returning_rsd_schools_to.html) (discussing the Louisiana state legislatures debate over returning adequately performing, previously state-taken over schools to local and elected control).

186. Dreilinger, *supra* note 161.

187. Danielle Dreilinger, *2 more Recovery Schools to Return to Orleans Parish – Maybe*, (Feb. 11, 2016, 10:26 PM), [http://www.nola.com/education/index.ssf/2016/02/new\\_beginnings\\_return\\_opsb.html](http://www.nola.com/education/index.ssf/2016/02/new_beginnings_return_opsb.html) (discussing the conditional vote of a New Orleans charter board to return its eligible schools to control of the popularly elected schools board).

188. 998 So. 2d 641 (Fla. Dist. Ct. App. 2008).

189. *Id.*

190. FLA. CONST. art. IX, § 4(a).

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school district.”<sup>191</sup> In 2006, the Florida state legislature passed section 1002.335 of the Florida Statutes.<sup>192</sup> This provision created the “Florida Schools of Excellence Commission,” which operated as an independent, state-run agency with the authority to approve charter schools throughout the state.<sup>193</sup>

Section 1002.335 effectively displaced popularly elected school boards throughout the state of Florida with an appointed, state-run body as authorizers and supervisors of charter schools within district boundaries.<sup>194</sup> The state of Florida could and did allow some popularly elected school boards to remain the exclusive authorizers and supervisors of charter schools in certain districts.<sup>195</sup> Under section 1002.335, this privilege could only be extended if the state of Florida deemed the decision to be appropriate.<sup>196</sup> Multiple popularly elected school boards, including the Duval County School Board, challenged the state’s decision to deny the exclusivity of control of all schools, including charter schools in their respective school districts, on the grounds that section 1002.335 was facially unconstitutional and violated Article 9 of the Florida Constitution.

The Florida appellate court hearing the case agreed with the popularly elected district school boards. The state constitution explicitly restricted the ability of the state legislature to create school boards. The court reasoned, “Section 1002.335 provide[d] for the creation of charter schools throughout Florida. The state permitt[ed] and encourage[d] the creation of a parallel system of free public education escaping the operation and control of local elected boards.”<sup>197</sup> Moreover, the new statute specifically bestowed the powers reserved for popularly elected school boards upon the newly appointed state-run board.<sup>198</sup>

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191. FLA. CONST. art. IX, § 4(b).

192. *Duval Cty.*, 998 So. 2d at 642.

193. *Id.*

194. *Duval Cty.*, 998 So. 2d at 642–44.

195. *Id.* at 642.

196. *Id.*

197. *Duval Cty.*, 998 So. 2d at 643.

198. *Id.*

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The court did not find the state's arguments in support of the legislation persuasive.<sup>199</sup> The state argued that section 1002.335 would further the constitutionally mandated uniform system of schools and the equity interest of charter schools, while affecting a marginal portion of the total school market share in Florida's public schools.<sup>200</sup> The court also did not find persuasive the argument that the Florida Department of Education could grant permission for school districts to remain the sole operator of all schools in the district.<sup>201</sup> In particular, the court expressed concern that the same statute that allowed the state to grant school districts permission to remain the exclusive operators, controllers and supervisors of all public schools simultaneously granted the authority to strip such districts' powers.<sup>202</sup>

The effect of the statute was to disallow constitutionally required, popularly elected school boards to have exclusive authority over all schools in their respective districts; instead, popularly elected school boards could only serve as agents for the state of Florida in achieving the state's agenda.<sup>203</sup> If school boards did not comply with the state's wishes, the state could presumably force acquiescence by threatening to remove the school board's authority to supervise the district's charter schools.

#### **A. Comparing and Contrasting Minority Voter Protection in School Board Elections in Louisiana and Florida**

The states of Louisiana and Florida both have constitutional requirements to establish popularly elected county or parish-level school boards. Different constitutional interpretations have led to varying results in locals' abilities to advance political and policy agendas pertaining to education. The Louisiana state constitution does not require that all boards be elected. Certainly, the state must establish the constitutionally mandated school boards, but the state

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199. *Duval Cty.*, 998 So. 2d at 644.

200. *Id.* at 643–44.

201. *Id.* at 644.

202. *Id.*

203. *Id.*

may also choose to establish alternative, parallel-running school boards.<sup>204</sup> Florida's constitution requires that all school boards be elected and that those elected school boards be the only governing body responsible for the education of each district's schools and students; thus, the state may not establish alternate school boards that are equivalent or superior in power to the elected, countywide school board.<sup>205</sup> Louisiana and Florida—aside from merely sharing constitutional requirements to elect school boards—are particularly unique among former section 5-covered jurisdictions. Only Louisiana and Florida, of all states with any section 5-covered jurisdictions, have constitutionally mandated voting protections pertaining to school board elections.

The Supreme Court's holding in *Shelby County*, while not purportedly a case about primary and secondary education, has substantial implications for school board selection processes. In particular, section 5-covered jurisdictions would have been required to seek preclearance from the federal government to install school board selection processes aside from elections in Louisiana and Florida. The Florida state courts have protected the voting rights of all, but particularly minority, voters in educational policy and politics by mandating that elected county school boards remain the only school boards in the state of Florida. Although the protection of minority voters may not have been the intent of the Florida constitution, the effect of the state's constitution is to maintain the ability of minority voters to control or influence education politics and policy in local school districts. Thus, in Florida, charter school boards, which in some areas have been found to be disproportionately White, are still accountable to elected county school boards. So long as minority voters are allowed to freely participate in school board elections, they will have some impact on education policy and politics.

This is not the case in Louisiana. Louisiana requires elected parish-wide school boards, but the state may establish parallel boards with substantially more power than the elected parish-wide school

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204. *Triplett*, 21 So. 3d at 405.

205. *Duval Cty.*, 998 So. 2d 641.

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board. If the state legislature would prefer to not have a predominately Black, elected school board, then it can establish an alternative school board that is either appointed or self-selected. If the Supreme Court had not thwarted the enforcement of section 5 by way of finding section 4 of the Act unconstitutional, the Louisiana state court's decision might have been for naught. Though Louisiana would maintain a state right to establish multiple school boards, that right would be restricted by the preemptive powers of section 5. The federal government would have required the state to prove how it would protect minority political participation before allowing the state to unilaterally install an appointed or self-selected, predominately White school board in lieu of an elected, predominately Black school board.

While many scholars may discuss the implications of *Shelby County* on national and statewide elections, municipal and county-level elections, arguably, more directly impact the lives of most voters. School boards, in particular, are perhaps the institution in the United States most similar to direct democracy; thus, school board elections are of great import to the analysis of the potential impacts of the Court's decision in *Shelby County*. While investigating the impact on the election of national and statewide office has great merit, examining the potential impacts of the Court's most recent case for the protection of minority voting rights in the most local of elections is imperative for multiple reasons.

First, the method by which national and state officials are appointed is generally well-prescribed. The circumstances when state or national officials are to be appointed are also generally limited to specific officials who are generally not the ultimate or sole originators and implementers of policies. This fact pattern might remain in the case of appointed school boards, but charter school boards have even less electoral accountability than appointed school boards. Charter school boards are practically self-selected, which might restrict the ability of charter school boards to remain accountable in a manner that satisfies the charter school board's promise of more accountability in exchange for more autonomy. It is important, then, to assess the impact of different structures of accountability for self-selected



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charter school boards. The remainder of this Article will discuss potential issues created by the Court's decision in *Shelby County* and the state court decisions in Louisiana and Florida.

**B. Collapsing a House of Cards: Issues at the Intersection of *Shelby County, Triplett and Duval County***

The small differences in constitutional language and interpretations between Louisiana and Florida have substantial differences in how accountable charter schools may or may not be to constituents in each state. These differences are not merely semantic in nature. All charter school boards—although appointed or self-selected—in the state of Florida are granted autonomy. However, within that autonomy, these boards are still accountable—though to what extent, is debatable—to the popularly elected county school boards of the state of Florida. On the contrary, only some appointed or self-selected charter school boards in Louisiana are held accountable to popularly elected parish school boards; this occurs if, and only if, those self-selected charter school boards seek the accountability of the popularly elected parish school boards in Louisiana since charter school boards may be granted operational permission through the appointed statewide school district if they do not want the popularly elected school board to oversee the operations of the charter school.<sup>206</sup>

The aforementioned differences in constitutional construction and interpretation are not just technical. On its face, the fact that Florida's charter schools are required to operate within the confines

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206. The irony in the context of New Orleans is that the charter schools under the control of the popularly elected Orleans Parish Public Schools are those least likely to be academically unsatisfactory since the schools left under the control of the elected school board are the schools that 1) were academically exceptional prior to the state takeover, 2) those schools that have recovered to academically acceptable levels and have voted amongst their self-appointed board to leave the Recovery School District and return to the Orleans Parish School Board, or 3) have been recently approved by the popularly elected Orleans Parish School Board, which only recently regained the right to charter schools in the city of New Orleans.

of an existing school district framework seems to afford more accountability to Florida's electors than Louisiana's charter schools, which may select to—but are not required to—operate within an existing school district's framework. To some extent, it could be argued that citizens in Florida may hold charter school boards to greater accountability since they may politically pressure elected school boards to open, close, or alter existing charter schools. In contrast, in Louisiana, parents may only have this option if charter schools opt to give parents that option; such a result flies in the face of concepts of accountability. Parents in Louisiana may elect to vote with their feet, but given the accountability structure—or lack thereof in Louisiana—that parent might well find him or herself in the same or worse position even after exercising their right to vote.

Take the following reasoning as evidence supporting this hypothesis. The state of Florida closes a higher percentage of charter schools than Louisiana. Although state accountability structures vary greatly, it cannot be dismissed that Florida's charter schools are typically higher performing than those in Louisiana (as defined by each respective state). In support of this argument is the fact that each state establishes the criteria by which a school could be considered "low performing" or "failing." The state of Florida has closed roughly thirty percent of its charter schools,<sup>207</sup> while Louisiana has closed only about nineteen percent of its charter schools.<sup>208</sup> If charter schools gain autonomy in exchange for greater accountability, then states should be closing low-performing schools or academically unacceptable schools.<sup>209</sup> Florida appears to close a greater proportion of its charter

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207. Jacob Carpenter, *Part 1 – Florida's Failed Charter Schools: Cracks in the System*, NAPLE DAILY NEWS (Sept. 13, 2014, 4:31 PM), <http://www.naplesnews.com/news/education/part-1---floridas-failed-charter-schools-cracks-in-the-system-ep-595720091-340772961.html>.

208. CTR. FOR RES. ON EDUC. OUTCOMES, CHARTER SCHOOL PERFORMANCE IN LOUISIANA 11 (2013), [https://credo.stanford.edu/documents/la\\_report2013\\_7\\_26\\_2013\\_final.pdf](https://credo.stanford.edu/documents/la_report2013_7_26_2013_final.pdf) (on file with author).

209. For purposes of this Article, low-performing schools are considered schools with the grade of C or below. Academically unacceptable schools are schools with the grade of D or F.

schools than does Louisiana<sup>210</sup> despite the fact that Louisiana (eighty-two percent)<sup>211</sup> has a greater portion of low-performing charter schools when compared to Florida (thirty-eight percent).<sup>212</sup>

Likewise, Louisiana (forty-two percent)<sup>213</sup> has a greater portion of its charter schools that are academically unacceptable than does Florida (seventeen percent).<sup>214</sup> It follows, then, that if Louisiana has a larger number of charter schools at risk of failing academically, it should be closing more charter schools than Florida, which has a far smaller proportion of struggling charter schools. Though the comparisons of proportions do little in the way of suggesting causation, the marked differences (and correlation) in the ultimate accountability measurement—school closure—may warrant further investigation into the effects of district supervision on charter school accountability.<sup>215</sup>

## V. Conclusions and Implications for the Creation and Implementation of Charter School Legislation Concerning Governance and its Relation to Accountability

The decisions of many parties, as well as the interaction of the consequences of those decisions, dictate policies. In the United States,

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210. Louisiana school performance data is reported as of the 2013-2014 school year while Louisiana school closure data is reported from the 2010-2011 school year. Florida school performance data is reported as of the 2012-2013 school year, while Florida school closure data is reported as of the 2013-2014 school year. Thus, accountability comparisons may be slightly skewed. Given the inability to access public data regarding school closures, this is the best available consideration.

211. LA. DEP'T EDUC., RAISING THE BAR: LOUISIANA TYPE 2, 4, AND 5 CHARTER SCHOOLS 2014-2015 ANNUAL REPORT 13-19 (2014), <https://www.louisianabelieves.com/docs/default-source/school-choice/2014-2015-charter-annual-report.pdf?sfvrsn=2>.

212. FLA. DEP'T EDUC., FLORIDA'S CHARTER SCHOOLS: FACT SHEETS (2014), [http://www.fldoe.org/core/fileparse.php/7696/urlt/fast\\_facts\\_charter\\_schools.pdf](http://www.fldoe.org/core/fileparse.php/7696/urlt/fast_facts_charter_schools.pdf).

213. LA. DEP'T EDUC., *supra* note 211.

214. FLA. DEP'T EDUC., *supra* note 212.

215. *See infra* Table 2 (illustrating the statistical test used to determine correction between state school board election requirements and charter school closures).

schools might have the largest cross-section of stakeholders, for they are one of few institutions in which nearly every citizen is required to participate in some manner. There are very few exceptions to the rule that every citizen will participate in the educational system; as such, stakes are generally high in debates about education policy, even if voting in school board elections is generally low.<sup>216</sup> Schools and schools board elections are local affairs, and if all politics are local, schools and school boards are perhaps the most local. School board elections are relatively inexpensive<sup>217</sup> and even candidates with little political experience or an unrecognizable name can rise to power with ease in the right context. These scenarios may lead to one's cousin, neighbor, or even a child's soccer coach becoming a local political figure via the school board.

On the other side of the school boards' refreshingly local influence is the increasingly demanding guidance of the federal government. Many scholars have noted that the federal government has tied incentives to accountability measures and "objective" results; this same federal intervention pressures states to adopt school choice policies.<sup>218</sup> Moreover, the rise in these accountability measures and the concomitant rise of reliance on objective results has resulted in a decrease in public schools that are governed by traditional, local school boards.<sup>219</sup> It is important, therefore, to assure that all schools and individuals who hold representative positions are actually being

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216. See generally FREDERICK HESS, NAT'L SCH. BD. ASS'N, *SCHOOL BOARDS AT THE DAWN OF THE 21ST CENTURY: CONDITIONS AND CHALLENGES OF DISTRICT GOVERNANCE* 33 (2002), <http://files.eric.ed.gov/fulltext/ED469432.pdf>.

217. *Id.* at 35.

218. See generally Joseph P. Viteritti, *The Federal Role in School Reform: Obama's "Race to the Top,"* 87 NOTRE DAME L. REV. 2087 (2012); Erica Frankenberg & Genevieve Siegel-Hawley, *Choosing Diversity: School Choice and Racial Integration in the Age of Obama*, 6 STAN. J. C.R. & C.L. 219, 249 (2010); see generally David Hursh, *Assessing No Child Left Behind and the Rise of Neoliberal Education Policies*, 44 AM. EDUC. RES. J. (2007); see also Nick Lewin, *The No Child Left Behind Act of 2001: The Triumph of School Choice over Racial Desegregation*, GEO. J. ON POVERTY L. & POL'Y 95 (2005); Roslyn A. Mickelson, *When Opting Out is Not a Choice: Implications for NCLB's Transfer Option from Charlotte, North Carolina*, 38 EQUITY & EXCELLENCE IN EDUC. (2005).

219. See Holley-Walker, *supra* note 156.

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held accountable. Analyzing the differences between Louisiana, where relatively fewer charter schools are closed and more charter schools perform poorly, and Florida, where the situation is the opposite, provides some insight into developing legislation that authorizes charter schools in a manner that might increase accountability. In sum, political pressure appears to be related to increased accountability.

Lawyers are wordsmiths. Judges might be the greatest of the wordsmiths. The disparate opinions in Louisiana and Florida are to some extent semantic in nature. The state court wordsmiths in each state treated the wording of constitutional provisions very differently. In Florida, the language of the state constitution made clear that countywide school boards should be elected and that schools should be the sole province of county school boards. The same did not hold true in Louisiana where there was no restrictive language barring the creation of parallel school boards to run parallel to the constitutionally mandated, elected school board.

As a result of the court's analysis in Louisiana, Black voters have little, if any, power over education policy and politics in New Orleans. Those same voters, however, exercised great power in the areas of policy and politics prior to Hurricane Katrina. The inability of Black voters to control education policy and politics in proportion to their political presence is not the only issue with the Louisiana court's decision in *Triplett*. Louisiana's inability to hold charter schools accountable is a result of the state's lack of reliable and inexpensive methods of accountability. In a cash-strapped state like Louisiana,<sup>220</sup> having citizens patrol some issues may be more reliable and inexpensive since people are more likely to respond politically when an issue affects them personally, and especially where the state is required to run school board elections.

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220. Jeff Guo, *Louisiana So Poor That Bobby Jindal's Budget Won't Fund Presidential Primaries in 2016*, WASH. POST (Mar. 23, 2015), <https://www.washingtonpost.com/blogs/govbeat/wp/2015/03/19/louisiana-is-so-poor-that-it-cant-afford-to-host-presidential-primaries-in-2016/> (last visited Oct. 11, 2015) (revealing that Louisiana's \$1.6 billion budget gap was so large that the state could not afford to host some elections).

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State legislatures, who have the power to create and amend legislation authorizing the operation of charter schools, should make concerted efforts to develop strategies that hold charter schools to account by way of political pressure from the general public while granting charter schools the autonomy to be innovative and flexible. Charter schools in Florida are directly accountable to the popularly elected county school board. If county voters are unhappy with the progress or behavior of a charter school, the county school board must act to correct the charter school's misfeasance, malfeasance, or nonfeasance. If the county school board does not act according to the wishes of the county electors, the electors can unseat the obstinate county board member(s) during the next school board election. This could be, but is often not, the case in Louisiana.

If parents in New Orleans are unhappy with the actions or inactions of a charter school, the parents have very little recourse against the charter school. Of course, parents can always remove their children from the charter schools in New Orleans; this might not, however, be a sufficient remedy since nearly every school in New Orleans is a charter school. It might be advantageous, particularly in encouraging accountability, if all charter schools were directly accountable to popularly elected school boards; local electors would then have the power to most directly address the issues associated with these boards. The fact that public accountability might decrease the charter schools' ability to satisfy the demands of accountability structures is easily rebuttable with the fact that a lack of electoral accountability in Louisiana has resulted in relatively few charter schools—low or high performing—closing down as opposed to the fact that greater electoral accountability in Florida has resulted in relatively more charter schools being closed—despite the fact that charter schools in Florida are higher performing than those in Louisiana.

Finally, Congress must agree upon legislation to reinvigorate section 4 of the Act. This will reestablish section 5 as a viable, enforceable protection of minority voting interests and perhaps enhance the ability of Black voters to pursue educational equality through influencing education policy and the politics of education.

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Many voting rights scholars and voting rights attorneys are discussing the need for section 5 to combat unannounced shifts in polling places, voter identification requirements, the reduction of early voting places and times, and other scandalous attempts to prevent minority voters from casting ballots. All of these issues deserve the attention that advocates give to them. It is also important to document and discuss that some states, such as Louisiana, are converting previously elected boards into appointed or self-selected positions; the newly appointed or self-selected positions, which are typically predominately White are replacing predominately Black positions.

Congress specifically envisioned that section 5 would prevent states from limiting minority involvement in political activity via rule changes as minorities ascended to political power.<sup>221</sup> Some conservative politicians and political commentators suggest that the Act, and particularly section 5, have accomplished this goal. Louisiana's changing rules—exchanging Black policymakers for White policymakers—indicates that we still have work to do in protecting minorities' right to political involvement. Congress has work to do. Some states, including Louisiana, can move to immediately protect minority voting rights—in terms of school board representation—by requiring that all new and alternative school boards answer directly to the politically elected boards before them.

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221. S. Rep. No. 97-417, at 6 (1982).

**Table 1. Summary of Charter School Board President Responses to Requests for Information on Efforts to Recruit Black Board Members**

Charter School Board	Effort at Recruiting Black Board Members
International School of Louisiana	Recruitment efforts are in conjunction with other forms of diversity recruitment, which might create conflict. In a numbered list, diversity is the last priority listed.
Lagniappe Academy of New Orleans	No specific recruitment efforts mentioned. Board nominations are solicited from parents, board members and community partners.
The Future Is Now Schools: New Orleans	No specific recruitment efforts mentioned, but the board seeks to include alumni (who, in recent times, are disproportionately Black). Members are selected on the recommendation of board members, community and political leaders.
Morris Jeff Community School	No specific recruitment efforts mentioned. Referrals to the board are made specifically by trustees and generally by "stakeholders."
Algiers Charter Schools Association	The board uses a parental proxy to assure parent participation. The board is aggressive in recruiting potential board members, using various methods of publically available advertisements as well as recommendations from key stakeholders. Also, long-term residency in the predominately Black Algiers area of New Orleans is a



	basic requirement for consideration for board membership.
FirstLine Schools, Inc. Charter Schools	No specific recruitment efforts mentioned. A nominating committee refers potential board members to the general board after nominations and interviews.
New Orleans College Prep	The board president did not answer questions regarding board selection process.
Educators for Quality Alternatives	The board president did not answer questions regarding board selection process.
ReNew Charter Schools	The board president did not answer questions regarding board selection process.

**Table 2. Fisher Exact Test of Independence for Ratio of Charters Closed and Remaining Open in Louisiana and Florida<sup>222</sup>**

<b>Charter School Status</b>	<b>Louisiana</b>	<b>Florida<sup>223</sup></b>	<b>Marginal Rows</b>
<b>Closed</b>	21	269	290
<b>Open</b>	91	631	722
<b>Marginal Columns</b>	112	900	1012 (Total)

222. P-value = 0.0145 (There is evidence that supports the claim that the ratio of school closures (rows) is associated with individual states (columns)).

223. Carpenter, *supra* note 207.