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**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**

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by

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Abstract

Charter schools are a growing phenomenon in the United States. The once emerging educational reform has grown into the linchpin reform in the United States. As charter schools, continue to grow in popularity as defined by states authorizing their operations, total schools operated and total number of students served, issues of race threaten to plague the advancement of the charter school movement. Charter schools are seen as a civil rights boon to minority parents; however, this research discusses how charter schools may run counter to historical narratives of civil rights. Through a Voting Rights Act analysis under Section 2 of the Act, the researcher determines that charter schools threaten the political participation and voice of racial minorities.

This study uses a statistical analysis embedded in a legal analysis of Section 2 of the Voting Rights Act to advance the argument that appointed charter school boards in New Orleans, Louisiana do not reflect the voting age population of the city. The study first examines case law to discover that Section 2 of the Voting Rights Act could be used a viable argument against the establishment, maintenance and/or expansion of charter schools. After finding that case law may support claims against appointed charter school boards under Section 2 of the Voting Rights Act, the study uses a Fisher Exact Test of Independence to prove that appointed charter school boards in New Orleans result in less descriptive representation for Black parents. The resultant p-value (0.0019528) for combined appointed charter school boards is significant at the .01 significance level. As disaggregated by charter school management type, the p-values are significant for both appointed charter school boards that operate one charter school or several charter schools.

This study introduces a new discourse into the legality of the implementation of charter schools as well as the political and policy consequences of the implementation of charter

schools. The study contributes to a broad array of literature on the subjects of the efficacy of appointed school boards to translate into representation for minorities and the legality of charter schools as related to the rights of minority parents. The results of this study are important as they introduce educational leaders, in their roles as educators, administrators or policymakers, to a counternarrative to theories of charter schools as a civil rights boon for minorities.

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CHAPTER 1: INTRODUCTION

I. Statement of the Problem

Admittedly charter schools receive their unfair share of attention in the United States' educational landscape. For all of the fuss about charter schools, the now standard-bearer of educational reform in the United States only accounts for a relatively small portion of total schools and total student population. While charter schools represent a relatively small portion of total schools and total student population, they represent a growing share of both student population and total schools operated. Every Monday through Friday millions and a rapidly increasing number of public students awake to attend charter schools (National Association of Public Charter Schools, 2013). These students, who are disproportionately minority, attend schools that were once thought to be the emergence of White flight schools to help middle class White families return to inner-city public schools. Time and experience has proven the initial thoughts about charter schools to be wrong. Charter schools are not, overall, White flight havens. In fact, charter schools, nationally, are more likely than traditional public schools to enroll minority students, albeit in hypersegregated and hyperisolated educational environments (Frankenberg, Siegel-Hawley and Wang, 2010).

Charter schools have a host of problems although charter schools are the education reform *du jour* among educational reformers and parents (Howell, Peterson and West, 2011). These problems range from funding to testing to teacher evaluation to academic achievement to authorization and renewal. The most salient of issues regarding charter schools, however, center on race. Some lawsuits, based primarily on the race of the litigants or those affected, have been initiated with the hope of either supporting or opposing the implementation of charter school legislation. Currently, lawsuits are made under a variety of state laws and constitutions since

federal courts have historically held that charter schools do not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. Thus, lawsuits challenging the legality of charter schools are based primarily in traditional educational law and at the state level. The challenges have often failed in front of courts sympathetic to the education reform movement – and in particular, the charter school movement. For whatever the reason, law and public policy, as well as judges and policymakers, have solidified as a cornerstone the role of charter schools in the education reform movement.

Since the release of *A Nation At Risk: The Imperative For Educational Reform* in 1983, the United States has experienced a near obsessive drive with reforming public education (Burtlers, 1996). Individual schools, districts and states as well as the federal government have launched countless varieties of educational reforms. Yet, many educational reforms lack staying power (Resnick and Hall, 1998). These reforms are often phased out of existence as quickly as they were phased into existence. Charter schools have not been this type of educational reform. Having doubled their enrollment in the last few years, charter schools have become a linchpin of modern educational reform and have experienced significant growth since their inception despite the fact that charter schools comprise such a small share of the education market. (Center for Public Education, 2014). Additionally, charter schools have exhibited a unique tenaciousness, staving off countless and various legal challenges. Charter schools are, therefore, part and parcel of the contemporary educational reform movement. More importantly, charter schools appear destined for an existence of longevity. Finally, charter schools are likely to reform – or at least – alter the educational landscape in the United States and most importantly, alter how the relationships between educational institutions and institutions in the greater society. Charter schools because of their quasi-public nature will alter the way that education law, education

politics and education policy apply to and affect schools. The manner in which charter schools will alter understandings of the law is of special importance because of the legacy of the use of the courts to gain access to educational equity. It is important to note that most, if not all, rights of students and teachers were gained through the courts in traditional public schools. Because of the theory of *stare decisis*, the fact patterns of those cases may not cover the fact patterns of public charter schools. While charter schools are public on paper, it is incontestable that charter schools also resemble private schools, particularly because they are public schools operated by private entities. As legal relationships are altered, scholars must study these changing relationships. How charter schools affect the voting rights of minorities and more particularly, the racial composition of charter school boards are the relationships of interest in the instant study. Charter school boards are the boards of directors that manage the operation of charter schools. Little, if anything, is known about the composition of these boards. In fact, it is tremendously difficult to collect data on the composition of charter school boards because of the fluidity of charter school board composition. Unlike traditional school boards – whether elected or appointed – charter school boards don't often report their racial composition. Charter school boards do not often have high-profile resignations that would indicate to observers when the composition of the charter school boards has been altered. In the one study that has been published regarding charter school board representation, researchers have found that elected charter school boards resulted in slight overrepresentation of minority populations (Stone, Zhao and Cureton, 2012). No studies have been conducted to analyze the composition of appointed charter school boards. The relationships between appointed charter school board representation and minority populations are important to study because the extant literature on school board

racial composition and student outcomes provides an academic backdrop that suggests minority students benefit from descriptive representation on school boards.

The growth of charter schools is uncontroverted. Whatever the state-by-state semantic disagreements concerning the definition of charter schools, charter schools have experienced substantial growth since their inception in 1991 (Institute on Race & Poverty, 2008). In just over two decades of existence, charter schools have faced a bevy of legal challenges. Charter schools have, however, survived those challenges. Charter school authorizing legislation is now almost universally found across the United States.¹ As of 2013, forty-two states and the District of Columbia have charter school legislation (Center for Education Reform, 2013a). Not only are charter schools growing in the number of jurisdictions served, but charter schools are also growing in both the number of operating schools and the number of students served. Nationally, charter schools account for 6,100 schools (Center for Education Reform, 2013b) and serve well over 2 million students (National Association of Public Charter Schools, 2013) with a near supermajority of charter schools reporting that they have a waiting list (Allen and Consoletti, 2010).² While there is some evidence that states have sought to slow the pace of charter school growth via caps and/or moratoriums, it is notable that more states have either embraced charter schools via lifting caps (National Alliance for Public Charter Schools, 2014c) or newly authorizing charter schools. It is not without note that federal legislation and policy have encouraged the growth of charter schools. For example, in a 2009 press release, Secretary of Education Arne Duncan expressed that states closed to or limiting the growth of charter schools would be disadvantaged in the competitive “Race to the Top” grant application process (Duncan,

¹ Alabama, Kentucky, Montana, Nebraska, North Dakota, South Dakota, Vermont and West Virginia do not have charter school authorizing legislation (Center for Education Reform, 2013).

² A recent report from the National Education Policy Center, however, questions this waiting list data. In particular, the report by Welner and Miron (2014) alleges that the waiting list data is suspect because the numbers are too exact, unverifiable and do not adjust for a lack of backfilling.

2009; White, 2009). Though some scholars argued that Race to the Top would not produce meaningful change due to political obstacles, it is unmistakable that the federal pressure to enable charter schools was present in Race to the Top (McGuinn, 2011). Giving more credence to this argument is the fact that charter schools, while unproven in the areas of integration and academic innovation and performance, received significantly more money in the federal budget than do their more proven counterparts, magnet schools (Siegel-Hawley and Frankenberg, 2012). Charter schools are, therefore, a part of the American educational system and will likely remain so.

Issues of race and equity have arisen due to the rise of charter schools. Scholars have argued that charter school students are more segregated than their traditional public school peers. Black charter school students are nearly twice as likely to attend a charter school that is ninety to one hundred percent minority as their counterparts in traditional public schools (Frankenberg Siegel-Hawley and Wang, 2011). Frankenberg et al (2011) also found that half of Latino students in charter schools will attend a school that is ninety to one hundred percent minority. Also, more than two of every five Black charter school students will attend a school that is almost exclusively students of color (Frankenberg et al, 2010). These statistics are dismaying because higher concentrations of minority students are tied to poorer educational outcomes (Bankston and Caldas, 1996).

As charter schools grow, they continue to proliferate in minority-populated areas aiding in further segregation of charter school students (Frankenberg et al, 2010). The idealistic missions of these charter schools are generally noble: to provide high quality education to low-income, minority students (Black Alliance for Educational Options, 2013). A 2010 study commissioned by the Civil Rights Project found, however, that many charter schools establish

operation in predominately minority areas (Frankenberg et al, 2010). Other studies corroborate the findings of the Civil Rights Project. The report from the Civil Rights Project, though attacked for its methodology (Ritter, Jensen, Kisida and McGee, 2010), revealed that charter schools are hypersegregated as well hyperisolated (Frankenberg et al, 2010). Even the detractors of Choice Without Equity found that charter schools were more segregated than traditional public schools (Ritter et al, 2010). The critical response to the report by the Civil Rights Project was based in the fact that charter school segregation was overstated in Choice Without Equity. Even assuming that this as fact, it is problematic that charter schools are more segregated than traditional public schools, which are themselves in a period of high segregation (Orfield, Kucsera and Siegel-Hawley, 2012).

Charter schools, notwithstanding issues with segregation, have garnered support in minority communities. A 2010 survey conducted by Harvard's Program on Educational Policy Governance and *Education Next* found that sixty-four percent of Black Americans supported charter schools while only fourteen percent of Black Americans opposed charter schools (Howell, Peterson and West, 2011). Nationally, that number is about forty-four percent for all races combined (Howell et al, 2011). Black Americans' affinity for charter schools is reasonable given the arguments of some scholars.³ These scholars have argued that charter schools – rather than traditional public schools - may more effectively serve the needs of Black and Latino students (Barnes, 1997; Green, 2000). For instance, Green and Mead (2004) highlighted the fact that charter schools are able to adopt educational themes that specifically address the educational needs of students of color, have small school sizes, and have more flexibility in hiring teachers. While some scholars have emphasized the negative effects of charter schools, parents of color

³ To contextualize Black Americans' affinity for charter schools, it should also be noted that the majority of Black public school students attend predominately Black schools (NCES, 2007), which are typically resource deprived and have a host a other negative academic and social indicators.

appear to be choosing charter schools when that option is available to the parent (Howell, Peterson and West, 2011).

Given the public relations teams supporting charter schools, it is unsurprising that charters schools are perceived as a success for minority and low-income parents. At both the local and national level, pro-charter school organizations appear to be working overtime to convince the general public that parental choice is a civil right (Jacobs, 2014; Keleher, 2013; Matthews, 2013; Bernard, 2011; Staff Writer, 2010). The spin combined with narratives of failing public schools, dating back to *A Nation at Risk*, has resulted in an attack on traditional public schools as being ineffective at their primary mission: educating students. The failure of public schools has been spun to specifically attack the failure to educate some of the most vulnerable student populations, low-income and minority students. Advocates of these students, unable to overcome the hurdle that the Supreme Court constructed in *Milliken v. Bradley* (1974), have now sought to overcome *Milliken* through methods that might result in segregated schools; this focus has been predominately on assuring low-income and minority students access to quality schools or equal educational opportunity, regardless of the school's status as segregated. The *Milliken* decision effectively banned the incorporation of suburban districts in the desegregation efforts of urban districts. The argument in *Milliken* focused on the fact that it was unprovable that suburban districts or the state produced policies that resulted in the segregation of schools. This "new civil right" has been framed as a self-actualization mechanism (Bernard, 2011; Keleher, 2013). Beyond being a self-actualization mechanism, Bernard (2011) suggests 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." As claims of the civil rights roots of the charter school movement are 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 civil rights, at least through a critical lens (Jacobs, 2014; Keleher, 2013; Matthews, 2013; Bernard, 2011; Staff Writer, 2010)(indeed, some scholars, such as Julian Vasquez Helig (2013), have supposed that what some are calling the Civil Rights Movement of our time is merely a charade to cover the fact that policymakers have failed to assure adequate education for all of our nation’s various populations). For instance, school desegregation and voting rights were cornerstones of the civil rights movement. Well before *Brown v. Board of Education* (1954), starting with *Sweatt v. Painter* (1950) and *McLaurin v. Oklahoma* (1950), civil rights advocates fought to integrate public schools in the United States when it became clear that segregated schools were not equal under the *Plessy* doctrine. Similarly, dating back to Reconstruction, civil rights advocates fought to secure the voting rights (and simultaneously, the right to political participation) of Blacks (Chin, 2004). The charter school movement has seemingly forgotten about (or perhaps ignored) these important civil rights battles in the movement’s battle to stage a new civil rights agenda: quality education (Jacobs, 2014; Keleher, 2013; Matthews, 2013; Bernard, 2011; Staff Writer, 2010).⁴

Regardless of the support for charter schools that is expressed by some minority communities, the establishment of charter schools may run afoul of Section 2 of the Voting Rights Act. Section 2 of the Voting Rights Act forbids the government from abridging or denying minority groups’ voting rights, whether such abridgment or denial is intentional or unintentional (*Thornburg v. Gingles*, 1986). Because charter schools often replace popularly elected school boards with appointed school boards that govern predominately minority populations, Section 2 of the Voting Rights Act may be applicable. Appendix A includes information on whether states authorizing charter schools mandate charter school board

⁴ Scholars debate the efficacy of charter schools to deliver universal educational equity and academic achievement.

elections, allow charter school board election or are silent on the selection of charter school boards. Federal precedent exists that supports a claim that the establishment of charter schools could violate Section 2 of the Voting Rights Act. In *Irby v. Virginia State Board of Elections* (1989), the Fourth Circuit Court of Appeal withheld a decision on whether Section 2 of the Voting Rights Act applied to appointed school boards before engaging in an analysis of whether the facts of the case would trigger a Voting Rights Act violation under Section 2. The court, in *Irby*, hinted that the Voting Rights Act would not typically apply to appointed school boards, but signaled that Section 2 of the Voting Rights Act might apply to situations where the appointment of school board members resulted in a disparate racial impact. The *Irby* court did not find that the particular facts of the case presented resulted in a disparate racial impact; nevertheless, the court left open the opportunity to present cases where the institution of appointed school boards resulted in a Section 2 violation.⁵ Federal precedent, perhaps, does support some claim that charter schools, especially those with appointed school boards, may violate Section 2 of the Voting Rights Act. This dissertation will investigate the link between federal voting rights precedent and the appointment of charter school boards in New Orleans.

II. Context for this Study

A. The Context of the New Orleans Public Charter School Takeover

To fully understand the scope of the charterization of New Orleans' public schools, one must understand the facts under which the public schools in New Orleans were taken over by the state of Louisiana. The facts indicate that the public schools in New Orleans were taken by the state while the majority of public school students and parents were still evacuated from the city of New Orleans. Furthermore, the facts describe a situation in which little or no public comment

⁵ More information on the *Irby* case is available in Chapter 4 of this dissertation.

was had in the lead up to the public school takeover. Subsection A of part II of chapter 1 of this dissertation explains the facts under which the schools in New Orleans were taken over by the state. This section starts with a brief history of the New Orleans Public Schools leading up to the takeover and then focuses on the legislative tool that was used to negotiate the take over before ending with a contextualizing discussion of the whereabouts and roles of New Orleans Public School advocates during the takeover process.

Prior to 2005 and Hurricane Katrina, the New Orleans Public Schools enrolled roughly 63,000 students in a dysfunctional educational system that was plagued by White flight to surrounding parishes (the Louisiana equivalent of counties) and middle-class Black flight to Catholic schools (Dingerson, 2007). According to Dingerson (2007), consistent managerial issues (misfeasance, malfeasance and nonfeasance) affected the Orleans Parish School Board prior to Katrina; this led to a perception that New Orleans Public Schools could not or simply would not be fixed. There were many signs of trouble for the faltering school district. Between 1996 and 2005, the school system saw nine superintendents lead the school district (UTNO et al, 2006). The school system was woefully underfunded. Attempts to increase local funding for schools failed to pass during citywide elections on an almost perennial basis (Dingerson, 2007). Hurricane Katrina exacerbated the financial problems of the school district because the city's tax base completely disappeared (UTNO et al, 2006). The district previously faced other and additional financial problems prior to Hurricane Katrina. A private accounting firm found payroll discrepancies of roughly \$12 million per year while the schools were also found to have mismanaged \$71 million in Title I funds in the period immediately before Hurricane Katrina destroyed the district (Frazier-Anderson, 2008). The financial problems of the district led to federal indictments against numerous school officials (Frazier-Anderson, 2008). The school

district's financial problems were further complicated through academic troubles. During the year immediately preceding Hurricane Katrina's landfall, sixty-three percent of New Orleans' public schools were labeled as academically unacceptable in part due to their low standardized test scores and poor attendance rates (Beabout et al, 2008). This number was up from twenty-five percent and forty-seven percent in 2000 and 2003, respectively (O'Neill and Thukral, 2010). The 2004 graduation rate was a dismal fifty-six percent (O'Neill and Thukral, 2010). It was apparent that drastic reform efforts in New Orleans were needed (Frazier-Anderson, 2008). Hurricane Katrina made landfall and forced a reboot of the New Orleans Public Schools by temporarily relieving the district of all its students (Beabout et al, 2008).

Although it is true that pre-Hurricane Katrina New Orleans had one of the worst urban school districts in the nation (O'Neill and Thukral, 2010), New Orleans has become the center of urban education reform since Hurricane Katrina (Buras, 2012). State lawmakers saw Hurricane Katrina as an opportunity to correct the poor performing, failing New Orleans schools (Beabout, 2007). The political and business communities in New Orleans as well as some very vocal evacuee families demanded educational change from a poor-performing school district to world-class schools (Miron, 2008).

The takeover of New Orleans' public schools was done in a less than open manner as opposed to with parental input, though. In November 2006, the state legislature passed Act 35; the Act wrested control of nearly all of New Orleans' public schools from the popularly-elected Orleans Parish School Board and created a new, state-run management organization, the Recovery School District, to manage the district's schools although the New Orleans delegation to the state legislature, en masse, resisted this school takeover (Dingerson, 2007). The state of Louisiana, through Act 35, took unilateral control of the majority of schools in New Orleans

(Miron, 2008). The state of Louisiana had dismantled the traditional power structure of the New Orleans Public Schools through a state takeover (and the subsequent chartering of the city's schools) (Beabout, 2010). The Orleans Parish School Board saw its responsibilities over schools and its policymaking powers slashed (Tillotson, 2007).

Act 35 affected New Orleans Public Schools in a unique manner; other school districts didn't meet some trigger requirements of Act 35 (UTNO et al, 2006).⁶ Additionally, Act 35 increased the school performance school that would label a school failing, a measure of school academic performance, between 27 and nearly 43 points while disregarding the previous requirement of four years of failure to allow school takeovers (UTNO et al, 2006). Act 35, therefore, expanded the definition of a failing school to include schools that were not previously labeled as failing (UTNO et al, 2006).⁷

In short order, the Recovery School District took over the operation of the majority of New Orleans' schools (Frazier-Anderson, 2008).⁸ The takeover was not well thought out as teacher shortages, lack of facilities and construction delays held up student enrollment (Frazier-Anderson, 2008). Faced with operational challenges, the Recovery School District had to do something, and that something was chartering the city's public schools. The idea of a chartered district grew as charter schools brought rapid improvement – as defined by school performance scores which are chiefly based on test scores – to the previously failing New Orleans schools (Smith, 2012). These facts lead to a reasonable belief that the road to the charter takeover was

⁶ For instance, one way of triggering Act 35 was to have 30 “failing” schools. At the time of Act 35's passage, only a handful of school districts exceeded 30 total schools (UTNO et al, 2006). Of those school districts, several could have triggered Act 35, but the state of Louisiana refused to conduct a state takeover of the public schools in those areas (UTNO et al, 2006).

⁷ The effect of Act 35 was to allow the state to takeover 102 schools (in addition to the five New Orleans Public Schools that had been previously taken over) (Tillotson, 2007) where as only 13 schools would have been taken over via the pre-Act 35 standard (UTNO et al, 2006).

⁸ It was not, however, the intention of the legislature to create a charter school system in New Orleans. In the same legislative session that the legislature approved Act 35, the legislature voted to limit the number of charter schools in the state (UTNO et al, 2006).

more “pave as you go” as opposed to a well thought out methodical approach to turning around the failing public schools of New Orleans (Beabout, 2010). Evidence of the pave as you go roadway can be found in the fact that the Recovery School District has several times amended the exit strategy for its control of the New Orleans Public Schools (Smith, 2012) as well as the fact that many Orleans Parish School Board-managed schools opted to open their doors as charters post-Hurricane Katrina to allow for a path of least resistance to the slow pace of school openings after the storm (Tillotson, 2007).

Charter schools, in New Orleans, did not arrive with the consent of parents. Instead, charter schools arose with the support of legislative mandate, executive order and federal intervention (Frazier-Anderson, 2008). Act 35 was not the only stimulus for New Orleans charter schools. The United States Department of Education, through Secretary Margaret Spellings, waived some federal restrictions on charter schools with the intent of restoring public education in New Orleans (Dingerson, 2007). Additionally, the United States Department of Education authorized millions of dollars to assist with the start-up of New Orleans charter schools (Dingerson, 2007). This money was persuasive in jumpstarting charter schools since the district had little to no money based on its depleted tax base. Simultaneously, Governor Kathleen Blanco waived requirements mandating parental and faculty support for the conversion of traditional public schools into charter schools. Meanwhile, Mayor Ray Nagin’s committee to restore education in New Orleans, a branch of the Bring New Orleans Back Commission, was dominated by pro-charter groups with no seats reserved for parents or teachers from New Orleans Public Schools. These forces combined to create a perception that charter schools were, in fact, the only realistic response to the damages created by the cascading floodwaters of Hurricane Katrina.

What makes Act 35's passage more clandestine is the timing of the passage. Act 35 was passed at a time when more affluent and White neighborhoods had been spared from the city's worst flooding while predominately Black neighborhoods were hit particularly hard (Dingerson, 2007). By October 2005, local White communities and middle-class Black communities had already seen substantial recession of Hurricane Katrina's waters (Dingerson, 2007). This is not true of Black communities, which were still under substantial amounts of water (Dingerson, 2007). The early returning population was, therefore, dominated by White and middle-class families (Dingerson, 2007). These are the families that did not previously use the public schools in large numbers. While efforts to rebuild New Orleans' poorest neighborhoods moved at a glacial pace, efforts to deconstruct the public school system moved at a rapid rate (Akers, 2012). This led some scholars to believe that divestment in Black communities had been purposeful (Buras, 2012). Moreover, those parents and students who had previously forsaken the public schools experienced disproportionate political power and voice in the rebuilding of New Orleans Public Schools.

B. The Context of the Voting Rights Act and Its Potential Impact on Educational Equity

Part A of this section explained the context of the state of Louisiana's takeover of the New Orleans public schools. Part A revealed that the state of Louisiana co-opted the New Orleans Public Schools during a period in which residents could not fend off the attack on their schools via political action. While the New Orleans school takeover provides some context for this study, a brief history of the Voting Rights Act, and particularly Section 2 of the Voting Rights Act, will give context to the need to protect the voting rights of minority parents in the New Orleans Public Schools.

The Voting Rights Act of 1965 was not Congress' first attempt at remedying the disenfranchisement of Blacks⁹. Until the passage of the Act, efforts had, however, been fruitless in some areas while obtaining insignificant results in others.¹⁰ Though Congress had long resisted the implementation of more effective voting rights legislation at the wishes of some White southern politicians, key anti-civil rights events¹¹ occurred in 1965. These events garnered national attention and made clear to Congress that action – beyond the ineffective actions already taken – was necessary to assure that Blacks would obtain and maintain rights to the franchise. In essence, states continued to find alternate paths to exclude Blacks from the political process although the 15th Amendment purportedly assured protection from disenfranchisement.

The Voting Rights Act of 1965 included key provisions that would aid in the prevention of disenfranchisement. The two greatest protections under the Act were Section 2 and Section 5. Section 2 of the Act established a nationwide blanket prohibition on the denial or abridgement of the right to participate in the political process. Section 2's prohibitions were not specific and could be applied generally to any effort to violate the right to vote. Section 2 was necessary to combat the fact that little to no progress had been made, nationally, at remedying voter disenfranchisement. Unfortunately, Section 2's protections are remedial in nature. Section 5 applied specifically to jurisdictions with a history steeped in denial of the right to the franchise and as such granted the Department of Justice increased oversight of the political process in those jurisdictions since they were more likely to create obstacles to obtaining or maintaining Blacks' right to vote. Section 5's protections are, therefore, preemptive. Section 4 of the Act

⁹ 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.

¹⁰ In particular, the southern region of the United States saw little to no results of previous voting rights activism and other parts of the nation saw little to no results (U.S. Department of Justice, 2013).

¹¹ Bloody Sunday may have had the most impact on spurring Congress into action as images of Black citizens seeking the franchise and being beaten for doing so were spread both nationally and internationally.

provided for jurisdictions' coverage under Section 5 and their eventual bailout from Section 5 coverage. Section 4 of the Voting Rights Act was held unconstitutional in *Shelby County v. Holder*, as discussed later. Without a functioning Section 4, Section 5 becomes unenforceable. Thus, the remedial measures of Section 2 are the only protections for Black voters to gain and assure racial parity on elected bodies. Section 2's remedial measures may or may not be adequate voting protections for Blacks to maintain, retain or obtain political voice and participation under judicial precedent.

Within 17 years of the Act's authorization, the Act saw several reauthorizations and amendments. New interpretations of the law came with each successive amendment. Through the 1970s, the courts maintained that voting schemes that diluted the voting power of Blacks were unconstitutional (*White v. Regester*, 1973). The Supreme Court, in 1980, reversed course and held that the only violation of the Voting Rights Acts was a voting scheme that intentionally abridged or denied the voting rights of minorities (*City of Mobile v. Bolden*, 1980). This new standard set by the Court in *City of Mobile v. Bolden* made proof of a Voting Rights Act claim much harder for plaintiffs because proving discriminatory intent is more difficult than proving discriminatory results.

The Supreme Court's action in *Bolden* prompted Congress to amend the Voting Rights Act. Under the new Section 2 of the Voting Rights Act, Congress added language allowing for plaintiffs to prove their cases without proving that voting schemes are intentionally dilutive. The amended Section 2 lowered the burden that plaintiffs had to meet to establish a Section 2 claim. The new, lower burden required only that plaintiffs demonstrated a discriminatory impact on the right to vote. The Supreme Court first considered the 1982 amendments in *Thornburg v. Gingles* (1986). The *Thornburg* court found that the amended Section 2 made clear that the appropriate

test for a Section 2 cases was the “results test” as opposed to the “intent test” (Thornburg v. Gingles, 1986). The Court also concluded that the intent test had to be rejected because Congress believed using the intent test pitted communities against each other (in essence, charges of racism were frequently hurled against community members), was excessively hard for plaintiffs to prove and did not reach the root issue of Section 2, actual abridgement or denial (an intent test might only regulate the most extreme cases of denial or abridgement) (Thornburg v. Gingles, 1986). *Thornburg* can therefore be read as repudiating the intent test established in *Bolden* (Thornburg v. Gingles, 1986).¹²

The language of Section 2 of the Voting Rights Act, as of the 1982 amendments to the Act, is codified at 42 U.S.C. § 1973. That language now states

- (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, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
- (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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. 42 U.S.C. 1973.

Despite the protections of Section 2 of the Voting Rights Act, Section 5 of the Voting Rights Act had afforded minority communities across the country, but specifically in the Deep

¹² Some courts have viewed the 1982 Amendments as an amendment to *Bolden*. See *Brown v. Board of Commissioners of the City of Chattanooga, Tennessee*, 722 F. Supp. 380, 389 (E.D. Tenn., 1989), holding if a system was conceived for a discriminatory purpose and it continues to serve that purpose, the system is unconstitutional.

South, advanced voting rights protections. When the Supreme Court invalidated Section 4 of the Voting Rights 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 (*Shelby County v. Holder*, 2013). 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. Though the United States Department of Justice, through the Attorney General, has filed multiple actions under Section 2, there is commentary that indicates that ending Section 5 enforcement has aided in the retrenchment of voting rights protections in the Deep South (Zingerle, 2014). This retrenchment is occurring although Blacks in the Deep South continue to play a critical role in national politics. Of course, Blacks played a crucial role in electing President Barack Obama – the first Black president – to the White House, but less obvious indicators of political involvement are at risk for Blacks. In Senate and congressional elections, Blacks typically aid in electing moderate or liberal Whites to office. In Louisiana, Mary Landrieu, the Democratic Senator, relies on a large Black turnout to maintain her position in the United States Senate. Zingerle (2014) argues that Blacks are not experiencing success at the state level as they are at the national level. This is true in Louisiana where both state houses are reliably conservative.

More important than the traditional discussion of voting rights retrenchment, the dissolution of rights and enforcement of Section 5 rights based predominately in the ending of the Section 4 trigger statute is yet another case in the list of cases that have retracted civil rights for minority groups. Not coincidentally, these cases arguably began with education cases. Thus, one must look carefully at the history of education law to ascertain the true depth of possible retrenchment resulting from *Shelby County*. As early as the 1970s, the Supreme Court showed

signs of fatigue or perhaps anti-civil rights agendas. School desegregation arguably experienced its heyday in the 1950s and 1960s. Sustained by an era of consensus building, unanimous Courts held in favor of Black plaintiffs seeking educational opportunities once limited for Black students or completely foreclosed to Black students. A unanimous Supreme Court, in 1950, 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 in an attempt to avoid integrating its all-White law school (*Sweatt v. Painter*, 1950). In the same year, a unanimous Court also held 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 outside of the instructional classroom to prevent the integration of Black and White students (*McLaurin v. Oklahoma State Regents*, 1950). The 1950s continued its run of impressive, and more importantly unanimous, school desegregation cases with *Brown v. Board of Education* (1954). *Brown*, in overturning the separate but equal policy advanced in *Plessy v. Ferguson* (1896), presented another unanimous case in which school districts – nationwide – were explicitly required to desegregate their schools. *Brown* and *Brown v. Board of Education II* (1955), the case that gave us ‘all deliberate speed,’ have become linchpins of desegregation efforts.

The 1960s brought more opinions in favor of school desegregation and educational equity for minority students. In 1968, a unanimous court ruled that token desegregation was unsatisfactory under the order issued in *Brown II*. In *Green v. County School Board of New Kent County* (1968), the Court issued the Green factors, or an integration checklist to determine if meaningful desegregation occurred in a given school district. The Green factors are the racial proportions of students, faculty and staff assigned to specific schools as well as absolute equality of transportation, facilities and extracurricular activities. Until the early 1990s, school districts

were required to fulfill all of these requirements in relative proportionality to exit federal district court supervision. After *Freeman v. Pitts* (1992), school districts may fulfill these requirements individually or all at once.

During the 1970s, proponents of school desegregation remained generally victorious in the courts. The early 1970s continued with unanimous decisions but as time progressed, judicial decisions became split, with consensus building being less important. In *Swann v. Charlotte-Mecklenberg Board of Education* (1970), a unanimous Supreme Court held that busing students to and from school as a remedy for de jure segregation was constitutional. While the Court, in *Swann*, reached a unanimous decision, the Court's consensus, by 1972, was dissolving. *Wright v. Council of City of Emporia* (1972) and *United States v. Scotland Neck City Board of Education* (1972) are both cases where proponents of school desegregation were successful at winning lawsuits but not at the level of previous school desegregation cases. In both *Wright* and *Scotland Neck*, all justices agreed in the result of the case, but four justices in each case submitted different rationales for reaching the ultimate decision in the case. The cracks in the former consensus became evermore obvious in *Milliken v. Bradley* (1974). In *Milliken*, the Court ruled that school desegregation plans could not include suburban school districts if the suburban districts were not guilty of de jure segregation in the past. A majority of the Court had drawn a line in the proverbial desegregation sand in *Milliken*.

Simultaneous to the Court's roll back of integration-mandating precedent was the rescinding of school integration. A report by the Civil Rights Project found that the only concentrated period of school integration was the decade immediately following the enactment of the civil rights legislation of the 1960s (Orfield, Kucsera & Siegel-Hawley,

2012). Most pertinently, this same report found statistics that supported the conclusion that schools have become increasingly segregated over the decades following the 1960s (Orfield et al, 2012). In particular, there has only been significant progress in integrating the most segregated schools in the country, those schools with minority enrollments of ninety-nine to one hundred percent; the integration of all other schools has faltered severely since the 1960s (Orfield et al, 2012). A broad array of literature exists to support the notion that students in integrated schools fare better than students in segregated schools. Thus, if schools are becoming more segregated with the aid of judicial precedent, then it is necessary to understand how segregated schools may provide adequate schooling and learning experiences for their chiefly minority constituencies. As discussed in chapter 2 of this dissertation, one method of providing educational equity, loosely put, is to assure that minority students and parents have sufficient representation on school boards. 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.

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 ostensibly not an issue of 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 paper will examine whether, under the extant language of the Voting Rights, the current circumstances in New Orleans produce a possible violation of the Voting Rights Act with the understanding that Black political participation and voice are critical to securing greater Black participation on school boards and thereby gaining greater educational equity for the

largely Black student body of New Orleans' public schools. In the alternative, the Court's holding in *Shelby County* could represent an additional obstacle to educational equity in New Orleans' public schools. This is the case because minority school board members might advocate for efforts to ameliorate race-related issues within the constraints of the law.

III. Research Questions/Rationale

It is important to determine the legal, policy-based and political consequences of appointing charter school board members in lieu of electing school board members. As such, this study, the first of its kind, will examine whether appointed charter school boards are less diverse than elected school boards governing traditional public schools in New Orleans, Louisiana as measured by the proportion of Black appointed school board members on appointed charter school boards and the proportion of Black school board members on popularly elected school boards. More on point with *Irby*, this study will also examine whether appointed charter school boards are representative of the population of minority citizens as analyzed against the voting age population of minorities in New Orleans according to the United States Census Bureau. In investigating the relationship between appointed charter school board members and the student population of respective charter schools, this study will likewise evaluate whether charter school board members reflect the student population in charter schools. Because the base examination in this study is a legal case study, these questions will be situated into a legal discussion on whether a lack of minority representation on appointed charter school boards is violative of Section 2 of the Voting Rights Act. To a lesser extent, this study will include a brief analysis of policy-based inclusions of minority representation on appointed charter school boards and an evaluation of the

political backdrop that might influence the appointment (or lack thereof) of charter schools board members.

This study will propose a new approach for analyzing the legality and political astuteness of charter schools. This new approach will rest primarily on the interaction of charter schools, the Voting Rights Act and the prevalence of minority charter school board members (especially since research finds that greater minority representation results in greater academic outcomes for minority students – see literature review for greater details). In proposing this new approach, the researcher will address four questions in chapters 4 and 5 of this study:

- First, is there legal precedent supporting a claim that Section 2 of the Voting Rights Act?
- Second, do appointed charter school boards differ statistically from popularly elected school boards?
- Third, does Black membership on appointed charter school boards in New Orleans, Louisiana reflect the voting age population?
- Finally, does Black membership on appointed charter school boards in New Orleans, Louisiana reflect the Black membership of the student population?

These questions will inform the overall goal of this dissertation: determining whether Section 2 of the Voting Rights Act of 1965 is a viable tool to intervene in the establishment, maintenance and/or advancement of charter schools.

A legal and statistical analysis of representation in New Orleans' public charter schools is appropriate because each year New Orleans is edging closer to having an entirely charter school system (Jindal, 2013). If (and possibly when) New Orleans becomes the first fully chartered school district, the city will be host to the first and only all charter school district in the United States. If an all charter school district is inevitable or impending, studies should be conducted to

determine the effects of charter schools on important institutions traditionally associated with the educational systems, such as representation on school boards. Currently, there are few, if any, studies that evaluate whether charter schools subvert the democratic process by which representatives are historically selected to serve on school boards. This study endeavors to be the first study of its kind to statistically compare racial representation on appointed charter school boards with the unique aspect of investigating the legality of charter school boards under the Voting Rights Act of 1965.

This study is timely because other cities have considered creating all charter districts in response to purported educational crises (Zubrzycki, 2013; Robertson, 2014; Kuras, 2013). For instance, cities such as Detroit, Memphis and Kansas City, Missouri have intimated that they would consider an all-charter school district. While some cities have opted against an all-charter approach, others have continued their push towards an all-charter school district. Still, other districts continue to see substantial growth in the rates of charter school enrollments and openings of charter schools. These cities often cite the positive academic indicators found in New Orleans after the conversion to a majority charter school district (Zubrzycki, 2013; Robertson, 2014). These indicators do not, however, encompass every possible indicator of the success or failure of charter schools.

Additionally, this study is timely because it evaluates the efficacy of appointed charter school boards to deliver representation for Black parents. In particular, the school boards in this study are not governed – at all – by the popularly elected New Orleans school board. The charter school boards are also all appointed. It is worth analyzing, then, if appointed boards result in more or less representation for Black parents. This is specifically the case since the one study that has evaluated elected charter school boards has found that elected charter school boards in

Minnesota have resulted in representation that is nearly proportional to the population of minority groups in Minnesota (Stone, Zhao and Cureton, 2012). Stone et al (2012) also found that representing minority parents was not a priority for elected charter school boards in Minnesota; this finding shows that elections may be effective at providing Black parents with representation, even when there is not a concerted effort to provide such representation.

The literature review addresses the unique intersection of charter schools, race, appointed school boards and Section 2 of the Voting Rights Act. In reviewing the literature on these subjects, it becomes more clear how Section 2 of the Voting Rights Act may be applicable to charter schools, especially as related to the appointment of charter school boards resulting in a disparate racial impact. No court has directly confronted either of these scenarios. Because no court has directly confronted this scenario, the voting rights of minority voters impacted by the establishment of charter schools has gone unchecked.

CHAPTER 2: LITERATURE REVIEW

I. Introduction

Chapter two of this dissertation reviews the intersection of literature pertaining to charter schools, school boards and race. The literature review conducted yielded very little case law addressing these issues, but the review also yielded a review with some debate among academicians regarding the efficacy of both charter schools and appointed school boards to produce an effect on policy as charter schools and appointed school boards relate to race. The literature review similarly found debate about the degree of segregation in charter schools although the literature appears to reveal a consensus on the fact that charter schools are, in fact, segregated to some degree. Chapter two, while revealing very little case law pertaining to race and charter schools, will support the notion that the paucity of case law involving race and charter schools is not indicative of a lack of race-related issues in charter schools. Instead, the lack of race-related charter school case law is related to the difficulty of addressing racial-related issues in education. Chapter two reveals a great need for continued research in the area of race and charter school governance. Because issues of race and charter schools do not readily appear before the court and because academicians continue to tease out potential issues of race and charter schools, it is of the utmost importance that further research into the impact of charter schools on minority groups continue. Furthermore, it is important to investigate the impact laws outside of education, such as Section 2 of the Voting Rights Act of 1965, on the operation of charter schools since education law is a compilation of laws from other legal areas.¹³

¹³ This is especially the case since § 5 of the Voting Rights Act, which courts have interpreted to ban appointive systems of selecting representatives when those systems have a disparate racial impact, has been rendered useless by the Supreme Court in *Shelby County v. Holder*, 570 U.S XXX (2013)

Part II of this literature review will consider the literature that addresses race and charter schools. In particular, part II of this literature review will focus on the few instances in which a federal or state court has assessed the impact of charter schools on the rights of minority populations. Part II of this chapter will also evaluate the literature arising from scholarly work on charter schools and race. Because the constitutionality of charter schools is well-settled law, this literature review will not examine the literature that addresses the legality of charter schools unless the issue bears directly upon the relationship between charter schools and their impact on minority racial groups. Part III of the literature review will survey the pertinent academic literature speaking to the legality and effectiveness of appointed school boards as they are related to racial representation on school boards. While appointed school boards are presumptively legal under Section 2 of the Voting Rights Act of 1965, scholars debate the productiveness of appointed school boards in securing representation of minority groups.

II. Charter Schools

A. Charter Schools In General

It is arguable whether any education reform or strategy has experienced political success equivalent to that of the charter school movement. The charter school movement has displayed great staying power and has continued to gather support as the movement is well into its third decade of existence. Though there were no charter schools just over twenty-three years ago, as of 2011 there was charter school authorizing legislation in forty-two states, the District of Columbia and Puerto Rico (Green et al, 2013). At the turn of the most recent decade, there were in excess of five thousand charter schools serving nearly two million students (Green et al, 2013).¹⁴ If

¹⁴ This number is now over 6,000 as mentioned in the previous chapter.

charter schools are here to stay, it is important that the impact of charter schools is monitored to assure that the benefits of charter schools are not setbacks in other areas, such as civil rights.

The term “charter school” is not static, however. Charter schools vary by state, by city and by individual school. Charter schools do, however, share some commonalities. Charter schools are generally established through a “performance contract detailing the school’s mission, program, goals, students served, methods of assessment and ways to measure success” (United States Department of State, 2012). Charter schools are most often granted a contract ranging from three to five years in length (United States Department of State, 2012). When the charter school’s contract expires, a charter authorizer may renew the school’s contract or charter based on the school’s ability to meet the requirements set forth in the contract (United States Department of State, 2012). In consideration of this accountability, charter schools are often exempted from a number of rules and regulations that apply to traditional public schools (Green and Mead, 2004).

Charter schools, no matter the rules or regulations governing them, have only marginal gains in popularity at the aggregated national level, but charter schools enjoy extreme popularity - especially among Black polling participants – when polling results are disaggregated by race. According to a survey conducted by Harvard’s Program on Educational Policy Governance and the journal, *Education Next*, Black respondents supported charter schools by a margin of almost five to one; Latino respondents supported charter schools by a margin of over two to one (Howell et al, 2011). According to Howell, Peterson and West (2011), Blacks and Latinos experienced large growth in support of charter schools from 2008 and 2009 to 2010. The wide margins of Blacks and Latinos favoring charter schools are therefore even more impressive given the short time frame in which such support has arisen. Black and Latino support of charter

schools has grown exponentially as charter schools experience growth in the absolute number of charter schools and as charter schools experience growth in the share of students served. The growth of charter schools, especially in minority communities, and the tremendous popularity of charter schools among minorities is reason to investigate the impact of charter schools on the rights of minorities.

B. Charter Schools, Race and the Courts

The intersection of charter schools and race, while an academic political battle, rarely appears before the judiciary. A comprehensive search of legal databases produced very few cases or controversies directly regarding charter schools and race (particularly for federal court cases). The federal courts have assessed the intersection of race and charter schools as related to the Equal Protection Clause of the Fourteenth Amendment and the discriminatory impact test of the regulations implementing Title VI of the Civil Rights Act. Very few cases have directly addressed these intersections. Moreover, there are very few cases analyzing the use of race in the operation of charter schools.

The first case discussed in this chapter involves a parent lawsuit alleging that the opening of charter schools in a predominately minority area violated the Equal Protection Clause of the Fourteenth Amendment. In *Villanueva v. Carere* (1996), the Tenth Circuit Court of Appeals addressed whether the Charter Schools Act, a Colorado charter school-enabling act, violated either the Equal Protection Clause or had a discriminatory impact on racial minorities. The Tenth Circuit Court of Appeals first addressed the issues surrounding the Equal Protection Clause of the Fourteenth Amendment. The court held that the establishment of a charter school in a predominately minority community did not violate the Equal Protection Clause. The court's analysis of the parents' Equal Protection Clause claim initiated with the legal standard that proof

of racially discriminatory intent or purpose is necessary to demonstrate a race-based violation of the Equal Protection Clause. It was the parent's inability to prove discriminatory intent that defeated the parent's claim. *Villanueva* is important to the progeny of race-related cases in the federal courts. The case provides a firm answer to a key argument concerning charter schools; post-*Villanueva* charter schools are not and will not be violative of the Equal Protection Clause without proof of intentional segregation.

Another source of litigation over race and charter schools has been the contention between the establishment of charter schools and the existence of federal desegregation decrees. The first of two published cases on this matter appeared before the United States District Court for the Western District of Michigan in *Berry v. School District of Benton Harbor* (1999). The Benton Harbor Area School District had been and still was subject to a federal desegregation decree. In other words, the Benton Harbor Area School District was required to remedy past racially discriminatory acts under the supervision of the federal district court. Three charter schools were the subject of the *Berry* case. Countryside Charter School had applied for and was granted approval to operate in the area under the jurisdiction of the Benton Harbor Area School District. Countryside Charter School opened a relatively small charter school with a unique curriculum. Additionally, Countryside Charter School was able to reach an agreement to operate with restrictions to avoid resegregation in the Benton Harbor Area School District.

The two other applicant charter schools experienced different fates in the *Berry* case, but the divergent results of the two applicant charter schools is helpful in determining the requirements for establishing a charter school in a district operating under an existing desegregation decree. The court held that charter schools seeking to establish operation in a jurisdiction bound by a desegregation decree are required to submit information that would allow

a court to assess whether the establishment of the charter school would negate the existing desegregation decree. The court, in *Berry*, prevented the funding of the Benton Harbor Charter Academy while it allowed the funding of the Benton Harbor Charter School. Benton Harbor Charter Academy failed to produce court-mandated information on the composition of its class. The court, in response, refused to authorize funding for the charter school finding that there was no method of determining the impact of the opening of Benton Harbor Charter Academy on the existing desegregation decree and more appropriately on the school districts' ability to comply with the existing decree. On the other hand, the court allowed the funding of Benton Harbor Charter School with some restrictions on the charter school. Benton Harbor Charter School differed from Benton Harbor Charter Academy in that Benton Harbor Charter School's application addressed methods of compliance with all aspects of the existing desegregation decree. The distinction between Benton Harbor Charter Academy and Benton Harbor Charter School is instructive for charter schools seeking establishment in districts operating under desegregation decrees. Charter schools hoping to establish operations in a district under an existing desegregation decree must make a concerted effort to assure that the establishment of the charter school does not hamper the effectiveness of the desegregation decree.

Nearly a decade elapsed before the federal courts again addressed the establishment of charter schools in districts operating under a desegregation decree, but when the courts addressed this issue in 2008, the federal courts added an important addendum to the rule in *Berry*. Though the *Berry* court was able to distinguish the two charter school applications based on the measures taken to assure compliance with the existing desegregation decree, efforts to comply with desegregation decrees are not dispositive of the issue of charters' impact on desegregation decrees. Federal courts may block the application of an applicant charter school no matter how

great an effort a charter school makes to comply with an existing desegregation decree. In *Cleveland v. Union Parish School Board* (2008), the United States District Court for the Western District of Louisiana lauded the applicant charter school for its efforts at assuring compliance with a federal desegregation decree, but the court held that the charter school's effect on the desegregation decree were too detrimental to overcome – even with restrictions. The facts of *Cleveland* were similar to those of *Berry*. The result in *Cleveland* was to deny the charter school's Motion for Authorization.

The constitutionality of racial balancing provisions is yet another area of judicial intervention when considering charter schools and race. At least one court has ruled that its state's racial balancing provision is a violation of the Equal Protection Clause of the Fourteenth Amendment. In *Beaufort County Board of Education v. Lighthouse Charter School Committee* (1999), a South Carolina trial court ruled that a legislative mandate requiring that the racial composition of charter schools be within ten percent of the surrounding school district was unconstitutional. The court found that the policy employed a race-based classification and applied strict scrutiny in its review. Under strict scrutiny, the legislative enactment was required to be narrowly tailored to satisfy a compelling state interest. Using this level of review, the court found that the policy was violative of the Equal Protection Clause. The court did not accept the argument that the racial balancing provision satisfied the compelling state interest of encouraging student diversity among charter schools.

In the alternative the court held that the state's racial balancing provision violated the Equal Protection Clause even if promoting racial diversity in charter schools was a compelling state interest because the provision was not narrowly tailored. First, the fact that charter schools would have to comply with the racial balancing provision in perpetuity was violative of the

narrowly tailored requirement. A second area of weakness for the policy was that there appeared to be a quota. Finally, the racial balancing provision was too inflexible and excessively burdensome on outside parties; charter schools would be forced to recruit students from up to fifty miles away in order to satisfy the racial balancing provision. The racial balancing provision was not severable from the charter school law and because of this fact, the court held the entire statute unconstitutional.

Though the case was appealed to the Supreme Court of South Carolina, the Supreme Court of South Carolina never reached the merits of the case. The state legislature responded to the trial court's decision by amending the racial balancing provision. The legislative amendments increased the variant percentage from ten percent to twenty percent and allowed approval of the charter school even if the charter school failed to comply with the racial balancing provision provided that the applicant charter school made a good faith effort to establish a diverse student body and the "application is acceptable in all other aspects." The amendments made the controversy before the Supreme Court of South Carolina moot and the court dismissed the case and vacated the trial court's decision. The supreme court took notice that the amendments now required a fact-based inquiry instead of the racial quota mandated in the initial policy, setting a new standard for constitutionality of racial balancing provisions.

The Supreme Court of the United States has addressed the issue of racial diversity in education (though not specifically charter schools) since the *Beaufort* decision. The Supreme Court has established student body diversity as a compelling state interest, but has restricted the use of racial classifications to achieve this compelling state interest. In *Grutter v. Bollinger* (2003), the Court held that diversity was a compelling state interest that could justify the consideration of race in the University of Michigan's law school admissions process. The Court

reasoned that the concept of diversity originated in a university's academic freedom under the First Amendment. Furthermore, the law school's admission policy was narrowly tailored because race was not used as a quota but instead race was considered one of many factors in a particular applicant's admission file. The Court found that there was real consideration about the ways that each applicant might contribute to the diversity of the law school community. The law school also gave meaningful consideration to diversity factors outside of race. While *Grutter* was a boon for proponents of racial diversity in education, the Court severely limited the use of race in K-12 school assignments only four years later. In *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), the Supreme Court effectively banned the use of racial classifications to achieve racial balancing in schools while allowing the pursuit of diversity or limiting racial isolation through means that account for race in nonspecific ways. *Parents Involved* has far-reaching implications for charter school racial balancing provisions. In a plurality opinion, the Court held that the use of racial classifications to obtain racially balanced schools is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, barring the exception of remedial measures aimed at curing prior racial discrimination. Though the Court appeared to foreclose the use of racial balancing provisions in *Parents Involved*, the case does suggest that the compelling state interest of student body diversity may be obtained by other means. Justice Kennedy, in his concurrence, asserted that schools may pursue race-conscious means to address student body diversity in a generalized manner. Thus, as applied to charter school racial diversity aims, the Court, following *Parents Involved*, is unlikely to approve of legislative mandates creating racial classifications; the Court may, however, approve of measures addressing charter school diversity if those measures do not create a racial classification.

C. Charter Schools, Race and the Literature

The role of the courts in determining how race and charter schools interact may be well-settled, but academicians are not as settled on the role of race in charter schools. Scholars have discussed and currently are discussing the role of race in charter schools. In particular, scholars disagree upon the degree of segregation in charter schools¹⁵, the ability of charter schools to operate as a desegregation tool and whether charter schools are state actors (an outcome important to the protection of rights for minority students).

In regards to the segregative nature of charter schools, the literature has reached a near consensus (Frankenberg, 2011). Charter schools do not seem to have an integrating impact as promised during the initial stages of the charter school movement (Institute on Race and Poverty, 2008). The Institute on Race and Poverty (2008) found that charter schools have exacerbated racial segregation in an already segregated schooling environment. Frankenberg (2011) found that a robust literature review supports the claim that charter schools concentrate students by race. Finnagin (2004) supports this claim in finding that traditional public schools enroll higher proportions of White students than do charter schools; on the other hand, charter schools enroll higher proportions of Black and Latino students than do traditional public schools. Similarly, a working paper from Zimmer et al (2009) indicates that Black students move into more racially isolated settings when transferring to public charter schools.

Scholars have asserted that students in charter schools experience higher levels of segregation than their traditional public school counterparts. The segregation of charter schools is aided by the fact that charter schools are oftentimes established in hypersegregated urban

¹⁵ Scholars do not, however, debate that charter school segregation exists.

environments; this contributes to further segregation in charter schools (Institute on Race & Poverty, 2008). The Institute on Race & Poverty (2008) found data that supports the claim that the racial composition of charter schools is likely to mirror the racial composition of the neighborhoods where the charter school is located. This is problematic because neighborhoods are still likely to be racially segregated. This assertion has been supported by further studies at the national and state level. Rotberg (2014) found that studies from multiple states support the conclusion that charter schools are more segregated than traditional public schools. For instance, Ni (2007) concluded that Michigan public charter schools racially isolated Black students while traditional public schools in the same jurisdiction racially isolated White students. Another study found that some charter school students in Arizona attended schools with worse integration depending on grade level (Garcia, 2007). Almost uniformly charter schools have been concluded to be more segregative than traditional public schools.

Charter school research has also concluded that public charter schools are more attractive to minority students. According to d'Entremont and Gulosino (2008), Black students are overrepresented in charter schools when compared to census data. This finding holds true when controlling for the fact that charter schools are often located in predominately minority locations. This finding may indicate that self-selection impacts the segregative nature of charter school enrollments and is supported by Garcia's study of segregation in Arizona charter schools. Garcia (2007) found that White flight and minority self-segregation affect charter school enrollment in Arizona charter schools. These studies corroborate a study by Finnagin (2004) that found that charter school enrollment for Black students far outpaced the proportion of Black individuals in the general population. These studies also corroborate other studies that find that Blacks and

Hispanics are overexposed to their own racial groups when enrolled in public charter schools (Frankenberg et al, 2010).

Though there is a near consensus that charter schools are more segregated than traditional public schools, some scholars have taken issue with the level of segregation as described by other scholars. Ritter et al (2010) took issue with the Frankenberg et al's (2010) analysis of charter school segregation. While Frankenberg et al (2010) found that charter schools were very much more segregated than traditional public schools, Ritter et al (2010) found that public charter schools are only marginally more segregated than traditional public schools. Even Ritter et al 2012, however, found that traditional public schools were more representative of one region's demographics than were charter schools. In a study of Little Rock area charter schools, Ritter et al (2012) found that charter schools were more likely to serve disproportionate numbers of White students making traditional public schools more Black in the city limits.

While some scholars have written on the intersection of race and student body composition of charter schools, other scholars have focused on the question of whether charter schools are state actors. If charter schools are not state actors, then traditional student and parent rights may not fully exist in charter schools. Though only a limited number of scholars have researched whether charter schools or charter management organizations are state actors and those that have researched the question have reached differing results, all current scholarship on the issue indicates the importance of the state action question to the continuance of the charter school movement as it is currently constructed and/or the rights of public school students as those rights are currently understood. For instance, LoTempio (2012) found that the state action doctrine is not designed for charter schools because of their quasi-public/private origins. Green and Nelson (2013) as well as Green et al (2012) found that the state action doctrine may or may

not apply to charter schools. Finally, French (2006) found that charter operators were not likely state actors. In all four articles, the authors found that the state action question had far reaching implication for society: student rights (LoTempio, Green and Nelson, Green et al) and viability of school reform movement (French). The remainder of this subsection will review the existing literature on charter schools and the state action doctrine. For brevity and ease of understanding, the definition of state actor and a brief review of the state action doctrine are provided immediately below.

State actors are those individuals that act under color of the government (Green and Nelson, 2013). This definition of a state actor does not forbid the inclusion of private citizens as state actors, but does limit the scenarios under which a private citizen could be considered a state actor. When the government is a flagrant joint participant in the alleged violative action, the private actor is said to be a state actor. When the government is not a flagrant joint participant, the cases are harder to decipher and additional tests are needed to determine if a private actor is, in fact, a state actor. The Supreme Court has announced four tests for determining when a private actor becomes a state actor: the public function exception, the government compulsion exception, the close nexus exception and the entanglement exception.

The state action doctrine has proven critical in the prevention of discriminatory behavior in various contexts. The state action doctrine developed from the Civil Rights Cases. The result of the Civil Rights Cases was that the Fourteenth Amendment only applied to state actors. Essentially, the Fourteenth Amendment does not cover the actions of private citizens (Wren, 2000). Just as the Fourteenth Amendment does not cover the actions of private citizens, the Constitution of the United States does not require that private actors conform their behaviors to its dictates. State action may be a misnomer. The Constitution applies to all levels of government

(Goldstein, 1998). Equal protection litigation is an important tool for securing the rights of all students in the American educational system. These challenges hinge on the ability to prevent discriminatory action(s) by the state. If charter schools are not state actors, some student rights may be left unprotected. Policymakers should reconsider a “public” education system that is not accountable to the United States Constitution (Wren, 2006).

Though the legitimacy of charter schools as public schools appears well-settled, new legal challenges threaten the core of the charter school movement: autonomy (French, 2006). While many of the challenges to the legitimacy of charter schools appeared before state courts, the new challenges are headed for federal court. While it remains true that charter schools may be exempt from some state statutes, it is also true that federal law still applies to charter schools (Green and Mead, 2004). New cases often challenge whether charter schools are state actors. State actor status is important to the sustainability of many student rights (LoTiempo, 2012). *Caviness v. Horizon Learning Center* (2010) may be the newest case in major state action cases as the case is already being cited to prove that charter schools are not state actors – even outside of the employment context (Hulden, 2011). Whether charter schools are state actors will affect if minority charter school students are covered by the First, Fourth and Fourteenth Amendments as well as other federal laws aiming to protect the rights of students (Green and Nelson, 2013). The logical conclusion is that an extension of *Caviness* would have profound effects on minority charter school students (Green et al, 2012). Although *Caviness* has brought into question whether or not charter schools are state actors, other courts have held that charter schools are state actors (Green and Nelson, 2013).¹⁶ It is also notable that all cases prior to *Caviness* found that charter

¹⁶ See *Reister v. Riverside Community Schools*, 257 F. Supp. 2d 968 (S.D. Ohio 2002); *Irene B. v. Philadelphia Academy Charter School*, 2003 WL 24052009 (E.D. Pa 2003); *Matwijko v. Board of Trustees of Global Concepts Charter School*, 2006 WL 2466868 (2006); *Scaggs v. N.Y. Dep’t of Educ.*, 2007 WL 1456221 (E.D.N.Y. 2007); and

schools were state actors (Green et al, 2012).¹⁷ Charter schools, if not state actors, could afford states a loophole to evade constitutional requirements by merely contracting the states' obligations away. Furthermore, if charter schools are not state actors, parents could be forced to choose between forfeiting constitutional rights and a perceived educational benefit (Hulden, 2011). Green, et al (2012) warned that Black students, given the statistics on student discipline, should be cautious about selecting a charter school if charter schools are not state actors. These students stand to lose vital constitutional protections that could help ward off discriminatory policies or practices. According to Hulden (2011), it is unlikely that states envisioned this scenario when they enacted charter school legislation. That charter schools are public schools is no longer an unanswered legal question; however, more recent challenges to charter schools focus on holding charter schools accountable in ways similar to traditional public schools.

Charter schools appear, at best, quasi-public. They are publicly funded, yet they are exempt from the plethora of regulations that affect traditional public schools. Charter schools look more similar to private schools when one considers that charter schools are generally operated by groups of private citizens outside of the local school board (Wren, 2006). Charter schools, therefore, have characteristics of both public and private schools (Goldstein, 1998). Because charter schools appear to be both public and private, there is a question of whether they are state actors or merely private entities providing a public service (Green et al, 2012). This question is not easily answered. States cannot simply legislate that charter schools are public as a method of deeming charter schools state actors (Goldstein, 1998). Furthermore, that charter schools, like traditional public schools, are created and regulated by the state does not make charter schools state actors. Charter schools are distinguishable from traditional public schools in

Jordan v. Kane Educ. Corp. 2009 WL 509744 (N.D. Ill. 2009) for other cases in which charter schools or charter management organizations were viewed as state actors in the eyes of the federal court.

¹⁷ See above footnote for cases.

many ways and these distinctions may result in a finding that charter schools are not state actors (Goldstein, 1998). Of course, variations in the operation of charter schools, the charter itself and the authorizing statute will affect any state action claim.

State action claims against charter schools are becoming more frequent (French, 2006). A multitude of problems, however, plagues judicial precedent related to charter schools and the state action doctrine. First, inconsistency in court holdings on state actions has resulted in confusion about the enforceability of the constitutional rights of students, parents and teachers. Also, significant precedent, outside of charter schools, exists that indicates that charter schools are not state actors; yet, federal courts have evaded directly addressing the question of whether charter schools are state actors (Hulden, 2011). Instead of addressing the question, courts have readily assumed charter schools to be state actors as opposed to conducting the thorough tests established by the Supreme Court (Goldstein, 1998; LoTiempo, 2011). The judicial resolution of the applicability of the United States Constitution to charter schools is important because the scope and availability of protections afforded by the Constitution often trump those afforded by other sources. If charter schools are not state actors, then their private conduct via policies and practices may become as resourceful as the operator pleases. While this could result in positive educational results, it could lead to greater abuses of students, such as a denial of important, previously well-settled students rights (Goldstein, 1998)¹⁸.

While there is a paucity of literature on whether charter schools are state actors, the scholars that have researched the issue both agree and disagree based on the exception employed for the analysis. Scholars that have researched whether charter schools are state actors under the public function exception have found that charter schools are not covered under the exception (Goldstein, 1999; Wren, 2006; Hulden, 2011; LoTiempo, 2012). Similarly, scholars have found

¹⁸ As previously noted, the First, Fourth and Fourteenth Amendment protections of students could be jeopardized.

that charter schools are not state actors under the state compulsion exception (Wren, 2006). The only exception that arouses debate is the close nexus exception. Some scholars have found that charter schools fall within the close nexus exception and are state actors (Hulden, 2011, Goldstein, 1998). Other scholars have found that charter schools are not state actors under the close nexus test (Wren, 2006). Neither courts nor scholars are certain as to whether charter schools are state actors. As such, students – and especially minority students – will have their rights hanging in the balance until the question is resolved.

III. Social Science Research and Appointed School Boards

Section III of Chapter 2 of the dissertation will review scholarly literature surrounding the implementation of appointed school boards as opposed to elected school boards. While the judiciary has reached a general consensus on the legality of appointed, rather than elected, school boards, there is some debate about the efficacy of appointed school boards to achieve meaningful representation for minorities. Section III will briefly discuss the legality of appointed school boards. Section III will also discuss the ability of appointed school boards to deliver descriptive and substantive representation in comparison to elected school boards. Section III will more specifically discuss the ability of minorities to achieve descriptive and substantive representation on appointed school boards as opposed to elected school boards. A literature review of the pertinent research on representation on elected school boards as compared to appointed school boards reveals that scholars have not fully settled on the astuteness of appointed school boards, especially because there is still uneasiness when balancing the advantages and disadvantages of appointive as opposed to elective school boards for minorities.

The courts have been in general consensus. Appointed boards – and as a result, appointed school boards – are legal as long as those appointed school boards do not systematically exclude

certain segments of the population (*Mayor of Philadelphia v. Educational Equality League*, 1974). Just as the courts have been in general consensus about the legality of appointed school boards so has the social science scholarship been in regard to the political and policy efficacy of Blacks in regard to school board selection types. In general, scholars have found that ward-based elections do not result in statistically greater descriptive representation than do at-large elections (Meier, et al 2005). Those same scholars have found, however, that substantive representation increases in ward-based elections as opposed to at-large elections (Meier et al, 2005). Ward-based elections results in practically higher numbers of Black representatives on school boards than do at-large elections, and substantive representation is positively correlated to descriptive representation (Meier and England, 1984). While ward-based elections appear to have greater advantages for minority voters, the most representative form of selection is not an election. Scholars have found that appointive posts increase descriptive representation for minorities (Robinson et al, 1985). Berkman and Plutzer (2010) modified this finding in stating that descriptive representation could increase with appointive posts and when descriptive representation increased substantive representation increases for minorities. Previously, scholars have found that districted elections and other variables support Black membership in policymaking school board roles. Additionally, these scholars found that appointive selection methods were tied to a decrease in Black membership in educational policymaking roles (Stewart et al, 1989).

The work of Robinson (1985) and Berkman and Plutzer (2010) seems supported, in part, by mixed-methods evidence from a study of Boston, Massachusetts. In particular, Taylor (2001) found that Black voters in Boston opposed the implementation of an appointed school board. The opposition of Black voters directly targeted the civil rights agenda, or perceived lack thereof, of

the appointed school board (Taylor, 2001). Taylor's (2001) research concludes that Black opposition to the appointed school board was incompatible with the facts of the circumstances. In an analysis of decisions made in the wake of the appointed board, the appointed board's decisions were more aligned with the interests of the Black population. As both Meier and colleagues and Berkman and Plutzer found, the appointive selection system created stronger substantive representation for minority communities. Intriguingly enough, Black voters appear to prefer selecting their own representatives on school boards than having another person choose their school board members. This fact presents a contradiction of sorts: Black Americans prefer political voice and effective, supportive education policies although the two may run in opposition to each other. In essence, scholars have found that appointive methods of selecting school board members work in favor of minority preferences even as minorities often oppose appointive posts.

Though social science research has found a positive correlation between appointed school boards and the education policy agenda of the Black population, it is important to note that some scholars have opposed the incorporation of appointed systems of choosing school board members. Feuerstein (2002) cautioned against the abandonment of electing school board members arguing theoretically that school boards connect citizens to education policy and aspire to popular governance.

The discussion about appointment versus election is important because of the implications for representation. Whichever format results in greater descriptive, and therefore substantive representation, is usually better for Black Americans. The gist of the matter is that greater numbers of Black school board members results in better substantive representation for Black students and parents. Meier et al (1984) found that suspensions, dropouts and number of

students placed in special education classes were reduced when greater numbers of Black school board representatives were present on school boards. In the same study, the researchers found a statistically significant relationship between Black school board representation and positive academic outcomes/indicators such as college enrollment and matriculation in gifted and talented courses at the primary and secondary level (Meier, 1984). Similarly, though not statistically significant, Meier et al (2005) concluded that increased presence of Black school board members resulted in the hiring of more Black teachers. Though the study of these relationships has not been conducted in charter schools (or arguably, any appointed school boards), if these findings are consistent among charter school boards, then it stands to reason that Black representation on charter school boards will also be reflective of fewer negative and more positive academic outcomes and indicators. It is with this theory in mind that this study endeavors to study whether or not public charter schools in New Orleans – the epicenter of the charter school movement – reflect the population of the city. Along the same lines, Meier and associates reason that Black population size has an impact on the ability to gain access to Black representation. If this is, in fact, true, then Blacks in New Orleans should be well represented as Blacks are the majority in general and voting age population in New Orleans. Moreover, it is one hypothesis of this study that Black representation will be higher among non-network charter schools than network charter schools. This hypothesis originates in the thought that network charter schools, charter schools run under a board that runs several charter schools, are run more like corporations, which will be further removed from the robust Black community of New Orleans. To the contrary, non-network charter schools, charter schools that are singly operated by a charter school board, will serve a community-oriented function.

IV. A New Legal Discourse: Why The Voting Rights Act is an Appropriate Measure of Legality for Charter Schools

Recall, from chapter 1 that the Voting Rights Act was intended to enable the political participation, through the electorate, of Black Americans. To that end, the most powerful sections of the Voting Rights Act, Section 2 (a national ban on vote dilution and infringement) and Section 5 (a jurisdiction specific requirement of preclearance) were the most successful methods of assuring Blacks the franchise. The provisions of the Voting Rights Act were even more successful at assuring Blacks the franchise the Fifteenth Amendment. Recall also from chapter 1 that the failures of the Fifteenth Amendment led to the enactment of the Voting Rights Act. With numerous challenges to the provisions of the Voting Rights Act, the Supreme Court had consistently upheld the Act as valid. In 2013, the Supreme Court, however, invalidated Section 4 of the Voting Rights Act (*Shelby County v. Holder*, 2013). Section 4 of the Voting Rights Act is the trigger statute for Section 5 of the Voting Rights Act, which requires preclearance of voting changes by the United States Department of Justice or the United States District Court for the District of Columbia (Voting Rights Act of 1965). In the *Shelby County* decision, the Supreme Court kept Section 2 intact; thus, Section 2 claims are still valid under the Voting Rights Act of 1965.

The Voting Rights Act Section 2 violation considered by this study (in chapter four) are is not novel but instead rests in the statutory language, legislative history and judicial precedent of the Voting Rights Act. The proposed violation is the disparate impact of the appointed charter school boards on minority voters, especially as appointed charter school boards replace the previously minority-heavy popularly elected school board. The proposed violation of the Voting

Rights Act focuses on the disparate impact that appointed school boards associated with some charter schools has on minority voters, especially as these appointed school boards may be displacing elected school board members. When these appointed school boards manifest themselves as predominately White and displace predominately minority, elected school boards, this violation of the Voting Rights Act finds support in the judicial precedent of Section 2 of the Voting Rights Act. In *Irby v. Virginia State Board of Elections*, the Fourth Circuit Court of Appeals held that Section 2 of the Voting Rights Act had not been violated when the state of Virginia opted for appointed school boards instead of elected school boards. The court did not, however, foreclose that Section 2 could ever apply to appointed school boards. In particular, the court postulated that Section 2 could apply to appointed school boards when appointed school boards had a disparate racial impact. Under *Alexander v. Sandoval* (2001), Congress must authorize private claims for disparate impact analysis. *Sandoval* creates no problems for Voting Rights Act litigation, though. Congress, through Section 2 of the Voting Rights Act, has explicitly authorized disparate impact analysis for Voting Rights Act claims (42 U.S.C. 1973(b)). This clears one hurdle established in *Sandoval*. Furthermore, the Supreme Court has already established that private parties may file suit for enforcement under the Voting Rights Act (*Thornburg v. Gingles*, 1986). This clears a second hurdle created by *Sandoval* to private suits asserting disparate impact. These combined facts result in a finding that *Sandoval* does not and cannot apply to Voting Rights Act claims, regardless to whether those claims are initiated under intentional discrimination suits or disparate impact suits.

Given the race-related issues (hypersegregation, possible diluted protection of minority rights and conflict with desegregation decrees) of charter schools, it is important to assess the impact of the implementation of charter schools on minority interests. In particular, the

combination of research indicating that Black parents may experience greater descriptive and substantive representation has never been analyzed in public charter school board settings. This research will determine the effect of charter schools on descriptive representation in public charter schools. Through a comparison of the adult population, or voting age population, and the proportion of Black members serving on individual and aggregated charter school boards, this research will investigate the legal consequences of implementing appointed charter school boards in place of popularly elected school boards. Chapter 3 of this study discusses the methods for conducting this comparison.

CHAPTER 3: RESEARCH METHODOLOGY, DATA COLLECTION AND DATA

I. Introduction

As long as there has been law, there has been legal research (Oluwole, 2007). This fact, when evaluated alongside the fact that the American legal system relies on *stare decisis*¹⁹, almost requires legal researchers to employ research strategies that combine investigations of law and history. Legal research is therefore an exercise based in document review. The legal researcher engages in a historical review of judicial and extrajudicial documents to suppose the answers to research questions while oftentimes raising new research questions along the way (Oluwole, 2007). Thus, the exact procedures used in the methodology of legal research are usually unknown until the legal research has been completed. There are, however, generally accepted modes of legal research. Chapter 3 of this study will examine how the traditional modes of legal research as well as quantitative methodology were used in conjunction to better understand the limitations of the Voting Rights Act of 1965 on the establishment, maintenance and expansion of charter schools in New Orleans, Louisiana.

Chapter three is divided into three parts. Part I is the introduction. Part II discusses the legal research methods taken in this study. Part II of this chapter of this dissertation discusses various sources utilized by the legal researcher. Part IIA covers primary sources. The primary sources for this study include statutes and case law. Part IIB discusses legal finding tools. Legal finding tools are the tools that legal researchers use to locate and verify data sources. The legal finding tool used in this study is primarily Shepard's. Part III discusses the general case

¹⁹ *Stare decisis* is the judicial maxim that restricts the holding of future cases by the holdings of previous cases decided by courts with higher authorities.

methodology associated with the case study's selection and evaluation processes. Part III of this chapter also discusses the quantitative nature of the methodology of this study. In Part IIIA, the researcher discusses the selection of the case for this study. In Part IIIB, the author discusses the methodology of the data collection. Part IIIC the author discloses the data that was collected and used in the statistical analyses. Finally, Part IV discusses the limitations of this study.

II. Legal Research Methodology

A. Primary Sources

Primary sources legal sources are those legal sources that create law. Primary sources include constitutions, statutes, regulations and case law. This subsection will describe each of these sources of law that were used in this study. The most basic of the primary sources are constitutions. Constitutions are “the most basic form of law” and “create the necessary governmental framework” for governance in a jurisdiction (Russo, 2006, p. 12). Because the research questions in this study do not raise a constitutional challenge, the Constitution of the United States of America (nor the constitution of any state in the United States of America) has not been used in this study.

Though constitutions are the most basic form of law and the most primary of all the primary legal sources, statutes are also among the most useful data sources for legal researchers. Statutes provide a critical source of data for legal researchers. Statutes can be located in a variety of sources (Russo, 2006). The United States Code is the official version of federal statutes. Other versions of federal statutes are, however, also useful. According to Russo (2006), annotated codes provide brief summaries or annotations of cases that have implicated the statute at hand. This is sometimes more useful to the legal researcher. In addition to statutory language, legal researchers may consult the legislative history of a statute. Legislative history helps construe the

meaning of a statute because the history reveals what the author of the bill and others had to say about the law before and during the bill's passage (Russo, 2006). Federal legislative histories can normally be found in the Congressional Record. Russo (2006) explains that the Congressional Record provides a nearly word-for-word report of daily Congressional proceedings. The Congressional Record typically does not include congressional hearings and/or committee reports, which can also be useful in understanding a statute.²⁰ The United States Code Congressional and Administrative News publishes some committee reports (Russo, 2006). Committee reports can also be obtained directly from the committee or subcommittee that conducted the proceedings or from libraries that are depositories for federal documents (Russo, 2006). The richness of data that is presented by statutes and their ancillary documents makes statutes and the ancillary documents extremely useful for legal researchers. In particular, this study used the Voting Rights Act of 1965 a federal statute protecting minority rights to political participation through voting (Voting Rights Act of 1965). This study also consulted the Report of the Committee on the Judiciary from the United States Senate (S. Rep. No. 97-417, 1982) in an effort to better understand the 1982 amendments to the Voting Rights Act. The 1982 amendments to the Voting Rights Act are of the utmost importance because the 1982 amendments were the most broad and sweeping reforms made to the Voting Rights Act of 1965. The amendments altered the judicial analysis of Voting Rights Act claims under several sections of the Act.

Another primary source of data for legal researchers is case law. Case law is a major focus of legal research in the United States. Judicial opinions are, therefore, the typical and logical starting point in the analysis of primary sources. This approach does not belittle the

²⁰ This study was able to obtain a copy of the Senate committee report accompanying the passage of the 1982 amendments to the Voting Rights Act of 1965 through a Google search of the citation for the committee report.

importance of other primary sources but merely acknowledges that other primary sources of law may not have clear meaning until they are interpreted by courts of law in particular circumstances. Case law comes from different courts with varying purposes. Trial court rulings are based in fact and are limited to determinations between the parties involved. Appellate court rulings concern the interpretation and application of legal precedent. Federal trial court opinions are placed in the Federal Supplement (F. Supp.) Series. Federal circuit court rulings are found in the Federal Reporter (F.) Series. If a circuit court opinion is not accepted into the Federal Reporter, it is published in the Federal Appendix (Fed.Appx). Opinions of the United States Supreme Court are found in a variety of places. The official location of these opinions is, however, the United States Reports (U.S.). This study used several legal cases to form a legal basis for the new legal argument pertaining to the legality of public charter schools in New Orleans, Louisiana.

B. Legal Finding Tools

The law is always and quickly evolving. Russo asserts that in 2006 legal databases held three million legal cases on file while adding an additional 50,000 cases annually. With such a large number of cases – all with their own individual fact patterns – the depth and breadth of legal documents on one subject matter can be seemingly limitless. Legal researchers must, therefore, become familiarized with research (or finding) tools that could assure reliance on the most relevant and latest laws and interpretations of the laws. Russo (2006) finds that legal researchers need to be most conversant with common means of accessing the most contemporary interpretation of the law: case digests, topic method, descriptive word searches and Shepard's.

Research (or finding) tools are the tools used by the researcher to locate appropriate sources for the research project at hand. Case digests provide a “comprehensive compilation, or

index, of the law around major points in a judicial opinion, briefly summarized in paragraph length headnotes or ‘squibs’, thereby granting a researcher relatively easy access to a particular question” (Russo, 2006, p. 20). The topic method allows the researcher to find resources, using an index, that match research interests with topics and authors writing in those research areas (Russo, 2006). Descriptive word searches assist legal researchers in locating material when the researcher is familiar with words or phrases in the related area of research (Russo, 2006). West publishes a multivolume encyclopedia known as “Words and Phrases” – a form of a descriptive word search – that aids in legal research. This finding tool alphabetically lists various words and phrases, followed by the “summaries of opinions that have interpreted, defined or construed them” (Russo, 2006, p. 21). Finally, Shepard’s allows the legal researcher to assess whether a case or statute is still good law (Oluwole, 2007). Shepard’s also allows the researcher to see how the case in question has been cited in the past (Russo, 2006). This process is known as “shepardizing.” Electronic databases can indicate when case law or statutes is good law, when the researcher should proceed with caution and when case law or a statute is no longer good law (Oluwole, 2007).

Primary and secondary sources are the essence of legal research, and finding tools are of great assistance to the legal researcher. The legal researcher, however, has great latitude in how to proceed with a given research project. As with any legal research, this study has employed the legal sources and tools mentioned above to locate documents relevant to the question under investigation. To determine relevance to the question under investigation, the documents have been sorted through and a detailed analysis of the documents given various legal principles has occurred. The legal research method has been part and parcel of the research methodology for this study. This study does, however, include a case study. Part II of this chapter will discuss the

procedures for case selection and the statistical analysis that accompanies case selection. Part III of this chapter will discuss the analysis of cases.

C. How the Researcher Applied Traditional Legal Research Methods to this Study

The author of this study relied on a combination of legal finding strategies to locate the case law pertinent to this study. In particular, the author started the legal research process with a well-known primary source that involved a Voting Rights Act of 1965 challenge to an appointed school board, the legal case *Mixon v. Ohio* (1999). The *Mixon* decision provided the researcher with a research tool akin to snowball sampling. In essence, the researcher could use a combination of the *Mixon* case and finding tools to locate other relevant case law. For instance, after locating *Mixon v. Ohio*, the researcher was able to locate *Irby v. State Board of Elections* (1989), which was cited in the *Mixon* case. The *Irby* case, in turn, listed all federal and some state law cases that had analyzed the application of Section 2 of the Voting Rights Act to appointed boards. These cases were carefully combed through to determine which of the cases considered appointed school boards. Only one other case was on point with the application of Section 2 of the Voting Rights Act to appointed school boards, *Searcy v. Williams* (1981). Using *Mixon* as a starting point and backtracking to *Searcy*, the researcher was able to locate all three federal circuit court opinions that considered the appointment of school board members under Section 2 of the Voting Rights Act.²¹

To find the history of more recent cases that addressed the application of the Voting Rights Act of 1965 to appointed school boards, the author utilized the Shepardize function in the

²¹ It is worth noting that every case that considers whether the appointment of school board members is within the purview of Section 2 of the Voting Rights Act has been appealed to a United States Circuit Court of Appeal. No cases of this sort, however, have been taken by the United States Supreme Court post-1982 Amendments to the Voting Rights Act. Although the United States Supreme Court did affirm the Fifth Circuit's *Searcy* opinion without comment, this affirmation occurred before the 1982 amendments to the Voting Rights Act of 1965 and no opinion accompanied the decision, which was settled on grounds other than Section 2 of the Voting Rights Act.

LexisNexis legal database. The Shepardize function revealed that all three federal circuit court opinions were still good law. The Shepardize function also allowed the researcher to determine which cases had relied on *Searcy*, *Irby* and/or *Mixon*. The Shepardize function revealed no other federal cases that had been decided with reliance on the three previously mentioned cases.

III. Quantitative Research Supplement

A. Site Selection

This study is a legal case study. The purpose of this study is to determine whether a viable case under Section 2 of the Voting Rights Act could be used to alter the creation, maintenance and expansion of charter school programs. To do this, this research will focus on whether Black parents in New Orleans public charter schools receive proportional or near-proportional representation on charter school boards of directors (as they do on the popularly elected Orleans Parish School Board). Because all legal cases must be decided on the merits of the circumstances presented to the court, the most plausible form of study is the case study method. In choosing the specific site for study, the researcher initially sought out the jurisdiction with the largest proportion of students in charter schools. This jurisdiction was New Orleans, Louisiana (Layton, 2013). According to a study compiled by the National Alliance for Public Charter Schools (2013b), New Orleans' market share for students enrolled in public charter schools was eighty-five percent for the 2012-2013 school year. This astounding number is up from seventy-six percent a year ago (National Alliance for Public Charter Schools, 2013b). Though Layton and the National Alliance for Public Charter Schools estimate a supermajority of New Orleans' public schools students to be enrolled in charter schools, these estimations are apparently conservative; Governor Bobby Jindal (2013) professed that ninety percent of New Orleans' public school students attend charter schools. Given the fact that New Orleans is the

most charter-friendly city in the United States, the selection of New Orleans as a case study gives the researcher the most impact of the study. Furthermore, other jurisdictions have sought to replicate the New Orleans model, so the selection of New Orleans as a case study has implications for other jurisdictions. The researcher found comparable additional sites by analyzing whether charter schools were authorized by an outside authorizer and whether charter schools were restricted to attendance zones of some kind, such as is the case in New Orleans. From those searches, the author found Little Rock and Wake County. This study originally endeavored to perform a comparison study using Little Rock, Arkansas and Wake County, North Carolina as additional study sites. Unfortunately, the researcher was unable to collect enough data in either of the additional sites to make informative conclusions. For instance, in Little Rock, only one of six charter school boards responded to information requests. In Wake County, no charter school boards responded to information requests. Because this dissertation is a chiefly a legal analysis that draws on social science data, it is important to note that legal cases are scrutinized on their individual merits. Analyzing Wake County and Little Rock charter schools would only be instructive on the merits of charter schools in those locations in addition to the merits of charter schools in New Orleans. There would be no ability to generalize to all charter schools without a broader sample that comes from a more widespread population. Thus, an analysis of New Orleans charter schools' issues with the Voting Rights Act (if any exist) would remain instructive on a case-by-case analysis of New Orleans charter schools.²²

²² Some may take issue with the fact that New Orleans is unique in its approach to charter schools. The government of Louisiana has been very explicit in stating that the city is pursuing a paradigm in which the entire school district would be comprised of charter schools. Because of this attempt at forced choice, parents in New Orleans are most vulnerable to potential Voting Rights Act violations. Whereas both Little Rock and Wake County have choice as an option, parents may avoid potential political voice dilution by choosing traditional public schools. Parents in New Orleans are not similarly safe from these political harms given the city's trajectory to a completely chartered district.

B. Data Collection Procedures

To conduct the appropriate statistical tests for this research project, the researcher must collect four different sets of data for comparison. The researcher collected data on the voting age population of New Orleans, Louisiana. Voting age population demographics are particularly useful to this study since the public charter schools in New Orleans draw from a citywide base of students; there are no districted school boundaries, per se. The researcher also collected data on the demographic makeup of public charter schools, the Orleans Parish school board as well as the appointed charter school boards that operate schools in Orleans Parish.

i. School Board Composition Data

Data was collected through a very simple email questionnaire that inquired, individually, into the racial composition of every charter school board in the city of New Orleans (See Appendix C). These board presidents were contacted three times via email. If school board presidents did not respond within a week of the third email, the researcher placed a follow-up phone call to the school to inquire about the racial makeup of the board. One charter school board reported invalid data or data that was otherwise ineligible for analysis given the structure of this study. Another school board did not have accurate contact information and could, therefore, not be included in this study. In all, this data represents just less than a third of all charter school boards in New Orleans, Louisiana. It should be noted that all charter school boards in New Orleans, Louisiana are appointed although some appointed charter school boards are under the management of the popularly elected Orleans Parish School Board (OPSB). Charter school boards under the management of OPSB have not been included in this study as those charter school boards still afford electoral coverage through school board elections. For instance, if residents of Orleans Parish are unhappy with charter-related activities of OPSB or the

charters managed by OPSB, they may unseat their school board representative during the next electoral cycle (ideally replacing the school board member with a member who aligns better with the will of the electorate). Tables including the information gathered through the communications with charter school board presidents are available in Chapter 5.

ii. Demographics of Popularly Elected School Board

Data on the demographics of the popularly elected school board in New Orleans was collected through document review. Through the analysis of appropriate newspaper articles detailing the politics of the school board elections in Orleans Parish, the researcher was able to ascertain the demographic composition of the popularly elected school board in New Orleans, Louisiana. Tables in Chapter 5 include the information collected on the popularly elected school board.

iii. Voting Age Population Data²³

Data on the voting age population of New Orleans was secured through the United States Census Bureau. The data was based on the most recent projections for adult populations at the time of the study. The most recent projections at the time of the study were for the years 2007-2011.²⁴ Chapter 5 discloses the data collected pertaining to the adult population of the city of New Orleans.

iv. School Population Data

Data for school population composition was collected through the National Center for Education Statistics. This data was not uniformly available for all schools and was only available

²³ Citywide voting age populations are appropriate for statistical analysis because charter schools draw their students from across the city of New Orleans as opposed to particular neighborhoods in the city. For instance, students from one neighborhood are not confined to select schools within that neighborhood. Those students may choose any charter school within the city limits. As such, determining the composition of the voting age population for each neighborhood is unnecessary in this study. It is satisfactory to note the composition of the voting age population for the entire city.

²⁴ The 2008-2012 projections were later added, but the statistical analysis of this data occurred prior to the addition of the 2008-2012 voting age population projections.

as recent as the 2010-2011 school year. Chapter 5 describes the data collected through the National Center for Education Statistics.

C. Statistical Analyses

To test whether there was a relationship between 1) appointed charter school boards and the popularly elected school board, 2) appointed charter school boards and the voting age population and 3) appointed charter school boards and the student population, the researcher used Fisher's Exact Test of Independence. The researcher used the Fisher Exact Test because the sample sizes are small, particularly in the case of the popularly elected school board and the appointed charter school boards. When the sample size is small, the Fisher Exact Test will produce the exact p-value for a given contingency table. Even when the sample size is large, the Fisher Exact Test is still useful in determining an exact p-value. The contingency tables for each test run are listed in Appendix B.

The Fisher Exact Tests were run using Minitab statistical analysis software. Minitab can only produce two-sided Fisher Exact Tests (Utts and Heckard, 2011). The solution to finding the one-tailed p-value from a two-tailed p-value using the Fisher Exact Test is simple. To obtain the one-tailed p-value if given the two-tailed p-value, merely divide the two-tailed p-value in half (Agresti, 1992). Those p-values that are over .05 are not statistically significant while those p-values that are under .05 are statistically significant. If the statistical tests performed are statistically significant, the researcher can conclude that there is a relationship between the race and ethnicity category and membership on appointed charter school boards.

IV. Limitations of the Study

Despite the relevance of the findings of this study, the results must be taken in context. The greatest limitation of this study is related to the sample of appointed charter school boards.

First, the sample of appointed charter school boards is not random. Some bias may exist in the self-selection of inclusion in the study. For example, some schools may have opted out of the study because they are woefully underinclusive when accounting for Black membership on appointed charter school boards. Other appointed charter school boards may have opted out of the study because they see themselves as reflective of the community interest and do not see themselves (or their schools) as benefiting from such a study.

Another limitation connected to the selection of appointed charter school boards for this study are the small sample sizes. Though this study endeavored to be as inclusive as possible, seeking comprehensive data from all appointed charter school boards in three unique cities, the researcher was only able to ascertain data from roughly one-third of appointed charter school boards in one city, one appointed charter school board in another city and no appointed charter school boards in the remaining city. The lack of inclusiveness affected the power of the statistical tests. Using such a small sample size results in an increased opportunity for Type II errors (Coladarci et al, 2011). According to Coladarci et al (2011) Type II errors occur when the researcher fails to reject a false null hypothesis. The potential for a Type II error is particularly present in the analysis of Black membership on the popularly elected school board and the appointed charter school boards. A larger, potentially longitudinal sample size is required to remedy the potential for a Type II error.

Another limitation of this study is that there is no way to triangulate the data received from charter school boards. The study, while as comprehensive as possible, could not assure that charter school board presidents accurately reflected the racial composition of their school boards. In some cases, charter school board presidents asked for more time to poll their boards. In other cases, charter school board presidents responded without acknowledgement of how the

respective board presidents collected the data. In the one case that the board president made assumptions about the board's racial composition, this data was excluded from the study. These are, however, problems that self-reported data present. There is no way to verify that each individual response is valid given the researcher's prescribed racial identification codes.

Finally, another limitation of the study is that the legal question hinges on a potential circuit split. The Fifth Circuit Court of Appeals, based in New Orleans, has already banned the use of Section 2 of the Voting Rights Act of 1965 on appointed school boards. Because of the potential circuit split, the Supreme Court of the United States might be willing to hear a case that applied Section 2 of the Voting Rights Act to an appointed school board. The Supreme Court routinely hears cases with the purpose of resolving a circuit split.

CHAPTER 4: LEGAL FINDINGS

I. Introduction

This chapter focuses on the case law pertaining to the application of Section 2 of the Voting Rights Act to appointed school boards. Section II of this chapter will detail the very few cases that have directly addressed the legality of appointed school boards under Section 2 of the Voting Rights Act of 1965. In particular, Section II of this chapter will detail the fact patterns and the eventual holdings of the three court cases featuring Section 2 of the Voting Rights Act as a defense to the selection processes of an appointed school board that have appeared before the United States courts of appeal. Section IIA discusses the precedent from the Fifth Circuit Court of Appeals. Section IIB analyzes the judicial precedent from the Fourth Circuit Court of Appeals. Section IIC evaluates the case law from the Sixth Circuit Court of Appeals. Finally Section IID of this chapter summarizes the existing applicable case law from the various courts of appeal.

II. Legal Findings

Few courts have addressed the appointive selection of school board members and Section 2 of the Voting Rights Act. The Fourth, Fifth and Sixth Circuit Courts of Appeals have provided generally similar analyses of whether Section 2 of the Voting Rights Act applies to the use of appointed school boards as opposed to elected school boards. After the most recent case, *Mixon v. Ohio*, in 1999, whether Section 2 of the Voting Rights Act applies to appointed school boards was only partially resolved, however. Most courts that has addressed the applicability of Section 2 of the Voting Rights Act to appointed school boards held that Section 2 did not cover appointed school boards. What was left unresolved, however, was whether Section 2 of the Voting Rights Act of 1965 covered appointed school boards with a disparate racial impact.

A. Fifth Circuit Court of Appeals

In *Searcy v. Williams* (1981), the Fifth Circuit Court of Appeals became the first appellate court to address the legality of an appointed school board designed to discriminate against Black citizens. In *Searcy*, the failing financial status of the all-White R. E. Lee Institute placed the education of White students in jeopardy in Thomaston, Georgia. As a result, the Georgia General Assembly passed legislation creating an independent, public school system for Thomaston, Georgia from the existing R. E. Lee Institute. The authorizing statute established that the R. E. Lee Institute's board of trustees would serve as the Thomaston Board of Education. Additionally, board of education members would continue to be "elected"²⁵ in the same manner in which they were elected prior to the transition to a public schooling system. Under the previous system, each year one member of the board of education would retire. The board of education, including the retiring member, would elect a new member to the board of education. The authorizing statute was approved by referendum in 1918 and reauthorized several times (though the only method of entry onto to the board of education remained a self-perpetuating form of selection). During desegregation, White traditions were adopted in favor of Black traditions. Until the time of the lawsuit, no Black had ever served on the Thomaston Board of Education. After the lawsuit was filed, the Thomaston Board of Education saw its first Black man selected to serve on the board of education in the board's history. The board of education, after the appointment, adopted an anti-discrimination and affirmative action policy as related to filling vacant seats on the Thomaston Board of Education. Despite its ills, the public voted overwhelmingly to keep the system in Thomaston as it existed. Despite the overwhelming public support of the Thomaston Board of Education, the Fifth Circuit found the operation of the board

²⁵ The federal courts found that this system was not, in fact, an election but rather an appointment process.

to be unconstitutional under the Fourteenth Amendment. The circuit court did not reach the plaintiffs' Voting Rights Act claims although the circuit court did note the district court's appropriate decision that Section 2 of the Voting Rights Act does not apply to appointive selection schemes.

The Fifth Circuit, in *Searcy*, never reached the question of whether Section 2 of the Voting Rights Act applied to appointive schemes. Instead, the court resolved the case's issues on Fourteenth Amendment grounds before stating that the district court held appropriately that Section 2 of the Voting Rights Act applies only to elective and not appointive selection schemes. In holding that the school board selection process violated the Fourteenth Amendment rights of the plaintiffs, the court focused on the discriminatory origins of the legislation and the continued discriminatory effects of the legislation. This holding vindicated the plaintiffs' claims and dispatched the Voting Rights Act issues.²⁶ Having resolved the primary issue (the discriminatory nature of the school board) in the case, the court found no reason to consider the Voting Rights Act claim.

B. Fourth Circuit Court of Appeals

Irby v. Virginia State Board of Elections (1989) was the Fourth Circuit Court of Appeals' first request to apply Section 2 of the Voting Rights Act to an appointive system of selecting school board members. In *Irby*, the Fourth Circuit refused to answer whether Section 2 applied to appointed offices but reserved opinion on that question for a later case. The plaintiffs in *Irby* alleged that the appointive system of selecting school board members was conceived and maintained for a discriminatory purpose. The plaintiffs further alleged that this system was a violation of Section 2 of the Voting Rights Act. The district court, in *Irby*, found that the appointment of local school boards in Virginia dated back to 1870. The district court, in *Irby*,

²⁶ The United States Supreme Court affirmed the Fifth Circuit Court of Appeals' decision in *Searcy* without opinion.

also found that there was no racially discriminatory intent in requiring appointed school boards. The district court also found “conflicting evidence” on whether the modifications and alterations – up to the turn of the century – to the appointive system were motivated by racially discriminatory intentions. At the turn of the century, the district court found evidence that the appointive scheme was maintained with the purpose of discriminating against potential Black school board members. Over the next thirty years, the state legislature made several changes to the appointive system. The district court found that no discriminatory intent existed in maintaining the appointive system over an elective system. The state of Virginia did allow Arlington County to begin electing its school board in 1947, but this authorization to elect the school board in Arlington County was revoked after *Brown v. Board of Education* in an attempt to “impede Arlington’s ability to comply with court-ordered desegregation”. Finally, there were several attempts to enact an elective scheme for selecting school board members in Virginia, but all of those attempts failed. The district court found that there was no discriminatory intent in keeping the appointive scheme.²⁷ The Fourth Circuit Court of Appeals found no error in the judgment of the district court and concluded that Virginia’s appointive scheme for choosing school board members did not have a discriminatory purpose.

Just as the Fourth Circuit found that the establishment and maintenance of the appointive scheme lacked a discriminatory purpose, the court found that the scheme did not have a discriminatory impact. According to the district court, the percentage of Blacks on schools boards in Virginia (under the appointive scheme) was not statistically different than the percentage of Blacks in the voting age population. In fact, the actual percentage of Blacks on

²⁷ The court found several nonracist reasons why the Virginia state legislature found appointive school boards favorable as opposed to appointed school boards. These reasons included providing diversity that might not be achieved through election, avoiding single-issue campaigns that are frequent in school board elections and protecting school boards from direct political pressures among many others.

appointed school boards in Virginia exactly mirrored the percentage of Blacks in the voting age population. Similar statistics were true of the individual cities and counties at issue in *Irby*. Of the five jurisdictions in *Irby*, only Buckingham and Halifax counties saw statistically significant differences in the percentage of Blacks in the voting age populations and the percentage of Blacks on the school board. Other things aside from racial discrimination could explain the statistical differences in Buckingham and Halifax counties. Thus, the Fourth Circuit Court of Appeals agreed with the district court in determining that the appointive system of choosing school board members did not have a discriminatory impact.

The Fourth Circuit Court of Appeals deliberately left open the question of the applicability of Section 2 of the Voting Rights Act to the use of appointive school boards. The court did intimate that Section 2 may be inapplicable to appointed systems of selection; however, the court also refused to take the step of holding that Section 2 did not apply to appointive systems for choosing officials. The court made its refusal in the face of precedent from other federal courts (district and circuit courts) and arguments that all residents were denied an opportunity to vote. That other federal courts had held Section 2 inapplicable and that the appointive selection structure denied all voters an opportunity for political engagement was not sufficient evidence to convince the Fourth Circuit to foreclose Section 2 of the Voting Rights Act as a viable claim against the use of appointive boards. The Fourth Circuit dispatched *Irby* by applying a Section 2 analysis and finding that that section of the Voting Rights Act is not a viable claim in this particular case but perhaps could be in another case that is similar but not identical.

In finding that Section 2 of the Voting Rights Act, even if it did apply to appointive systems of choosing officials, would not be triggered by the facts in *Irby*, the court examined

whether the appointive system produced racially discriminatory effects. Though Black representation was not statistically proportional in the jurisdictions challenged, the court held that mere statistical incongruence was insufficient evidence to lodge a Section 2 claim. In three of the five challenged jurisdictions in *Irby*, adding one additional Black member to the respective Boards would either completely or nearly completely erase any statistical difference in the percentage of Blacks in the voting age population and the percentage of Blacks on the School Board. In one jurisdiction with an abnormally large difference in Black representatives and the Black population, every Black person that requested to serve on the school board was selected to serve on the school board. Finally, another jurisdiction had had Blacks nominated for school board positions, but in at least one instance, a Black nominee had willfully withdrawn before appointment. The statistical difference between the Black population and the proportion of Blacks serving on the school boards could, in essence, be attributed to a lack of Black citizens seeking school board seats – as opposed to a discriminatory racial effect as required to implicate Section 2 of the Voting Rights Act.

The Fourth Circuit Court of Appeals dismissed the plaintiffs' remaining challenges rather summarily. The court did not allow the plaintiffs to challenge the racial composition of the appointing officers. Under *Irby*, such challenges must be made as direct challenges against those bodies under the Voting Rights Act. Furthermore, the court ruled that the mere fact that White officials made appointments would not be enough to prove racial discrimination. The Fourth Circuit Court of Appeals kept open the door to allege a Section 2 violation although the appeals court dismissed the Section 2 claims of the plaintiffs in *Irby*.

C. Sixth Circuit Court of Appeals

The Sixth Circuit Court of Appeals also confronted the question of how Section 2 of the Voting Rights Act applied to the use of appointed school boards in *Mixon v. Ohio* (1999). In *Mixon*, plaintiffs, voters and taxpayers of the Cleveland School District, sought to have Ohio Substitute House Bill 269 declared unconstitutional. H.B. 269 altered the composition and the number of members on the Cleveland School Board by allowing the Mayor of Cleveland to appoint the new school board for the Cleveland School District, a district consisting primarily of portions of Cleveland with the addition of areas from four adjacent jurisdictions. Prior to the switch to an appointed school board, school district voters selected school board members in a public election. *Mixon* brought into question whether the transition from an elective method to an appointive method of choosing the school board in Cleveland abridged or denied minorities' right to vote in violation of Section 2 of the Voting Rights Act. The Sixth Circuit answered this question with a resounding "no".

The primary effect of H.B. 269 was to convert an elected school board into an appointed school board. Under H.B. 269, the school board would no longer be chosen in a popular election; instead, the mayor would select the school board from a list of nominees presented by a nominating committee. H.B. 269 provided specific limitations on who could serve on the nomination committee as well as who could be chosen as a nominee. For instance, the nominating committee was required to consist of

- (i) Three parents or guardians of children attending the schools in the municipal
- (ii) Three persons appointed by the mayor (i.e., the Mayor of Cleveland);
- (iii) One person appointed by the president of the legislative body of the municipal corporation containing the greatest portion of the municipal school district's territory (i.e., Cleveland)

- (iv) One teacher appointed by the collective bargaining representative of the school district's teachers;
- (v) One principal appointed through a vote, conducted by the State Superintendent, of the school district's principal; and
- (vi) One representative of the business community appointed by an organized collective business entity selected by the mayor; and
- (vii) One president of a public or private institution of higher education located within the municipal school district appointed by the State Superintendent.

Also, the slate of nominees from which the mayor would chose the school board was required to fulfill certain requirements. No nominee is allowed to be an elected public official and all nominees must be residents of the municipal school district. At least one member of the selected school board must reside in the municipal school district and not reside in the municipal corporation containing the greatest portion of the districts area. Four of nine selected board members must have shown, prior to appointment, expertise in a field related to the operation of schools. Any president of a state university of college would serve as an ex officio member of the board. Finally, the board, after the first thirty days, could replace any vacancies. Until that time, the mayor reserved the right to fill vacancies on the board. The new system of selecting school board members in Cleveland, as enacted in H.B. 269, was without doubt an appointive system as opposed to an elective system. The Sixth Circuit Court of Appeals, nevertheless, held that the transition to an appointive from an elective school board system did not trigger Section 2 of the Voting Rights Act.

The protections of Section 2 of the Voting Rights Act do not extend to all forms of selection processes. In *Mixon*, the Sixth Circuit Court of Appeal held that Section 2 of the Voting Rights Act only applies to elective, not appointive systems. In reaching this decision, the Sixth Circuit relied on precedent from other circuits. The Sixth Circuit relied heavily on *Searcy* and *Irby*, the other cases where plaintiffs sought to apply Section 2 of the Voting Rights Act to appointed school boards. In *Searcy*, the Fifth Circuit Court of Appeals held that no Section 2

claim existed against appointed school boards; Section 2 protections only extended to elective rather than appointive positions. In *Irby*, the Fourth Circuit Court of Appeals did not decide the question of the application of Section 2 of the Voting Rights Act to appointed positions though the court experienced some pessimism regarding such application of Section 2. The court further found that addressing the issue of the Section's applicability was unnecessary because the plaintiffs could not establish a claim even if Section 2 did apply. The Fourth Circuit Court of Appeals questioned the Act's applicability while leaving open the question of whether the Act could ever apply to appointed positions. Although *Mixon* was only the third instance in which a circuit court of appeal addressed the application of Section 2 of the Voting Rights Act to appointed school boards, the Sixth Circuit borrowed from analogous precedent in non-school board cases to explain its stance. The court, in *Mixon*, found that all federal courts addressing the issue of the applicability of § 2 to appointed offices found that Section 2 of the Voting Rights Act did not apply.

In addition to relying on its sister circuits, the Sixth Circuit interpreted the language of the Act itself. According to the plain language of the Act, the Voting Rights Act only covers the election and nomination of representatives, not appointed officials. The *Mixon* court also found that the legislative intent of the Voting Rights Act did not reflect a desire to hold appointed systems to the same account as elective systems. In reaching this conclusion, the Sixth Circuit dismissed relevant legislative history regarding the use of appointive systems as “cursory language”.²⁸ The court also feared that allowing challenges to appointive systems of selection could result in retroactive challenges to governmental choices of how to select officials. The court found this too far to extend the reach of Section 2 of the Voting Rights Act. Having

²⁸ This language is considered cursory although the legislative history of the 1982 amendments to the Voting Rights Act specifically mention the conversion of elected posts to appointed posts.

reasoned similar to the Fifth Circuit in *Searcy*, the Sixth Circuit looked to the final disposition of the *Searcy* case. The Sixth Circuit made note of the Supreme Court's affirmation, without comment, in *Searcy*. The language of the Voting Rights Act, according to the *Mixon* court, mandated a judicial interpretation foregoing the application of Section 2 of the Act to appointed school boards.

D. School Board Appointments and the Voting Rights Act: Implications For Charter Schools

Federal courts, in general, have held that the selection processes for appointed school boards do not fall within the scope of Section 2 of the Voting Rights Act (*Searcy v. Williams*, 1981; *Mixon v. Ohio*, 1999). The federal courts have, however, only tangentially touched on whether Section 2 is triggered when the appointed school board has a disparate racial impact (*Searcy v. Williams*, 1981; *Irby v. Virginia State Board of Elections*, 1989)²⁹. In *Mixon*, the plaintiffs did not allege a disparate racial impact, and the Sixth Circuit found that Section 2 of the Voting Rights Act was inapplicable. In *Searcy*, the Fifth Circuit, despite an authorizing statute with a racially discriminatory motive and continued racial impact, found that Section 2 did not apply to appointive selection schemes. Finally, the Fourth Circuit Court of Appeals did not answer the question of whether Section 2 applies to appointive selection schemes. It is important to note that the Fourth Circuit, in *Irby*, did proceed with an analysis based in racial impact analysis before concluding that there was no disparate racial impact. Because there is no consensus at the circuit court level, a claim that an appointive school board that has a disparate racial impact may trigger a Section 2 violation may have some merit (despite the Fourth Circuit's warning in dictum in *Irby*).

²⁹ *Irby* occurred after the Supreme Court's affirmation in *Searcy*; thus, the Fourth Circuit Court of Appeals must have found that there were instances, outside of *Irby and Searcy*, that might trigger § 2 of the Voting Rights Act.

The circumstances of New Orleans' public charter schools is more readily akin to the situation in *Irby* than it is akin to the fact patterns in *Searcy* and/or *Mixon*. New Orleans' conversion to charter schools, which triggers the replacement of the popularly elected school board with appointed charter school boards is easily distinguishable from *Searcy* because there is little to no evidence that charter school boards are overtly discriminating against Black membership on appointed charter school boards. Likewise, the decision in *Searcy* arrived prior to the 1982 amendments to the Voting Rights Act, in which Congress specifically mentioned the transition from elected posts to appointed posts in the Senate Committee Report (in relation to Section 5 but not Section 2). The mention of changing posts from elected to appointed is important because it establishes that Congress was aware of a problem affecting the initial versions of the Voting Rights Act and its subsequent amendments. The situation in New Orleans is also distinguishable from the facts in *Mixon*. In *Mixon*, the plaintiffs did not allege a disparate impact on minority voters in the Cleveland Metropolitan Area. Of course, the statute in *Mixon* was not implemented before it provoked a challenge. These facts alone differentiate New Orleans from a *Mixon* analysis. The crux of any argument in New Orleans is not merely a transfer of posts from elected to appointed. The crucible of the New Orleans scenario lies in whether the city's newly appointed charter school boards reject the participation of Black board members, a sharp contrast to the popularly elected school boards in the city that marginally overrepresent Black voters on the popularly elected school board.

The court case that most resembles the fact pattern of New Orleans' appointed charter school boards is *Irby*. The facts in *Irby* account for the disparate impact analysis that is part and parcel of the scenario in New Orleans, Louisiana. In particular, the facts in New Orleans and the facts in *Irby* attempt to resolve whether appointed school boards are representative of the voting

age population of a jurisdiction. Unlike the facts in *Searcy*, there is no allegation that Blacks are unable – by legislative mandate – to pursue membership on the appointed school board. Likewise, there is an allegation that the use of appointed school boards, while facially neutral, is resulting in discriminatory application. These facts are not contemplated in *Mixon*. It is, therefore, only reasonable to apply the rule of law as established in *Irby* to the New Orleans fact patterns. Of course, the *Irby* court is dubious of the relationship between Section 2 and appointed boards. This doubtfulness is aligned well with the language in the statutory history (See page 6 of the Senate Report). Congress does not specifically ban the use of appointed boards via Section 2 of the Voting Rights Act - even when those boards have a disparate impact on minority voters. Section 5 may, on the other hand, serve as a buffer to appointed school boards. Congress, however, could not have meant for the nonsensical result of the courts' reading of Section 2 of the Voting Rights Act in relation to appointed boards: jurisdictions may not create a voting regime that impacts minority communities in a disparate manner, but governments may completely end-run the Voting Rights Act by denying majority-minority voters the franchise.

In their limited role in the selection of charter school board members, elections have proven to produce roughly proportional representation of Black Americans on a statewide basis. The only state that requires elections of charter school board members is Minnesota (see Appendix A). In Minnesota, charter school boards are predominately comprised of Whites. This fact is on its face misleading; it should not be shocking. Minnesota, as a state, is comprised of a roughly eight-six percent White population (United States Census Bureau, 2012). According to the United States Census Bureau (2012), Blacks in Minnesota are only five and a half percent of the population (and presumptively a smaller share of the voting age population). In Minnesota, Black membership on charter school boards is six percent and White membership is eight-five

percent (Stone, Zhao and Cureton, 2012). Therefore, it is accurate to say that charter school board elections in Minnesota have resulted in roughly proportional representation on elected charter school boards. Indeed, school-based elections have resulted in similar electoral responses that ward-based elections have been found to engender. Blacks are slightly overrepresented in these elections. School-based elections may, however, have other negative side effects, such as closing off taxpayer access to the election of school board members for schools supported by tax dollars.

Therefore, *Irby*-like legal analyses, which relies upon the potential disparate racial impact of appointed school boards may implicate the implementation and/or expansion of charter schools, especially with the understanding that Blacks are overrepresented in charter school board elections and may be underrepresented in charter school board appointments. The majority of states that have enacted charter school legislation do not require charter schools to elect their boards of education, which would mute most allegations of disparate impact. In fact, while several states offer an option between appointment and election (See Appendix A), remember that only Minnesota explicitly requires that charter school boards be elected (See Appendix A). As states implement charter legislation unwittingly favoring appointed charter school boards in place of elected charter school boards, states may leave themselves – or their charter schools – vulnerable to Section 2 Voting Rights Act claims. This is especially the case if predominately White appointed charter school boards replace predominately minority popularly elected school boards.³⁰ The implementation and expansion of charter schools combined with the preference for

³⁰ This is not the case when appointed charter school boards are racially diverse in that they are reflective of the voting age population. It should be noted that there are conditions under which appointed school boards are more racially diverse than elected school boards. Berkman and Plutzer (2010) found this to be the case especially when those appointing the school board are interested in appointing a diverse board. Berkman and Plutzer additionally reason that there are political dynamics that deal with appeasing political bases that result in more diverse appointments to appointed school boards. While this is not the case in New Orleans public charter schools (see

appointed charter school boards (which in New Orleans are not racially diverse as defined by mirroring or closely resembling the city's population numbers) may be problematic for Section 2 of the Voting Rights Act if courts addressed Section 2 of the Voting Rights Act under an *Irby*-like analysis. *Irby*, which cites *Thornburg*, could lead to courts finding that disparate impact analysis applies to appointed school boards. While no case is directly on point with this argument, the logical conclusion from *Irby* and *Thornburg* taken together is that disparate impact analysis applies generally to Voting Rights Act analysis, inclusive of appointed school boards. *Irby* left the door open to a violation of the Voting Rights Act through the disproportionate appointment of appointed school board members. *Thornburg*, which preceded *Irby*, allows for the use of disparate impact analysis in cases alleging the violation of the Voting Rights Act: this line of reasoning from the Supreme Court arose from the 1982 amendments to the Voting Rights Act, which unequivocally allows from the use of disparate impact analysis in cases alleging the Voting Rights Act had been violated. In other words, *if Irby* applies and is allowed to bring appointed school boards into the purview of the Voting Rights Act, then disparate impact analysis must apply to appointed schools boards since the statutory language, legislative history and case law dictate such involvement.

Having resolved that an *Irby* disparate impact analysis could be appropriate to investigate the use of appointed charter school boards in New Orleans, chapter five of this dissertation will statistically analyze the membership on New Orleans public charter school boards to ascertain the racial makeup of the charter school boards. Whether Black Americans receive proportional representation on charter school boards in New Orleans will be instructional in developing any legal argument for or against charter school boards in the city. There is legal precedent that may

chapter 5), it could readily be the case if those appointing public charter school boards were more interested in diversity.

support an attack on appointed charter school boards pending a court adopts the Fourth Circuit's reasoning in *Irby* that allows for some facts under which a Section 2 of the Voting Rights Act challenge can be made, but that legal precedent is of no use to potential plaintiffs if charter school boards in New Orleans do not have a disparate impact on minority voters.

CHAPTER 5: SOCIAL SCIENCE FINDINGS

I. Introduction

Chapter 5 of this dissertation discusses the social science findings of this study. In understanding whether the Voting Rights Act of 1965 can serve as a buffer between the establishment of charter schools and the rights of minority community members to resist the establishment of these schools, it is important to understand how statistics may support claims of disparate impact on minority communities. Part II of this chapter discusses the collected data for this study. In particular, part II is subdivided into four parts, each representing a different dataset for this study. Part III of this chapter considers statistical evidence from one locale with a version of forced choice, New Orleans, Louisiana. This statistical data provide a fact pattern ripe to support the application of the *Irby* reasoning towards a Section 2 violation of the Voting Rights Act. Part III is subdivided into sections that address the likelihood of a citywide lawsuit against appointed charter school boards, evidence that supports litigation for disaggregated appointed charter school boards (network vs. non-network charter school boards)³¹, evidence that some individual appointed charter school boards, themselves, are violative of Section 2 of the Voting Rights Act, the differences between the school districts in *Irby* and the school district in New Orleans and finally, a discussion about data that was not statistically significant.

³¹ For purposes of this study, network charter school boards are appointed charter school boards that manage more than one charter school. Non-network charter school boards are appointed charter school boards that manage only one charter school.

II. Data

A. Black Representation on Reported Charter School Boards in New Orleans

The data collected pertaining to the Black representation on reported charter school boards is summarized below (Table 5-1). The data reported represents nine charter school boards of the twenty-nine available charter school boards that are not governed by the Orleans Parish School Board. Table 5-1 shows that the Black representation on appointed charter school boards ranges from a few as one Black representative to as many as nearly all representatives being Black. In the charter schools in this study, as few as fourteen percent of appointed charter school board members were Black on some charter school boards while some other appointed charter school boards had upward of eighty-five percent Black board membership. The majority of appointed charter school boards are concentrated around thirty percent to just over one half Black board membership.

Table 5-1: Black Representation on Network and Non-Network Appointed Charter School Boards

Board	Network v. Non-Network	Black Representatives	Total Representatives
International School of Louisiana	Non-Network	3 (30.0%)	10
Educators for Quality Alternatives	Non-Network	1 (14.3%)	7
Lagniappe Academies of New Orleans	Non-Network	2 (28.6%)	7
Future Is Now Schools: New Orleans	Non-Network	4 (57.1%)	7
Morris Jeff Community Schools	Non-Network	5 (55.6%)	9

Algiers Charter Schools Association	Network	6 (85.7%)	7
Firstline Schools, Inc.	Network	7 (53.8%)	13
New Orleans College Preparatory Academy	Network	3 (30.0%)	10
ReNew Schools	Network	2 (15.4%)	13

* Data collected through survey of all public charter schools in New Orleans, Louisiana.

B. Black Representation on Popularly Elected School Board in New Orleans

The data on Black representation on the popularly elected school board reveals that Black school board members are in the majority on the popularly elected school board. When further calculated, Blacks school board members hold a four to three majority over White school board members (Dreilinger, 2013). Black representatives comprise just over fifty-seven percent of the popularly elected school board. Comparatively, three of the appointed charter school boards in this study are relatively or exactly proportional to the popularly-elected school board. One appointed charter school board is greater in representation than is the popularly elected school board. Finally, five of the appointed charter school boards in the study are less representative than the popularly elected school board. Essentially, there is no clear pattern to describe the black composition of appointed charter school boards in New Orleans; the Black composition of charter school boards is diverse in this study.

C. Black Voting Age Population in New Orleans

In the predominately Black city of New Orleans, Louisiana, the voting age population is similarly predominately Black. In New Orleans, Black persons are a total of 129,345 citizens over the age of eighteen of a grand total of 232,145 citizens over the age of eighteen. This represents a percentage just under fifty-six percent of the total population. Comparing data from the voting age population to the composition of the popularly-elected school board in New

Orleans, Louisiana reveals that Black persons in New Orleans are overrepresented on the popularly elected school board by roughly two percent as relative to their representation in the voting age population.

D. Black Students Enrolled in Reported Charter Schools in New Orleans

Table 5-2 reveals the Black student representation in charter schools that reported for this study. The table includes data on twenty-five charter schools. This total represents roughly forty percent of the 63 total charter schools – that are not managed by the popularly elected OPSB – in New Orleans, Louisiana. In essence, table 5-2 illustrates that the majority of enrolled students in charter schools in New Orleans are Black. There are two exceptions in International School and Morris Jeff Community School where Black students are under-enrolled. In all, roughly nine out of ten students enrolled in New Orleans charter schools are Black. As discussed in chapter 2, Meier and colleagues have found that better school board representation of and for minority students, results in better academic indicators for students. It is then important to decipher whether the popularly elected school board results in greater representation or and for minority students than do appointed charter school boards.

Table 5-2: Black Membership in Reported Charter Schools

School Name	Board Name	Network v. Non-Network	Total Black Students	Total Students
International School of Louisiana	International School of Louisiana	Non-Network	225 (42.9%)	525
William J. Fischer Elementary School	Algiers Charter School Association	Network	498 (98.4%)	506
McDonogh #32 Elementary School	Algiers Charter School Association	Network	551 (98.9%)	557
Martin Behrman Elementary	Algiers Charter School	Network	610 (97.1%)	628

School	Association			
LB Landry – OP Walker College and Career Preparatory High School	Algiers Charter School Association	Network	N/R*	N/R*
Dwight D. Eisenhower Elementary School	Algiers Charter School Association	Network	531 (89.2%)	595
Algiers Technology Academy	Algiers Charter School Association	Network	307 (93.0%)	330
The NET Charter School	Educators for Quality Alternatives	Non-Network	N/R*	N/R*
S.J. Green Charter School	FirstLine Schools, Inc.	Network	457 (94.4%)	484
Langston Hughes Academy Charter School	FirstLine Schools, Inc.	Network	592 (99.2%)	597
Joseph S. Clark High School	FirstLine Schools, Inc.	Network	N/R*	N/R*
John Dibert Community School	FirstLine Schools, Inc.	Network	358 (89.9%)	398
Arthur Ashe Charter School	FirstLine Schools, Inc.	Network	308 (95.4%)	323
Sylvanie Williams College Prep	New Orleans College Preparatory Academy	Network	N/R*	N/R*
Crocker College Prep	New Orleans College Preparatory Academy	Network	213 (96.4%)	221
Cohen College Prep	New Orleans College Preparatory Academy	Network	N/R*	N/R*
Lagniappe Academy of New Orleans	Lagniappe Academies of New Orleans	Non-Network	61 (100%)	61
John McDonogh High School	Future Is Now Schools: New Orleans	Non-Network	551 (99.1%)	556

ReNew SciTech Academy	ReNew Schools	Network	608 (95.3%)	638
ReNew Schaumburg	ReNew Schools	Network	595 (98.2%)	606
ReNew Delores T. Aaron Elementary School	ReNew Schools	Network	N/R*	N/R*
ReNew Cultural Arts Academy	ReNew Schools	Network	557 (96.0%)	580
ReNew Accelerated High School	ReNew Schools	Network	N/R*	N/R*
Morris Jeff Community Schools	Morris Jeff Community Schools	Non-Network	78 (56.1%)	139

* Data not reported for these schools.

**** Data available from the National Center for Educational Statistics for school year 2010-2011 at <http://nces.ed.gov/>. Data is not reported for some schools in this study.

III. Statistical Findings

A. City-Wide Lawsuit a Potential Threat Based On Statistical Data

An analysis of reported appointed charter school board composition in New Orleans reveals that the Black population on the selected appointed charter school boards is, in fact, statistically different than the Black composition of the voting age population of the city. Using the Fisher Exact Test with the null hypothesis that there is no association between the proportion of Black representation on appointed charter school boards as compared to the Black representation in the voting age population and the alternate hypothesis that the voting age population is blacker in composition than appointed charter school boards (as described in Chapter 3 of this study) the p-value for the test comparing the association of Black membership in both the voting age population and appointed charter school boards is significant at the .05 alpha-level. The results of the Fisher Exact Test for Black membership in the voting age population and appointed charter school boards in the city of New Orleans reveals that there is statistical evidence supporting the claim that Black membership in the voting age population is

greater than Black membership on appointed charter school boards. This evidence is not only supported at the .05 alpha-level; it is also supported at the more significant .01 alpha-level. Table 5-3 presents the relevant statistical analysis of the contingency table. A list of all contingency tables for all Fisher Exact Tests can be located in Appendix B.

Table 5-3: Appointed Charter School Boards versus Voting Age Population

Ethnicity	Appointed Charter School Boards (members/% of total members)	Voting Age Population (members/% of total members)
Black	33/ 39.76%	129345/ 55.72%
Non-Black	50/ 60.24%	102800/ 44.28
All	83/ 100%	232,145/ 100%
	p-value: 0.0019528	

N = 9 charter school boards

Recall the facts of the *Irby* case from chapter 4. In *Irby*, the Fourth Circuit Court of Appeals found that Section 2 of the Voting Rights Act did not apply to the facts presented in the case because there was no disparate impact on minority voters. Black membership in the voting age population mirrored Black representation on appointed school boards, but more importantly Black membership on appointed school boards in the challenged districts was not disparate enough given the circumstances of the fact pattern(s). The data in this section reveals that Black membership on appointed charter school boards in New Orleans is, in fact, statistically different than Black membership in the voting age population for the boards for which there is data. Adding one additional Black representative will not cure the statistical difference in Black representation in the voting age population and on charter school boards as it did in *Irby*. This statistical difference appears enough to trigger the *Irby* court’s concern about disparate impact on minority voters, a concern which could lead to a court conclusion that Section 2 of the Voting Rights Act could apply to appointed school boards. If Section 2 of the Voting Rights Act does apply to appointed school boards, it would then follow that Section 2 would also have

application to appointed charter school boards. While such a finding would not make charter schools inoperable under the conditions, finding that charter schools in New Orleans violate Section 2 of the Voting Right Act could jeopardize the current governance structure of charter schools in the charter capital of the country. For instance, if charter schools were forced to host elections, the current construction of charter school boards and the leadership of those charter schools could be unseated.

B. City-wide Suit Possible for Both Network and Non-Network Charter Schools

Although the researcher originally hypothesized that non-network charter schools, or charter schools with boards of directors that operate only one charter school, would have more diverse boards of directors than network charter schools, or charter schools with board of directors that operate two or more charter schools, as defined by the absolute number of Black board of director members, this hypothesis did not hold. This hypothesis was made on the basis that non-network charter school boards would serve a “mom-and-pop” function more than network charter schools would serve a similar function. In essence, mom-and-pop charter schools (non-network charter schools) would ideally have a smaller risk of litigation under the *Irby*-made possibility of a lawsuit because non-network charter schools should be more community-based. New Orleans, as a predominately Black city in both general and voting age population, should have a tremendously healthy population of Black potential board members for community-minded charter school boards to choose from in establishing their boards of directors. Table 5-4 reveals that both network and non-network charter school boards are susceptible to lawsuits if a court pursued the *Irby* court’s reasoning or belief that Section 2 might apply to appointed school boards. Table 5-4 also reveals that there is not enough evidence of association between Black membership on network and non-network boards to warrant a claim that either non-network or

network appointed charter school boards have greater or lesser Black representation. Table 5-4 can be accurately read as definitively stating that both appointed charter school boards in network and non-network charter schools lack proportional Black representation.³²

Table 5-4: Appointed Charter School Boards (network) versus Voting Age Population

	Board Membership		Voting Age Population		P-Value
	N	%	N	%	
Appointed Charter School Boards (Network)					
Black	18	41.9	129345	55.7	
non-Black	25	58.1	102800	44.3	
All	43	100.0	232,145	100.0	0.04504075
Appointed Charter School Boards (Non-Network)					
Black	15	37.5	129345	55.7	
non-Black	25	62.5	102800	44.3	
All	40	100.0	232,145	100.0	0.01253045
Appointed Charter School Boards (Network v. Non-Network)					
Black	18	41.9	15	37.5	
non-Black	25	58.1	25	62.5	
All	43	100.0	40	100.0	0.411406

C. Individual Boards Susceptible to Potential VRA Irby Claim

In addition to possible citywide liability under *Irby*, two of the nine school boards in the study are particularly problematic. The results of the Fisher Exact Test for the school boards for ReNew Schools and Educators for Quality Alternatives both reject the null hypothesis that there is no association between ethnicity and school board/voting age population. For these two boards

³² This statement holds true for the boards participating in this study. More data is needed to confirm that this data holds true for all appointed charter school boards.

in particular, the p-values are well under .05. The p-value for Educators for Quality Alternatives is significant at the .05 level for the one-tailed test, and the p-value for ReNew Schools is significant at the .01 level for the one-tailed test. The results of the Fisher Exact test show that a plaintiff may have viable options for individual school board litigation against these two boards even when the plaintiff has decided against filing for a citywide lawsuit. Table 5-5 indicates that Black representation on these two appointed charter school boards is associated with lower levels of representation than is present in the voting age population.

Table 5-5: Fisher Exact Tests for Statistically Significant Individual School Boards

	Board Membership		Student Population		P-Value
	N	%	N	%	
Educators for Quality Alternatives					
Black	1	14.3	129345	55.7	
Non-Black	6	85.7	102800	44.3	
All	7	100.0	232,145	100.0	0.02470895
ReNew Schools					
Black	2	15.4	129345	55.7	
Non-Black	11	84.6	102800	44.3	
All	13	100.0	232,145	100.0	0.00202275

D. *Irby* Reasoning Probably Not Available In New Orleans

Recall from earlier the discussion about the Fourth Circuit Court of Appeals’ decision not to forbid the application of Section 2 of the Voting Rights Act to appointed school boards. In that discussion, much was made about the application of a Voting Rights Act Section 2 analysis and the particular facts of *Irby* that prevented a finding of a Section 2 of the Voting Rights Act violation. The fact pattern in *Irby* failed to raise a Voting Rights Act Section 2 claim, not only on its face but as applied according to the *Irby* court. The plaintiffs in *Irby* could not overcome the

fact that no judicially-recognized attempt was made to prevent the inclusion of Black political voice and power on the appointed school boards in question. Though it is reasonably questionable whether the school boards, or those appointing the school boards, made adequate attempts to secure Black participation in school board politics, the question before the court was whether the school boards had prevented the inclusion of Black participation in school board politics. The answer to that question was no. Remember, the surrounding circumstances that Blacks had avoided inclusion on the school board and were accepted for school board membership where the option of such selection was possible dictated a finding that a Voting Rights Act Section 2 violation could not pass muster.

Appointed charter school boards in New Orleans are not likely to have the reasoning of the *Irby* court. Appointed charter school boards in New Orleans do not have mitigating circumstances such as the school boards in *Irby*. For instance, there is evidence that Black parents, a majority of the voting age population (roughly 56%), are available to serve on the appointed charter school boards. Further underscoring this point is the fact that charter schools in New Orleans are filled with Black students who would presumably have Black parents. According to self-reported responses, charter school boards do not necessarily seek out these parents. As evidenced by the responses to the email questionnaire, many of the charter school boards do not, necessarily, reach out to parents in an attempt to secure diversity in board membership.³³ In the alternative, charter school boards are seeking particular members through means that have not produced a prevalence of Black members on appointed charter school

³³ The Algiers Charter Schools Association does reach out to parents to secure their membership on the appointed charter school board. According to self-reported responses to an email questionnaire, the Algiers Charter Schools Association recently appointed two parents to their charter school board while no other charter school board specifically mentioned parents as a potential pool of applicants for charter school board positions.

boards that would resemble the proportion of Black membership in the voting age population or for that matter, in the enrollment in the city's public schools.³⁴

Black parents are a majority of the voting age population in New Orleans. With the exception of the Algiers Charter Schools Association, charter school boards in New Orleans have failed to capitalize on the prevalence of Black Americans who could serve on appointed charter school boards in New Orleans. A statistical comparison is not necessary to understand the impact of Black adults comprising the majority of the city of New Orleans' population. Although elections are not always a fair comparison to political will of a given population, it is not without note that the percentage of Black school board representation on the popularly elected school board nearly mirrors the percentage of Black representation in the city's voting age population. This provides some evidence that Black parents and voters are invested in having Black representation in education policy and politics.

Almost all charter schools in New Orleans expose students to severe racial isolation. This severe racial isolation, while problematic for a variety of reasons, produces yet another question: why are the Black parents of racially isolated students not serving on appointed charter school boards? The severe racial isolation of Black students in New Orleans' public charter school boards results in a plethora of Black students, who likely have Black parents. On its face, this fact supports a notion of a healthy pool of potential Black charter school board members. Instead, Black students in New Orleans are enrolled in schools with boards that do not reflect the racial composition of the city's school or the city in general. It is also notable that almost all charter school boards in this study, while individually not violative of the proposed violation under *Irby* as it pertains to the city's voting age population in New Orleans, fail to racially

³⁴ Further investigation is needed to determine if legislation and policy dictate requirements that cannot readily be found in the Black community in New Orleans.

represent their student body enrollment. Table 5-6 provides the relevant Fisher Exact Tests for school board Black racial composition versus school district Black membership. The percent of Black school board members is statistically different than the percentage of Black school membership in all but two cases – International School and Morris Jeff Community School. These two cases are exceptional cases, however. In both cases, the school demographics indicate that the schools over-enroll non-Black students given the population of New Orleans (See table 5-2). Thus, overall Black board membership does not proportionally represent Black school composition in New Orleans. This problem, which is more political than legal, lends support to the claim that Black citizens are not picked for appointed charter school board posts. The question of why these citizens are not serving on appointed charter school boards still remains. It does not appear that Black Americans are specifically targeted in the search for appointed charter school board members. Instead, it is apparent that most appointed charter school boards use a method that is akin to snowball sampling. More qualitative data is needed to assure that the potential *Irby*-based attack on appointed charter school boards in New Orleans is not easily defeated by these appointed charter school boards. For instance, it may well be that these charter school boards have exhausted their eligible Black parent population at their respective schools given the selection requirements being enforced by the state of Louisiana.

Table 5-6: Black Membership in Schools Covered By School Boards versus Black Membership on Charter School Boards

	Board Membership		Student Population		P-Value
	N	%	N	%	
International School of Louisiana					
Black	3	30.0	225	42.9	
Non-Black	7	70.0	300	57.1	
All	10	100.0	525	100.0	0.264164
Lagniappe Academy of New Orleans					

Black	2	28.6	61	100.0	
Non-Black	5	71.4	0	0.0	
All	7	100.0	61	100.0	<.001
The Future Is Now Schools: New Orleans					
Black	4	57.1	551	99.1	
Non-Black	3	42.9	5	0.9	
All	7	100.0	556	100.0	<.001
Morris Jeff Community School					
Black	5	55.6	78	56.1	
Non-Black	4	44.4	61	43.9	
All	9	100.0	139	100.0	0.5
Algiers Charter Schools Association					
Black	6	85.7	2497	95.5	
Non-Black	1	14.3	119	4.5	
All	7	100.0	2616	100.0	0.139885
FirstLine, Inc. Charter Schools					
Black	7	53.8	1715	95.2	
Non-Black	6	46.2	87	4.8	
All	13	100.0	1802	100.0	<.001
New Orleans College Preparatory					
Black	3	30.0	213	96.4	
Non-Black	7	70.0	8	3.6	
All	10	100.0	221	100.0	<.001
ReNew Charter Schools					
Black	2	15.4	1762	96.5	
Non-Black	11	84.6	64	3.5	
All	13	100.0	1826	100.0	<.001
New Orleans Public Charter Schools					
Black	33	39.8	7100	91.7	
Non-Black	50	60.2	644	8.3	
All	83	100.0	7744	100.0	<.001

In essence, appointed charter school boards in New Orleans would have to provide some evidence that Black parents have refused opportunities to participate on the appointed charter school boards. This task will be difficult for appointed charter school boards in New Orleans outside of the Algiers Charter Schools Association. Unlike the districts in *Irby*, the appointed

charter school boards are not just missing Black representation. The appointed charter school boards in New Orleans are missing proportional Black representation in a majority Black city, with a majority Black electorate and an almost exclusively Black student population. The presumptions of inclusiveness enjoyed by the districts in *Irby* simply do not exist for the appointed charter school boards in New Orleans.

E. Not Enough Information to Compare Appointed Charter School Boards to Popularly Elected School Board.

The comparisons between the racial composition of the popularly elected school board and the individual appointed charter school boards were not statistically significant. The non-statistical significance of this data is non-persuasive for three reasons. First, a potential exception to the rule that appointed boards are free of the restrictions of the Voting Rights Act, as crafted by the Fourth Circuit Court of Appeals in *Irby*, does not compare the proportion of appointed board members to elected board members. The researcher collected this data as an added measure of political voice and power. Secondly, the absence of statistical significance does not, in and of itself, prove that no association exists. In essence, the absence of guilt does not prove innocence. Finally, many factors contribute to the resultant p-values reached by the Fisher Exact Test. The small sample sizes, in particular, make the comparison between appointed charter school boards and the popularly elected school board less powerful. More information concerning the correction of these limitations is discussed in Chapter 3 of this study.

CHAPTER 6: DISCUSSION & CONCLUSIONS

I. Introduction

Chapter 6 of this study discusses the implications of the findings and the conclusion of the study. In this study, the researcher has been guided by one general question: does the appointment of charter school board members in New Orleans, Louisiana violate Section 2 of the Voting Rights Act? In chapters four and five, the author found two important findings. First, the courts have not sufficiently decided whether Section 2 of the Voting Rights Act of 1965 applies to appointed school boards when there is an allegation of disparate impact. Furthermore, the author found that appointed school charter school boards, in one location, end-run the electoral wishes of the Black population. The remainder of this study will situate the findings of the study in the broader context of legal, policy and political importance pertaining to appointed school boards and Section 2 of the Voting Rights Act.

II. Import/Relevance of the Study

Part II of this chapter is divided into two parts. The first part of this chapter focuses on the legal implications of the study. These implications focus on how and why judicial intervention is a threat for appointed charter school boards. The second part of this chapter hones in on the political and policy implications of this study. The policy and politics components of the implications are melded together because politics can affect policy when it comes to school boards.

A. Legal Implications of the Study

The legal implications of this study are rather clear. The study introduces a new discourse into the arguments regarding the legality of charter schools, specifically whether charter school

board diversity is compatible with the Voting Rights Act of 1965. This study, while introducing a new legal discourse into the charter school movement, also provides a counternarrative, fueled by a legal argument, to the popular narrative that Black Americans are pro-charter schools. In fact, New Orleans' unique voting patterns may reflect a deeper divide among Black Americans support of the charter school movement. New Orleans' voting age population and membership on the popularly elected school board are nearly identical. This fact provides some proof that Black New Orleanians (and perhaps Black Americans) desire Black representation in school board policymaking roles. Still, Black parents are proponents of charter schools according to national polling. In other words, Black parents desire a balance between political representation and some benefit offered by charter schools. Charter schools in New Orleans, according to this study, do not offer such a balance. Parents are not offered charter schools with representation of Black political voice. Instead, Black parents' political voice is shut out or at least muffled through hopeful proxies on appointed charter school boards in New Orleans.

The phenomenon of Black parents' support for charter schools might also be explained through Black parents disapproval of traditional public schools. Black parents disapproval of traditional public schools may stem from a variety of historical issues affecting the relationship between the Black population and notions of public schooling. These issues include hypersegregation of public schools, which is fueled in part by legal precedent such as *Milliken v. Bradley* (1974). *Milliken* severely restricts the ability of segregated districts to overcome artificial geographic barriers in implementing desegregation plans. Furthermore, these historical issues include severe funding deprivation, which is fueled in part by judicial precedent such as *San Antonio Independent School District v. Rodriguez* (1973). *Rodriguez* effectively stymied attempts at providing equitable funding of public schools by finding that education was not a

fundamental right. Because education was not a fundamental right under *Rodriguez*, strict scrutiny (or any other elevated scrutiny) did not apply to the school funding plan. As such, the state only needed a rational explanation for its school funding formula. These problems and others contribute to Black dissatisfaction with traditional public schools. More research is needed to isolate the true cause of Black support for charter schools as some charter school support might be the result of mere frustration with traditional public schools.

This study proves that, outside of understandings of traditional education law, persuasive legal arguments for preventing the proliferation of charter schools (as charter schools currently operate) may exist. The charter school movement, beloved by Black parents, may be at risk of legal attack and perhaps a permanent end (at least terms of autonomous/independent appointed charter school boards) if changes to the charter school board appointment procedures are not realized. Those changes may come to fruition as alterations in selection processes or shifts in the goals of appointment. Furthermore, with the knowledge that appointed charter school boards in New Orleans lack proportional descriptive representation, an astute plaintiff's attorney might find a viable Section 5 of the Voting Rights Act challenge in some jurisdictions pending a successful reimplementation of Section 4 of the Voting Rights Act.³⁵ In addition to having potential Section 2 and Section 5 of the Voting Rights Act implications, the study has implications for the legal parameters of appointed charter school boards. Under the Fourteenth Amendment, appointed boards are not allowed to exclude certain components of the population in their appointments (*Mayor of Philadelphia v. Educational Equity League*, 1974). The data in this study indicates that appointed charter school boards in New Orleans, Louisiana may be

³⁵ Section 4 of the Voting Rights Act was struck down as applied in *Shelby County v. Holder*, 570 U.S. XXX (2013). Section 4 is the trigger statute for Section 5 of the Voting Rights Act. Without Section 4 of the Voting Rights Act, Section 5 has no enforceable power.

dangerously close to claims that they effectively exclude or neglect to include Black participation.

B. Political and Policy Implications of the Study

School board composition, chiefly influenced by educational politics, can result in a policymaking agenda, or education policy. If the findings of this study hold true, then the Black parents in New Orleans public charter schools are experiencing less involvement in educational politics and this could jeopardize or thwart any attempt to launch a solid policymaking agenda in public charter schools that is established by the predominately Black voting age population of the city. This is a major implication in that charter schools are seen as a panacea for academically failing schools. This theory is more than likely more strongly supported in the Black community, where a near supermajority of parents prefers charter schools over traditional public schools. This is particularly the case in New Orleans, where anecdotal evidence of Black parents support of charter schools is based only in the fact that charter enrollment is up and polls that are difficult to ascertain.³⁶

Charter schools' continued growth is also a direct threat to the established tradition of popularly elected school boards. Currently, almost all school boards in the United States are elected (Resnick, 1999). As charter schools continue to grow and implement appointed governing boards, the percentage of popularly elected school boards will decrease. The study, though limited in scope, indicates that appointed charter school boards do not operate as appointed school boards operate in general. Appointed charter school boards in this study are much whiter than the comparative adult population for the city of New Orleans. As a continued threat to the traditional procedure of electing public schools boards (where many politicians get

³⁶ It should be noted that the rise in charter school enrollment has happened at the same time as the closures of traditional public schools.

their political genesis), it is necessary to monitor the operation and composition of appointed charter school boards.

Because the results of this study indicate that Black parents and students may achieve less passive representation with appointed charter school boards, the implementation of appointed charter school boards may be viewed as an attack on Black political participation, political power and political voice. Educational leaders, be they in traditional public schools or in public charter schools (but specifically in public charter schools), should be cognizant of this fact. Educational leaders should make a concerted effort to assure that the concerns of Black stakeholders are realized through the educational policymaking functions of school boards and that Black stakeholders have an opportunity to participate in educational politics. Based on the findings of this study, this is not currently the case. Black stakeholders are not present in educational politics as represented by numbers of Black board of director members on appointed charter school boards. More evidence is needed to ascertain whether Black stakeholders are having their political will translated into a policymaking agenda through proxies.

Using political power to gain access to educational privilege as an indicator, Black New Orleanians, having achieved less descriptive representation through appointed charter school boards, may not see greater substantive representation. According to Berkman and Plutzer (2010), greater substantive representation was positively correlated with greater descriptive representation for appointed charter school boards. Berkman and Plutzer used expenditure data in their work. Additional research is needed to determine if appointed charter school boards has resulted in greater educational expenditures. On the other hand, other scholars have used non-expenditure data, such as suspension rates, students enrolled in special education classes, faculty of color hire rates, et cetera to determine substantive, or active, representation. Like the work of

Berkman and Plutzer, more research is needed to determine if appointed charter school boards affect this data for public charter schools. Nevertheless, it is not without notice that descriptive representation has decreased in New Orleans after the institution of appointed charter school boards. This decrease should alarm educational leaders, parents and students as less passive representation may result in less active representation for Black stakeholders. Future research is needed to determine whether the decrease in passive representation has resulted in a decrease in active representation.

The dichotomy between the elected school board in New Orleans and the appointed charter school boards in New Orleans brings into question the conclusion of previous scholars. Although school board elections are generally known to be low-key affairs with relatively low turnout (Hess, 2002), the fact that elected school boards result in higher descriptive representation contradicts the conclusions of Robinson et al (1985). The comparison between the electoral will of Black New Orleanians, wherein Blacks dominate the school board and the prevalence, or lack thereof, of Black membership on appointed charter school boards results in a findings that the political desires of Black parents are not necessarily met on appointed charter school boards. The implication of this finding is that further study is needed to determine the ordering of preferences of Black parents as they are related to charter schools.

Recall from chapter 2 that some scholars have found that appointment of school board members increases descriptive representation (Robinson et al, 1985). This is simply not the case in New Orleans appointed charter school boards. In fact, the findings of this study more closely mirror the findings of the study that found that appointive selection procedures harm Black descriptive representation (Stewart et al, 1989). Further research is needed to determine if nationally appointed charter school boards result in disproportionately White charter school

governance. Based on the limited findings of this study, the political implications of appointed charter school boards include limited access in policymaking and governance roles for Black Americans. The exclusion of Black Americans from policymaking and governance roles may mean that Black Americans have less active representation in the policymaking realm. As discussed earlier, racial minorities, especially Black Americans, heavily favor charter schools. The findings of the study bring into question the relevance of studies examining racial representation on school boards. Perhaps there are other priorities for minority parents. Minority parents express a preference for charter schools, even when the results of this study indicate that Black parents are underrepresented on appointed charter school boards.

Finally, that some appointed charter school boards in the study rely on personal contacts to fulfill their appointments to the appointed charter school board is problematic. There is evidence that groups of friends are segregated (Dunsmuir, 2013). If groups of friends are, in fact, segregated, then the further exclusion of Black charter school board representatives – whether purposeful or incidental – is inevitable. A disproportionately and predominately White appointed school board membership is bound to result in further disproportional representation on appointed charter school boards.

Moreover, as the first study that endeavors to analyze the racial composition of charter school boards in New Orleans, the epicenter of the charter movement, the study is the first to report – beyond anecdotal evidence – that charter school boards in New Orleans are disproportionately White. This study, therefore, provides the entryway for understanding some of the strife involved in administering charter schools in New Orleans. For instance, recent reports have shown that minority parents have opposed the chartering of some schools in predominately minority areas (Reckdahl, 2013). Additionally, parents of and advocates for minority students

have filed several civil rights-related complaints alleging fundamental flaws in the disciplinary procedures associated with charter schools in New Orleans (Dreilinger, 2014). In both cited instances, parents, advocates and most importantly, students have argued that the educational leadership in some New Orleans Public charter schools don't understand and/or empathize with the students enrolled in their charter schools.³⁷ Given that Meier and colleagues (1984) have already established that minority students have more positive and less negative academic outcomes when there is minority representation on school boards, this study indicates that more research needs to be conducted on the relationship between composition of appointed charter school boards and student outcomes (suspensions, graduation rates, enrollment in special education courses, etc.).

While this study substantiates the need for further investigation into the composition of New Orleans public charter school boards, it also directly supports the evidence found by Stone et al (2012). In particular, Stone and associates found that recruitment of minority charter school board members was not a priority in Minnesota. This study, linking to Stone and colleagues, indicates that similar results are evident in New Orleans. For instance, the state of Louisiana recommends certain expertise for participation on a charter school board: charter school board members should have expertise in law, finance, community development, organizational operation or education (Louisiana Department of Education). These categories may not particularly play to the strengths of poor, Black citizens in New Orleans (or anywhere else in the United States). This study, therefore, indicates a further need to investigate the makeup of New Orleans charter school board membership, specifically, and generally, charter school board membership.

³⁷ At the national level, the United States Department of Education teamed with the United States Department of Justice to issue joint guidance on the applicability of civil rights laws to charter schools. This is further evidence of the, perhaps, unintended consequences of the establishment of charter schools.

As indicated above, this study provides evidence that appointed charter school boards in New Orleans do not provide proportional representation of Black parents. New Orleans might look to other jurisdictions for mechanisms to alter the racial composition of its appointed charter school boards. For instance, the District of Columbia uses a parental proxy to encourage the inclusion of the voice of parents. Like New Orleans, the parents in the District of Columbia have a high likelihood of being Black American. There are, however, no studies on the success of the parental proxy to afford a diversity of charter school board members in the District of Columbia. This study, on the other hand, has found that the one charter school board that uses the parental proxy most reflects the racial composition of the charter schools controlled by the charter school board and most reflects the racial composition of the voting age population of New Orleans. The parental proxy in the District of Columbia has gone unchallenged and is, therefore, legal. It is unlikely, given that states have placed numerous restrictions on the appointment of charter school board members, that the parental proxy is illegal. Minnesota, unlike the District of Columbia, has achieved racial parity on charter school boards through election (despite not having a focus on recruiting minority board members). The essence of the charter school board elections in Minnesota is that charter school boards are elected from the parents of the student body of the school. While charter school boards are, in fact, predominately White in Minnesota, charter school boards are less White than the actual population of Minnesota, though only marginally. Charter school board elections that are conducted through polling based in schools are a potential solution to charter school board issues of disproportionality of White members in New Orleans.

III. Future Studies

Although the findings of this study are severely limited by the responses (or lack thereof) from appointed charter school boards, the study's findings can be expanded upon with further research. Given more time, the author could include all appointed charter school boards in the city of New Orleans through appropriate public records requests and subsequent lawsuits or threat thereof. Additionally, the author could commission a study that compares the effects of expanded choice in New Orleans with other cities with high percentages of students enrolled in charter schools, such as Washington, D.C. The researcher could also expand this study to include and compare cities such as Detroit, Philadelphia and Denver, cities where charter schools are authorized by elected school boards instead of by an outside, unelected agency. These additional studies will bring clarity to the findings of the study.

Likewise, the legal analysis of this data will not end with the analysis under Section 2 of the Voting Rights Act of 1965. There is other applicable legal precedent that might warrant judicial intervention into the establishment, maintenance and/or expansion of charter schools. Aside from using a Section 2 Voting Rights Act analysis, the author also proposes to use a hypothetical analysis under Section 5 of the Voting Rights Act to reanalyze this data. Though Section 2 jurisdiction may or may not reach appointed charter school boards, it is worth investigating whether the appointed charter school boards violate Section 5 of the Voting Rights Act. The researcher also plans to move beyond the Voting Rights Act analysis and reassess this data in light of other judicial precedent, including bans on appointment structures that fail to include certain portions of the population. With such rich pilot study data that backs up anecdotal evidence, an expanded study of charter school board racial membership is ripe for study.

Outside of the legal analyses, future political studies are piqued by this study. For instance, an analysis that correlates student outcomes to board representation in charter schools is warranted given the results of this study. Furthermore, the composition of charter school administrators and teachers is worthy of study given the combination of the results of this study and the extant literature on the topic. One would expect a disproportionately White administrative and teaching force given the results of this study.

IV. Conclusions

This study has examined whether the appointment of charter school board members can be challenged under Section 2 of the Voting Rights Act of 1965. In chapters 4 and 5, this study examined four questions of import to this overarching question. First, in chapter 4, the study evaluated the legal precedent to find that the Fourth Circuit Court of Appeals has opened the door to an exception to the general rule that Section 2 of the Voting Rights Act does not apply to appointed boards. Through this possible exception, the researcher found that Section 2 of the Voting Rights Act could find application to the appointment of charter school board members. If this exception catches the attention of a federal court, the calm waters of charter school legality could be troubled. Second, the study examined whether the popularly elected school board differs from appointed charter school boards in New Orleans, Louisiana in racial composition. The answer to the statistical tests run was not statistically significant. As such, there is not enough evidence to prove that the popularly elected school board and the appointed charter school boards in New Orleans differ in racial composition. Third, the study assessed whether the appointed charter school boards in New Orleans varied from the racial composition of the adult population of the city. The results of the statistical tests proved that, in composite and as disaggregated by charter management type, the city's voting age population is more Black than

are appointed charter school boards. In addition to the composite and disaggregated data, two individual appointed charter school boards were uniquely problematic to this assessment.

Finally, the study inquired into the claims that appointed charter school boards do not reflect the student population of New Orleans charter schools. The statistical tests run on this data proved that, almost uniformly, this claim is true. Combining the fact that the appointed charter school boards do not reflect the voting age population of the city of New Orleans and the fact that the charter schools are predominately Black, indicating a healthy Black adult population among other things, it is not beyond reasonable to assert an *Irby*-like claim to the appointed charter school boards in the city of New Orleans.

More particularly, this study established that the Fourth Circuit Court of Appeals decision in *Irby v. Virginia State Board of Elections*, which has been misinterpreted by another court, may allow for Section 2 Voting Rights Act lawsuits to assess the disparate impact of appointed charter school boards. In *Irby*, the Fourth Circuit Court of Appeals found that Section 2 of the Voting Rights Act of 1965 did not apply to the circumstances of the case. The court reached this decision only after applying a Voting Rights Act Section 2 analysis. Another court has interpreted the failure to find Section 2 of the Voting Rights Act applicable in *Irby* as a signal that the Fourth Circuit Court of Appeals did not intend for the case to be read as a Section 2 analysis. This interpretation, based in dictum, cannot be true. Dictum cannot usurp the power of a judicial holding. In *Irby*, the court initially stated in dictum that all other federal courts have found the Section 2 of the Voting Rights Act does not apply to appointed boards; however, the holding of the case falls upon a Section 2 analysis that finds that Section 2 of the Voting Rights Act does not apply to the particular facts of the case. This reinterpretation of *Irby* is the first major finding of this study.

The second major finding of this study places statistical support behind the anecdotal statement that appointed charter school boards in New Orleans are not racially representative of the population. Using a Fisher Exact Test of Independence, this study was able to reject the null hypothesis that race and membership on appointed charter school boards and in the city of New Orleans' adult population were unrelated. The results of the Fisher Exact Test proved that the appointed charter school boards in the study were not reflective of the voting age population of the city. In addition to not being reflective of the voting age population of the city, the statistical test also proved this to be true of the appointed charter school boards in the city of New Orleans whether the appointed charter school board managed one or multiple charter schools in the city. Finally, the Fisher Exact Test revealed that two appointed charter school boards, ReNew Schools and Educators for Quality Alternatives, are particularly problematic at the micro level. These two schools, even with a test that lacked adequate statistical power, were statistically different than the voting age population. It is these tests that may trigger the actual rule that *Irby* passed on in ruling that Section 2 did not apply to appointed school boards. In particular, the tests may open the door to overrule the rule that appointed school boards are out of reach for the Voting Rights Act.

The potential *Irby* exception to the rule that appointed school boards are out of reach of Section 2 of the Voting Rights Act is clouded with its own exceptions. The case failed because of the particular circumstances in which there were no overt signs of racial discrimination, nor were there signs of discriminatory effects. This study found that Black Americans are a solid majority of the adult population in the city of New Orleans. This finding was supported by the fact that Black Americans also attend the charter schools in this study in severe isolation. These isolated Black students, who likely have Black parents, provide yet another example of the large pool of

Black adults from whom the appointed charter schools boards could pull to fulfill the appointed charter school boards' membership requirements. Such is the case in Washington, D.C., where the parental proxy has not been legally challenged and little or no research exists on the effects of the parental proxy³⁸. The parental proxy is simply not happening *en masse* in New Orleans. As such, the study also found that the facts of *Irby*, particularly those facts that led to a finding that prevented an exception to the rule that appointed charter school boards are out of the reach of Section 2 of the Voting Rights Act, do not arise in the circumstances of the city of New Orleans' appointed charter school boards.

These findings are important to appointed charter school boards because of the legal implications. Appointed charter school boards, which in New Orleans comprise their own school districts, could be legally liable under Section 2 of the Voting Rights Act if they do not correct the disproportionate racial compositions of their school boards. Such lawsuits could be a threat to educational reform activities in the city of New Orleans, the epicenter for the charter school movement, by transforming the leadership of the charter movement. Educational leaders in charter schools should also fear the consequences of arming educational leaders in traditional public schools, chiefly their competitors, with arguments that might prevent the expansion of charter schools or might also harm the image of charter schools. In an atmosphere where school choice equates to schools fighting over students, the threat of a lawsuit based in racial animosity or racial tensions, especially in a predominately Black city, could threaten the growth and expansion of even successful charter schools if parents are to think that appointed charter school boards are racist or have racist effects.

³⁸ The use of parents as a proxy is probably legal given that Minnesota has restricted its elections to the point where teachers employed at a given charter school must comprise the majority of the charter school board. Also, the District of Columbia requires the appointment of at least two parents on the board of directors for a charter school.

Charter school boards should be more explicit about the search process for board members, especially when the charter school board is an appointed board. The fact that the school boards in Virginia had exhausted the number of willing Black participants/applicants to the school board saved the state from a Voting Rights Act Section 2 claim. Appointed charter school boards in New Orleans do not enjoy this same benefits because there is no real record of how charter school boards select their members. Most charter school boards in this study merely state that diversity is an objective but fail to expound upon how that diversity is met. As we know from the statistical tests, the boards in this study have failed to meet their diversity goals. Appointed charter school boards could benefit from delineating how they seek out their members from racially or ethnically diverse backgrounds.

These findings are also important to policymakers because policymakers have the power to alter the selection processes for appointed charter school board members. State and federal legislatures should require that appointed charter school boards maintain at least some semblance of racial and ethnic diversity as defined by comparisons to the adult population of the jurisdictions served by the appointed charter school boards. Policymakers should also require that charter school boards track the racial composition of appointed charter school boards. In addition to making future studies more accessible, tracking appointed charter school boards will give further insight into the legal, political and policy necessities regarding charter school governance.

Moreover, federal legislatures should make clear that plaintiffs can and should file lawsuits against appointed boards when those boards result in discriminatory effects on minority voters in the next reauthorization of the Voting Rights Act. In other words, the federal government should create the exception that is contemplated in *Irby*. This would reduce the

confusion pertaining to the rights and responsibilities of both voters and appointers of appointed charter school boards.

Finally, this study is of import to educational leaders outside of traditional educational leadership roles. Educational leadership is not confined to administrators, school board members and policymakers. This study is important to educational advocates as leaders on both sides of the charter school movement. As a proponent of charter schools, an advocate may view this study as addressing an Achilles heel of charter schools: the fact that charter school boards are often underrepresentative in their efforts to obtain equitable educational achievement. As an opponent of charter schools, an advocate may see this study as an alternative method of conversing about charter schools: a new discourse on the establishment, maintenance and expansion of charter schools

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Appendix A: State Statutes Regarding the Selection of Charter School Boards

State	Statute(s)	Statutory Language
Alaska	N/A	Alaska has no explicit statutory regulation of charter school boards.
Arkansas	6-2-102 (a)	Any number of persons, the multiple of three (3), not less than six (6) nor more than thirty-three (33), who have associated or shall associate, according to the provisions of this chapter, under any name assumed by them, for the purpose of founding or maintaining any institution of learning, and who shall comply with the provisions of this chapter, shall, with their successors, constitute a body corporate under the name assumed by them in their articles of association.
Arizona	15-183 (E) (8)	The charter of a charter school shall do all of the following: Ensure that it provides for a governing body for the charter school that is responsible for the policy decisions of the charter school. Notwithstanding section 1-216 , if there is a vacancy or vacancies on the governing body, a majority of the remaining members of the governing body constitute a quorum for the transaction of business, unless that quorum is prohibited by the charter school's operating agreement.
California	Cal Ed Code § 47605 (b) (5) (D)	...the governing board of the school district shall not deny a petition for the establishment of a charter school unless it makes written factual findings, specific to the particular petition, setting forth specific facts to support one or more of the following findings: The petition does not contain reasonably comprehensive descriptions of all of the following: The governance structure of the school...
Colorado	22-30.5-106 (1) (h)	...at a minimum, each charter school application includes: A description of the governance and operation of the proposed charter school, including the nature and extent of parental, professional educator, and community involvement in the governance and operation of the proposed charter school, that is consistent with the standards adopted by rule of the state board pursuant to section 22-2-106 (1) (h);
Connecticut	§ 10-66bb (d)	Applications pursuant to this section shall include a description of: the school governance and procedures for the establishment of a governing council that includes teachers and parents and guardians of students enrolled in the school, and (ii) the chairperson of the local or regional board of education of the town in which the charter school is located and which has jurisdiction over a school that resembles the approximate grade configuration of the charter school, or the designee of such chairperson, provided such designee is a member of the board of education or the superintendent of schools for the school district, and (B) is responsible for the oversight of charter school operations, provided no member or employee of the governing council may have a personal or financial interest in the assets, real or personal, of the school...
Delaware	14 Del. C. § 504(b)	The board of directors of a charter school shall be deemed public agents authorized by a public school district or the Department with the approval of the State Board to control the charter school. <u>No person shall serve as a member of a charter school board of directors</u>
Delaware	14 Del. C. § 504(b)	The board of directors of a charter school shall be deemed public agents authorized by a public school district or the Department with the approval of the State Board to control the charter school. No person shall serve as a member of a charter school board of directors who is an elected member of a local school board of education.

District of Columbia	D.C. Code § 38-1802.02 (9)	A petition under § 38-1802.01 to establish a public charter school shall include the following: The names and addresses of the members of the proposed Board of Trustees and the procedures for selecting trustees;
Florida		
Georgia		Not listed in state statutes.
Hawaii	HRS § 302D-13 (d) (7) HRS § 302D-14 (d) (7)	A charter application to become a start-up charter school shall meet the requirements of this subsection and section 302D-25. The charter application shall include the following: A description of the constitution of the governing board, terms of governing board members, and the process by which governing board members were selected; A charter application to become a conversion charter school shall meet the requirements of this subsection and section 302D-25. The charter application shall include the following: A description of the constitution of the governing board, terms of governing board members, and the process by which governing board members were selected
Idaho		
Illinois	105 ILCS 5/27A-7 (a) (10)	A description of the governance and operation of the charter school...
Indiana	Ind. Code Ann. § 20-24-3-4 (b) (3) (C)	A proposal must contain at least the following information: The following information for the proposed charter school: Governance structure...
Iowa	Iowa Code § 256F.5 (4)	The method for appointing or forming an advisory council for the charter school or innovation zone school. The membership of an advisory council appointed or formed in accordance with this chapter shall not include more than one member of a participating school board.
Kansas	K.S.A. § 72-1906 (b) (5)	The board of education of a school district shall receive and review each petition for establishment or continuation of a charter school and may grant or renew a charter for operation of the school. The charter must contain the following key elements: the governance structure of the school...
Louisiana	17:3991 (1) (a) – (c) (ii)	Except for a Type 4 charter school, a charter school approved and established in accordance with the provisions of this Chapter shall be organized as a nonprofit corporation under applicable state and federal laws. Should a charter school be established with a governing or management board, the members of such shall receive no compensation other than reimbursement of actual expenses incurred while fulfilling duties as a member of such a board. A charter school shall be prohibited from employing, in any manner, any member of the governing or management board of such school. Not more than twenty percent of the members of any governing or management board of a charter school shall be members of the same immediate family. Members of the same immediate family shall include a board member and any other board members to whom he is related as defined in R.S. 42:1102(13) and any other board members to whom any of them are so related.
Maine	20-A § 2406	The proposed public charter school's governance plan, including:
Maine	20-A § 2406	The proposed public charter school's governance plan, including: Background information on proposed board members and any assurances or certifications required by the authorizer... Identification of the proposed founding governing board members and, if identified, the proposed school leader or leaders...

Maryland		
Massachusetts	71 § 89 (e) (viii)	The board shall establish the information needed in an application for the approval of a charter school; provided that the application shall include, but not be limited to, a description of: the school governance and bylaws...
Michigan	MCLS § 380.502 (3) (e) (i)	To obtain a contract to organize and operate 1 or more public school academies, 1 or more persons or an entity may apply to an authorizing body described in subsection (2). The application shall include at least all of the following: Documentation meeting the application requirements of the authorizing body, including at least all of the following: The governance structure of the public school academy...
Minnesota	124D.10 Subd.4	(d) The operators authorized to organize and operate a school, before entering into a contract or other agreement for professional or other services, goods, or facilities, must incorporate as a nonprofit corporation under chapter 317A and must establish a board of directors composed of at least five members who are not related parties until a timely election for members of the ongoing charter school board of directors is held according to the school's articles and bylaws under paragraph (f). A charter school board of directors must be composed of at least five members who are not related parties. Staff members employed at the school, including teachers providing instruction under a contract with a cooperative, and all parents or legal guardians of children enrolled in the school are the voters eligible to elect the members of the school's board of directors. A charter school must notify eligible voters of the school board election dates at least 30 days before the election. Board of director meetings must comply with chapter 13D.
Mississippi		
Missouri	§ 160.405 (1) (2)	... The charter shall be a legally binding performance contract that describes the obligations and responsibilities of the school and the sponsor as outlined in sections 160.400 to 160.425 and section 167.349 and shall also include: A description of the charter school's organizational structure and bylaws of the governing body, which will be responsible for the policy, financial management, and operational decisions of the charter school...
Nevada	§ 386.520 (4) (e)	An application to form a charter school must include all information prescribed by the Department by regulation and: The proposed system of governance for the charter school, including, without limitation, the number of persons who will govern, the method for nominating and electing the persons who will govern and the term of office for each person.
New Hampshire	194-B:3 (II) (c)	Except as expressly provided in this chapter, the duty and role of the local school board relative to the establishment of a chartered public school shall be to approve or disapprove the proposed chartered public school application based upon whether or not the proposed application contains in specific detail the following required elements: Methods by which trustees and their terms are determined.
New Jersey	§ 18A:36A-5 (c)	The application for a charter school shall include the following information: The proposed governance structure of the charter school including a list of the proposed members of the board of trustees of the charter school or a description of the qualifications and method for the appointment or election of members of the board of trustees...
New Mexico	22-8B-4	A charter school shall be governed by a governing body in the
New Mexico	22-8B-4	A charter school shall be governed by a governing body in the manner set forth in the charter contract; provided that a governing body shall have at least five members; and provided further that no member of a governing body for a charter school that is initially approved on or after July 1, 2005 or whose charter is renewed on or after July 1, 2005 shall serve on the governing body of another

New York	2851 (2) (c)	The information provided on the application shall be consistent with the provisions of this article and other applicable laws, rules and regulations. Such information shall include: The proposed governance structure of the school, including a list of members of the initial board of trustees, a description of the qualifications, terms and method of appointment or election of trustees, the organizational structure of the school...
North Carolina	§115C-238.29B	The application shall contain at least the following information: The governance structure of the school including the names of the initial members of the board of directors ...
Ohio	3314.02 (B) ³⁹	A proposing person or group that has a preliminary agreement under this division may proceed to finalize plans for the school, establish a governing authority for the school, and negotiate a contract with the board. Provided the proposing person or group adheres to the preliminary agreement and all provisions of this chapter, the board shall negotiate in good faith to enter into a contract in accordance with section 3314.03 of the Revised Code and division (C) of this section.
Oklahoma	70 Okl. St. § 3-135 (A) (3)	The sponsor of a charter school shall enter into a written contract with the governing body of the charter school. The contract shall incorporate the provisions of the charter of the charter school and contain, but shall not be limited to, the following provisions: Management and administration of the charter school...
Oregon	ORS § 338.045 (2) (f)	The proposal shall include, but need not be limited to: The governance structure of the public charter school...
Pennsylvania	17-1719-A(4)	An application to establish a charter school shall include all of the following information: The proposed governance structure of the charter school, including a description and method for the appointment or election of members of the board of trustees.
Rhode Island	16-77.2-2(a)(6)	Present a plan for the governance, administration, and operation of the district charter school, including the manner in which the governing board of the school will be chosen, the nature and extent of parental, professional educator, and community involvement in the governance and operation of the district charter school...
South Carolina	59-40-60	Except as provided in subsection (F), an applicant who wishes to form a charter school shall: form a charter committee for the charter school which includes one or more teachers... The charter school application must include: a description of the governance and operation of the charter school, including the nature and extent of parental, professional educator, and community involvement in the governance and operation of the charter school
Tennessee	49-13-107 (b) (8)	On or before October 1 of the year preceding the year in which the proposed public charter school plans to begin operation, the sponsor seeking to establish a public charter school shall prepare and file with the chartering authority an application providing the following information and documents: The names and addresses of the members of the governing body...
Texas	For open-enrollment charter schools: §12.111 (a) (7-8)	Each charter granted under this subchapter must describe the governing structure of the program, including: the officer positions designated; the manner in which officers are selected and removed from office; the manner in which members of the governing body of the school are selected and removed from office; the manner in which vacancies on that governing body are filled; the term for which members of that governing body serve; and whether the terms
Texas	For open-enrollment charter schools: §12.111 (a) (7-8)	Each charter granted under this subchapter must describe the governing structure of the program, including: the officer positions designated; the manner in which officers are selected and removed from office; the manner in which members of the governing body of the school are selected and removed from office; the manner in which vacancies on that governing body are filled; the term for

Utah	53A-1a-508 (3) (c)	The charter shall include: the governance structure of the school
Washington	§ 28A.710.020 (3)	A charter school established under this chapter: Is governed by a charter school board according to the terms of a renewable, five-year charter contract executed under RCW 28A.710.160
Wisconsin	118.40 (1m) (b) (6)	The petition shall include all of the following: The governance structure of the school...
Wyoming	§ 21-3-304 (d)	A charter school shall be administered and governed by a governing body in a manner agreed to by the charter school applicant and the school district.

APPENDIX B: CONTINGENCY TABLES FOR FISHER EXACT TESTS

For all tests:
 tabulated statistics are Ethnic, Category
 Use frequencies in Frequency
 Rows are Ethnic and Columns are Category

Question #1: Are appointed charter school boards statistically different than the popularly elected school board in New Orleans, Louisiana?

Part A: Compare all appointed charter school boards (combined) to the popularly elected school board.

	Appointed School Boards (Combin	Orleans Parish School Board	All
Black	33	4	37
non-Black	50	3	53
All	83	7	90
Cell Contents: Count			
Fisher's exact test: P-Value = 0.439667 (One tailed P-value: 0.2198335)			

Part B: Compare all network-based, appointed school boards to the popularly elected school board.

	Appointed School Boards (networ	Orleans Parish School Board	All
Black	18	4	22
non-Black	25	3	28
All	43	7	50
Cell Contents: Count			
Fisher's exact test: P-Value = 0.684320 (One tailed P-value: 0.34216)			

Part C: Compare all non-network-based, appointed school boards to the popularly elected school board.

	Appointed School Boards (non-ne	Orleans Parish School Board	All
Black	15	4	19
non-Black	25	3	28
All	40	7	47
Cell Contents: Count			
Fisher's exact test: P-Value = 0.417311 (One tailed P-value: 0.2086555)			

Part D: Compare all network-based, appointed charter school boards to the non-network-based, appointed charter school boards.

	Appointed School Boards (network)	Appointed School Boards (non-network)	All
Black	18	15	33
non-Black	25	25	50
All	43	40	83

Cell Contents: Count

Fisher's exact test: P-Value = 0.822812 (One tailed P-value: 0.411406)

Part E: Compare each individual appointed charter school board to the popularly elected school board.

1) *International School of Louisiana Compared to Popularly Elected School Board*

	Orleans International School of Louisiana	Parish School Board	All
Black	3	4	7
non-Black	7	3	10
All	10	7	17

Cell Contents: Count

Fisher's exact test: P-Value = 0.349959 (One tailed P-value: 0.1749795)

2) *Educators for Quality Alternatives Compared to Popularly Elected School Board*

	Orleans Educators for Quality Alternatives	Parish School Board	All
Black	1	4	5
non-Black	6	3	9
All	7	7	14

Cell Contents: Count

Fisher's exact test: P-Value = 0.265734 (One tailed P-value: 0.132867)

3) *Lagniappe Academies of New Orleans Compared to Popularly Elected School Board*

	Orleans Lagniappe Parish Academies School of New Orle Board All		
Black	2	4	6
non-Black	5	3	8
All	7	7	14
Cell Contents: Count			
Fisher's exact test: P-Value = 0.592075 (One tailed P-value: 0.2960375)			

4) *Future Is Now Schools: New Orleans Compared to Popularly Elected School Board*

	Future Is Orleans Now Parish Schools: School New Orle Board All		
Black	4	4	8
non-Black	3	3	6
All	7	7	14
Cell Contents: Count			
Fisher's exact test: P-Value = 1 (One tailed P-value: 0.5)			

5) *Morris Jeff Community Schools Compared to Popularly Elected School Board*

	Orleans Morris Jeff Parish Community School School Board All		
Black	5	4	9
non-Black	4	3	7
All	9	7	16
Cell Contents: Count			
Fisher's exact test: P-Value = 1 (One tailed P-value: 0.5)			

6) *Algiers Charter Schools Association Compared to Popularly Elected School Board*

	Algiers Orleans Charter Parish Schools School Associa Board All		
Black	6	4	10
non-Black	1	3	4
All	7	7	14
Cell Contents: Count			

Fisher's exact test: P-Value = 0.559441 (One tailed P-value: 0.2797205)

7) *FirstLine Schools, Inc. Compared to Popularly Elected School Board*

	Orleans FirstLine Parish Schools, School Inc. Board All		
Black	7	4	11
non-Black	6	3	9
All	13	7	20

Cell Contents: Count

Fisher's exact test: P-Value = 1 (One tailed P-value: 0.5)

8) *New Orleans College Preparatory Academy Compared to Popularly Elected School Board*

	Orleans New Orleans Parish College School Preparatory Board All		
Black	3	4	7
non-Black	7	3	10
All	10	7	17

Cell Contents: Count

Fisher's exact test: P-Value = 0.349959 (.1749795)

9) *ReNew Schools Compared to Popularly Elected School Board*

Rows: Ethnic Columns: Category

	Orleans Parish School ReNew Board Schools All		
Black	4	2	6
non-Black	3	11	14
All	7	13	20

Cell Contents: Count

Fisher's exact test: P-Value = 0.121930 (One tailed P-value: 0.060965)

Question #2: Are appointed charter school boards statistically different than the Voting Age Population of New Orleans, Louisiana?

Part A: Compare all appointed charter school boards (in aggregate) to the Voting Age Population of New Orleans, Louisiana.

	Appointed School Boards (Combin	Voting Age Population	All
Black	33	129345	129378
non-Black	50	102800	102850
All	83	232145	232228
Cell Contents: Count			
Fisher's exact test: P-Value = 0.0039056 (One tailed P-value: .0019528)			

Part B: Compare all network-based, appointed charter school boards (in aggregate) to the Voting Age Population of New Orleans, Louisiana.

	Appointed School Boards (networ	Voting Age Population	All
Black	18	129345	129363
non-Black	25	102800	102825
All	43	232145	232188
Cell Contents: Count			
Fisher's exact test: P-Value = 0.0900815 (One tailed P-value: 0.04504075)			

Part C: Compare all non-network-based, appointed charter school boards (in aggregate) to the Voting Age Population of New Orleans, Louisiana.

	Appointed School Boards (non-ne	Voting Age Population	All
Black	15	129345	129360
non-Black	25	102800	102825
All	40	232145	232185
Cell Contents: Count			
Fisher's exact test: P-Value = 0.0250609 (One tailed P-value: 0.01253045)			

Part D: Compare all appointed charter school boards (individually) to the Voting Age Population of New Orleans.

1) International School of Louisiana Compared to the Voting Age Population of New Orleans

	International School of Louisiana	Voting Age Population	All
Black	3	129345	129348
non-Black	7	102800	102807
All	10	232145	232155
Cell Contents:	Count		
Fisher's exact test: P-Value = 0.119705 (One tailed P-value: 0.0598525)			

2) Educators for Quality Alternatives Compared to the Voting Age Population of New Orleans

	Educators for Quality Alternatives	Voting Age Population	All
Black	1	129345	129346
non-Black	6	102800	102806
All	7	232145	232152
Cell Contents:	Count		
Fisher's exact test: P-Value = 0.0494179 (One tailed P-value: 0.02470895)			

3) Lagniappe Academies of New Orleans Compared to the Voting Age Population of New Orleans

	Lagniappe Academies of New Orleans	Voting Age Population	All
Black	2	129345	129347
non-Black	5	102800	102805
All	7	232145	232152
Cell Contents:	Count		
Fisher's exact test: P-Value = 0.253167 (One tailed P-value: 0.1265835)			

4) *Future Is Now Schools: New Orleans Compared to the Voting Age Population of New Orleans*

Future Is Now Schools: Voting Age New Orleans Population All			
Black	4	129345	129349
non-Black	3	102800	102803
All	7	232145	232152
Cell Contents: Count			
Fisher's exact test: P-Value = 1 (One tailed P-value: 0.5)			

5) *Morris Jeff Community School Compared to the Voting Age Population of New Orleans*

Morris Jeff Community School Voting Age Population All			
Black	5	129345	129350
non-Black	4	102800	102804
All	9	232145	232154
Cell Contents: Count			
Fisher's exact test: P-Value = 1 (One tailed P-value: 0.5)			

6) *Algiers Charter Schools Association Compared to the Voting Age Population of New Orleans*

Algiers Charter Schools Association Voting Age Population All			
Black	6	129345	129351
non-Black	1	102800	102801
All	7	232145	232152
Cell Contents: Count			
Fisher's exact test: P-Value = 0.142160 (One tailed P-value: 0.07108)			

7) *FirstLine Schools, Inc. Compared to the Voting Age Population of New Orleans*

	FirstLine Schools, Voting Age Inc. Population	All
Black	7 129345	129352
non-Black	6 102800	102806
All	13 232145	232158
Cell Contents: Count		
Fisher's exact test: P-Value = 1 (One tailed P-value: 0.5)		

8) *New Orleans College Preparatory Compared to the Voting Age Population of New Orleans*

	New Orleans College Voting Age Preparatory Population	All
Black	3 129345	129348
non-Black	7 102800	102807
All	10 232145	232155
Cell Contents: Count		
Fisher's exact test: P-Value = 0.119705 (One tailed P-value: 0.0598525)		

9) *ReNew Schools Compared to the Voting Age Population of New Orleans*

	ReNew Voting Age Schools Population	All
Black	2 129345	129347
non-Black	11 102800	102811
All	13 232145	232158
Cell Contents: Count		
Fisher's exact test: P-Value = 0.0040455 (One tailed P-value: 0.00202275)		

Question 3: Are Black citizens underrepresented on appointed charter school boards as compared to the student population of individual charter schools?

Part A: Compare Black representation on charter school boards (in aggregate) to the total student population of Black students.

	Appointed School Boards (Combin	Student Population (All Charter	All
Black	33	7100	7133
non-Black	50	644	694
All	83	7744	7827

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000000 (One tailed P-value: 0.0000000)

Part B: Compare Black representation on all network charter school boards (in aggregate) to Black student population in network charter schools.

	Appointed School Boards (Combin	Student Population (Network Cha	All
Black	18	6185	6203
non-Black	25	278	303
All	43	6463	6506

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000000 (One tailed P-value: 0.0000000)

Part C: Compare all non-network charter school boards (in aggregate) to Black student population enrolled in non-network charter schools.

	Appointed School Boards (Non-Ne	Student Population (Non-Network	All
Black	14	915	929
non-Black	19	366	385
All	33	1281	1314

Cell Contents: Count

Fisher's exact test: P-Value = 0.0006976 (One tailed P-value: 0.0003488)

Part D: Compare Black membership on all charter school boards (individually) to the Black student population in individual charter schools.

- 1) Black Membership on International of School of Louisiana Compared to Black Student Population in the International School of Louisiana

	International School of Louisiana	Student Population - Internatio	All
Black	3	225	228
non-Black	7	300	307
All	10	525	535

Cell Contents: Count

Fisher's exact test: P-Value = 0.528328 (One tailed P-value: 0.264164)

- 2) Black Membership on Educators for Quality Alternatives Compared to Black Student Population in The NET Charter School

The NET Charter School: missing

- 3) Black Membership on Lagniappe Academies of New Orleans Compared to Black Student Population in Lagniappe Academy

	Lagniappe Academies of New Orle	Student Population - Lagniappe	All
Black	2	61	63
non-Black	5	0	5
All	7	61	68

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000020 (One tailed P-value: 0.000001)

- 4) Black Membership on Future Is Now: New Orleans Compared to Black Student Population in John McDonogh High School

	Future Is Now Schools: New Orle	Student Population - John Mac	All
Black	4	551	555
non-Black	3	5	8
All	7	556	563

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000645 (One tailed P-value: 0.00003225)

5) Black Membership on Morris Jeff Community School Compared to Black Student Population in Morris Jeff Community School

	Morris Jeff Community School	Student Population - Jeff	All
Black	5	78	83
non-Black	4	61	65
All	9	139	148

Cell Contents: Count

Fisher's exact test: P-Value = 1 (One tailed P-value: 0.5)

6) Black Membership on Algiers Charter School Association Compared to Black Student Population in Fischer Charter School

	Algiers Charter Schools Associa	Student Population - Fischer	All
Black	6	498	504
non-Black	1	8	9
All	7	506	513

Cell Contents: Count

Fisher's exact test: P-Value = 0.117180 (One tailed P-value: 0.05859)

7) Black Membership on Algiers Charter School Association Compared to Black Student Population in McDonogh #32 Charter School

	Algiers Charter Schools Associa	Student Population - #32	All
Black	6	551	557
non-Black	1	6	7
All	7	557	564

Cell Contents: Count

Fisher's exact test: P-Value = 0.0841427 (One tailed P-value: 0.04207135)

8) Black Membership on Algiers Charter School Association Compared to Black Student Population Landry-Walker Charter School

Landry-Walker: missing

9) Black Membership on Algiers Charter School Association Compared to Black Student Population in Eisenhower Charter School

	Algiers Charter Schools Associa	Student Population - Eisenhower	All
Black	6	531	537
non-Black	1	64	65
All	7	595	602
Cell Contents: Count			
Fisher's exact test: P-Value = 0.55249 (One tailed P-value: 0.276245)			

10) Black Membership on Algiers Charter School Association Compared to Black Student Population in Algiers Tech Charter School

	Algiers Charter Schools Associa	Student Population - Tech	All
Black	6	307	313
non-Black	1	23	24
All	7	330	337
Cell Contents: Count			
Fisher's exact test: P-Value = 0.406668 (One tailed P-value: 0.203334)			

11) Black Membership on FirstLine Schools, Inc. Compared to Black Student Population in Green Charter School

	FirstLine Schools, Inc.	Student Population - Green	All
Black	7	457	464
non-Black	6	27	33
All	13	484	497
Cell Contents: Count			
Fisher's exact test: P-Value = 0.0000667 (One tailed P-value: 0.00003335)			

12) Black Membership on FirstLine Schools, Inc. Compared to Black Student Population in Langston Hughes Charter School

	FirstLine Schools, Inc.	Student Population	All
Black	7	592	599
non-Black	6	5	11
All	13	597	610

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000000 (One tailed P-value: 0.0000000)

13) Black Membership on FirstLine Schools, Inc. Compared to Black Student Population in Clark Charter School

Joseph S. Clark High School: missing

14) Black Membership on FirstLine Schools, Inc. Compared to Black Student Population in Dibert Charter School

	FirstLine Schools, Inc.	Student Population	All
Black	7	358	365
non-Black	6	40	46
All	13	398	411

Cell Contents: Count

Fisher's exact test: P-Value = 0.0013406 (One tailed P-value: 0.0006703)

15) Black Membership on FirstLine Schools, Inc. Compared to Black Student Population in Arthur Ashe Charter School

	FirstLine Schools, Inc.	Student Population	All
Black	7	308	315
non-Black	6	15	21
All	13	323	336

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000368 (One tailed P-value: 0.0000184)

16) Black Membership on New Orleans College Preparatory Compared to Black Student Population in Sylvania Williams Charter School

Sylvania Williams College Prep: missing

17) Black Membership on New Orleans College Preparatory Compared to Black Student Population in Crocker Charter School

	New Orleans College Preparatory	Student Population - Crocker	All
Black	3	213	216
non-Black	7	8	15
All	10	221	231

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000001 (One tailed P-value: 0.00000005)

18) Black Membership on New Orleans College Preparatory Compared to Black Student Population in Walter L. Cohen Charter School

Cohen College Prep: missing

19) Black Membership on ReNew Schools Compared to Black Student Population in SciTech Charter School

	ReNew Schools	Student Population - SciTech	All
Black	2	608	610
non-Black	11	30	41
All	13	638	651

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000000 (One tailed P-value: 0.00000000)

20) Black Membership on ReNew Schools Compared to Black Student Population in Schaumberg Charter School

	ReNew Schools	Student Population - Schaumberg	All
Black	2	595	597
non-Black	11	11	22
All	13	606	619

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000000 (One tailed P-value: 0.00000000)

21) Black Membership on ReNew Schools Compared to Black Student Population in Delores T. Aaron Charter School

ReNew Delores T. Aaron Elementary School: missing

22) Black Membership on ReNew Schools Compared to Black Student Population in ReNew Cultural Arts Charter School

	ReNew Schools	Student Population - Cultural A	All
Black	2	557	559
non-Black	11	23	34
All	13	580	593

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000000 (One tailed P-value: 0.00000000)

23) Black Membership on ReNew Schools Compared to Black Student Population in ReNew Accelerated High Charter School

ReNew Accelerated High School: missing

Part E: Compare Black membership on all charter school boards (individually) to the Black student population in charter schools managed by the respective charter school board.

1) *Black Membership on Algiers Charter Schools Association Compared to Enrollment of Black students in Algiers Charter Schools Association Charter Schools*

	Algiers Charter Schools Associa	Student Population - ACSA	All
Black	6	2497	2503
non-Black	1	119	120
All	7	2616	2623

Cell Contents: Count

Fisher's exact test: P-Value = 0.279770 (One tailed P-value: 0.139885)

2) *Black Membership on FirstLine Schools, Inc. Compared to Enrollment of Black students in Algiers FirstLine Schools, Inc. Charter Schools*

	FirstLine	Student Population - FirstLine	All
Black	7	1715	1722
non-Black	6	87	93
All	13	1802	1815

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000198 (One tailed P-value: 0.0000099)

3) *Black Membership on New Orleans College Preparatory Compared to Enrollment of Black students in New Orleans College Preparatory Charter Schools*

	New Orleans College Preparatory	Student Population - New Orlean	All
Black	3	213	216
non-Black	7	8	15
All	10	221	231

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000001 (One tailed P-value: 0.00000005)

4) *Black Membership on ReNew Schools Compared to Enrollment of Black students in ReNew Schools Charter Schools*

	ReNew Schools	Student Population - ReNew Scho	All
Black	2	1760	1762
non-Black	11	64	75
All	13	1824	1837

Cell Contents: Count

Fisher's exact test: P-Value = 0.0000000 (One tailed P-value: 0.00000000)

APPENDIX C: EMAILS TO CHARTER SCHOOL BOARD PRESIDENTS

I. Initial Email to Charter School Board Presidents in New Orleans

Dear Charter School Board President:

My name is Steven L. Nelson, and I am a graduate student at Penn State University. I am currently working on my dissertation and am contacting you in regards to the potential collection of data for my dissertation. As a graduate of the New Orleans Public School, I maintain a strong interest in the New Orleans Public School System, and my dissertation considers, among other things, the racial composition of charter school boards in the nation-leading school reform efforts in New Orleans. To aid in this research, I am requesting that you provide demographic information on your charter school's board of directors. In particular, I am asking that you provide me with 1) the total number of members on your charter school board, 2) the total number of White charter school board members, 3) the total number of Black charter school board members and 4) the total number of Latino charter school board members. Finally, it would also be helpful if you could provide 5) any information on the board member selection process at your school(s). I do not need any specific information on individual charter school board members; please refrain from sending such information if possible.

If you choose to assist me in this research project, please respond to this email with the requested information at your earliest convenience. Do not hesitate to contact me if the collection of this data will take longer than the allotted time and you would like to provide the requested information at a later date. You may also contact me with any additional questions, comments or concerns. On **December 20, 2013**, I will send a follow-up email to you regarding this request. Please reply to this email if you prefer not to receive any further communication from me. I look forward to your responses. Thank you in advance for your time and assistance.

II. First Follow-Up Email to Charter School Board Presidents in New Orleans

Dear Charter School Board President:

My name is Steven L. Nelson. I am a graduate student at Penn State University, and I emailed you earlier this month requesting information on the composition of your charter school board of directors. This information is needed for the completion of my dissertation, which considers the composition of charter school boards. Preliminary findings indicate that appointed charter school boards are often just as diverse as the popularly elected school board; however, more data is needed to confirm these findings. To aid in this research, I am requesting that you provide demographic information on your charter school's board of directors. You can assist me with this important research by responding to this email with the following information: 1) the total number of members on your charter school board, 2) the total number of White charter school board members, 3) the total number of Black charter school board members and 4) the total number of Latino charter school board members. Finally, it would also be helpful if you could

provide 5) any information on the board member selection process at your school(s). I do not need any specific information on individual charter school board members; please refrain from sending such information if possible. I look forward to receiving your responses. Thank you in advance for your time and assistance with this research!

III. Second Follow-Up Email to Charter School Board Presidents in New Orleans

Dear Charter School Board President:

My name is Steven L. Nelson. I am a graduate student at Penn State University, and I emailed you earlier this month requesting information on the composition of your charter school board of directors. This information is needed for the completion of my dissertation, which considers the composition of charter school boards. To aid in this research, I am requesting that you provide demographic information on your charter school's board of directors. You can assist me with this important research by responding to this email with the following information: 1) the total number of members on your charter school board, 2) the total number of White charter school board members, 3) the total number of Black charter school board members and 4) the total number of Latino charter school board members. Finally, it would also be helpful if you could provide 5) any information on the board member selection process at your school(s). I do not need any specific information on individual charter school board members; please refrain from sending such information if possible. I look forward to receiving your responses. Thank you in advance for your time and assistance with this research!

Curriculum Vita: Steven L. Nelson

Education

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Articles

Collins, K., Green, P., Nelson, S. and Madahar, S. (forthcoming). "Cyber Charter Schools and Students with (Dis)Abilities: Rebooting the IDEA to Address Equity, Access and Compliance" *Equity and Excellence in Education*.

Frankenberg, E., Green, P., and Nelson, S. (2013). Fighting Demographic Destiny: A Legal Analysis of Attempts of the Strategies That White Enclaves Might Use to Maintain School Segregation. *To Be Published in Volume 24, Issue 1 of the George Mason University Civil Rights Law Journal*.

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Green, P., and Nelson, S. (2013). Charter Schools. In Gooden, M., Eckes, S., Mead, J., McNeal, L. and Torres, M. (Eds.) *The Principal's Legal Handbook*. Education Law Association: Dayton, OH.