

# ARE BLACK PARENTS LOCKED OUT OF CHALLENGING DISPROPORTIONATELY LOW CHARTER SCHOOL BOARD REPRESENTATION? ASSESSING THE ROLE OF THE FEDERAL COURTS IN BUILDING A HOUSE OF CARDS

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

HEATHER N. BENNETT, ESQ.\*\*

## INTRODUCTION

The state of Minnesota established the first charter school in the United States in 1991.<sup>1</sup> In the roughly quarter century since then, charter schools have experienced exponential growth.<sup>2</sup> As of 2015, nearly every state in the union has charter school authorizing legislation.<sup>3</sup> In addition to experiencing rapid growth in support among

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\*Dr. Nelson is an Assistant Professor of Leadership and Policy Studies in the College of Education at the University of Memphis. He earned his Ph.D. from the Department of Education Policy Studies at the Pennsylvania State University and his J.D. from the University of Iowa. His research focuses on the intersection of law, policy and politics and the educational system(s), particularly in relation to movement towards and/or away from equity.

\*\*Heather Bennett is a Ph.D. Candidate in the Educational Leadership Program in the Department of Education Policy Studies at the Pennsylvania State University. Heather Bennett is a graduate of the Dickinson Law School at the Pennsylvania State University.

1. Institute of Race and Poverty, *Failed Promises: Assessing Charter Schools in the Twin Cities* 1 (2008), [https://www1.law.umn.edu/uploads/32/40/3240a8492f4c1d738fa87d975a4e5ea5/65\\_2012\\_Update\\_of\\_IRP\\_2008\\_Charter\\_School\\_Study.pdf](https://www1.law.umn.edu/uploads/32/40/3240a8492f4c1d738fa87d975a4e5ea5/65_2012_Update_of_IRP_2008_Charter_School_Study.pdf) (on file with author) (Minnesota was the first state to authorize and create charter schools).

2. See National Association of Public Charter Schools, *Get the Facts*, <http://www.publiccharters.org/get-the-facts/> (finding that charter school enrollment has more than doubled in the last ten years).

3. See Preston C. Green III, Erica Frankenberg, Steven L. Nelson & Julie Rowland,

policymakers, charter schools have also experienced growing support among those individuals served by schools. Charter school enrollment has now surpassed 2.5 million students and the number of individual charter schools accounts for more than 6,500 schools.<sup>4</sup> Minority stakeholders are particularly motivated to attend charter schools,<sup>5</sup> but some scholars have warned that charter schools may jeopardize the federally protected civil rights of minority groups.<sup>6</sup> Charter schools—at the national level—only comprise a small portion of the primary and secondary school market share despite the rapid increase in charter schools in operation, charter school enrollment, and the number of states authorizing charter schools.<sup>7</sup> The numbers signifying rapid growth and a national presence of the charter school movement have contributed to increased debate about the efficacy of charter schools to achieve educational equity as measured by various academic indicators<sup>8</sup> and measures of segregation for minority students.<sup>9</sup> Given the relatively small market share of charter schools at the national level, the amount of attention paid to charter schools may be

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*Charter Schools, Students of Color and the State Action Doctrine: Are the Rights of Students of Color Sufficiently Protected?*, 18 WASH. & LEE J. C.R. & SOC. JUST. 253–275 (2012) (finding that 42 states as well as the District of Columbia and Puerto Rico have charter schools. Note that several states, chiefly Mississippi, Washington and Alabama, have passed charter school authorizing legislation since the publication of this piece).

4. *School Choice & Education: By the Numbers*, CTR. FOR EDUC. REFORM, <https://www.edreform.com/2014/12/school-choice-education-by-the-numbers/>

5. William Howell, Martin West & Paul E. Peterson, *Meeting of the Minds*, 11 EDUC. NEXT 20 (2011), [http://educationnext.org/files/ednext\\_2010\\_Survey\\_Article.pdf](http://educationnext.org/files/ednext_2010_Survey_Article.pdf).

6. See, e.g., Steven L. Nelson & Jennifer E. Grace, *The Right to Remain Silent in New Orleans: The Role of Non-Politically Accountable Charter School Boards in the School-to-Prison Pipeline*, 40 NOVA L. REV. (forthcoming June 2016); Steven L. Nelson, *Killing Two Achievements with One Stone: The Intersectional Impacts of Shelby County on the Rights to Vote and Access High Performing Schools*, 13 HASTINGS RACE & POVERTY L.J. 225 (2016) [hereinafter *Killing Two Achievements*]; Erica Frankenberg, Genevieve Siegel-Hawley & Jia Wang, *Choice Without Equity: Charter School Segregation*, 19 EDUC. POL'Y ANALYSIS ARCHIVES, no. 1, 2011, <http://dx.doi.org/10.14507/epaa.v19n1.2011779> [hereinafter *Choice Without Equity*].

7. Steven L. Nelson, *Balancing School Choice and Political Voice: An Analysis of the Legality of Public Charter Schools in New Orleans, Louisiana Under Section 2 of the Voting Rights Act* (Dec. 2014) (unpublished Ph.D. dissertation, Pennsylvania State University) [hereinafter *Balancing School Choice*].

8. See Nelson & Grace, *supra* note 6 (evaluating the role of charter schools in New Orleans on student achievement using data other than standardized tests after finding rises in state test scores for Louisiana's public charter schools did not match national test scores).

9. See Erica Frankenberg, Genevieve Siegel-Hawley & Jia Wang, *The Civil Rights Project, Choice Without Equity: Charter School Segregation and the Need for Civil Rights Standards* (2010), <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/choice-without-equity-2009-report/frankenbergs-choices-without-equity-2010.pdf> (finding that charter schools are more segregated than traditional public schools).

disproportionate to the actual impact of charter schools. But the debate surrounding charter schools continues because both supporters and skeptics of the charter school movement believe that the movement is a harbinger of education policy to come.

This Article considers whether minority stakeholders in the charter school movement, as currently instituted in New Orleans, have access to the judicial protections requisite to maintain the political power necessary to impact education policy in relative proportion to similar opportunities that preceded the mass chartering of public schools in New Orleans. It is necessary to investigate this potential rollback of civil rights in education research suggesting that Black stakeholders in New Orleans have experienced diminished opportunities for involvement in the politics of education and educational policy—to the detriment of Black parents and students in New Orleans.<sup>10</sup>

The majority of research on charter schools is unsettled and limited to well-confined areas. The most prominent and comprehensive reports on charter schools focus on academic achievement and racial segregation. Other research explores critical areas such as student fundamental rights in charter schools. Stanford's Center for Research on Education Outcome has produced multiple national analyses of student achievement in charter schools.<sup>11</sup> The University of California–Los Angeles' Civil Rights Project assembled a national review of student segregation in charter schools.<sup>12</sup> Likewise, some scholars have assessed whether the rights of minority students are protected in charter schools; this research line generally analyzes whether charter schools, which are publicly funded but privately managed, are state actors under 42 U.S.C. § 1983.<sup>13</sup> Although these issues are important in the schema of charter school establishment, maintenance, and expansion, they do not account for an important investigation into the impact of charter schools on representation and political power of

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10. *Killing Two Achievements*, *supra* note 6; *see also* Nelson & Grace, *supra* note 6.

11. *See, e.g.*, Center for Research on Education Outcomes, *Charter School Performance in Louisiana* (2013), [https://credo.stanford.edu/documents/la\\_report\\_2013\\_7\\_26\\_2013\\_final.pdf](https://credo.stanford.edu/documents/la_report_2013_7_26_2013_final.pdf) (finding that Louisiana's charter schools have shown greater academic growth than its traditional public schools).

12. *See* Frankenberg, Siegel-Hawley & Wang, *supra* note 9 (finding that charter schools are almost universally more segregated than traditional public schools at the national level, state and metropolitan levels).

13. *See* Green, Frankenberg, Nelson & Rowland, *supra* note 3 (finding that federal courts have not issued a uniform declaration on whether charter schools are state actors and the lack of certainty around the status of charter schools as state actors or non-state actors could jeopardize constitutional and civil rights).

minorities on charter school boards. In fact, the literature on the impact of charter schools on the representation and political power of minorities on school boards is very scant. One examination of elected charter school boards in Minnesota found that these elected school boards result in slightly greater representation of minorities on school boards.<sup>14</sup> Another study found that some self-selected charter school boards in New Orleans resulted in disproportionately White charter school boards that usurped power from the democratically elected and predominately Black Orleans Parish School Board.<sup>15</sup> Although the response rate for the study on New Orleans' charter school boards was low,<sup>16</sup> the low response rate is indicative of the unaccountable and insular nature typical of charter schools.

This Article investigates whether the Voting Rights Act of 1965 or the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States or both may serve as restraints on the disproportionate selection of Whites on appointed charter school boards in New Orleans. If neither of these civil rights stalwarts can regulate the disproportionate selection of Whites on self-selected charter school boards in New Orleans, Black parents in New Orleans may have no, or at most limited, legal recourse to assure equitable political participation in the arena of education policy and/or the politics of education. Thus, Black citizens in New Orleans may experience a decline in their proportional representation on school boards and political power as well as their participatory abilities in the arena of educational politics despite the continued election of a predominately Black school board. Part I focuses on understanding charter schools in the unique context of New Orleans' public schools. Parts II and III explore the use of the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment as remedies to the disproportionality of White charter school board members in New

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14. Melissa Stone, Jerry Zhao & Colin Cureton, *Charter School Governance, Financial Management, Educational Performance and Sustainability: Research Pilot Study Report* (Hubert H. Humphrey Institute of Public Affairs 2012).

15. *Balancing School Choice*, *supra* note 7; see also Steven L. Nelson, *Gaining Choice and Losing Voice: Is the New Orleans Charter School Takeover a Case of the Emperor's New Clothes?*, in ONLY IN NEW ORLEANS: SCHOOL CHOICE AND EQUITY POST-HURRICANE KATRINA 237–66 (Luis Miron, Brian R. Beabout and Joseph Boselovic eds. 2015) [hereinafter *Gaining Choice*].

16. *Killing Two Achievements*, *supra* note 6 (discussing that only nine charter school boards in New Orleans responded to a survey regarding charter school board racial demographics and finding that only six of those boards responded to inquiries about efforts to diversify charter school boards. Likewise, only three boards were found to address racial diversity on charter school boards via policy, and only one charter school board in New Orleans explicitly sought racial diversity via policy).

Orleans.

## I. UNDERSTANDING CHARTER SCHOOLS IN THE UNIQUE CONTEXT OF NEW ORLEANS' PUBLIC SCHOOLS

This Part provides a brief history of New Orleans' public schools, and discusses the facts leading to Louisiana's takeover of public schools in New Orleans. This Part also discusses the legislative and political tools that were used to enable the takeover. Finally, this Part contextualizes the discussion of the whereabouts and roles of the advocates of New Orleans' public schools during the takeover process that led to the dismantling of the popularly elected Black school board and to the rise of disproportionately White charter school boards.

Prior to Hurricane Katrina's landfall, New Orleans' public school system was one of the largest (enrolling more than 63,000 students) and most dysfunctional educational systems in the United States. The system was plagued by White flight to surrounding parishes (the Louisiana equivalent of counties) and middle-class Black flight to Catholic schools.<sup>17</sup> The Orleans Parish School Board's mismanagement led to a perception that New Orleans' public schools would not and could not educate its students.<sup>18</sup> The signs of trouble for the faltering school district leading up to Hurricane Katrina's landfall included the appointment of nine different superintendents of schools in the ten years leading up to the takeover,<sup>19</sup> and perennial underfunding of the school systems, due largely to an inability to pass school taxes during citywide elections.<sup>20</sup> Hurricane Katrina forced the evacuation of the city's entire tax base, exacerbating the financial problems of the fledgling district.<sup>21</sup>

There were other problems that predated Hurricane Katrina. The school district experienced payroll discrepancies totaling over \$12 million per year, and had upset federal officials by squandering more than \$71 million in Title I funds.<sup>22</sup> These financial problems led to

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17. Leigh Dingerson, *Dismantling a Community Timeline*, 90(2) HIGH SCHOOL J. 8 (2007).

18. *Id.*

19. United Teachers of New Orleans, Louisiana Federation of Teachers & American Federation of Teachers, '*National Model' or Flawed Approach: The Post-Katrina New Orleans Public Schools* (2006), <http://www.coweninstitute.com/wp-content/uploads/2010/03/AFTNationalModelorFlawedApproach.pdf> [hereinafter *UTNO*].

20. Dingerson, *supra* note 17 at 8.

21. *UTNO*, *supra* note 19.

22. Pamela Frazier-Anderson, *Public Schooling in Post-Hurricane Katrina New Orleans: Are Charter Schools the Solution or Part of the Problem?* 93(3) J. OF AFR.-AM. HIST. 410, 429

federal indictments against numerous school officials.<sup>23</sup> The school district's financial problems overshadowed its woeful academic performance. In 2004, 63% of New Orleans' public schools were labeled as failing schools because of persistently low standardized test scores and incredulously low attendance rates.<sup>24</sup> The percentage of students failing to meet proficiency standards had increased substantially from 25% and 47% in 2000 and 2003, respectively.<sup>25</sup> Likewise, the 2004 high school graduation rate was barely over 50%.<sup>26</sup> New Orleans needed drastic school reform efforts.<sup>27</sup> Hurricane Katrina's landfall offered the city of New Orleans and its schools the educational equivalent of a mulligan.<sup>28</sup>

New Orleans is currently the center of urban education reform,<sup>29</sup> and is on the cusp of shaking its pre-Katrina reputation as one of the worst urban school districts in the nation.<sup>30</sup> To many Louisiana politicians, Hurricane Katrina was an opportunity to correct New Orleans' chronically poor performing and failing public schools.<sup>31</sup> Additionally, New Orleans' business community as well as some overly vocal families demanded that the New Orleans public schools change from an under-performing to a world-class school district.<sup>32</sup>

The takeover of New Orleans' public schools was hostile despite assertions that parents in New Orleans guided the reformation of the city's public schools. The autumn after Hurricane Katrina's landfall, the state legislature passed Act 35. Act 35 wrested control of nearly all of New Orleans' public schools from the popularly elected Orleans Parish School Board and placed that control in the Recovery School District

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(2008).

23. *Id.*

24. Brian R. Beabout, Alison A. Carr-Chellman, Khaled A. Alkandari, Luis C. Almeida, Husra T. Gurse, Ziyang Ma, Rucha S. Modak & Raymond S. Pastore, *The Perceptions of New Orleans Educators on the Process of Rebuilding the New Orleans School System after Katrina*, 13 J. EDUC. FOR STUDENTS PLACED RISK 212, 237 (2008).

25. Paul T. O'Neill and Renita K. Thukral, *The Unique System of Charter Schools in New Orleans after Hurricane Katrina: Distinctive Structure, Familiar Challenges*, 11 LOY. J. PUB. INT. L. 319 (2010).

26. *Id.*

27. Frazier-Anderson, *supra* note 22.

28. Beabout et al., *supra* note 24, at 212–37.

29. Kristin Buras, 'We're Not Going Nowhere': Race, Urban Space and the Struggle for King Elementary School in New Orleans, 54 CRITICAL STUDIES IN EDUC., 19, 32 (2012).

30. O'Neill & Thukral, *supra* note 25.

31. Brian R. Beabout, *Stakeholder Organizations: Hurricane Katrina and the New Orleans Public Schools*, MULTICULTURAL EDUC., 43–49 (2007).

32. Luis Miron, *The Urban School Crisis in New Orleans: Pre and Post-Katrina Perspectives*, 13 J. EDUC. FOR STUDENTS PLACED RISK 238, 258 (2008).

(RSD), a state-run school district with appointed leadership. The state takeover occurred despite resistance from the New Orleans delegation to the Louisiana legislature.<sup>33</sup> Act 35<sup>34</sup> allowed the state of Louisiana to take unilateral control of the majority of schools in New Orleans,<sup>35</sup> and dismantled the traditional power structure of the New Orleans' public schools through a state takeover (and the subsequent chartering of the city's schools).<sup>36</sup> The Orleans Parish School Board saw the vast majority of its responsibilities over schools and its policymaking powers immediately terminated.<sup>37</sup>

Act 35 did not affect all school districts equally.<sup>38</sup> Additionally, Act 35 increased the School Performance Score (a state calculation used to determine a school's academic success rate) that would label a school as failing.<sup>39</sup> The increase amounted to between 27 and 45 points on a scale between 0 and 200.<sup>40</sup> The criteria also disregarded the previous requirement of four years of failing school performance to require the state to conduct a school takeover.<sup>41</sup> Act 35, in essence, expanded the definition of a failing school to include schools that were not previously labeled as failing, including some that had recently been commended for exemplary performance.<sup>42</sup> The Louisiana legislature had, without warning, changed the rules on public education stakeholders in New Orleans.

The RSD quickly assumed leadership over the vast majority of New Orleans' schools.<sup>43</sup> The takeover, however, was not well planned.

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33. Dingerson, *supra* note 17, at 8.

34. 2005 La. Acts 2538–39 (codified as amended at LA. STAT. ANN § 17:10.7 (2015)).

35. Miron, *supra* note 32.

36. Brian R. Beabout, *Leadership for Change in the Educational Wild West of Post-Katrina New Orleans*, 11 J. EDUC. CHANGE 403, 424 (2010).

37. Dirk Tillotson, *What's Next for New Orleans?* 90 HIGH SCHOOL J. 69–74 (2007).

38. *UTNO*, *supra* note 19. According to this report, one way of triggering Act 35 was to have 30 academically unacceptable schools. Contemporaneous to Act 35's passage, only a handful of school districts contained 30 schools. Of the few school districts that would have qualified for state takeover under Act 35, the state of Louisiana refused to conduct a state takeover of any of those school districts.

39. *Id.* at 19.

40. *Id.*

41. *Id.*

42. *Id.* Act 35's effect was to allow the state to seize 102 of New Orleans' public schools in one action, adding to the previous 5 New Orleans schools that had been previously taken over by the state. See Tillotson, *supra* note 36. Likewise, the state of Louisiana had only taken over 13 schools—statewide—prior to Act 35's promulgation. See *UTNO*, *supra* note 19.

43. Frazier-Anderson, *supra* note 22 (finding evidence that the Louisiana legislature did not intend to create a mass charter school movement). In the same legislative session that the legislature approved Act 35, the legislature voted to limit the number of charter schools established throughout the state. See *UTNO*, *supra* note 19.

Teacher shortages, a lack of facilities, and construction delays all complicated student enrollment.<sup>44</sup> The RSD opted to charter many of New Orleans' public schools after realizing that the state of Louisiana could not run schools in New Orleans much better than the Orleans Parish School Board had run the schools. The rapid increase in school performance scores (based primarily on state standardized test scores) after the mass chartering in New Orleans produced a perception that charter schools might have had the ability to revive the still-struggling public schooling system.<sup>45</sup> In effect, however, the charter school takeover was not well planned, but rather "pave as you go."<sup>46</sup> The state of Louisiana continues to lack a clear, consistent and manageable plan to successfully educate students in New Orleans as evidenced by the fact that the RSD has several times amended its strategy for returning New Orleans' public schools to local control.<sup>47</sup> The practical result is that self-selected charter school boards who are not politically accountable unilaterally determine when the city's schools will return to local and politically accountable governance.<sup>48</sup>

Charter schools in New Orleans arose from legislative fiat, executive order, and federal intervention.<sup>49</sup> In addition to the passage of Act 35, the United States Department of Education (DOE), through then-Secretary Margaret Spellings, waived many federal restrictions on charter schools, which enabled the mass chartering of the city's public schools.<sup>50</sup> Likewise, the DOE donated millions of dollars to assist with the start-up funds required to jumpstart charter schools in New Orleans.<sup>51</sup> Given the district's lack of a tax base to support the reopening of public schools, the influx of money from the DOE was instrumental in reestablishing the city's public schools, especially those that would have converted to charter schools. Meanwhile, then-Governor Kathleen Blanco removed requirements mandating parental and faculty support for the conversion of traditional public schools into

44. Frazier-Anderson, *supra* note 22.

45. Nelson Smith, *The Louisiana Recovery School District: Lessons for the Buckeye State* (Thomas Fordham Inst. 2012), <http://files.eric.ed.gov/fulltext/ED528943.pdf>.

46. Beabout, *supra* note 36, at 403–424.

47. Smith, *supra* note 45.

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

49. Frazier-Anderson, *supra* note 22.

50. Dingerson, *supra* note 17, at 8.

51. *Id.*



charter schools; thus, charter school entrepreneurs had very few obstacles to overcome in conducting a hostile takeover of schools in New Orleans.<sup>52</sup> At the same time, pro-charter groups dominated then-Mayor C. Ray Nagin's Bring New Orleans Back Commission while no seats were reserved for parents or teachers from New Orleans' public schools.<sup>53</sup> The pro-charter domination of federal, state, and local positions pertaining to education allowed the pro-charter groups to create the perception of a false dichotomy: either charter schools or no schools.<sup>54</sup>

The timing of Act 35's passage appears clandestine and nefarious, at best. The Louisiana legislature passed Act 35 when the greater share of more affluent and White neighborhoods had been spared from the city's worst flooding while predominately Black neighborhoods suffered disproportionately catastrophic damage.<sup>55</sup> By October 2005, many local White communities and middle-class Black communities were on the mend, having already experienced substantial recession of floodwaters and had been allowed by the government to return to their homes.<sup>56</sup> Poorer Black neighborhoods did not have similar fortunes.<sup>57</sup> White families and middle-class Black families dominated the population that first returned to the city of New Orleans.<sup>58</sup> These families did not, however, previously use the public schools in large numbers.<sup>59</sup> Efforts to rebuild New Orleans' poorest and most Black neighborhoods moved at a glacial pace, but efforts to displace Black New Orleanians' power over education policy and the politics of education moved much more rapidly.<sup>60</sup> These facts have led some scholars to believe that divestment in Black communities was purposeful.<sup>61</sup> Most importantly, those parents and students who had previously forsaken the public schools in New Orleans wielded disproportionate political power and voice in the rebuilding of New Orleans' public schools. The resultant system of schools in New Orleans consists of a series of predominately White, self-selected charter school

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52. *Balancing School Choice*, *supra* note 7.

53. *Id.*

54. *Id.*

55. *Id.*

56. Dingerson, *supra* note 17, at 8.

57. *Id.*

58. *Id.*

59. Dingerson, *supra* note 17.

60. Joshua Akers, *Separate and Unequal: The Consumption of Public Education in Post-Katrina New Orleans*, 36 INT'L J. URB & REGIONAL RES. 29, 48 (2012).

61. Buras, *supra* note 29.

boards governing nearly exclusively Black public schools in a city with a voting age population that is predominately Black. This system represents a significant divergence from the popularly elected, predominately Black Orleans Parish School Board that operated prior to Hurricane Katrina and reflected the demographic of the city's voting age population.<sup>62</sup>

## II. OPPORTUNITY (DIS)MISSED: THE VOTING RIGHTS ACT IS NO DEFENSE TO DISPROPORTIONATE APPOINTMENT OF WHITE CHARTER SCHOOL BOARD MEMBERS

Given this understanding of the way in which self-selected charter school boards in New Orleans are predominately White and displace the political power of a predominately Black board, an initial inquiry considers how the Voting Rights Act might protect the predominately Black electors in New Orleans. Prior to the Court's 2013 holding in *Shelby County v. Holder*,<sup>63</sup> the city of New Orleans was a Section 5 jurisdiction, meaning the state of Louisiana needed specific permissions from the federal government to alter electoral practices. Section 5 of the Voting Rights Act was specifically designed to intervene in the situation that presented itself to the voters of New Orleans, for the situation in New Orleans was one in which the state created a predominately White appointed and later predominately White self-selected school boards to supersede the power of the predominately Black, popularly elected school board. The Supreme Court, having expelled Section 4 of the Voting Rights Act and leaving Section 5 temporarily unenforceable in *Shelby County v. Holder*, left the voters of New Orleans with only Section 2 of the Voting Rights Act as a potential remedy for this possible violation of the Voting Rights Act.<sup>64</sup> Part II of this article discusses the history and current applicability of the Voting Rights Act to the circumstances of the New Orleans charter school takeover.

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62. *Balancing School Choice*, *supra* note 7.

63. 133 S. Ct. 2612 (2013).

64. *Id.*

### A. *Background on the Voting Rights Act*

Long before the Voting Rights Act of 1965,<sup>65</sup> Congress had attempted to intervene in the disenfranchisement of Blacks.<sup>66</sup> Yet states continued to find alternate paths to exclude Blacks from the political process although the Fifteenth Amendment purportedly assured protection from disenfranchisement.<sup>67</sup> The restrictions of the Fifteenth Amendment had proven generally powerless in remedying the disenfranchisement of Blacks in the U.S. and appeared almost nonexistent in the South.<sup>68</sup> Key anti-civil rights events, such as Bloody Sunday, occurred in 1965 and forced Congress to act more stridently to protect the voting rights of Blacks.<sup>69</sup>

Sections 2 and 5 are the broadest and most restrictive protections under the Voting Rights Act. Section 2 of the Act prohibits the denial or abridgement of the right to participate in the political process by way of a nationwide blanket prohibition. Section 2's prohibitions purposefully lack specificity and are generally applicable to any and all efforts at violating the right to vote. Because little progress had been made at the national level to ensure Blacks' right to the electoral franchise was protected, Congress saw fit to establish Section 2.<sup>70</sup> Section 2's protections are, unfortunately, remedial in nature; thus, potential plaintiffs must suffer some identifiable harm before the judiciary will intervene.<sup>71</sup> Section 5, on the other hand, applied specifically to jurisdictions that had proven to be ineffective at protecting the right of Blacks to participate in the electoral process, or worse had been instrumental in preventing the exercise of that same right.<sup>72</sup> Thus, Section 5 granted the federal government heightened

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65. Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2012)).

66. The Fifteenth Amendment, passed during Reconstruction, was previously the most notable attempt at remedying voter disenfranchisement. Though partially successful, the Fifteenth 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.

67. *Balancing School Choice*, *supra* note 7.

68. 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. *See* S. REP. NO. 97-417, at 5 (1982).

69. *Balancing School Choice*, *supra* note 7.

70. *See generally* S. REP. NO. 97-417, at 5 (1982); *see also* U.S. Dep't. of Justice, *Section 2 of the Voting Rights Act*, <http://www.justice.gov/crt/section-2-voting-rights-act> (last updated Aug. 8, 2015) [hereinafter *DOJ Section 2*].

71. *See generally* S. REP. NO. 97-417, at 6 (1982); *see also DOJ Section 2*, *supra* note 70.

72. *See generally* S. REP. NO. 97-417, at 5–6 (1982); *see also Killing Two Achievements*, *supra* note 6 (discussing the impact of the holding of *Shelby County* on educational equity, in particular

oversight of the electoral processes in jurisdictions covered under the section with the understanding that these jurisdictions were more likely to create or be obstinate in removing obstacles to Blacks' right to vote.<sup>73</sup> Unlike Section 2's protections, Section 5's protections are, therefore, preemptive. Section 4 of the Act provided the formula to determine which jurisdictions were covered under Section 5 and likewise determined when jurisdictions covered under Section 5 could be relieved of the duty to obtain federal permission to alter voting processes.<sup>74</sup> The Supreme Court held Section 4 unconstitutional in *Shelby County v. Holder*,<sup>75</sup> as discussed below. Section 5 is unenforceable without an enforceable Section 4. Without Section 5, minority stakeholders may have only Section 2's remedial protections, and Section 2's applicability is uncertain as related to nonelected school boards. Thus, minority stakeholders may not have an assured pathway to racial representation, if not parity, on self-selected charter school boards.

Since its initial passage, the Voting Rights Act has evolved in many ways. Before the Act reached 20 years old, it had experienced several reauthorizations and amendments that prompted new interpretations to the Act.<sup>76</sup> Through the first fifteen years of existence, the Court maintained that the Act prohibited voting schemes that diluted the voting power of Blacks.<sup>77</sup> In 1980, the Court reversed course and found violative of the Act only voting schemes that *intentionally* abridged or denied the voting rights of minorities.<sup>78</sup> After the Court's holding in *City of Mobile v. Bolden*,<sup>79</sup> a plaintiff's burdens of proof would be much higher in order to sustain an allegation of a violation of the Voting Rights Act.<sup>80</sup>

Congress quickly amended the Voting Rights Act after the *Bolden* decision.<sup>81</sup> The amended Section 2 allowed plaintiffs to prove their

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considering how Section 5 would prevent states from vacillating between structures to limit Black political power in setting agendas in education policy and the politics of education); U.S. Dep't. of Justice, *About Section 5 of the Voting Rights Act: The Shelby County Decision*, <http://www.justice.gov/crt/about-section-5-voting-rights-act> (last updated Aug. 8, 2015) [hereinafter *DOJ Section 5*].

73. *Id.*

74. *Id.*

75. 133 S. Ct. 2612 (2013).

76. *Balancing School Choice*, *supra* note 7.

77. *See, e.g., White v. Regester*, 412 U.S. 755, 763 (1973).

78. *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (plurality opinion).

79. *Id.*

80. *Balancing School Choice*, *supra* note 7.

81. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982); *see also*

Voting Rights Act cases without proving intentionality or otherwise purposeful discrimination.<sup>82</sup> Congress' amendment to Section 2 returned a Voting Rights Act plaintiff's burden of proof to the level where the plaintiff needed only to demonstrate a discriminatory impact.<sup>83</sup> The Supreme Court first considered the amended Section 2 in *Thornburg v. Gingles*.<sup>84</sup> In *Thornburg*, the Court found that the amended Section 2 established that the appropriate test for a Section 2 case was the "results test" as opposed to the *Bolden* "intent test."<sup>85</sup> Congress had previously openly questioned the efficacy of an intent test to remedy all procedures that jeopardize the electoral franchise as well as the impact of the intent test on community relations in enumerating reasons for rejecting the intent test in favor of the results test.<sup>86</sup>

The language of Section 2 of the Voting Rights Act, as of the 1982 amendments to the Act, is codified at 52 U.S.C. § 10301.<sup>87</sup> It 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

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S. REP. NO. 97-417 (1982).

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

83. *Id.* at 44.

84. *Id.*

85. *Id.* at 63.

86. *Id.* at 35.

87. 52 U.S.C. § 10301 (2015) (originally codified at 42 U.S.C. § 1973).

establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.<sup>88</sup>

Although Section 2 has been interpreted as a robust protection of voting rights, Section 5 was by far the preferred provision of the Voting Rights Act for claims of denial and/or abridgement, when applicable. The Supreme Court invalidated Section 4 of the Voting Rights Act—practically ending Section 5 enforcement—and left many minority communities with only the remedial measures of Section 2 in lieu of the more powerful and preemptive measures of Section 5. States might now be free to gerrymander electoral districts to assure political victories for candidates that are not particularly in favor of the political ideals shared by Black communities.<sup>89</sup> Although the United States Department of Justice, through the Attorney General, continues to file multiple actions under Section 2, there is evidence supporting the claim that ending Section 5 enforcement has aided in the retrenchment of voting rights protections in the Deep South.<sup>90</sup>

This retrenchment is occurring despite the fact that Blacks in the Deep South continue to play a critical role in national politics.<sup>91</sup> Of course, Black voters were pivotal in electing President Barack Obama—the first Black president—to the White House, but the ability of Blacks to control more local politics may be in jeopardy.<sup>92</sup> In Senate and congressional elections, Black voters are important in electing moderate or liberal Whites to office.<sup>93</sup> In the case of Louisiana, then-Senator Mary Landrieu, a moderate Democrat, relied on a large Black turnout to maintain her political position.<sup>94</sup> Some commentators argue that Blacks are not experiencing the electoral success at the state level

88. *Id.*

89. See *Killing Two Achievements*, *supra* note 6 (discussing the impact of the holding of *Shelby County* on educational equity, in particular considering how Section 5 would prevent states from vacillating between structures to limit Black political power in setting agendas in education policy and the politics of education); see also Damian Williams, *Reconstructing Section 5: A Post-Katrina Proposal for Voting Rights Act Reform*, 116 *YALE L.J.* 1116 (2007) (discussing the general lack of protection of Section 5 of the Voting Rights Act for citizens of New Orleans).

90. See, e.g., Jason Zingerle, *The New Racism: This is How the Civil Rights Movement Ends*, *THE NEW REPUBLIC* (Aug. 10, 2014), <http://www.newrepublic.com/article/119019/civil-rights-movement-going-reverse-alabama>; Myrna Perez & Vishal Agraharkar, *The Brennan Center For Justice Analysis, If Section 5 Falls: New Voting Implications*, [https://www.brennancenter.org/sites/default/files/publications/Section\\_5\\_New\\_Voting\\_Implications.pdf](https://www.brennancenter.org/sites/default/files/publications/Section_5_New_Voting_Implications.pdf) (on file with author).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Balancing School Choice*, *supra* note 7.

as they are at the national level.<sup>95</sup> This is true in Louisiana where both state houses are reliably conservative. More important to this Article, the charter school movement, as currently instituted in New Orleans, produces disproportionately and predominately White self-selected charter school boards that do not particularly pursue diversification.<sup>96</sup> Moreover, there is research to show that these boards' inability to secure Black membership in combination with political insulation results in poorer academic accountability.<sup>97</sup>

As legal scholars begin to discuss the intersection of movements to assure educational equity and access to the electoral franchise, it is important to note that these two civil rights struggles are very interdependent.<sup>98</sup> In many ways, the Court's dismissal of Section 4 can be properly understood as another setback in the effort towards educational equity.<sup>99</sup> When reviewing pertinent legal cases, it becomes apparent that issues of educational equity and/or equal educational access have not been a top priority for the Court in recent years.<sup>100</sup> The Court's decision in *Shelby County*, while ostensibly not an issue of educational equity, may have practical effects on the ability of Black New Orleanians to obtain, maintain and retain political involvement at the local (especially school board) level.<sup>101</sup>

The next section will examine whether, under the extant language of the Voting Rights Act and the Equal Protection Clause, the current circumstances in New Orleans produce a viable civil rights-based claim. Such a claim would assume 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.<sup>102</sup> In the alternative, the

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95. Zingerle, *supra* note 90.

96. *Killing Two Achievements*, *supra* note 6.

97. See Nelson & Grace, *supra* note 6; *Killing Two Achievements*, *supra* note 6.

98. *Id.*

99. *Id.*

100. *Killing Two Achievements*, *supra* note 6, at 233–39.

101. *Balancing School Choice*, *supra* note 7.

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

Court's holding in *Shelby County* could represent an additional obstacle to educational equity for Black students in New Orleans' public schools.

*B. The Application of Section Two of the Voting Rights Act to Non-Elected School Boards*

The most relevant statute for addressing the selection of non-elected school board members is Section 2 of the Voting Rights Act. Section 2 is the nationwide ban on electoral processes that disenfranchise or limit the political participation of minority voters.<sup>103</sup> Few federal courts, however, have addressed the selection of non-elected school board members under Section 2 of the Voting Rights Act;<sup>104</sup> and those that have addressed the intersection of Section 2 and non-elected school boards have been hostile to such efforts. The Fourth, Fifth and Sixth Circuit Courts of Appeals have conducted these analyses and have reached generally similar conclusions as to whether the Voting Rights Act applies to the use of non-elected school boards. After the most recent case involving the application of Section 2 to non-elected school boards, the question of whether Section 2 of the Voting Rights Act applies to non-elected school boards was partially resolved. Two of three federal courts addressing the applicability of Section 2 to non-elected school boards have explicitly rejected the use of Section 2 to regulate non-elected boards. The remaining court suggested that Section 2 might apply to non-elected school boards if the selection process had a disparate racial impact. Given more recent Supreme Court precedent, even the application of a disparate impact analysis—the only extant argument for using Section 2 to address non-elected school boards—does not appear to be likely.

In *Searcy v. Williams*,<sup>105</sup> the Fifth Circuit became the first federal appellate court to assess the legality of a non-elected school board.<sup>106</sup> In *Searcy*, the Georgia General Assembly authorized the creation of an independent, public school system for Thomaston, Georgia from the pre-existing R. E. Lee Institute.<sup>107</sup> The faltering financial status of the

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103. *Killing Two Achievements*, *supra* note 6 at 228.

104. Importantly, the state of Louisiana has a constitutional provision requiring that the state establish popularly elected school boards to govern the public schools of each parish. This constitutional provision has not been interpreted to ban the establishment of other, more powerful and unelected school board. *Killing Two Achievements*, *supra* note 6 at 228.

105. 656 F.2d 1003 (5th Cir. 1981).

106. *See id.*

107. *Id.* at 1005.



private, all-White R. E. Lee Institute jeopardized the education of White students in Thomaston.<sup>108</sup> The authorizing statute required that the R. E. Lee Institute's board of trustees become the Thomaston Board of Education.<sup>109</sup> Board of education members in Thomaston would, under the new statute, continue to be "elected"<sup>110</sup> in the same manner in which they were selected prior to the creation of the new, public school system.<sup>111</sup> Previously, each year one member of the board of education would retire, and the board of education, including the retiring member, would choose the next member of the board.<sup>112</sup> The statute creating the new school system was approved by referendum in 1918 and reauthorized several times (though the only method of entry onto the board of education remained a self-perpetuating form of selection).<sup>113</sup>

The board of education continued to effectuate explicitly racist policies upon its transition to a public entity. During desegregation, White traditions were uniformly adopted in lieu of Black traditions.<sup>114</sup> Until the time immediately preceding the lawsuit in *Searcy*, no Black had ever been "elected" to the board of education.<sup>115</sup> The public seemingly endorsed the policies of the board of education as it repeatedly voted overwhelmingly to keep the system in Thomaston as it existed despite the evident exclusion of Black stakeholders.<sup>116</sup> The board appointed its first Black man to service only after the initiation of the lawsuit.<sup>117</sup> The board of education, after the historic appointment, adopted an anti-discrimination and affirmative action policy to fill vacant seats.<sup>118</sup>

The Fifth Circuit later found the operation of the board to be unconstitutional under the Fourteenth Amendment.<sup>119</sup> The appeals court did not reach the plaintiffs' Voting Rights Act claim but did note the district court's appropriate decision that Section 2 of the Voting

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108. *Id.*

109. *Id.*

110. The federal courts found that this system was not actually an election but rather an appointment process.

111. *Id.* at 1005.

112. *Id.*

113. *See id.*

114. *See id.* at 1005–1006.

115. *Id.* at 1006.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 1010.

Rights Act does not apply to appointive selection schemes.<sup>120</sup> In holding that the school board selection process violated the plaintiffs' protections under the Fourteenth Amendment, the court focused on the discriminatory origins of the legislation and the continued discriminatory effects of the legislation.<sup>121</sup> This holding vindicated the plaintiffs' claims and dispatched the Voting Rights Act issues.<sup>122</sup> The court found no reason to consider the Voting Rights Act claim because the plaintiff's primary issue (the discriminatory nature of the school board) had been resolved.<sup>123</sup>

The next federal appellate court to address the applicability of Section 2 to non-elected boards was the Fourth Circuit. In *Irby v. Virginia State Board of Elections*,<sup>124</sup> the court did not resolve whether Section 2 applied to appointed positions but instead reserved opinion on that question for a later case.<sup>125</sup> In *Irby*, the plaintiffs alleged that the appointive system of selecting school board members, which until federal intervention consistently produced exclusively White boards, was conceived and maintained for a discriminatory purpose.<sup>126</sup> The plaintiffs, in particular, alleged that this system was a violation of Section 2 of the Voting Rights Act.<sup>127</sup> According to the district court, the appointment of local school boards in Virginia dated back to 1870.<sup>128</sup> Furthermore, there was no racially discriminatory intent in requiring appointed school boards at the onset of the policy.<sup>129</sup> The district court could not determine whether the modifications and alterations up to the turn of the century to the appointive system were motivated by racially discriminatory intentions.<sup>130</sup> After the turn of the century, the appointive scheme was maintained with the purpose of limiting the opportunities to select Black school board members.<sup>131</sup> Over the next three decades, the state legislature made several changes to the appointive system.<sup>132</sup> Notwithstanding the discriminatory history

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120. *Id.*

121. *Id.*

122. The United States Supreme Court affirmed the Fifth Circuit's decision in *Searcy* without opinion in *Searcy v. Hightower*, 455 U.S. 984 (1982).

123. *Searcy*, 656 F.2d at 1010.

124. 889 F.2d 1352 (4th Cir. 1989).

125. *See id.* at 1357.

126. *Id.*

127. *Id.* at 1353.

128. *Id.* at 1354.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See id.* at 1354–56.

of the selection process, the district court found that no discriminatory intent existed in maintaining the appointive system over an elective system.<sup>133</sup>

The Fourth Circuit found the establishment and maintenance of the appointive scheme lacked a discriminatory purpose and a discriminatory impact.<sup>134</sup> According to the district court, the percentage of Blacks on school boards in Virginia (under the appointive scheme) was not statistically different than the percentage of Blacks in the voting age population.<sup>135</sup> In fact, the actual percentage of Blacks on appointed school boards in Virginia exactly mirrored the percentage of Blacks in the voting age population.<sup>136</sup> Similar statistics were true of the individual cities and counties at issue in *Irby*.<sup>137</sup> 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.<sup>138</sup> Other variables—aside from racial discrimination—could explain the statistical differences in Buckingham and Halifax counties.<sup>139</sup> Thus, the Fourth Circuit agreed with the district court in determining that the appointive system of choosing school board members did not have a discriminatory impact.<sup>140</sup>

The Fourth Circuit deliberately left open the question of the applicability of Section 2 of the Voting Rights Act to the use of appointive school boards.<sup>141</sup> The court intimated that Section 2 might

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133. *Id.* at 1354. 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*, 347 U.S. 483 (1954), in an attempt to “impede Arlington’s ability to comply with court-ordered desegregation.” *Irby*, 889 F.2d at 1354. Finally, there were several attempts to enact an elective scheme for selecting school board members in Virginia, but all of those attempts failed. *Id.* The district court found that there was no discriminatory intent in keeping the appointive scheme. *Id.* at 1355. The Fourth Circuit 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. *Id.* The court accepted several nonracist reasons why the Virginia state legislature found appointive school boards favorable as opposed to appointed school boards. *Id.* 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 provide. *Id.*

134. *Id.* at 1358.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

be inapplicable to non-elective systems of selection; however, the court also refused to hold that Section 2 did not apply to appointive systems for choosing officials.<sup>142</sup> The court thus departed from the approach of its sister circuits<sup>143</sup> and ignored arguments that no citizens were allowed to vote.<sup>144</sup> The Fourth Circuit dispatched *Irby* by applying a Section 2 analysis and found that Section 2 of the Voting Rights Act was not applicable in this particular case but perhaps could be in another case that is similar but not identical.<sup>145</sup>

To reach its conclusion, the court examined whether the appointive system produced racially discriminatory and disparate effects.<sup>146</sup> Although the court acknowledged that Black representation was not statistically proportional in the jurisdictions challenged, the court held that mere statistical incongruence was insufficient evidence to assert a claim under Section 2.<sup>147</sup> In three of the five jurisdictions challenged in *Irby*, adding just one additional Black member to the school board would remedy any statistical difference in the percentage of Blacks in the voting age population and the percentage of Blacks on the school board.<sup>148</sup> There was one jurisdiction with a vast difference in Black representatives and the Black voting age population; however, every Black person that requested to serve on the school board had been selected.<sup>149</sup> Another jurisdiction had had Blacks nominated for school board positions, but the Black nominees had willfully withdrawn before appointment.<sup>150</sup>

The Fourth Circuit summarily dismissed the plaintiffs' remaining challenges. The court did not allow the plaintiffs to challenge the racial composition of the appointing officers; according to the *Irby* court, challenges to the composition of elected bodies must be made as direct challenges against those bodies under the Voting Rights Act, not as to their actions.<sup>151</sup> The court stated that the mere fact that White officials made appointments is not enough to prove racial discrimination.<sup>152</sup> The

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142. *Id.* at 1357.

143. *See Balancing School Choice, supra* note 7 (finding that almost all federal courts have found that Section 2 of the Voting Rights Act applies only to elected positions).

144. *Irby*, 889 F. 2d at 1357.

145. *Id.*

146. *Id.* at 1357–59.

147. *Id.* at 1358–59.

148. *Id.* at 1358.

149. *Id.*

150. *Id.*

151. *Id.* at 1359.

152. *Id.*

Fourth Circuit, therefore, kept open the door to allege a Section 2 violation although it had dismissed the Section 2 claims of the *Irby* plaintiffs.

Only one other federal appeals court has addressed the application of Section 2 of the Voting Rights Act to non-elected selection processes. The Sixth Circuit confronted the intersection of Section 2 of the Voting Rights Act and appointed school boards in *Mixon v. Ohio*.<sup>153</sup> In *Mixon*, voters and taxpayers of the Cleveland School District sought to have Ohio Substitute House Bill 269 declared unconstitutional.<sup>154</sup> H.B. 269 changed the composition and the number of members on the Cleveland School Board by allowing the Mayor of Cleveland to appoint the new school board of a district that consists primarily of portions of Cleveland with the addition of areas from four adjacent jurisdictions.<sup>155</sup> Prior to granting the Mayor of Cleveland the right to mayoral control of the school board, school district voters selected school board members in a public election.<sup>156</sup> *Mixon*, unlike previous federal voting rights act cases, 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.<sup>157</sup> The Sixth Circuit resolved this question with a resounding "no."<sup>158</sup>

The primary effect of H.B. 269 was to convert the Cleveland School Board from elected to appointed.<sup>159</sup> This type of change is presumptively valid based largely on Supreme Court dicta.<sup>160</sup> The school board would no longer be chosen in a popular election; instead, the mayor would appoint the board members from a list of nominees presented by a nominating committee. Furthermore, the legislation made a provision for the board to convert into a self-selected board, one in which the board would select its own successors.<sup>161</sup> H.B. 269 provided specific limitations on who could serve on the nomination

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153. 193 F.3d 389 (6th Cir. 1999).

154. *Id.* at 393.

155. *Id.* at 394–95.

156. *Id.*

157. Recall that the plaintiffs in *Searcy* and *Irby* contested the maintenance of a previously appointed boards.

158. See generally *Mixon*, 139 F.3d 389 (6th Cir. 1999).

159. *Id.* at 407

160. See *id.* at 407 (clarifying the roots of the legality of transitioning elected boards to appointed boards and also justifying the Ohio legislature's actions).

161. *Id.* at 395.

committee as well as who could be chosen as a nominee.<sup>162</sup> 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.<sup>163</sup>

Furthermore, the slate of nominees from which the mayor would choose the school board was required to fulfill certain requirements. No nominee could be an elected public official and all nominees had to be residents of the municipal school district.<sup>164</sup> At least one member of the selected school board was required to reside in the municipal school district outside of the city of Cleveland.<sup>165</sup> Four of nine selected board members were required to show, prior to appointment, expertise in a field related to the operation of schools.<sup>166</sup> The board, after the first thirty days, could use self-selection to compose the school board; until that time, the mayor reserved the right to appoint school board members.<sup>167</sup> 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;<sup>168</sup> perhaps the system was

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162. *Id.* at 395–96.

163. *Id.*

164. *Id.* at 396.

165. *Id.*

166. *Id.*

167. *Id.* at 410.

168. In many instances within this case, the Sixth Circuit implies, if not explicitly states, that

even self-selected because after six months the new school board would independently—and with very little political accountability to its stakeholders—control its own composition.<sup>169</sup> Nevertheless, the Sixth Circuit held that the transition away from an elective school board system did not trigger Section 2 of the Voting Rights Act.<sup>170</sup>

The federal appellate courts have made clear that the protections of Section 2 of the Voting Rights Act do not extend to all forms of selection processes. In *Mixon*, the Sixth Circuit held that Section 2 applies only to elective, not appointive systems; in many ways, *Mixon* might also ban the application of Section 2 to even self-selected public governing boards. The court cited both *Searcy* and *Irby*, described above. In addressing the issue of Section 2's ability to regulate appointed school boards, the Sixth Circuit borrowed from analogous precedent in non-school board cases to explain its stance. The court found that all federal courts addressing the issue of the applicability of Section 2 to appointed offices had found that Section 2 of the Voting Rights Act did not apply.<sup>171</sup>

In addition to relying on its sister circuits, the Sixth Circuit interpreted the language of the Voting Rights Act itself. The plain language of the Voting Rights Act indicates that Section 2 only covers the election and nomination of representatives, not appointed officials.<sup>172</sup> The court also found that the legislative intent of the Voting Rights Act dictated that appointed systems could not be held to the same account as elective systems.<sup>173</sup> In reaching this conclusion, the Sixth Circuit did not give proper credit to relevant legislative history regarding the use of appointive systems as “cursory language.”<sup>174</sup> The court expressed a fear that allowing challenges to appointive systems of selection could result in a slippery slope of allowing retroactive challenges to governmental choices of how to select officials.<sup>175</sup> The

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there is no constitutional or federal statutory restriction on the selection process of administrative units in government.

169. *Mixon*, 139 F.3d at 410.

170. *See id.* at 389.

171. *Id.* at 406–07. The Sixth Circuit's analysis was somewhat of an overstatement because the analysis does not give proper credit to the Fourth Circuit's argument that Section 2 might apply to appointed school boards given a disparate impact on minority voters.

172. *Id.* at 407–08.

173. *Id.*

174. *Id.* at 408. This language is considered cursory, although the legislative history of the 1982 amendments to the Voting Rights Act specifically mentions the conversion of elected posts to appointed posts. On the contrary, the Sixth Circuit found persuasive the dicta from a Supreme Court case in holding in this very case.

175. *Id.*

Sixth Circuit also noted the Supreme Court's affirmation, without comment, in *Searcy*.<sup>176</sup> The language of the Voting Rights Act, according to *Mixon*, mandated a judicial interpretation foregoing the application of Section 2 of the Act to appointed school boards.

Thus, the Fourth Circuit's disparate impact analysis in *Irby* is the only remaining link between Section 2 of the Voting Rights Act and appointed and/or self-selected school boards.<sup>177</sup> Unfortunately, more recent updates to the Supreme Court's disparate impact jurisprudence indicate that a disparate impact analysis under Section 2 of the Voting Rights Act is uncertain.<sup>178</sup> The sum of federal court cases addressing the application of Section 2 of the Voting Rights Act to school boards—other than those elected—limit the possibility of Black parents in New Orleans challenging the self-selection of charter school boards and concomitantly limits the ability of Black parents in New Orleans to impact education policy and the politics of education.

*C. New Orleans' Voters, the State Takeover of New Orleans' Public Schools and the Preclearance Requirement of § 5 of the Voting Rights Act*

If Section 2 of the Voting Rights Act does not protect the right of Black voters in New Orleans to participate in and influence education policy and the politics of education through the electoral process, Black voters in New Orleans may seek relief under Section 5 of the Voting Rights Act. Section 5, prior to the Supreme Court's holding in *Shelby County v. Holder*,<sup>179</sup> was the most restrictive and powerful provision of the Voting Rights Act. Although all jurisdictions in the United States are Voting Rights Act Section 2 jurisdictions, the jurisdictions with the most heinous pasts in terms of assuring the voting rights and political

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176. *Id.*

177. *Balancing School Choice*, *supra* note 7.

178. Under *Alexander v. Sandoval*, 532 U.S. 275 (2001), Congress must authorize private claims for disparate impact analysis in the statutory language that it promulgates. *Sandoval* creates no problems for Voting Rights Act litigation; Congress, through Section 2 of the Voting Rights Act, has explicitly authorized disparate impact analysis for Voting Rights Act claims. See 42 U.S.C. § 1973(b) (2012). Section 2 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 using disparate impact analysis. See *Thornburg v. Gingles*, 478 U.S. 30 (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 of whether those claims are initiated under intentional discrimination suits or disparate impact suits.

179. 133 S. Ct. 2612 (2013).



participation of minorities are Section 5 jurisdictions.<sup>180</sup> Section 5 of the Voting Rights Act requires that those jurisdictions, determined by Section 4 of the Voting Rights Act, that have a history steeped in the disenfranchisement of ethnic and racial minorities must petition the federal government to make changes to the voting procedures.<sup>181</sup> New Orleans was a Section 5 jurisdiction; in fact, the entire state of Louisiana was a Section 5 jurisdiction.<sup>182</sup>

### 1. The Creation of the State Takeover District and Appointed Charter School Boards in New Orleans Was a Change in Voting Procedures in New Orleans

Section 5 of the Voting Rights Act requires changes in the voting procedures in the city of New Orleans to be evaluated and approved by the federal government.<sup>183</sup> When the state of Louisiana stripped the popularly elected Orleans Parish School Board of its power and transferred that power to an appointed, state-run school board,<sup>184</sup> there was effectively a change in voting procedures. *Searcy* instructs that the Section 2 of the Voting Rights Act does not impact non-elected boards,<sup>185</sup> but the creation of new, appointed board to replace the old, elected board is a violation of the Voting Rights Act if there is no preclearance.<sup>186</sup> The popular retort to attestations that the transfer of power from the popularly elected Orleans Parish School Board to the appointed, state-run Recovery School District is that the transfer of power was not permanent in New Orleans.<sup>187</sup> At first glance, this argument holds up. The pre-Katrina New Orleans public schools were in shambles, as was the school district's tax base.<sup>188</sup> Due to outside pressures (encouragement by the federal government in the form of financial support and coercion by the state in the form of executive

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180. *DOJ Section 5, supra* note 72; *see also* S. REP. NO. 97-417 at 6, (1982) *reprinted in* 1982 U.S.C.C.A.N. 177.

181. *See Williams, supra* note 90, at 1116 (discussing how Section 5 was not robust enough to account for the situation that Hurricane Katrina introduced to the predominately Black (67 percent) city of New Orleans).

182. *See id.*

183. S. REP. NO. 97-417, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177 (identifying the transition between elective and appointive systems as being of paramount concern to protecting the voting rights of Blacks).

184. *See generally Killing Two Achievements, supra* note 6.

185. *See Searcy v. Williams*, 656 F.2d 1003 (5th Cir. 1981) (holding that the Voting Rights Act does not apply to boards that are not elected and suggesting that the Equal Protection Clause of the Fourteenth Amendment is a more appropriate method of regulating non-elected boards).

186. *Killing Two Achievements, supra* note 6.

187. *Gaining Choice, supra* note 15, at 246-47.

188. *See id.*

orders and legislation) as well as necessity (the city had to react to the return of its student body, which had no schools at the time), the district almost had to convert the majority of its schools into charter schools.<sup>189</sup> With very few options and even less time, the schools were opened in the most immediate manner available.<sup>190</sup> Although the state takeover of New Orleans' public schools was temporary, more than a decade after the state's takeover of the city's public schools it is clear that the schools would not be returned to the governance of the popularly elected school board in the near future.<sup>191</sup> It is incontrovertible that the state is unable to justify the conversion of elected posts to appointed/self-selected posts in perpetuity, but it is equally preposterous to assume that withholding political power from a previously empowered group for a decade—and likely longer—meets the approval of Section 5 without preclearance.

## 2. The Court's Decision in *Shelby County v. Holder* May Negate Any Retroactive Section 5 Preclearance Violation in New Orleans

When the popularly elected and predominately Black Orleans Parish School Board experienced a decrease in its governing powers, the state of Louisiana, which initiated the change from an elected school board ultimately to self-selected charter school boards, should have requested preclearance from the United States Department of Justice or the District Court for the District of Columbia, which has statutory power to “pre-clear” jurisdictions.<sup>192</sup> The state of Louisiana did not seek preclearance but instead moved ahead with its planned takeover of the New Orleans Public Schools with the impression that the state takeover was temporary and that power would presumably be given back to the voters of Orleans Parish once the schools were achieving adequately.<sup>193</sup> The state of Louisiana rushed into taking over

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189. Cf. Nelson & Grace, *supra* note 6; *Killing Two Achievements*, *supra* note 6; *Gaining Choice*, *supra* note 15, at 246–47 (all at some point questioning the length of the temporary takeover of New Orleans' public schools).

190. *Id.*

191. Danielle Dreilinger, *Second Recovery Charter Votes to Return to Orleans Parish System*, NOLA.COM (Jan. 2, 2015, 5:48 PM), [http://www.nola.com/education/index.ssf/2015/01/second\\_recovery\\_charter\\_votes.html](http://www.nola.com/education/index.ssf/2015/01/second_recovery_charter_votes.html) (reporting that only two “recovered” schools have returned to local control after Hurricane Katrina enabled the charter school takeover of New Orleans' public schools only). Although several charter schools are reportedly eligible for return to local control, the self-selected school boards of those schools have refused to cede power to the popularly elected and predominately Black Orleans Parish School Board.

192. See generally Williams, *supra* note 90.

193. Cf. Nelson & Grace, *supra* note 6; Nelson, *Killing Two Achievements*, *supra* note 6;

the public schools in New Orleans without adequate considerations for protecting the right of Blacks in New Orleans to influence education policy and/or the politics of education. The city of New Orleans is a decade into its school reform experiment, and despite allegations that the city's public schools are achieving academic success, only two schools have returned to the governance of the popularly elected and predominately Black Orleans Parish School Board.<sup>194</sup> Similarly, few schools have opened under the guidance of the reformed and now high-performing Orleans Parish School Board.<sup>195</sup> For some time, the state refused to allow the opening of additional public schools under the Orleans Parish School Board although parents, community members and advocates have long sought the opening of additional Orleans Parish Public Schools through the renovation and reestablishment of once failed and closed schools.<sup>196</sup>

The state's refusal to open new schools under the Orleans Parish Board is perplexing because—taken alone—the schools operating under the Orleans Parish School Board rank as the second highest performing schools in the state of Louisiana.<sup>197</sup> In essence, the state has placed the responsibility of returning charter schools to the Orleans Parish School Board with the predominately White, self-selected charter school boards themselves, which in some ways abdicates the state's duty to protect Black voters' political participation.<sup>198</sup> The transition of the governing structure of New Orleans' public schools raises concerns that Black voters may not have sufficient entrée points to influence education policy and the politics of education by way of the electoral process, if Black voters have any entrée points at all.

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*Gaining Choice*, *supra* note 15, at 246–47 (acknowledging the need for drastic reforms in New Orleans' public schools but questioning whether the reform movement has run its course).

194. Dreilinger, *supra* note 191.

195. Louisiana Department of Education, *Performance Scores*, <http://www.louisianabelieves.com/resources/library/performance-scores>, (establishing that the district performance score for Orleans Parish trails only the district performance score for the schools comprising the City of Zachary, Louisiana's public schools) [hereinafter *Performance Scores*].

196. Danielle Dreilinger, *John Mac, Black High School, Goes to Diverse Bricolage Elementary*, NOLA.COM (Apr. 22, 2015; 5:45 PM), [http://www.nola.com/education/index.ssf/2015/04/john\\_mac\\_goes\\_to\\_bricolage\\_cha.html](http://www.nola.com/education/index.ssf/2015/04/john_mac_goes_to_bricolage_cha.html) (reporting that a diverse school, which is predominately White in an almost exclusively Black school district, will receive a newly renovated school district over the wishes of Black community activists who requested a new school for high school students that would be operated by the popularly elected Orleans Parish School Board).

197. *See Performance Scores*, *supra* note 195.

198. *See generally* Nelson & Grace, *supra* note 6; *Killing Two Achievements*, *supra* note 6; *Gaining Choice*, *supra* note 15, at 246–47 (all stating that the rise of disproportionately White and self-selected charter school boards shunts the political involvement of the predominately Black voting age population of New Orleans and the stakeholders of the city's public schools).

Moreover, the state's takeover of New Orleans' public schools appears to support scholarly arguments that the New Orleans charter school experiment developed with racial animus.<sup>199</sup> The state takeover of the New Orleans public schools does not appear to be temporary, appears to affect the long-range political power of Black voters in New Orleans and perhaps developed from racially discriminatory purposes.

Section 5 of the Voting Rights Act does not forbid the change from an elected to an appointed school board—or in this case, the splitting of power from a solely elected and predominately Black school board to predominately self-selected and predominately White charter school boards. Section 5 merely requires that the federal government, in some capacity, assure that the political voice and participation of minority voters, through the election process, is not circumvented.<sup>200</sup> Though there is evidence that the state of Louisiana sought emergency preclearance for temporary changes to voting procedures that were prompted by Hurricane Katrina,<sup>201</sup> it is unlikely that the federal government granted the state of Louisiana an indefinite right to breach the voting protections of Black voters in New Orleans. Unfortunately, Black voters in New Orleans have little recourse, despite the continued existence of Section 5 of the Voting Rights Act.<sup>202</sup> With no enforceable Section 5, the state of Louisiana is presumably allowed to alter selection processes for school governance and the development and implementation of educational policy through the conversion of elected posts to appointive and/or self-selected posts. Neither Section 2 nor Section 5 of the Voting Rights Act is a viable option to prevent the disproportionate appointment of White charter school board members, even when such appointments specifically and simultaneously end-run the electoral wishes of Black voters and mute Black political participation in educational policy and politics. Whether intentional or inadvertent, the conversion of elected posts to appointive posts in predominately Black jurisdictions has the ability to shift educational policy and the politics of education. And in some cases, it may reify the presence and influence of White enclaves in

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199. Buras, *supra* note 29, at 19–32.

200. It is important to note that the federal government's evaluation(s) under Section 5 does not result in immediate and/or automatic denial of a jurisdiction's proposed voting processes.

201. *See generally* Williams, *supra* note 90.

202. The Supreme Court of the United States made Section 5 of the Voting Rights Act ineffective through its decision in *Shelby County*, which invalidated the trigger statute for requiring preclearance, Section 4 of the Voting Rights Act. *See supra* notes 65–102 and accompanying text.

educational policy and politics despite the decreasing numbers of these White enclaves (in raw count and percentages).<sup>203</sup>

### III. FALSE HOPE FOR AND FAILED PROMISES OF EQUALITY: THE EQUAL PROTECTION CLAUSE ONLY PROTECTS MINORITIES FROM DISPROPORTIONATE APPOINTMENT OF WHITE CHARTER SCHOOL BOARD MEMBERS IN THEORY

It is difficult, if not impossible, for the Voting Rights Act to regulate the disproportionate installation of White stakeholders on self-selected charter schools. The Equal Protection Clause (“EPC”) of the Fourteenth Amendment of the United States Constitution is a potential alternate limiting force on the disproportionate appointment of White Americans on appointed charter school boards in New Orleans. The EPC<sup>204</sup> prohibits states from treating similarly situated citizens in disparate manners based upon classification status or from impeding citizens’ fundamental rights guaranteed in the Constitution.<sup>205</sup> Part III of this article will focus on the promise of equitable appointments that is ostensibly assured through the Equal Protection Clause. First, Part III will discuss the scrutiny and burdens of proof necessary to warrant a successful claim under the EPC to determine how federal courts have decided discretionary appointment decisions. Second, an analysis of federal court decisions on the constitutionality of discretionary and mandatory appointments sheds light on the development and current status of the law on this topic. Finally, Part III applies the EPC to determine whether charter school board appointments in New Orleans are sufficiently discretionary thus escaping protection under the Equal Protection Clause.

#### *A. How the Federal Courts Have Defined the Powers of the Equal Protection Clause*

To determine if state law or policy violates the EPC, federal courts have applied different levels of scrutiny: strict scrutiny, intermediate

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203. That White enclaves have been able to control education policy and the politics of education is not unique to New Orleans. Minority stakeholders and allies of minority stakeholders battle the same enclaves in other areas of the country. See Erica Frankenberg, Preston C. Green III & Steven L. Nelson, *Fighting “Demographic Destiny”: A Legal Analysis of Attempts of the Strategies that White Enclaves Might Use to Maintain School Segregation*, 24 GEO. MASON U. C.R. L.J. 39 (2013).

204. The Equal Protection Clause provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

205. Derek W. Meinecke & David W. Adamany, Note, *School Reform in Detroit and Public Act 10: A Decisive Legislative Effort with an Uncertain Outcome*, 47 WAYNE L. REV. 9 (2001).

scrutiny, and rational basis. These courts' application of strict scrutiny depends particularly on two factors: whether the policy/law burdens a suspect class of people,<sup>206</sup> and/or whether the policy/law burdens certain fundamental rights as found in the U.S. Constitution. To withstand a strict scrutiny analysis, the state must show that the infringement of the fundamental right or the discrimination of a suspect class of people (e.g., sex or race) serves a compelling interest and employs narrowly tailored measures to effectuate that interest.<sup>207</sup> Typically, the application of a strict scrutiny analysis would result in a finding that the law was unconstitutional.<sup>208</sup> Absent such qualifications to warrant a strict scrutiny analysis, the courts have typically adopted a rational basis standard to determine the constitutionality of the state law.<sup>209</sup> To withstand a rational basis analysis, the government must only show that it had a legitimate reason for the classification.<sup>210</sup> State statutes usually survive most challenges under the rational basis standard.<sup>211</sup> The rational basis standard and application can be described:

In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any *reasonably conceivable state of facts* that could provide a rational basis for the classification. Where there are "plausible reasons" for Congress' action, "our inquiry is at an end."<sup>212</sup>

For the analysis of the constitutionality of discretionary appointed school boards, two rights are aptly discussed: the right to education and the right to vote. Education is neither stated nor guaranteed in the Constitution and is therefore not considered a fundamental right to warrant strict scrutiny analysis.<sup>213</sup> Students' right to education are not burdened by the reorganization from an elected school board structure to an appointed one, especially if evidence exists that the previous

206. Classifications that survive strict scrutiny are race, national origin, religion, and alienage. See *Graham v. Richardson*, 403 U.S. 365 (1971); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

207. *Grutter*, 539 U.S. 306 (2003).

208. Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793 (2006). From 1990–2003, the application of strict scrutiny in published final rulings in federal cases would result in the survival of 30% of the challenged laws. *Id.* at 813.

209. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973).

210. *Id.*

211. See, e.g., *Heller v. Doe*, 509 U.S. 312 (1993).

212. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993) (citations omitted).

213. *Rodriguez*, 411 U.S. 1 (1973).

school system had proven ineffective.<sup>214</sup> The Fourth Circuit case, *Irby v. Virginia State Board of Elections*, lists a number of reasons for states to implement an appointed school board structure that withstand the rational basis review:

- (i) Insulating school governance matters from direct political pressures;
- (ii) promoting stable school board membership;
- (iii) encouraging the service of individuals who would not seek elective office;
- (iv) promoting diversity in viewpoints which otherwise may not achieve representation on an elected school board;
- (v) avoiding the division of fiscal authority among multiple elected bodies;
- (vi) avoiding the fragmentation of local political authority;
- (vii) avoiding the problem of single issue campaigns which frequently occur with elected school boards.<sup>215</sup>

However, the Court has determined that citizens have a constitutionally protected right to “participate in elections on an equal basis with other citizens in the jurisdiction” and violations of this right should trigger a strict scrutiny analysis.<sup>216</sup> Inquiries regarding whether citizens are disenfranchised when the legislature substitutes elected school boards for appointed school boards have been analyzed under the supposition of the fundamental right to vote. The Supreme Court, however, has interpreted the Equal Protection Clause to only invalidate laws that purposely discriminate.<sup>217</sup> Challenges to facially neutral state actions that have discriminatory effects on a suspect class or fundamental right will not sustain an EPC claim, leaving the decision to enact a disparate impact claim to legislation.<sup>218</sup> For example, in *City of Mobile v. Bolden*, the Court indicated that there could be no violation of the EPC regarding the right to vote if there is no purposeful or intentional discrimination in voting. *Bolden*, instead, hinted that discriminatory purpose could be inferred in seemingly discriminatory neutral laws (for example, the purpose of the law can be explained on grounds apart from race) if there is other evidence that supports a

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214. See Meinecke, *supra* note 205 (In the 1990’s, majority Black cities, Cleveland, Chicago, and Baltimore school boards were taken over by the state or city, due to patterns of school board ineffectiveness. In response, state law substituted elected school board systems for a discretionary appointed system).

215. *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1355 (4th Cir. 1989).

216. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); see also *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Reynolds v. Sims*, 377 U.S. 533 (1964) (articulating the “one man, one vote” principle).

217. *Washington v. Davis*, 426 U.S. 229 (1976).

218. Richard A. Primus, Note, *Equal Protection and Disparate Impact Round Three*, 117 HARV. L. REV. 493, no. 2. (2003). See also *Bolden*, 446 U.S. 55; *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256 (1979); *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977) (zoning); *Davis*, 426 U.S. 229 (employment).

finding of discriminatory purpose.<sup>219</sup> In relation to this study, minority plaintiffs arguing that state laws validating discretionary school board appointments disproportionately excluding minority groups from the school board violates their right to vote must prove that the laws have a discriminatory purpose infringing on their right to participate equally in elections in order to sustain an EPC claim.

### *B. The Constitutionality of Discretionary School Board Appointments*

While the Court appears to address the concept of discretionary board appointments, no case law exists that explicitly discusses the concept of mandatory board appointments. From the Court's available intimations, the nucleus of the difference between discretionary and mandatory appointments appears to be that discretionary appointments provide broad latitude in the limits of what person or groups of persons may be selected to fulfill the vacant position whereas mandatory appointments require the appointing officer to appoint specific persons or groups of person to fulfill the open position. In the case of mandatory appointments, the person or group of persons need only be specified by title and/or position alone; an individual need not be named to fill the spot.<sup>220</sup> Much more problematic is the fact that the Court has given no instruction on when jurisdictions must or should use mandatory as opposed to discretionary appointments. The absence of judicial guidance is salient because there is no legally recognized right to challenge discretionary appointments. The federal courts have made some pronouncements using the EPC, specifically related to discretionary appointment decisions. These pronouncements relate to the burdens of proof attached to EPC inquiries needed to determine whether laws substituting elected school boards for appointed school boards violate the Constitution.

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219. See *Bolden*, 446 U.S. at 70 (“[D]isproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose.”).

220. See *Mayor of Phila. v. Educ. Equal. League*, 415 U.S. 605 (1974). This case attempts to provide examples of discretionary and, to an abstract extent, mandatory appointments. The Mayor of Philadelphia must make appointments to the School Board from among nominees submitted by the Nominating Panel (discretionary/ mandatory). The Mayor appoints four members to the Panel from the citizenry at large (discretionary), and then the remaining members of the Panel must be the highest ranking officer of one of the nine categories of citywide organizations or institutions “such as a labor union council, a commerce organization, a public school parent-teachers association, a degree-granting institution of higher learning, discretionary appointments” (discretionary/ mandatory). *Id.* at 606. The Court never explicitly identifies mandatory appointments nor gives guidance as to the rights attached to such appointments. However, the Court does hint at such appointments in this case because it implies that there are clear titles attached to who can or cannot be appointed to the Nominating Panel.



First, the courts have recognized that discretionary appointed school boards do not necessarily violate the right to vote under the Constitution. Beginning with *Sailors v. Kent Board of Education*, the Court determined that the right to vote does not apply to appointed school board cases.<sup>221</sup> In *Sailors*, the appellants brought an EPC claim under the Fourteenth Amendment in response to a Michigan statute that took away the power to elect county school boards from the qualified school electors, and placed it in the hands of delegates from elected local school boards to appoint the county school board; therefore, violating the “one man one vote” principle articulated in *Reynolds v. Simms*. The Court disagreed and stated, “We find no constitutional reason why state or local officers of the non-legislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election.”<sup>222</sup>

The Court argued that the “one man one vote” principle was not relevant in this case, and did not impinge the right to vote because the county school board serves an essential administrative (not legislative) function<sup>223</sup> of the state. Such reasoning hinged on the need for state governments to be flexible, and “experiment with new techniques” to meet changing conditions of urban school districts specifically for non-legislative officers. The State has the discretion to choose whether to appoint, elect, or combine the two mechanisms to determine non-legislative positions.<sup>224</sup>

Second, because discretionary appointed school boards are allowed, in cases where discretionary appointments disproportionately exclude minorities, plaintiffs must prove that the law in question has a discriminatory intent under the EPC. Federal courts have applauded the application of statistical analysis to the prevalence (or lack thereof) of minority representation on appointed boards, yet these same courts

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221. 387 U.S. 105 (1967).

222. *Id.* at 108.

223. *Id.* at 110. In *Hadley v. Junior Coll. Dist. of Metro. Kan.*, 397 U.S. 50 (1970), the Court answered the question left by *Sailors* determining whether a State may constitute a local legislative body through the appointive rather than the elective process. In terms of distinguishing between “legislative” and “administrative” officers, the Court rejected the distinction because “governmental activities ‘cannot easily be classified in neat categories.’” *Id.* at 56. The Court held that “as a general rule, whenever a state or local government *decides* to select persons by popular election to perform governmental [or legislative] functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election.” *Id.*

224. *Sailors*, 387 U.S. at 110–11.

have cautioned against the overreliance on statistical analysis of board membership to prove discriminatory intent in laws that are facially neutral. For example, in 1974, the Court opined in *Mayor of Philadelphia v. Equal Education Equal League* that Philadelphia's structure of appointed discretionary school boards was constitutional.<sup>225</sup> The public education amendment to the Philadelphia city charter approved in 1965 changed the school board structure to allow the Mayor to appoint nine members to the School Board; the mayor was allowed to choose appointees from names submitted by the Nominating Panel.<sup>226</sup> The claimants argued that the Mayor unconstitutionally disqualified Blacks from membership of the Nominating Panel, because the percentage of Blacks was woefully underrepresented to those on the Nominating Panel (15%) as compared to the city (34%) and student body of the public school system (60%). In multiple cases, federal courts have determined that statistics do not adequately indicate the racial animus needed to prove racial discrimination of appointments to discretionarily appointed boards.<sup>227</sup> The Court found that there was not enough evidence in the record to warrant a finding of racial discrimination.<sup>228</sup> Moreover, not all citizens are equally capable of serving on certain boards, especially when those boards have required or recommended skill sets. With discretionary decisions, the "relevant universe for comparison purposes consists of the highest-ranking officers of the categories of organizations and institutions specified in the city charter, not the population at large."<sup>229</sup> According to the Court in *Richmond v. J.A. Croson Company*, "when special qualifications are required to fill particular jobs, comparisons to the general populations . . . may have little probative value."<sup>230</sup>

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225. 415 U.S. 605 (1974).

226. *Id.*

227. *Id.* at 620–21.

228. *Id.* at 616–620. The Court indicated that the Third Circuit Court of Appeals finding of a prima facie case racial discrimination was incorrect. The Court of Appeals decision rested on 1) "ambiguous" testimony as to a statement by Mayor Tate in 1969 (newspaper account stating that he would not appoint no Negroes to the Board, even though two Negroes were already on the Board), in regards to the 1969 school board, not of the 1971 Panel; 2) Unawareness of Black organizations that could serve on the Panel of a city official who did not have the final authority to challenge appointments; and 3) The Supreme Court found that racial composition comparisons was "meaningless" in the context of this case.

229. *Id.* at 620–21. The District Court's concern for the smallness of the sample presented by the 13-member Panel was also well founded.

230. 488 U.S. 469, 501 (1989) (quotation omitted); see also *Mayor of Phila.*, 415 U.S. at 620; *Carter v. Jury Comm'n of Greene Cty.*, 396 U.S. 320 (1970); *Bruno v. W.B. Saunders Co.*, 882 F.2d 760 (3d Cir. 1989).

While the Court is correct to be suspicious of statistics that contain a small *n*-value, the Court's reasoning has extended to situations in which Blacks have been absolutely excluded from participation on discretionarily appointed boards. Conversely, four years prior to *Equal Education League*, the Court found that the exclusion of Blacks from the grand jury commission that selected the school board represented a prima facie case of discriminatory purpose under the EPC. In *Turner v. Fouche*, a judge-appointed jury commission selected the grand jury, which in turn selected the school board.<sup>231</sup> The Georgia system gave the jury commission discretion to exclude anyone not "upright" and "intelligent" from the grand jury list.<sup>232</sup> This method in itself did not violate any particular suspect class and thus did not violate the Constitution. However, the jury commissioners used the method to overwhelmingly exclude Blacks from the grand jury list.<sup>233</sup> The elimination of 171 Blacks out of the 178 total citizens disqualified for lack of "intelligence" or "uprightness" from the roster of potential jurors was found to be proof of "invidious discrimination."<sup>234</sup>

In *Searcy v. Williams*,<sup>235</sup> the Fifth Circuit used the *Turner* analysis to determine if a school board's discretionary appointment selection methods proved to be unconstitutional. In *Searcy*, Black voters brought a claim of racial discrimination challenging the compositional makeup and method of selection of a school board under a particular Georgia charter. In this instance, from 1915 to 1970, the all White board of trustees would elect (appoint) a new board member. Within that time frame no Black person served on the school board until the lawsuit was filed. The Fifth Circuit found the law to be constitutional on its face because the law did not require that the school board be composed of only white members. Therefore, the discriminatory purpose was inferred from overwhelming statistical evidence to explain the disparity, and fulfilled the high burden articulated in *City of Mobile v. Bolden*.<sup>236</sup> The White school boards' subjective selection of new members that excluded Blacks for sixty-one years was found to be highly discriminatory. The court held that appointed school board systems are permissible under the EPC of the Fourteenth Amendment "so long as the appointments are not made in a manner that

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231. 396 U.S. 346, 348 (1970).

232. *Id.* at 358.

233. *Id.* at 360.

234. *Id.* at 359.

235. 656 F.2d 1003 (5th Cir. 1981).

236. 446 U.S. 55, 70 (1980).

systematically excludes an element of the population from consideration.”<sup>237</sup> Furthermore, the Fifth Circuit indicated that there is a difference between elected and appointed selections. In an election, the fact that the citizenry did not elect Blacks does not indicate that the election is discriminatory, but a system of appointments, which totally excludes Blacks, should be an indicator of discrimination.<sup>238</sup>

The *Searcy* case is important because the Fifth Circuit explicitly stated that the Equal Protection Clause would be more useful than the Voting Rights Act at evaluating the proportionality and inclusiveness of minority citizens on appointed school boards.<sup>239</sup> The Fifth Circuit’s broad interpretation of *Equal Education League*,<sup>240</sup> combined with a denial of voting rights protection, gives rise to an implied promise that the Equal Protection Clause will protect minority populations from disproportionate appointments of Whites on appointed school boards. If Blacks cannot rely on the Voting Rights Act and its expansive coverage to protect them from exclusion from the political process, Black voters must be able to rely on the EPC to force the inclusion of minorities in the appointment process.<sup>241</sup> Otherwise, minorities may be left without the law’s protection from disproportionate appointment of Whites to appointed school boards. Yet, the current state of the law seems to require total exclusion from discretionary appointment decisions of minority populations to warrant a discriminatory purpose characterization of neutral policies, which is an extremely high bar to overcome.

Third, the Court recognized that judicial oversight of discretionary appointments made by elected officials might interfere with an elected official’s capacity to serve the electorate.<sup>242</sup> As addressed in *Equal Education League*, the Court exclusively discussed the “delicate” nature of federal-state relationships in the application of the

237. *Searcy*, 656 F.2d at 1009.

238. *Id.* at 1003.

239. *Id.* at 1009.

240. 415 U.S. 605 (1974).

241. *See Searcy*, 656 F.2d at 1009.

242. This point was not used in the Court’s ultimate decision to declare that the Mayor’s appointments did not violate the Constitution. However, the Court exclusively discussed the “delicate” nature of federal-state relationships in the application of the Fourteenth Amendment, specifically in regards to the federal government’s promise to protect minority rights in contention with a state’s executive’s discretionary power to appoint members to certain positions. *See Carter v. Jury Comm’n of Greene Cty.*, 396 U.S. 320 (1970) (finding that an Alabama law allowing the Governor to make discretionary appointments to a county jury commission, on its face did not violate the Constitution, even though the appointments completely excluded Blacks from service). *See also* *Quinn v. Millsap*, 491 U.S. 95 (1989); *Rizzo v. Goode*, 423 U.S. 362 (1976).

Fourteenth Amendment, specifically in regards to the federal government's promise to protect minority rights in contention with a state executive's discretionary power to appoint members to certain positions. Proving that an appointing officer is using a discretionary appointment in a discriminatory manner requires an arduous burden of proof even in relation to the behaviors of the appointing officer.<sup>243</sup> Even evidence that an appointing officer has acted in a discriminatory manner in the past will not suffice as probative of the discriminatory actions of the appointing officer. For example, in *Carter v. Jury Commission of Greene County*,<sup>244</sup> the Court found that an Alabama law allowing the Governor to make discretionary appointments to a county jury commission on its face did not violate the Constitution, even though the appointments completely excluded Blacks from service.<sup>245</sup> In another Alabama case, *James v. Wallace*,<sup>246</sup> the plaintiffs failed to prove that Governor George Wallace engaged in discrimination against Blacks in his discretionary appointments to state boards and commissions, despite Wallace's history of racial discrimination.<sup>247</sup> The Court denoted that it is the Governor's duty to represent the people that elected him, and to carry out policies that were the basis of his election. Yet such criteria highlight an acceptance of discriminatory actions by elected officials and do not protect the rights of the minority population, invalidating the purpose of the Fourteenth Amendment.

These three rules articulated by the various federal courts make it extremely difficult for Black citizens and families to obtain any relief against discretionary school board appointments that disproportionately exclude Blacks from service. The gravamen of the situation is that there is no reasonable method by which to challenge discretionary appointments under the Equal Protection Clause. Moreover, the Court has given no guidance on how to identify when an appointment is mandatory as opposed to discretionary in nature. Likewise, the difference is illusory because a legislative body could make all appointments discretionary to enable the employment of racially discriminatory appointment processes.

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243. See *Carter*, 396 U.S. 320; *James v. Wallace*, 533 F.2d 963 (5th Cir. 1976). In both cases, plaintiffs provided proof of discriminatory actions, but in neither case was this proof enough to overcome discretion.

244. 396 U.S. 320 (1970).

245. *Id.*

246. 533 F.2d 963 (5th Cir. 1976).

247. *Id.*

*C. Whether An Appointment is Mandatory or Discretionary  
Determines the Amount of Equity Possible Through Charter  
School Board Appointments*

The self-selections of charter school board members in New Orleans are discretionary in nature. There are no required persons or groups of persons that must serve on charter school boards; instead, the state legislature, primarily through the Louisiana Department of Education, permits charter school boards to consider a variety of needs that potential charter school board members may need to fulfill.<sup>248</sup> Sitting charter school boards are generally free to self-select whomever they feel is necessary to make the charter school board function best.<sup>249</sup>

The promise of regulating charter school board self-selections so that the boards achieve some form of racial parity as compared to pre-Katrina numbers relies heavily on the mechanism for making the appointment of the charter school board. On their face, discretionary appointments might only assure equitable appointments of charter school boards if the appointing officer is invested in creating a charter school board resembling the community at-large or the appointing officer is dedicated to diversity in some other form. The use of mandatory appointments, although much more restrictive and contrary to the charter school movement's ideals of autonomy, may produce greater opportunities for involvement from minority communities because mandatory appointments would allow for Black stakeholders to challenge the appointments (or lack thereof) of Black charter school board members. Despite the importance of the distinction between mandatory and discretionary appointments, discussed above,<sup>250</sup> the federal courts have never explicitly defined when an appointment would be classified in either category. Although courts do not give explicit guidance on differentiating mandatory and discretionary appointments, they have instead indirectly elucidated the terms under which a government appointment may be discretionary.

Based on an analysis of the federal court's definitions of discretionary appointments, mandatory appointments, or appointments that presumably dictate a prescribed person to be included on a board, would likely better assure the inclusion of

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248. LOUISIANA DEP'T. OF EDUCATION, LOUISIANA BELIEVES: LOUISIANA CHARTER SCHOOL PERFORMANCE COMPACT: CHARTER SCHOOL BOARDS, <http://www.louisianabelieves.com/docs/school-choice/faq---charter-board.pdf?sfvrsn=2> (last visited June 26, 2016).

249. *Id.*

250. *See supra* notes 231–52 and accompanying text.

minority groups on charter school boards than discretionary appointments, or appointments made at the caprice of the appointing officer. This is necessarily the case because mandatory appointments, by definition, should require that the appointing officer select certain individuals to serve on the charter school board. An example of such a requirement might be that charter school boards must appoint at least three parents to the charter school board. Because the majority of charter schools in New Orleans are predominately Black (and some are exclusively Black), the appointment of parents might assure that Blacks would be present on charter school boards in more measurable numbers.<sup>251</sup> Requiring a parental proxy would not be a foolproof method of assuring Black representation, but the parental proxy does at a minimum open the door to more proportional representation for Blacks on New Orleans' self-selected charter school boards.

The marquee difference in the courts' handling of the different types of government appointments appears to be that the federal courts may be more apt to resolve issues of mandatory appointments through the Equal Protection Clause although this is not explicitly clear from the courts' holdings. The federal courts have abdicated their duty to resolve questions of discretionary appointments by treating the discretionary appointments as non-justiciable political questions.<sup>252</sup> By treating discretionary appointments as non-justiciable political questions, the Court has explicitly made appointing officers and their discretionary appointments only answerable at the voting booth.<sup>253</sup> Minorities, by definition, may not have the political power to hold appointing officers accountable at the voting booth, especially when

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251. *Balancing School Choice*, *supra* note 7

252. See *James v. Wallace*, 533 F.2d 963, 968 (5th Cir. 1976). The court held that the plaintiffs in an Equal Protection Clause claim did not meet the burden of proof required for the federal courts to intervene in discretionary appointments, which is a political question. *Id.* The Fifth Circuit argued that the Alabama electors desired policies supported by the Wallace administration. *Id.* The court did not find the appointments of Governor Wallace to be violative of the Equal Protection Clause simply because the governor had 1) appointed Blacks to less than 1% of available positions, 2) had openly argued for the oppression of Blacks, 3) had previously been investigated for racially oppressive in the appointment of his executive branch and 4) the federal courts had already had to intervene in the actions of many of the boards in question. *Id.* at 964-968. These factors did not give pause to the court; instead, they give more credence to Wallace's attestation that he was objective and fair in his appointment of officials although such an attestation would fly in the face of facts. *Id.* at 968.

253. *Id.* If George Wallace's racist past and current actions did not raise the ire of the federal courts, it is difficult to imagine a circumstance under which the courts would find that a discretionary appointment was violative of the Equal Protection Clause. Thus, the only protections assuring equitable appointments to government left to would-be-plaintiffs is to replace, by way of the voting process, the offending appointing officer.

juxtaposed against White voters.<sup>254</sup> Because of the gap in civil rights protections for minorities, minority citizens are at the mercy of White voters; thus, minorities can rely only on the protections in the voting process because there is no ability to hold appointed officers accountable through the Equal Protection Clause. This reasoning reveals a glaring hole in civil rights protections for minorities. Section 2 of the Voting Rights Act does not protect minorities' stakes in appointed boards because Section 2 does not contemplate the protection of appointed posts.<sup>255</sup> Voting Rights Act cases encourage the use of the Equal Protection Clause to rectify issues associated with appointed boards.<sup>256</sup> Yet the case law on appointed boards does not protect against disproportionate discretionary appointments of White Americans.<sup>257</sup> To assure that minority parents have access to judicial tools to address disproportionate appointments of White Americans, charter school boards should consider the use of mandatory, rather than discretionary appointments, in choosing successive board members.

Although the self-selection of charter school board members in New Orleans' public charter schools are most likely discretionary, some of the federal courts' reasoning supporting discretionary appointments is not sustainable if society is to pursue racial equity. There are no elected officials that can be held directly accountable for the self-selection of charter school board members.<sup>258</sup> For instance, charter school board member self-selections traditionally rely on seated

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254. See Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991) (questioning the efficacy of minority safe districts to impact the legislative process and concluding that majority safe districts might merely transfer discrimination from the electoral process into the legislative process, where such discrimination is not statutorily banned).

255. See *Searcy v. Williams*, 656 F.2d 1003 (5th Cir. 1981); *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989); *Mixon v. Ohio*, 139 F.3d 389 (6th Cir. 1999) (all holding against or explicitly questioning whether Section 2 of the Voting Rights Act applies to non-elected school boards. Combined with *Shelby County*, Section 2 nor Section 5 protect minority stakeholders against the disproportionate appointment of White board members—or perhaps—complete exclusion of Black board members).

256. *Searcy*, 656 F.2d 1003 (5th Cir. 1981); *Irby*, 889 F.2d 1352; *Mixon*, 139 F.3d 389 (all of these cases, at the minimum, suggest that Section 5 is the appropriate provision of the Voting Rights Act for regulating appointed school boards).

257. See *Mayor of Phila. v. Edu. Equality League*, 415 U.S. 605 (1974).

258. The only mechanism for altering the operation of any one charter school in the state of Louisiana would be to gain a majority on the Louisiana Board of Elementary and Secondary Education. Unfortunately, each voter can only cast one vote for membership on the Board of Elementary and Secondary Education. Those votes are within districts, so voters in New Orleans would have to hope that voters across the state would join the voters of New Orleans in attempting to overthrow the current school reform movement.



charter school board members to appoint replacement board members.<sup>259</sup> Given the structure of the Recovery School District and the state takeover of the New Orleans Public Schools, there are no elected officials in the direct line of accountability to parents and students in New Orleans. In fact, the only elected officials that are indirectly accountable to parents and students in New Orleans are the members of the Board of Elementary and Secondary Education (“BESE”). New Orleans shares a BESE member with Jefferson Parish (a suburb of New Orleans); thus, this board member is not directly and solely answerable to a New Orleans constituency and could be duly reelected notwithstanding widespread opposition from the City of New Orleans.<sup>260</sup>

#### IV. HOW THE VOTING RIGHTS ACT AND THE EQUAL PROTECTION CLAUSE CONSPIRE TO UNDO PROGRESS IN SCHOOL BOARD REPRESENTATION FOR BLACKS

That neither the Voting Rights Act nor the Equal Protection Clause adequately protect the political interests of minorities is abundantly clear. Although the Supreme Court has failed to address the suitability of applying the Voting Rights Act to nonelected school boards, the federal appellate courts have been in near accord on the issue. With the possible exception of the Fourth Circuit, the federal appellate courts have summarily rejected the application of the Voting Rights Act to nonelected school boards. The Supreme Court—unlike in the case of the Voting Rights Act’s application to nonelected school boards—has decided on the application of the EPC to nonelected boards. Although the Court has unequivocally stated that the EPC should prohibit the exclusion of minorities from appointed boards, the Court’s decisions have not met this admirable standard. In fact, the Court and other lower federal courts have overtly declined to apply the EPC as a limiting force on the disproportionate appointment of White Americans and the exclusion of minorities on school boards (and other boards). Part IV of this Article addresses how the federal courts’ decisions in Voting Rights Act and EPC cases collude to produce an

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259. *Balancing School Choice*, *supra* note 7.

260. Board of Elementary and Secondary Education, About BESE, Map of BESE Districts, <http://bese.louisiana.gov/about-bese/map-of-bese-districts> (showing that the Second District for the Board of Elementary and Secondary Education and extends north and west along the Mississippi River to include parts of the New Orleans and Baton Rouge metropolitan areas).

acerbic gap in civil rights coverage for Black stakeholders in New Orleans' public schools.

*A. New Orleans' Charter School Boards Are Able to End-Run Section 2 of The Voting Rights Act Through the Establishment of Appointed Charter School Boards Without A Functioning Section 5 of the Voting Rights Act*

The Court's holding in *Shelby County v. Holder*<sup>261</sup> was ostensibly not an educational equity issue, but the Court's most recent Voting Rights Act decision has broad implications for Black stakeholders in New Orleans' charter schools. By invalidating Section 4 of the Voting Rights Act and thereby making Section 5 of the Voting Rights Act unenforceable,<sup>262</sup> the Supreme Court disallowed the last viable option to restrict the disproportionate self-selection of White charter school board members. A functioning Section 5 of the Voting Rights Act could force charter school boards, which are replacing the popularly elected school board in New Orleans, to obtain preclearance before implementing their self-selective procedures. The state takeover of New Orleans' public schools and the subsequent stripping of power from the Orleans Parish School Board were pitched as a temporary fix to the failing school system. Nearly a decade later—and with the once failing school district ranked as the second highest performing school district in the state—only two schools have voted to return to the district and relatively few schools have been opened under the district's leadership (despite a growing student population<sup>263</sup> and a demand from local parents and advocates).<sup>264</sup> It does not seem imminent that there will be a return to power or mass reopening of new schools under the district's leadership; thus, it is hardly arguable that the transition of power over schools from the popularly elected Orleans Parish School Board to the appointed leadership of charter school boards is anything but permanent.

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261. 133 S. Ct. 2612 (2013).

262. *Id.* at 2631.

263. See Danielle Dreilinger, *New Orleans School Count Flattens for 1st Time Since Katrina*, NOLA.COM (Nov. 18, 2015; 5:02 PM), [http://www.nola.com/education/index.ssf/2015/11/new\\_orleans\\_school\\_enrollment\\_2.html#incart\\_river](http://www.nola.com/education/index.ssf/2015/11/new_orleans_school_enrollment_2.html#incart_river); Danielle Dreilinger, *See Where New Orleans Public School Enrollment is Growing*, NOLA.COM (Nov. 18, 2015; 3:08 PM), [http://www.nola.com/education/index.ssf/2015/11/opsb\\_enrollment\\_2015\\_special\\_e.html](http://www.nola.com/education/index.ssf/2015/11/opsb_enrollment_2015_special_e.html) (together finding that enrollment in New Orleans' public schools is shrinking, but enrollment in schools under the popularly elected Orleans Parish School Board is increasing as more room for students is granted, mostly by designing new, larger buildings).

264. Dreilinger, *supra* note 196.

An unenforceable Section 5 of the Voting Rights Act forces Black parents in New Orleans to rely on Section 2 of the Voting Rights Act to counter disproportionate self-selection of Whites on charter school boards. Reliance on Section 2 of the Voting Rights Act to impede the disproportionate appointment of White charter school board members is a precarious proposition, if not totally misplaced. Only one federal court has ever entertained the notion of applying Section 2 to nonelected boards.<sup>265</sup> That court ultimately decided to forego the application of Section 2 to nonelected boards.<sup>266</sup> Minority parents in New Orleans have an even larger obstacle to overcome. Specifically, the Fifth Circuit, which oversees the city of New Orleans, has already foreclosed the application of Section 2 to nonelected school boards and presumably self-selected charter school boards in *Searcy*.<sup>267</sup> Minority parents in New Orleans, therefore, must hope for a shift in precedent if they are to use Section 2 to regulate the disproportionate self-selection of Whites to charter school boards.

*B. The Voting Rights Act Is Not Viable for Regulating the Selection of Charter School Board Members in New Orleans, and the Equal Protection Clause's Promise of Equitable Board Selection Is Illusory*

The Voting Rights Act is not a viable statute for regulating the self-selection of charter school board members in New Orleans based on the federal court's refusal to apply Section 2 of the Voting Rights Act to nonelected school boards. Although New Orleans' Black voters could have potentially relied on Section 5 of the Voting Rights Act to claim that a change in the voting process requiring preclearance occurred, Section 5 is no longer enforceable. The time for challenging Section 5 preclearance failures may have long passed. To be clear, Section 2 of the Voting Rights Act does not regulate nonelected selection mechanisms for selecting school boards because federal courts have found that Section 5 contemplates such regulation and EPC similarly targets disproportionate appointment policies and procedures. Section 5 of the Voting Rights Act is, unfortunately, no longer enforceable. Courts are only allowed to use the EPC when appointments are mandatory. The self-selection of charter school board members in New Orleans is best characterized as discretionary.

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265. *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989).

266. *Id.*

267. *Searcy v. Williams*, 656 F.2d 1003 (5th Cir. 1981).

The federal court's refusal to apply Section 2 of the Voting Rights Act to appointed school boards is further complicated by the fact that the Supreme Court has offered an illusory promise of regulating the appointment of boards via the EPC. In sum, the federal courts have nearly uniformly denied minority parents the use of the Voting Rights Act to combat the inequitable appointment of school board members. Black voters seeking to assure proportional racial self-selections to charter school boards can rely only on the EPC. The Equal Protection Clause's promise of equitable appointive representation lacks enforceability because of the Court's interpretation of the EPC. The federal courts have expressed sympathy for minority parents, recognizing that the assessment of minority representation on appointed boards is an intricate matter.<sup>268</sup> In New Orleans, Black voters are statistically underrepresented on reported self-selected charter school boards. These parents and students have no way to assure proportional or even equitable representation on these charter school boards, although Black parents and students controlled educational policy by way of the elected school board prior to Hurricane Katrina and the subsequent state takeover and chartering of the school district.

*C. The Reasoning of the Court—In Terms of Voter Accountability of Appointing Officers—Seems Circular At Best and Is Not Directly Applicable to Self-Selected Boards*

As vexing as the problem is, the fact that the charter school movement has usurped the prominent role of Black stakeholders in educational policy and politics in New Orleans is not the headline of the story. There is something much more sinister occurring in New Orleans (and potentially in other predominately Black areas of the country). The federal courts—where many civil rights were won for Blacks—have failed to protect these rights. That the protection of Black participation in the politics of education and education policy in New Orleans is faltering is not on its face the basis of insidious activity, though such an argument could be made. In fact, the erosion of Black participation and power over education policy and politics in New Orleans is more the work of the federal court's impressive bout of circular reasoning. In essence, it is always some other statute that should be regulating the attack on Black political power, at least in terms of educational policy and politics.

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268. See *Carter v. Jury Comm'n of Greene Cty.*, 396 U.S. 320, 331 (1970) ("While there is force in what the appellants say, we cannot agree that § 21 is irredeemably invalid on its face.").

Admittedly, it is hard to argue with the initial reasoning of the federal appellate courts. The federal courts have never been in the business of applying Section 2 of the Voting Rights Act to nonelected school boards. For a wide variety of reasons, the federal courts have historically relied on the application of Section 5 of the Voting Rights Act for the regulation of appointed boards. This alone is not problematic. It would be unfathomable that the federal government would monitor every jurisdiction's alterations of its governance selection procedures, specifically because some jurisdictions are more likely to enact legislation and policies that regress the rights of minority voters. The federal government, therefore, need only closely monitor the Section 5 jurisdictions for compliance with preclearance because the history of these jurisdictions implies a greater likelihood that these jurisdictions would somehow misbehave in regard to protecting minority political participation. If a jurisdiction does not have a history of misbehavior in regard to minority voting rights, then potential claimants would have to prove discriminatory actions by governments after the enactment of the alleged discriminatory policy rather than forcing the governmental entities to seek preclearance from the appropriate parties. The federal courts held steady on this reasoning with the reliance on Section 5 of the Voting Rights Act.

The reliance on Section 5 to monitor the jurisdictions with the most troubling histories of voting protections worked well until 2013 when the Court invalidated Section 4 of the Voting Rights Act and simultaneously made Section 5 unenforceable. Suddenly, the federal courts' reliance on Section 5 to protect Blacks from policies that transferred elected positions into self-selected positions became troubling. After 2013, an identification as a Section 5 jurisdiction carried little to no weight. The loss of the preclearance requirement received the most press, but there were other changes that could have more immediate and drastic effects. Jurisdictions that were previously Section 5 jurisdictions were free to implement any voting changes that did not violate Section 2. Herein lies the problem: Section 2 does not regulate nonelected boards. Jurisdictions that were previously blocked from changing their elected boards into nonelected boards were suddenly free to do so, opening the pathway to mute Black political power by nixing the ability of Black voters to gain racial representation on charter school boards. The federal courts have successfully punted on the issue of nonelected boards, although Congress had already

declared the switch from elected to nonelected boards to be suspicious in light of protecting minority voters.<sup>269</sup>

Under close scrutiny, however, the federal courts have also failed to regulate self-selected boards under the EPC. Even when the facts of challenged cases prove discriminatory intent, discriminatory action and discriminatory effect originating from the same action, the federal courts have rejected application of the EPC to appointed boards. Once again, taken individually, the courts' arguments appear sound. Elected officials must be able to select nonelected officials who will best respond to the wishes of the majority of the electorate. Taken as a whole, however, the federal courts arguments are troubling. Section 2 of the Voting Rights Act does not protect minority voters from the disproportionate appointment of White board members because Section 5 is specifically tasked with this protection. Section 5 of the Voting Rights Act does not protect Black voters from the disproportionate appointment of White board members because Section 5 is no longer enforceable. Despite the failure of the Voting Rights Act to protect Black voters from these transgressions, Black voters should be able to take solace in the fact that the EPC will protect Black voters from the disproportionate nonelected selection of White board members. The EPC analyses of the federal courts, however, rely on the ability of Black voters—who are uniformly statewide minorities—to elect statewide candidates that represent the political views of Black voters. In other words, under the EPC, Black voters may assure adequate representation on nonelected boards by voting for candidates who support the electoral wishes of the Black population. This assumes that Black voters may adequately utilize their rights under the Voting Rights Act. The reasoning is viciously circular in that all purported protections are tied to statutes that protect Black voters only in theory because the statutes rely on each other and are ineffective because each statute relies on the protections of another statute with limited enforceability. Moreover, there is an unstated assumption that each theoretical protection will afford Black voters and their political voice and participation adequate coverage to overcome nifty and sanctioned attempts to dilute Black political voice and participation. It only stands to reason, then, that a predominately Black city that consistently elects predominately Black school boards is left with predominately White appointed charter school boards

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269. S. REP. NO. 97-417, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177.

governing schools that are predominately Black. It is no coincidence; it is an attempt by Whites to usurp power over schools and education policy and politics from Blacks fully knowing that there is no recourse for these poor Black parents under current federal court precedent.

### CONCLUSION

Schools in New Orleans are predominately Black and poor, yet the governance of these schools is comprised of predominately White charter school board members. The state takeover of public schools, which led to the chartering of the public schools, has been hailed as a revival of parental involvement in New Orleans' public schools. The reports of increased parental involvement do not reveal the statistics used to calculate (or estimate) parental involvement, but an analysis of Black voting patterns in New Orleans—which almost always lead to a predominately Black elected school board—suggests that parental involvement in terms of selecting school leadership on appointed charter school boards is limited or foreclosed entirely from Black parents.<sup>270</sup> The involvement of White board members may be beneficial to the schools of New Orleans. New Orleans, which leads the nation in percentage of students enrolled in private schools, has seen not only substantial White flight to the suburbs but has also seen an almost crippling amount of middle-class Black flight to private schools. If these well-to-do board members are going to attract those families who have foregone New Orleans' public schools back to the struggling school district, then the incorporation of these board members is not only admirable but likely necessary. There are, however, problems with the emergence of White charter school board members as the dominant force in education policy. Research of traditional public schools reveals that an adequate presence of Black board members and policymakers correlates to better achievement for Black students.<sup>271</sup> It is difficult to make such statements in the charter school context but is not unreasonable given the nature of our schools and our society.

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270. See Vincent Rossmeier & Patrick Sims, *K-12 Public Education Through the Public's Eyes: Parents' and Adults' Perceptions of Public Education in New Orleans*, Cowen Institute for Public Education Initiatives (2015), [http://www.coweninstitute.com/wp-content/uploads/2015/05/cowen.poll\\_2015.pdf](http://www.coweninstitute.com/wp-content/uploads/2015/05/cowen.poll_2015.pdf) (on file with author) (finding that almost all respondents to a poll support a return to local control of New Orleans' public schools); see also *Balancing School Choice*, *supra* note 7.

271. See *supra* note 102 and accompanying text.

Although charter school advocates have asserted that Black parents in New Orleans are “choosing” reform schools for their school-aged children, the most requested choices for schooling are routinely those schools governed by the popularly elected Orleans Parish School Board.<sup>272</sup> The combination of forced choice, compulsory attendance and poverty in New Orleans dictates that even poor performing charter schools (or those undesirable to Black parents) will enroll some students, considering nearly all public schools in New Orleans are charter schools. Even if these parents sought a traditional public school, the remaining traditional public schools—which are operated by the popularly elected Orleans Parish School Board—are historically selective, though this selectivity does not always occur in the admissions process and few seats are generally available for these high performing schools.<sup>273</sup> The assertion that Black parents in New Orleans are choosing charter schools is misleading outside of this context and potentially purposefully skewed. Furthermore, Black voters in New Orleans continue to elect a predominately Black school board and, when given the opportunity, predominately Black officials. In the most glaring example of Black political will to elect Black officials, New Orleanians elected a Black city council membership—the predominately Black voting age population of the city handed Black leaders nearly three-quarters of the city council seats.<sup>274</sup> It is difficult to imagine that Black voters are eager to see Black candidates in all leadership roles, except those associated with education. In an apparent nod to this theory, the Louisiana Legislature has recently passed legislation requiring the Recovery School District to return control of all public schools in New Orleans to the popularly elected Orleans Parish School Board.<sup>275</sup>

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272. See EnrollNola, April 2015 Main Round Summary (2015), <https://oneappnola.files.wordpress.com/2015/02/2015-0428-mr-summary1.pdf>. Three of the top five elementary schools—Benjamin Franklin, Alice Harte and Mary Bethune—in the common public school application process were from the Orleans Parish School Board and all of the top three high schools are governed by the Orleans Parish School Board—Edna Karr, Eleanor McMain and McDonogh #35. *Id.* One must remember that there are almost four times as many schools governed by the nonelected Recovery School District than are governed by the popularly elected Orleans Parish School Board, giving these preferences more force. *Id.*

273. See *id.* Although many of the schools governed by the Orleans Parish School Board have been selective admissions, many of these schools dropped their selective admissions after Hurricane Katrina.

274. Mason Harrison, *Black Majority Regained on New Orleans City Council*, LOUISIANA WEEKLY (Mar. 31, 2014), <http://www.louisianaweekly.com/black-majority-regained-on-new-orleans-city-council> (discussing that the New Orleans City Council would return to having a Black supermajority in 2011, the first time since the election immediately following Hurricane Katrina).

275. Danielle Dreilinger, *New Orleans' Katrina School Takeover to End, Legislature Decides*,



The Louisiana Association of Public Charter Schools has launched an initiative to recruit and train charter school board members.<sup>276</sup> If the Louisiana Association of Public Charter Schools can use this mechanism to attract, train and retain parents of minority students onto charter school boards, this will be a step in a positive direction. This step alone indicates that the charter schools themselves recognize that involvement of members of the community—perhaps even those who are racial minorities—is necessary. It is also likely the reason that many charter school boards have refused to answer questions about minority membership and participation.<sup>277</sup> The charter school association need not look far for potential solutions for its woes at recruiting, training and retaining minority board members. The Algiers Charter School Association, a consortium of charter schools on the Westbank of New Orleans—a sizeable area in terms of the city’s population—has actively recruited parents to serve on their charter school board.<sup>278</sup> As a result of these efforts, the Algiers Charter School Association’s board of directors almost represents its nearly exclusive Black population proportionally and over-represents the voting age population of the city of New Orleans.<sup>279</sup>

Statistically, the charter schools in Algiers continue to see significant growth in student performance as measured by multiple indicators of student success. Similarly, the schools enjoy successful extracurricular activities—a point not as easily made by other charter schools in the area.<sup>280</sup> It is for this reason that charter schools in New Orleans should pursue the use of a parental proxy. Actively recruiting parents—specifically Black parents—to their charter school boards will, in effect, alter the composition of charter school boards to make the appointed school boards more reflective of the city and the school district populations.

The sample size of the schools responding to the survey regarding board composition is insufficient to make adequate findings regarding all charter school boards in New Orleans. This is, in part, because

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TIMES-PICAYUNE (May 5, 2016), [http://www.nola.com/education/index.ssf/2016/05/new\\_orleans\\_schools\\_reunify.html](http://www.nola.com/education/index.ssf/2016/05/new_orleans_schools_reunify.html).

276. Louisiana Association of Public Charter Schools, Programs & Resources, Top Shelf, <http://lacharterschools.org/programs-resources/the-top-shelf/>.

277. *Balancing School Choice*, *supra* note 7.

278. *Id.*

279. *Id.*

280. Walker-Landry High School has competed at high levels in athletics and band, both important to the culture of New Orleans’ public school students.

charter schools have no reason to respond to criticisms regarding board appointments and race. No state or federal agency tracks the racial composition of charter school boards. In fact, some charter school boards admitted that the boards themselves do not keep track of this information. This news is startling because there is ample research on the connection between board racial representation and student achievement in traditional public schools. Charter schools, which profess to be better equipped to serve unique populations, including minority students, should be invested in keeping information that could better prove the efficacy of charter schools to create more equitable schools and higher student achievement. State and federal policymakers should insist that charter schools not only collect but also distribute information on the racial composition of their boards, if only to give another point of evaluation of the effect of charter schools on minority communities and the participation and voice of minority communities in educational policy and politics.

Currently, New Orleans' public charter schools find support in improved School Performance Scores, which are comprised mostly of test scores on state assessments.<sup>281</sup> These improvements remain questionable because the state of Louisiana often changes the scale and scoring of schools, such that it is difficult to evaluate the change in a school's score on a year-to-year basis. Furthermore, Louisiana students continue to decline in performance on some nationally normed tests, despite gains on state tests.<sup>282</sup> Finally, test scores cannot be the only measure worthy of inclusion in evaluating school success. In a high-profile national story, a young man and public school student in New Orleans who was praised for his commitment to social justice was gunned down in the streets of New Orleans.<sup>283</sup> Students who are out of schools, for whatever reason, are more likely to be engaged in these acts, as perpetrators or victims. Adequate measures of student achievement must transcend test scores and include items such as suspension, graduation, and dropout rates, as well as many other

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281. See Nelson & Grace, *supra* note 6 (citing that the state of Louisiana has complete control of the state-based tests but not the national tests, which might be the cause of the disparate scores of the same students).

282. See *id.* (questioning the rapid increases in the state-based achievement scores of students in New Orleans' public schools in light of recent national test results showing general stasis, if not a general decline, in achievement).

283. Johnathan Bullington, *For New Orleans, Teen's Death the Loss of a "Visionary"*, *Educators Say*, NOLA.COM (Oct. 23, 2014; 12:02 AM), [http://www.nola.com/crime/index.ssf/2014/10/for\\_new\\_orleans\\_teens\\_death\\_th.html](http://www.nola.com/crime/index.ssf/2014/10/for_new_orleans_teens_death_th.html)).

measures. Thus far, analysis of the charter school takeover in New Orleans does not reflect a story of urban education renewal.<sup>284</sup> Schools in New Orleans must be tasked with more than achieving higher test scores. They must revive the hope of a city. This may be unfair, but it is a reality. How can one be hopeful and continuously deprived of the ability to affect the policies that dictate one's life?

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284. See Nelson & Grace, *supra* note 6 (finding links between better student outcomes, aside from grades, for schools with some political accountability as opposed to schools without any political accountability to the public).