Discussion of Puerto Rican migration and immigration and its effects on practicing law for voting rights, elections and politics, by the authors of *Latinos in New York*

**CLE MATERIALS**

Wednesday, April 25, 2018
3:45 p.m., Check-in
4 - 5:30 p.m., Program

Fordham Law School
Room 3-02
150 W 62nd Street
New York, NY 10023
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Speaker Biographies

Juan Cartagena, President and General Counsel of Latino Justice

Juan Cartagena is one of the nation's leading voices on equality and nondiscrimination who has successfully used the law to effectuate systems change for the benefit of marginalized communities. A dynamic public speaker, seasoned litigator and educator Mr. Cartagena is currently the President and General Counsel of LatinoJustice PRLDEF a national civil rights public interest law office that represents Latinas and Latinos throughout the country and works to increase their entry into the legal profession. He is a constitutional and civil rights attorney who has vast experience litigating cases on behalf of Latino and African American communities.

He formerly served as General Counsel and Vice President for Advocacy at the Community Service Society of New York. At CSS he also directed the Mass Imprisonment & Reentry Initiative which focuses on the effects these policies have on poor and minority communities. From 1990 to 1991 he worked at the government of Puerto Rico's Department of Puerto Rican Community Affairs in the United States where he served as Legal Director. Previously, he was Associate Counsel at the Community Service Society and before that he worked as a Staff Attorney at the former Puerto Rican Legal Defense & Education Fund (now LatinoJustice PRLDEF).

Mr. Cartagena is a former Municipal Court Judge in Hoboken, NJ and served as General Counsel to the Hispanic Bar Association of New Jersey.

A graduate of Dartmouth College and Columbia University School of Law, Mr. Cartagena lectures on constitutional and civil rights issues at Rutgers University in New Brunswick and the Interamerican University Law School in San Juan. He has written numerous articles on constitutional and civil rights laws, and has been recognized for his work on the political representation of poor and marginalized communities – especially Puerto Rican and Latino communities. His current research interests include the effects of mass imprisonment on Latino, and particularly Puerto Rican, communities, and criminal justice, policing and drug policy reform.

His work on a national level with the Voting Rights Act, the National Voter Registration Act and the Help America Vote Act led to invitations in 2005-2006 to testify before the U.S. House and Senate on the reauthorization of the Voting Rights Act and its effects on Latino communities in New York and New Jersey.

Mr. Cartagena has served on numerous boards of community-based organizations and government task forces in New York and New Jersey, including Governor Paterson’s Task Force on Transforming New York State’s Juvenile Justice System and Governor Corzine’s Blue Ribbon Advisory Panel on Immigrant Policy.
He has received numerous awards for his contributions to the field of civil rights law, among them the Freedom Fighter Award, Jersey City NAACP; the Martin Luther King, Jr. Social Justice Award, Dartmouth College; the Cesar Chavez Community Service Award, U.S. Hispanic Leadership Institute; and the Don Pedro Albizu Campos Award, Jersey City Borinquen Lions Club.8

Angelo Falcón, Director of National Institute for Latino Policy

Is a political scientist best known for starting the Institute for Puerto Rican Policy (IPR) in New York City in the early 1980s, a nonprofit and nonpartisan policy center that focuses on Latino issues in the United States. It is now known as the National Institute for Latino Policy and Falcón serves as its current President. He was also recently an Adjunct Assistant Professor at the Columbia University School of Public and International Affairs (S.I.P.A.).

Falcón has been able to combine academic and policy research with an aggressive advocacy style based on broad coalition-building and community organizing. Noted for his caustic sense of humor and his progressive politics, he has become one of the longest-serving chief executives of a Latino nonprofit in the country.

Clara Rodríguez, Professor of Sociology Fordham University

Professor Rodriguez is the recipient of numerous research and teaching awards, most recently, the American Sociological Association's 2001 Award for Distinguished Contributions to Research in the Field of Latina/o Studies, her university's Award for Distinguished Teaching in the Social Sciences in 2003, and she was designated "Distinguished Lecturer" by the Organization of American Historians. Recently, she was elected to the Governing Board of the American Sociological Association for a three year term. She has been a Visiting Professor at Columbia University, MIT, and Yale University. She has also been a Visiting Scholar at the Russell Sage Foundation and a Senior Fellow at the Smithsonian Institution's National Museum of American History. Previously, she was the Dean of Fordham University's College of Liberal Studies. She has written over 50 articles on Latinos in the United States and most recently co-authored of The Culture and Commerce of Publishing in the 21st Century (Stanford University Press, 2007). She has also been a consultant to "Dora the Explorer" and "Sesame Street.

José Rámón Sánchez,

Chair, Urban Studies Department and Professor of Political Science at Long Island University

A political theorist who has concentrated on urban political economy, American politics and the nature of power, Sánchez is a respected authority on Puerto Rican and Latino politics. He has published widely in those fields and is author of the book “Boricua Power: A Political History of
Puerto Ricans in the United States,” published by New York University Press. He is also co-author and co-editor of “The Iraq Papers,” published by Oxford University Press. He is a dedicated teacher and recipient of the David E. Newton Award for Outstanding Teaching. Dr. Sánchez is also the chair of the Urban Studies Program at LIU. He has served on the board of directors of a number of organizations, including the Institute for Puerto Rican Policy and the Center for Puerto Rican Studies, as well as the Puerto Rican Legal Defense and Education Fund. He is currently on the boards of the Myrtle Avenue Redevelopment Corporation and is chair of the board for the National Institute for Latino Policy. He blogs at http://jibarosoy.wordpress.com.

Moderator:

**Tanya Katerí Hernández**, Archibald R. Murray Professor of Law at Fordham University School of Law

Professor Hernández, is an internationally recognized comparative race law expert and Fulbright Scholar who has visited at the Université Paris Ouest Nanterre La Défense, in Paris and the University of the West Indies Law School, in Trinidad. She has previously served as a Law and Public Policy Affairs Fellow at Princeton University, a Faculty Fellow at the Institute for Research on Women at Rutgers University; a Non-resident Faculty Fellowship at the Fred T. Korematsu Center for Law and Equality, and as an Independent Scholar in Residence at the Schomburg Center for Research in Black Culture. Professor Hernandez is a Fellow of the American Bar Foundation, and the American Law Institute. Hispanic Business Magazine selected her as one of the 100 Most Influential Hispanics of 2007. Professor Hernandez serves on the editorial boards of the Law and Social Inquiry Journal of the American Bar Foundation, the Revista Brasileira de Direito e Justiça/Brazilian Journal of Law and Justice, and the Latino Studies Journal published by Palgrave-Macmillian Press.

Professor Hernandez’s scholarly interest is in the study of comparative race relations and anti-discrimination law, and her work in that area has been published in numerous university law reviews like Cornell, Harvard, N.Y.U., U.C. Berkeley, Yale and in news outlets like the New York Times, among other publications. Her most recent publication is the book "Racial Subordination in Latin America: The Role of the State, Customary Law and the New Civil Rights Response" (Cambridge Univ. Press).

In June 2012, New York City witnessed a congressional primary election that crystallized decades of voting rights struggles and the promises of the Voting Rights Act of 1965 (VRA) for Latino voters. For the first time in New York, a third Latino congressional district was created, reflecting the growing demographic change in the city when Latinos went to court to force the issue. For the first time, a credible candidate who was Dominican, not Puerto Rican, had a decent chance at securing the sued-for Democratic Party nomination for Congress. For the first time in a long time, the debate over whether Latino communities are better off being represented by a Latino than by an incumbent African American was a subtext in the larger campaign debate. For the first time in a long time, serious questions were raised about the lack of sufficient bilingual assistance for Spanish-speaking voters that may have decreased the turnout in favor of the Latino candidate.

In short, Adriano Espaillat’s challenge to the incumbency of Charles Rangel ushered in a new era of Dominican politics while reflecting the established, successful tools that Puerto Ricans used to gain their own footholds in New York City politics. Eventually Espaillat was successful in 2016 defeating Rangel’s hand-picked successor and becoming the first Dominican
elected to Congress in the nation. Latino political history is intertwined with Latino voting-rights history in New York City. Those tools, anchored in the Voting Rights Act, are also responsible for the election of the first Ecuadorian in New York, Assemblyman Francisco Moya from Queens, and years earlier, the first Dominican elected official in the country, Guillermo Linares from Manhattan.

As important as it is to study the political history of emerging Latino communities, their candidates for public office, and their interactions with the partisan political machinery, and given the role of law and civil rights enforcement in the city, it is equally important to study the role of the Latino voters and how Latino communities converted the struggle for civil rights into the protection of voting rights writ large.

Central to that analysis is the development and implementation of the Voting Rights Act of 1965 and its amendments. Considered the most effective of the civil rights acts passed in the heyday of the 1960s civil rights movement, the Voting Rights Act addresses two interrelated methods of discrimination in voting: *Vote denial* categorizes the set of laws and policies that impede equal access to voter registration and the voting booth. Poll taxes, literacy tests, white primaries, and grandfather clauses were successfully outlawed in the first wave of voter denial claims. Yet the vexing issue of how felon disfranchisement, which in New York dates back to 1821, still exists today and operates to thwart full Latino voting strength is a living example of vote-denial policies. In other parts of the country, voter photo-identification requirements are also modern-day vote-denial practices. *Vote dilution* refers to the minimization of the relative political strength of racial- and language-minority voters when their votes are aggregated. Where Latino voters coalesce around certain candidates and white voters coalesce to stop the election of minority-preferred candidates, certain election structures, such as at-large elections or unfair redistricting plans, can operate to cancel out the collective strength of protected minorities.

The Voting Rights Act has numerous provisions to eliminate the discriminatory effects of both unlawful vote denial and vote dilution. Section 2 of the VRA applies nationally and prohibits laws and practices that deny racial- and language-minority voters an equal opportunity to elect candidates of their choice. Section 5 applies to a small number of jurisdictions with a history of voter-related discrimination and requires them to get preapproval, called preclearance, from the federal government before implementing any change in election laws and policies. Section 203 also has a limited
geographic scope in jurisdictions that contain citizens of certain language-
minority background (such as, Spanish, Native American, or Asian lan-
guages) who need bilingual assistance because of their inability to fully and
meaningfully cast their votes in an English-only system. And section 4(e)
applies nationally, but only to voters from Puerto Rico who achieved at least
a sixth-grade education there but have difficulty participating in the electoral
process without assistance in Spanish.

Latino voting rights in the city can only be understood in the context of
this forty-plus-year history, because New York City stood at the forefront of
developing those laws and protections for marginalized voters throughout
this time. And Latino voting rights in the city can only be assessed by focus-
ing foremost on Puerto Rican voters, because for over forty years, they led
the way in securing what we now take for granted in the many parts of the
United States: the elimination of English-only election structures and the es-
tablissement of bilingual voting systems. It is to that history that we now turn.

PUERTO RICANS AND THE EMERGENCE OF LATINO VOTING RIGHTS

The migration of Puerto Ricans to the United States and their impact on the
political framework of local politics in this country is neither of recent vin-
tage nor of limited geographical scope. But what has not garnered enough
attention is the role of the Puerto Rican community in the development of
voting-rights protections for all Latinos in the United States. It all begins in
New York City.

New York City enjoys a long history of Puerto Rican progressive elec-
torial activism, starting in the first half of the twentieth century. In the period
between the two World Wars, Puerto Ricans in New York had thirty-six vi-
brant political and social organizations and a voter registration rate of 50%.¹
The Puerto Rican population, which quadrupled from 1940 to 1950,² easily
gravitated to Vito Marcantonio, an Italian congressman from East Harlem
who became a tireless advocate for the working poor and the oppressed and
a champion of Puerto Rican independence. Recognized as the “de facto
Congressman for Puerto Rico,”³ Marcantonio’s politics proved too much for
the entrenched power elite of the city and led to concerted efforts to defeat
him and in turn destabilize the burgeoning Puerto Rican voting bloc in the
city.⁴ This newfound political strength that began with Marcantonio spilled
over into the subsequent election of the first Puerto Rican official in the
United States in 1937, Oscar García Rivera to the New York State Assembly on the Republican and American Labor Party line. Eventually, the Liberal Party, the political arm of the garment workers union (ILGWU), along with the Tammany (Democratic) political machine, made it a point to block Puerto Ricans from leadership positions and stem the activism of Puerto Rican voters.5

Decades later Herman Badillo, a Democrat, became the first Puerto Rican elected to Congress in 1971. Badillo's congressional legacy was significant for the Puerto Rican community, because it coincided with the development of the Voting Rights Act, resulting in the surge of Puerto Rican elected officials, especially in Bronx County (a section-5-covered jurisdiction), and created an effective voice for Puerto Rican causes in Washington. That voice won VRA protection as well as federal sponsorship of bilingual education. By the 1990s, Puerto Rican political activism solidified in New York with the election of a second Puerto Rican to Congress,6 Nydia Velázquez from Brooklyn, along with the emergence of the Bronx and Upper Manhattan as the base of Puerto Rican, and later, Dominican, electoral success.

None of these inroads would have been made, however, without the VRA, and these inroads, in turn, were presaged by a little-known provision of the original VRA, section 4(e), which was directed exclusively to benefit the Puerto Rican community: In 1965, literacy tests impeded the full enfranchisement of African Americans and were a clear target of the VRA. Despite the Supreme Court's pronouncement that literacy tests were constitutional,7 the danger of the tests in the Deep South was in their discriminatory application. As a result, the coverage formula for section 5's protections specifically included literacy tests among the “tests or devices” that were used to trigger the VRA's most exacting provisions. Section 5's initial geographic scope was limited to a small number of states and jurisdictions, all of them in the South. In 1965, however, the discriminatory use of literacy tests as a prerequisite for voting went beyond the domain of southern states to include New York.

New York's literacy test requirement was the ultimate target of section 4(e), and it already had a history of discriminatory use against vulnerable populations in the state. In general, southern and eastern European immigrants had been the targets for literacy tests' exclusionary function.8 In New York, the 1921 state constitutional provision mandating literacy tests for voting was equally exclusionary. As early as 1915, the debates by constitutional delegates established its clear racial purposes.9
By mandating English literacy exclusively, New York’s literacy test impeded the full participation of Puerto Rican migrants, who used the courts to challenge its discriminatory nature. In 1961 in *Camacho v. Rogers*, Puerto Rican voters tested the limits of the state’s literacy test when applied to citizens from Puerto Rico. José Camacho was schooled in Puerto Rico in Spanish. He voted in Puerto Rico before migrating to New York but was unable to demonstrate literacy in English under New York law. Camacho was unsuccessful in his Fourteenth and Fifteenth Amendment constitutional challenge. But the issues raised in *Camacho v. Rogers* became the focal point of Puerto Rican political activism for years to come.

As the VRA was winding its way through Congress, the Puerto Rican community in New York was intent on finding a federal legislative solution to the issues raised in *Camacho v. Rogers*. The ultimate result of this effort was section 4(e), which states in part:

1. Congress hereby declares that to secure the rights under the Fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.

2. No person who demonstrates that he has successfully completed the sixth primary grade in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language.

With bipartisan support from Senators Robert Kennedy and Jacob Javits, section 4(e) was touted as an important remedy to the exclusion of Puerto Rican voters, who, through Congress’s deliberate policies, were schooled substantially in a language other than English, but who were also required under New York constitutional law to demonstrate proficiency in English before exercising the franchise.

Puerto Rican activists also participated in this debate and testified before Congress in support of section 4(e) including Herman Badillo, Irma Vidal Santaella, and Gilberto Gerena-Valentin. Badillo, as noted above,
became the first Puerto Rican elected to Congress and represented the Legion of Voters before Congress in 1965. Vidal Santaella subsequently became a judge of the New York County Supreme Court and was the first Puerto Rican woman admitted to the bar of New York State. She also represented the Legion of Voters in 1965 before Congress. Gerena-Valentín was a renowned community activist and became a New York City councilman from the Bronx in the 1970s. In the 1965 testimony, he represented the National Association of Puerto Rican Civil Rights. Their testimony was clear: New York’s English-only literacy test requirement was discriminatory on its face and as applied to Puerto Ricans in the city. They estimated that of 730,000 Puerto Ricans in New York of all ages, 150,000 registered to vote, but close to 330,000 were prevented from registering. Literacy test certificates would “suddenly disappear,” causing delays of hours, if not the entire day, to replace them, or pencils would be missing whenever Puerto Ricans sought to take the test. Collectively, the witnesses defused the “myth in [the] State of New York that a citizen can be an intelligent, well-informed voter only if he is literate in English.”

New York State fought back and challenged the constitutionality of section 4(e) all the way to the US Supreme Court. The court, in 1966 in *Katzenbach v. Morgan*, upheld section 4(e) as valid, and in doing so, it unequivocally highlighted section 4(e)’s protection for Puerto Rican voters: “[Section] 4(e) may be viewed as a measure to secure for the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement.” Section 4(e)’s significance in the area of civil rights in general, and voting rights in particular, cannot be overstated. Rarely does the US Supreme Court rule on matters exclusively affecting the Puerto Rican diaspora. Rarely does Congress pass a law that applies only to Puerto Ricans to ensure their equal protection when they arrive in the United States. And rarely do any of these federal branches of government address discrimination against Puerto Ricans precisely because of their language background, thus implicitly equating language discrimination with national-origin discrimination in civil rights enforcement.

All told, the 1965 version of the VRA contained vigorous limitations on state power embodied in section 5’s coverage of the Deep South, nationwide prohibitions on voting discrimination under section 2, and discrete protections against discrimination against Puerto Rican voters because of their
unique language-minority status. Section 4(e) is often overlooked in the analysis of the VRA's impact on Latino voting strength by various commentators who erroneously conclude that the act's 1975 amendments expanding section 5 coverage to Latino citizens in English-only electoral systems and establishing section 203 bilingual assistance were the act's first targeted provisions to assist Latino voters. In fact, section 4(e)—the Puerto Rican provision of the VRA—provided the means to extend the VRA's strongest protections under section 5 to New York, and in doing so extended the act's best tools to the only major metropolis outside of the Deep South. In 1970, Congress amended the threshold formula, and in 1971, three counties, Bronx, Kings, and New York, met the criteria for section 5 coverage. New York State again resisted and initially succeeded in stopping the application of section 5 in New York City.

Simultaneously, a handful of federal court decisions in New York under section 4(e) underscored how New York's literacy test and English-only elections worked to discriminate against Puerto Rican voters. Lawyers at the Puerto Rican Legal Defense and Education Fund litigated these cases. In *Lopez v. Dinkins*, Puerto Rican voters used section 4(e) to secure assistance in Spanish at the polls and the printing of ballots in Spanish. In *Coalition for Education in District One v. Board of Elections*, a federal court overturned a school board election because, in part, of the city's failure to provide adequate bilingual assistance to Puerto Rican voters. Both of these cases paved the way for the wholesale provision of bilingual assistance in the case of *Torres v. Sachs*. There, the court made two important findings. First it established that the city's English-only election system constituted a condition on the right to vote contrary to both section 4(e) and the 1970 Voting Rights Amendment. This conclusion effectively supported the construction that English-only elections were a "test or device" under the VRA—a critical legal interpretation at the time. Second, the court concluded that the right to vote requires meaningful access: "Plaintiffs cannot cast an effective vote without being able to comprehend fully the registration and election forms and the ballot itself." As a result of the *Torres* decision, the United States reopened the court decision that exempted New York from section 5 coverage and successfully recaptured Bronx, Kings, and New York Counties under section 5.

Thus, section 4(e) of the VRA, the Puerto Rican amendment, and the litigation that it engendered resulted in the act's strongest provisions to protect, first, African American and Puerto Rican voters, and, subsequently, all Latino and Asian voters in the city. The impact of section 5 coverage and
protection of minority voters in New York City cannot be overstated. And all of that was due to the unique Puerto Rican provision of the Voting Rights Act.

But section 4(e)’s impact did not just stop in New York City—it had national import as well by demonstrating the viability of creating comprehensive, bilingual alternatives to English-only electoral systems, and on a large scale. With over 668,000 Puerto Ricans in New York City in 1960 and close to 812,000 in 1970, section 4(e) litigation worked to the benefit of hundreds of thousands of other Latinos in the city alone.24 Torres v. Sachs and the other section 4(e) cases outside of New York City25 created the template for full bilingual assistance above and beyond voter registration, to reach language access to the ballots and access to bilingual assistance at the polls. By the time the 1975 language-assistance amendments to the VRA were enacted, Puerto Rican voters were enjoying increased access to the political process through these alternative systems. These electoral reforms, forged by the continuous struggle of Puerto Rican activists and lawyers going back to the 1950s with Camacho v. Doe, justified the full expansion of bilingual voting assistance to all language minorities in the 1975 VRA amendments that created section 203. As the House Judiciary Committee noted at the time: “There is no question but that bilingual election materials would facilitate voting on the part of language [sic] minority citizens and would at last bring them into the electoral process on an equal footing with other citizens. The provision of bilingual materials is certainly not a radical step... Courts in New York have ordered complete bilingual election assistance, from dissemination of registration information through bilingual media to the use of bilingual election inspectors.”26

Section 4(e)’s national footprint went even further. The litigation it generated established the legal foundation to extend section 5’s coverage to language-minority citizens in all section 5 jurisdictions. In 1975, the principal voting-rights advocates who urged Congress to amend section 5 to incorporate protections for Latino voters were Mexican American lawyers and activists.27 The Mexican American Legal Defense and Education Fund (MALDEF) argued, “Federal courts have held that where Spanish-speaking Americans reside, the conducting of an election only in the English language is a ‘device’ which abridges or denies the right to vote of such citizens.”28 Congress agreed. In short, the construction of section 5’s coverage formula to capture English-only election systems was won in large part by relying upon the only section 5 jurisdiction at the time that contained language-minority voters and that used the courts to assert their voting rights, specifically, the case of Puerto Ricans in New York City.
CREATING LATINO LEGISLATIVE DISTRICTS,
DEBATING WHO BEST REPRESENTS LATINOS

New York is unique in the way the Voting Rights Act operates on multiple levels and on such a large scale. On Election Day in New York City, over six thousand election districts with over three thousand electronic scanners and thirty-three thousand poll workers are in operation in a city of 8.5 million residents. The interconnection between the requirements of the VRA is an important element in the VRAs reach in the city. Federal observers—deployed pursuant to the VRA—provide information that is then used by the US attorney general in assessing the fairness of election changes for language-minority voters. Litigation under section 2 of the act is used to bolster denials of preclearance under section 5. And section 203 compliance issues become the focus of section 5 inquiries by the Department of Justice. Thus, despite its coverage of only a few counties in the state of New York, section 5 and section 203, in tandem with litigation, have addressed a breadth of voting-rights issues in the city. Besides language assistance, another staple of VRA protections in New York City is the creation of fair redistricting plans.

When it comes to elected officials, Latino communities have historically been excluded, and continue even now to be excluded, from American political spheres. In 2007, the census reported only 4,954 Latino elected officials in the United States, or less than 1% of the universe of over 500,000 elected positions in the country. Despite this canyon of disparity, there is still a debate over the fate of majority-minority districts, a debate that began in earnest with the Supreme Court's decision in 1993 in Shaw v. Reno. This is a debate that has benefited to some degree by concerns over its consequences for Latinos.

Latino voters, like other protected minorities under the VRA, often face a polemic regarding race/ethnicity and political representation: the tension between having Latinos directly represent Latinos in a legislative body and having non-Latinos willing and able to adequately represent Latino interests. Much of this turns on what political scientists call descriptive versus substantive representation. Descriptive representation is achieved when the representative comes from the same social or demographic group that she represents in an elected body. Substantive representation is obtained when representatives get results consistent with, and responsive to, the political needs of their constituents, regardless of the representatives' race, ethnic background, or social background. Adherence to descriptive representation
would result in the creation of safe minority districts, that is, districts with high minority concentrations, in order to maximize the electoral success of the minority group. Conversely, distributing minority voters throughout more “influence” districts presumably increases the opportunities for minorities to elect candidates of choice who may not be of their race but would represent their interests.

The question for Latinos nationally is whether at this point of their political development they must be descriptively represented in their respective legislatures in order to be fairly represented. In other words, there are few places like Bronx County or Dade County, Florida, where the voting strength of Latinos is mirrored in the halls of their local legislative bodies. Yet when compared to the inroads made by African American elected officials, Latinos’ progress has failed to reach parity in many jurisdictions. While Latinos share many attributes, opportunities, and lessons learned with African Americans in over forty years of VRA protection, the debate must still account for them separately in order to address their unique needs today and before the rules of the game are inexorably changed.

For decades, the VRA has been interpreted by the courts to require majority-minority districts in spite of some of these recent criticisms. In New York City majority-Latino districts have been created to comply with both section 2 and section 5 of the VRA. On multiple occasions, the Department of Justice has denied preclearance to unfair redistricting plans precisely because they failed to give Latinos an equal electoral opportunity by failing to create Latino majority districts. The classic example in this regard is the redistricting of the New York City Council in the 1980s.

In 1981, Mayor Edward Koch signed into law a city council redistricting ordinance with barely any protest from the eight minority members of the council. While African Americans and Latinos rose to 47% of the city’s population at the time, the city council plan created only eight minority districts in a forty-five member council. The city’s leadership explained its inability to create additional electoral opportunities for black and Latino voters by heralding a pervasive integration of the city’s residents on a scale never seen before. In the Bronx, at that time two-thirds black and Latino, the council created only two minority districts out of six, claiming it could not find enough minority concentrations since the minority population was allegedly diffused throughout the borough. The city submitted its new plan to the Department of Justice for approval but would only provide it with additional information in a piecemeal fashion after the Puerto Rican Legal Defense and
Education Fund disclosed the pressure placed on minority council members to support the discriminatory plan. Citing an affidavit from Councilman Gilberto Gerena-Valentin, which described how the leadership threatened to draw his residence out of his district if he failed to support the plan, PRLDEF charged that the plan violated section 5 because it purposefully failed to provide Latino and black voters with an equal electoral opportunity.  

Arrogantly, the city continued its preparations for a September 10 city council primary election without having secured the necessary federal preclearance in advance. PRLDEF attorneys filed Gerena-Valentin v. Koch, one of three VRA suits filed to stop the elections, and on September 8, 1981, the federal courts canceled the elections in the wake of the city's failure to comply with the VRA. The city responded by trying to hold citywide and city council at-large elections on September 22, 1981. But again, at PRLDEF's urging, the Department of Justice denied preclearance for the request to include at-large council races in the newly scheduled primary precisely because of the "uniquely disparate impact on Spanish-speaking voters." By October 1981, the Department of Justice denied preclearance of the original council redistricting plan, noting as well that Latino communities in the Bronx were fragmented illegally, with the result that their voting strength was diluted. A remap was now required, and the city council reluctantly ceded to the demands of black and Latino voters. By February 1982, new minority districts were added in the Bronx and in Brooklyn, and minority districts in Manhattan were strengthened. The new plan was ultimately precleared by the Department of Justice that year.

The 1981 city council redistricting battle was a watershed moment in securing voting rights for Latinos and blacks in New York City. It generated the beginnings of a minority-voting-rights bar in the city as the attorneys who worked on those cases (Gerena-Valentin v. Koch, Herron v. Koch, and others) would continue to counsel black and Latino voting-rights activists in the city for decades to come. It put teeth into the VRA as a federal court showed no hesitation in stopping an election at the eleventh hour in the country's largest city for its failure to get permission, in advance, to implement changes in a redistricting plan. And it provided Latino and black communities with a game plan to address their concerns directly to a responsive Department of Justice, a plan also emboldened by the courts' willingness to faithfully enforce the mandates of the VRA. Section 5's administrative vehicle to address concerns of minority voters provides a way for communities to directly relay their concerns about voter discrimination without going to
court and without the need for an attorney. Because section 5 encourages jurisdictions to reach out to minority voters in advance of preclearance, Latino voters had an additional tool to stop discriminatory laws.

Afterwards, subsequent redistricting plans were successfully challenged because they failed to provide for Latino-majority districts. In 1991 the New York City Council redistricting plan was denied preclearance, and subsequently redrawn, because of the discriminatory effect it would have on Latino voters in at least two separate areas of the city: Williamsburg/Bushwick in Kings County (Brooklyn) and East Harlem / Bronx in New York and Bronx counties. The Department of Justice objected to unnecessary packing of Latino voters in the Williamsburg district while denying a fair chance of electing candidates of choice in the adjacent Bushwick district. In East Harlem, the objection centered on the failure to create a district that crossed county lines that would give Latino voters a chance to elect candidates of choice. In Queens, the Department of Justice commented that Latino voters were also not given an equal opportunity to elect candidates of choice because a majority district was not created.

In 1992, New York State was taken to task for its assembly redistricting plan. Faced with an identifiable, compact community of Latino voters in Washington Heights in Northern Manhattan, many of them from the Dominican Republic, New York State authorities attempted to fracture the community between two assembly districts (71 and 72), but were stopped. The objection letter highlighted the existence of racially polarized voting in that area. It also found that the state knowingly proceeded to fracture the Latino community and reduce its ability to elect candidates of choice: “The proposed district boundary lines appear to minimize Hispanic voting strength in light of prevailing patterns of polarized voting. Moreover, the state was aware of this consequence given its own estimates of likely voter turnout in Districts 71 and 72.”35 As a result of this enforcement of voting rights for the Latino community in 1996, Adriano Espailat won election in Assembly District 72, becoming the first Dominican ever elected to the New York State Legislature.

These examples evidence the need to use Voting Rights Act protections and majority-Latino districts to create the electoral opportunities necessary to ensure equal access to political representation. But they beg the question: Are Latino-majority districts required to provide equal electoral opportunity? One social-scientific phenomenon, the existence of racially polarized voting, would tilt the answer in the affirmative.
Whether or not voting is characterized by racial polarization is a critical indicator of discrimination. Racially polarized voting ("RPV") is an indispensable element of proof in redistricting cases and others where structural impediments are challenged as preventing full and fair participation of the country's racial and language minorities. The data—a comparison of election returns at the election district level with demographic data at the smallest geographical unit—are analyzed using sophisticated statistical methods to prove the correlations between the race of the voter and the race of the candidate, while controlling for other factors. Two related phenomena are thus described: the level of political cohesion that may exist within the racial- or language-minority group (i.e., do minorities tend to support minority candidates? Or are there clearly identifiable minority-preferred candidates, irrespective of race?) and the presence of white bloc voting that tends to defeat minority-preferred candidates. In short, RPV describes voting behavior where Latinos significantly support Latino candidates and where whites behave correspondingly and, by and large, defeat Latino candidates.

New York City has had numerous episodes where RPV has affected the outcome of its elections. Not all the data have been put to rigorous, court-tested analysis, but there are enough episodes, in and outside of the realm of statistical significance, that speak to a continuing problem.

One of the earlier documented analyses of RPV—under more rigorous regression standards—was conducted by Richard Engstrom and led to a district court's finding of significant racially polarized voting in the 1985 case Butts v. City of New York.\(^{36}\) Engstrom analyzed the 1982 Democratic primary for lieutenant governor, where H. Carl McCall, an African American, ran against white candidates and also analyzed the 1984 Democratic presidential primary, where Jesse Jackson ran against Walter Mondale and other white candidates. Engstrom, using regression analysis, documented significant cohesion by African Americans and Latinos for McCall and by African American voters for Jesse Jackson. White voters, on the other hand, only gave McCall 24% of their vote and virtually no support to Jackson in 1984 (4%). Coupled with an analysis of the 1973 runoff election between Herman Badillo (Puerto Rican) and Abraham Beame (white), the court in Butts v. City of New York found that "racial and ethnic polarization and bloc voting exists in New York City to a significant degree."\(^{37}\)

The Department of Justice has justified, in part, a number of its objections to preclearance under section 5 in New York City on the prevalence of racially polarized voting. For example, the 1992 state assembly plan was
denied preclearance when it minimized Latino voting strength in Upper Manhattan by fracturing an identifiable community that was already suffering the effects of RPV. The 1991 elections for New York City Council and the 1990 elections for New York State Assembly have been identified as having evidence of RPV by at least two federal courts, in Puerto Rican Legal Defense & Education Fund v. Gantt38 and Diaz v. Silver.39

The 2004 case of Rodriguez v. Pataki offers a limited analysis of RPV in a portion of Bronx County in a case that challenged the redistricting of the state senate. Despite its conclusion that the VRA was not violated, the court found that Bronx Latino voters in State Senate Districts 34 and 35 were politically cohesive and also concluded that white bloc voting defeated the Latino-preferred candidate.40 While the evidence is limited—and ultimately the court denied the section 2 claim—the findings of the court are relevant here.

The Rodriguez case also offers a glimpse of additional evidence of political cohesion within black and Latino communities in the city. In the 2001 mayoral primary, where Fernando Ferrer (Puerto Rican) ran against Mark Green and other white candidates, Latinos and blacks coalesced behind Ferrer—the only election cited by the court where there may have been cohesion between the two groups. In other contests, African American voters demonstrated cohesion in the 1997 mayoral primary (63% voting for Rev. Al Sharpton) and in the 2001 city comptroller race, where William Thompson, an African American, defeated a white candidate, Harold Berman. However, there was no apparent cohesion behind Larry Seabrook's candidacy, at the same time that the Latino-preferred candidate was rejected both in the 1994 congressional district primary (the Puerto Rican, Willie Colon) and again in the 2001 citywide race for public advocate (Willie Colon, again). Similarly, Latino voters showed levels of political cohesion for Willie Colon on two occasions (the 1994 congressional Democratic primary and the 2001 public advocate race) but rejected the African American preferred candidates in the 1997 mayoral primary (Rev. Al Sharpton) and the 2001 city comptroller race (William Thompson).

Another comprehensive analysis of RPV in New York City was performed in 1991 by James Loewen for the Community Service Society regarding the viability of the city council redistricting plan after the 1990 census. The study, subsequently expanded and published in 1993,41 analyzed a number of elections in the city where a minority candidate ran against a white candidate. The highlights include two primarily Latino-white races, for the citywide position of president of the city council. In 1985 three Latino
candidates faced off against two white candidates (the African American candidate was not considered a major candidate in the analysis), and there was high cohesion among Latinos for the Latino candidates and high cohesion by white voters for the white candidates. Using regression analysis, Loewen concluded that in 1989 Andrew Stein, the incumbent, captured 90% of the white vote, Ralph Mendez captured 75% of the Latino vote, and blacks split among the two, but generally supported the white candidate.

Loewen also found that in general, white voters were the “most polarized group” among the voters he analyzed. For Latino voters, he generally found the presence of RPV in the elections analyzed—both in their cohesion for Latino candidates and in the failure of white voters mostly, and to a much lesser extent, Black voters, to support Latino candidates. The study concluded with the admonition that “levels of political mobilization and racial bloc voting in New York City change constantly, due to registration drives, new candidacies, and changes in the underlying age structure and citizenship rate in the city’s various ethnic and racial groups.” In short, racially polarized voting is a phenomenon in flux—and a phenomenon often used to justify the creation of majority-Latino districts, which in New York City paved the way to integrating city, county, and federal legislatures with Latino elected officials.

ENSURING COMPLIANCE WITH SPANISH-LANGUAGE ASSISTANCE COMES FULL CIRCLE

By the time of the 2012 primary election contest between Adriano Espaillat and Charles Rangel in the new 13th Congressional District, which covered El Barrio, Harlem, Washington Heights, Inwood, and a portion of the West Bronx, Spanish-language assistance to Latino voters had been a feature of court-ordered mandates for nearly forty years. Lopez v. Dinkins in 1973 and Torres v. Sachs in 1974 consolidated the promises of section 4(e) of the Voting Rights Act, and not just for Puerto Ricans. Instead, every Latino citizen who needed bilingual assistance reaped the benefits of this early litigation. But those court orders still required vigilance in 2012 as numerous complaints poured into the office of LatinoJustice PRLDEF about the lack of sufficient bilingual assistance in Dominican communities and about inadequate deployment of Spanish interpreters overall. Clearly both the need and the benefits of such assistance are still topics that require attention in Latino communities.
Aside from the value of promoting an open, accessible democracy, research conducted in six section-203-covered New York counties points to the salutary effects of providing bilingual assistance for Latino voters, namely, the positive correlation between section 203 language assistance and increased voter registration. One such study for New York concludes that after controlling for other factors that affect registration (e.g., education levels, nativity, residential mobility, etc.), analysts found that the use of ballots and registration materials in the covered language was significantly correlated to increased registration levels at both the city and county level for both Spanish- and Chinese-speaking voters.44

Nonetheless, the language-assistance provisions of the VRA require constant oversight. After the 2000 general elections, the New York State attorney general investigated the failure of the New York City Board of Elections to provide appropriate language assistance to Latino voters. Documenting future complaints and evaluating “flaws in election administration that may affect voters on the basis of race or ethnicity” were among the recommendations made as a result.45 Major problems in securing oral assistance in Spanish at the polls continued to plague subsequent New York City elections. In 2001, the board was short 3,371 poll inspectors—15% of the total need. It was also short 33% of the total number of Spanish interpreters it needed for that election.46

Even considering the longevity of the Latino population in the city—especially its Puerto Rican community—the prevalence of Spanish-language use at home and the corresponding lower proficiency in English ensure that bilingual assistance remains a challenge in New York City.47 For Latinos nationally, the percentage of persons who speak English less than “very well” and who report that Spanish is spoken in their homes is 40.6%. In New York City, 51% of Latinos who speak Spanish at home report lower proficiency levels in English. It is important to note here that the measure of speaking English less than “very well” is the measure used by the Census Bureau, along with other indicators, to certify section 203 coverage. Family literacy centers in New York City—indeed, all places where adults can try to learn English—are in very short supply, with demand far exceeding supply.48 The city’s inability to fully comply with section 203 requirements for Latino voters resulted in the assignment of federal observers in a number of elections since the 1992 amendments to section 203. Of the multiple times federal observers were present, the following elections were identified as warranting federal oversight to ensure bilingual assistance: September 2001 (Kings
and New York Counties); October 2001 (Bronx County); September 2004 (Queens County).

New York City continues to be the city with the largest number of Puerto Rican residents: a sizable force of close to 720,000, making them the city’s largest national-origin group among the city’s 2.4 million Latino residents, at least for the next few years.⁴⁹ The conditions that led to their ability to gain access to New York’s political process through Spanish-language assistance—including their strong ties to the Spanish language, the circular migration between Puerto Rico and New York City, and the juridical foundation of the unique relationship between the United States and Puerto Rico—have not changed appreciably, thus making Puerto Ricans’ need for language assistance in elections today as vital as it was in the 1960s and 1970s.⁵⁰

The provision of bilingual assistance today inures to the benefit of Dominican and Ecuadorian voters as well—groups that have had some electoral success. Assuredly, they will benefit Mexican American voters in the near future as well. But as seen in the 2012 congressional primary election in Harlem and Washington Heights, providing assistance where it is most needed is still a challenge in New York City.

CONCLUSION

Voting-rights enforcement guarantees opportunities, not results. The elimination of unlawful vote-denial practices and of illegal vote-dilution schemes provides only a foundation for an equal opportunity for racial and language minorities to elect their candidates of choice. Indeed, section 2 of the Voting Rights Act clearly prohibits any mandate on proportionality—the mere disproportionality between the share of the minority electorate and the number of minority elected officials does not by itself evidence a violation of law. Once given an equal opportunity to participate and to vote, the Latino electorate is responsible, for example, for exercising its discretion among competing candidates.

Nor does voting-rights enforcement guarantee postelection results consistent with the needs of the Latino community even if it is successful in electing Latino officials. Whether these Latino officials can exercise political power, however defined, is not a concern under the Voting Rights Act. In short, no matter how successfully Latinos use the courts and the legislative branch to establish voting rights, the endgame says little about the
effectiveness of its representatives or the existence and enhancement of political power. Newly elected Latino officials may become marginalized by the legislative or party leadership once in office, or they may be last in line for choice appointments to important committees. Or conversely, they may learn how to exercise their influence by other means and bring home important public works projects or necessary funding. Again, whether they are successful or not is not within the purview of the statutes and case law that define voting rights today.

What the Voting Rights Act has done very successfully is to integrate the halls of legislative power (and judicial power in many cases in New York, as well) with Latino faces. Their mere presence acts as a shield and a sword in important deliberations over budget appropriations and legislative reform. This chapter presents a short description of some of those integration success stories—stories that have paved the way for a reformation of how language, ethnicity, and race are played out in the New York City political scene. A comprehensive analysis of Latino political power would shed light on whether Latino voting rights in the city have succeeded in securing an equal share of political strength and influence. But what remains clear is that without the opportunities created by voting-rights enforcement, and the significant role Latino voters and communities played in that enforcement, Latino political power would hardly be part of the discourse.

POSTSCRIPT

At present, it is too early to discern the full negative impact from the June 25, 2013, Supreme Court decision Shelby County v. Holder. This decision struck down section 4 of the Voting Rights Act, which required New York City to gain preclearance or approval from the Department of Justice for any voting-law changes it sought to implement. In eliminating section 4 the Supreme Court rendered the section 5 preclearance provision inoperable. While the loss of section 5 is keenly felt throughout the South and especially for Latinos in Texas and Florida, its absence in New York City would have arguably prevented a diminution in Latino voting strength in two subsequent, unrelated incidents: the closing of polling sites in Charles Rangel’s congressional district, which Adriano Espaillat complained of in his second campaign in 2014, and Governor Cuomo’s inordinate delay in calling for special elections to fill vacancies in numerous state assembly and state senate districts throughout
2013. The real test in determining the value of section 5 in New York City, however, will be in the next round of redistricting after the 2020 census. Redistricting maps significantly change Latino voting strength and routinely part of the previously-monitored changes subject to section 5 review.

NOTES


6. Nydia Velázquez, Democrat, was elected to Congress in 1992 and continues to serve. She is the first and only Puerto Rican woman to serve in Congress. José Serrano represents the Latino congressional district in the South Bronx, which went from Herman Badillo to Roberto García to Serrano.


13. Ibid., 511.

16. Ibid., 384 U.S. at 652.
22. Ibid., 312.
31. For a discussion of how the attack on majority-minority districts affects Latino voting power in New York and for questions about the need for majority-Latino districts in particular and their relationship to overall Latino electoral participation, see Cartagena, “Latinos and Section 5 of the Voting Rights Act,” 215n101.

34. Ibid., 194.


42. Ibid., 48.
43. Ibid., 72.
45. Ibid.
48. Bernstein, “Proficiency in English Decreases.”