VOTING RIGHTS IN NEW YORK 1982-2006

A REPORT OF RENEWTHEVRA.ORG

PREPARED BY JUAN CARTAGENA

MARCH 2006

VOTING RIGHTS IN NEW YORK 1982-2006

JUAN CARTAGENA[1]

TABLE OF CONTENTS

[1] General Counsel, Community Service Society. Esmeralda Simmons (Center for Law & Social Justice, Megar Evers College), Margaret Fung (Asian American Legal Defense & Education Fund), Jon Greenbaum ((Lawyers' Committee for Civil Rights Under Law) and Debo Adegbile (NAACP Legal Defense Fund) assisted in editing this report; and Glenn Magpantay (Asian American Legal Defense & Education Fund), Gabriel Torres, Walter Fields (Community Service Society) and Paul Wooten were instrumental in collecting materials relied upon in this report.

INTRODUCTION TO THE VOTING RIGHTS ACT

At the time of the 1982 amendments to the Voting Rights Act and the continuation of Section 5 coverage to three counties in New York City, the city was at a major crossroads regarding faithful compliance with the mandates of the Act. Just one year earlier in the largest city in the United States, the largest municipal election apparatus in the country was brought to a screeching halt in September 1981 when the federal courts enjoined the mayoral primaries – two days before Election Day – because the city failed to obtain preclearance of new (and discriminatory) city council lines and election district changes.[2] The cost of closing down the election was enormous and a lesson was painfully learned: minority voters knew how to get back to court, the courts would not stand by idly in the face of obvious Section 5 noncompliance, and business-as-usual politics would no longer be the same. Weeks later, the Department of Justice (DOJ) would not only officially deny preclearance to the city council plan but would find that its egregious disregard of the burgeoning African-American and Latino voting strength in the city had a discriminatory purpose and a discriminatory effect.

In this context, the 1982 extension of Section 5 to parts of New York City should not have seemed so anomalous to a country that continued to harbor stereotypes about how voter discrimination was a monopoly of the deep South. For racial and language minorities in New York City, the truth was otherwise. New York's history was replete with numerous examples where the color of one's skin, the foreignness of one's ancestry, and the difficulty with which one brokered the English language all worked to deny the franchise to its citizens. Similar to the 1970 coverage of New York, Kings, and Bronx counties under Section 5, the official pronouncement that New York City continued to require special vigilance when it came to the ballot box was not surprising to its African-American, Puerto Rican, and Chinese-American residents. Indeed, in a related context, the city itself would agree when it conceded, in 1992, that its failures in the past to comply with the Voting Rights Act required special, remedial measures to fully integrate racial and language minorities into decision-making bodies.[3]

Section 5 coverage in 1970 and again in 1982 was necessary; as was the coverage of the language assistance provisions of Section 4(f)(4) and Section 203 of the Act. The latter was particularly relevant since New York City's Puerto Rican community was instrumental in showing the country that bilingual election systems could work – and in the country's largest city at that.

Three counties in New York state – all in New York City – are covered under Section 5 (Bronx, Kings, and New York), requiring preclearance of all election changes. Bronx and Kings counties are also covered under Section 4(f)(4) of the Act (requiring preclearance for certain language minority citizens). At present seven counties in the State are covered under Section 203 of the Act, requiring language assistance in voting for certain language minority citizens: Spanish-language: Bronx, Nassau, Kings, New York, Queens, Suffolk, Westchester; Chinese-language: Kings, New York, Queens; Korean-language: Queens. Finally, the VRA's federal observer provisions have been implemented in New York City on multiple occasions as well to prevent violations of the VRA against racial and language minority groups.

[2] Heron v. Koch, 523 F. Supp. 167 (E.D.N.Y. 1981).
[3] Ravitch v. City of New York, 1992 U.S. Dist. LEXIS 11481, *16 (S.D.N.Y. 1992). See Appendix D.

New York is unique in the way the Voting Rights Act operates on multiple levels and on such a large scale. The complexities and breadth of the coverage of the temporary provisions of the VRA are significant in New York City: approximately 5,797 election districts with close to 6,400 voting machines and 25,000 poll workers are in operation in a city of 8 million residents. And yet the interconnection between the requirements of the VRA is an important element in the VRA's reach in the city – as will be explained in this report. Federal observers – deployed under the authority of the VRA – provide information that is then used by the U.S. 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 DOJ. Thus, despite its coverage of only a few counties in the State of New York, the temporary provisions of the VRA, in tandem with litigation filed outside of Section 5 and Section 203, have addressed a breadth of voting rights issues in the city.

This report, and its appendices, document the state of New York voting rights from the end of 1982 through the present as part of a larger attempt to provide Congress a full record with which to consider the reauthorization of certain provisions of the Voting Rights Act which are set to expire in 2007. For this period in New York City, electoral politics is fascinating in its own right. A series of unprecedented, but in reality long-overdue, and bittersweet firsts occurred: the first and only African-American Mayor (David Dinkins); the first and only Latino candidate to finally capture the nomination for mayor of one of the two major parties (Fernando Ferrer); the first and only Asian American to finally win a city council seat (John Liu); and the first and only African-American to win a statewide office (Carl McCall). But the period also includes a number of debates and challenges that forced the city to look to its unfortunate, racially-based past in the area of voting rights (such as the racist attitudes of New York's Constitutional Conventions of the 1800s) and that also force the city to look to its future (such as the pending court challenge to force full language assistance for Asian American voters).

The political empowerment of racial and language minorities in New York City since the 1982 amendments to the Voting Rights Act has made great strides, while also leaving much more work to be done to eliminate discrimination in the area of voting. Election day practices that impede the full participation of racial and language minorities, unfair redistricting plans, and inadequate language assistance are repetitive barriers to the full enfranchisement of the protected classes under the Voting Rights Act. The preclearance process under Section 5 of the Voting Rights Act has been particularly successful in blocking discriminatory changes outright, and, equally important, in preventing unfair changes in election law and practice from ever coming to light. The result, we posit, is that New York City, overall, still needs the protections of Section 5, the promise of Section 203, and the vigilance required in the federal observer provisions of the Voting Rights Act.

I. Section 5 Preclearance Activity by the U.S. Attorney General in New York City: Objections and More Information Requests

Since 1982,[4] Section 5 preclearance requests in New York City have been almost exclusively lodged with DOJ. Throughout the relevant time period, with only one exception related to the creation of elected judgeships in 1994,[5] New York City has consistently availed itself of the administrative preclearance process instead of seeking preclearance in the U.S. District Court for the District of Columbia. The administrative response by DOJ to requests for preclearance involves the grant or denial of preclearance requests and/or the issuance of More Information Request letters to the submitting jurisdiction. In the period from 1990 to 2005 alone, a total of 2,611 changes affecting New York's three covered counties (Bronx, Brooklyn, and New York counties – all located in New York City) were submitted to DOJ.[6] While the overall number of objections is relatively low compared to other Section 5 jurisdictions, the variety of changes that have resulted in denials of preclearance is telling: methods of elections in community school board contests; packing and fracturing of minority communities in redistricting plans; changes from elected positions to appointed positions; language assistance barriers; and judicial elections have all been subject to objections preventing their implementation under Section 5. These proposed objections along with role of More Information Requests from DOJ, are discussed below.

A. Section 5 Objections Post-1982

The U.S. Attorney General has interposed fourteen objections under Section 5 in seven separate letters, post 1982. Indeed, two-thirds of all the objections ever interposed by the Attorney General in New York City were made after 1982.

July 19, 1991 Objection: New York City Council Redistricting Plan Discriminates against Latino Voters: Following a pattern developed with the 1970s and 1980s redistricting efforts,[7] New York once again could not prove the absence of discrimination in the adoption of state and city redistricting plans after the 1990 Census resulting in an Attorney General objection under

[4] Section 5 preclearance activity for New York's three covered counties starts in 1974 – after litigation that temporarily exempted New York from coverage and then reopened the matter to once again Section 5 review. For a full discussion of which racial and language minority groups were covered and why see Appendix E.

[5] See, Letter of Loretta King, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, 5 December 1994, Re: Submission No. 93-0672. See www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed 8 June 2005).

[6] Luis Ricardo Fraga & Maria Lizet Ocampo, "The Deterrent Effect of Section 5 of the Voting Rights Act: The Role of More Information Requests," Table 2, Conference Paper, "Protecting Democracy: Using Research to Inform the Voting Rights Reauthorization Debate," Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity at the University of California, Berkeley School of Law and the Institute for Governmental Studies, University of California, Berkeley. February 9, 2005. See Appendix G. We have yet to analyze data regarding the total number of submissions for preclearance submitted in the period from 1983 through 1989, inclusive. What is clear, however, is that there are no Section 5 objections on file from 1983 through 1989.

[7] Submission V6107 for preclearance of Congressional, State Assembly and State Senate redistricting plans was the subject of an Attorney General objection in April 1974; Submission 81-1901 regarding the New York City Council redistricting plan met with an objection in October 1981; and the Attorney General interposed an objection to the Congressional, State Senate and State Assembly redistricting plans in June 1982 (Submission 82-2462). See www.uksdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed on 8 June 2005).

Section 5.[8] At issue in the city council redistricting effort was the creation of a new paradigm of 51 councilmanic districts, created by voter referendum after the U.S. Supreme Court ruled that the city's board of estimate was unconstitutionally devised in violation of the "one person, one vote" principle of the Equal Protection Clause.[9] The task, in DOJ's opinion, was

> a job of staggering proportions, namely, to divide a city of over seven million people into 51 new council districts *while addressing the historical inability of the many minority communities in the city to elect candidates of their choice*.[10]

Despite its efforts, the New York City Districting Commission created a plan that had an impermissible, discriminatory effect on Latino voters in at least two separate areas of the city: Williamsburg / Bushwick in Kings County 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, and the denial of 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. [11]

June 24, 1992 Objection: New York State Assembly Redistricting Plan Discriminates against Latino Voters: 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 were stopped from fracturing the community between two Assembly districts: District 71, represented by the African American, Herman Farrell, and District 72, represented by a non-Hispanic white, John Brian Murtagh. 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.[12]

In 1996, Adriano Espaillat won election in Assembly District 72, becoming the first Dominican ever elected to the New York Legislature.

---

[8] Submission 91-1902 for the New York City Council resulted in an objection; Submission 92-2184 for the State Assembly redistricting plan also resulted in a Section 5 objection. See www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed 8 June 2005).

[9] Board of Estimate v. Morris, 489 U.S. 688 (1989).

[10] Letter of John R. Dunne, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, 19 July 1991, Re: Submission No. 91-1902. See www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed 8 June 2005). (Emphasis added.)

[11] The Department of Justice also went out of its way to comment on the districting of Queens County as well, despite the fact that the county is not covered under Section 5 of the VRA. The concern in Queens centered on the plan's overall effects on Latino representation in the new 51-member City Council – specifically District 21 in Queens did not present, in the Attorney General's view, an equal opportunity for Latinos in that borough to participate in the political process.

[12] Letter of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, 24 June 1992, Re: Submission No. 92-2184. See www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed 8 June 2005). (Emphasis added.)

August 9, 1993 Objections: New York City Board of Elections Discriminates against Chinese-American Voters by Failing to Provide Appropriate Language Assistance: A proposed board of elections Chinese-language targeting program, intended to serve Chinese American citizens who were limited-English proficient and in need of information in their native language was categorically rejected by DOJ under Section 5.[13] The board's plan failed to translate the actual ballot on its voting machines; failed to include any measures for quality control over the accuracy or completeness of any translations provided; failed to acknowledge the presence of different dialects of the Chinese language among its voters; failed to train Chinese translators or interpreters; failed to allocate available translators to election districts according to need (one translator would be assigned to one election district whether it had 261 Chinese-speaking voters or 2,629 such voters); and failed to appropriately target language assistance in either New York, Kings or Queens counties. Specifically, since polling sites in New York City regularly contain multiple election districts, the board's proposed targeting plan of limiting Chinese language information to districts that had 200 or more Chinese eligible voters, would, in DOJ's opinion, severely underserve Chinese voters throughout the three Section 203 covered counties. For Kings and New York counties, the plan would have reached only 50 percent of the 34,000 Chinese American voters that qualified for assistance.[14] Accordingly, DOJ objected to each of the four changes submitted in the plan as applied in New York and Kings counties.

The plan was modified substantially after the denial of preclearance, but is nonetheless the subject of controversy. In 2006, Chinese voters sued to enforce the guarantees of Section 203 in *Chinatown Voter Education Alliance v. Ravitz* (see Section IV, below).

May 13, 1994 Objection: New York City Board of Elections Discriminates against Chinese-American Voters by Failing to Translate Candidate's Names and Machine Operating Instructions: In 1994, DOJ denied preclearance to Chinese-language election procedures in Kings and New York counties in two material respects: the failure to translate candidates' names on machine ballots during both primary and general elections and the failure to translate operating instructions for voting machines during general elections. In doing so, DOJ did not accept various arguments by the board of elections that space and/or time limitations prevented it from complying with Section 203 and Section 5, or that the translation of candidates' names into Chinese would confuse voters or that the provision of sample ballots on site would solve any problem associated with failing to translate directly on the machines.[15]

Regarding the provision of translations for operating instructions, DOJ relied in part on the documentation provided by its own federal observers to conclude that "many Chinese-speaking voters have encountered difficulties as a direct result of the board's failure to translate these instructions." However, with respect to the board's refusal to translate candidates' names, even

[13] Letter of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, 9 August 1993, Re: Submission No. 92-4334; 92-4790; 93-1552; 93-0057. See www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed 8 June 2005).

[14] While not a Section 5 jurisdiction the Department also noted that in Queens County, where 20,000 voting age Chinese-speaking citizens are limited-English proficient and eligible for language assistance, not one election district would qualify for Chinese voting information under the Board's plan.

[15] Letter of Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, 13 May 1994, Re: Submission No. 93-4733. See www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed 8 June 2005).

where space on the ballot existed, Assistant Attorney General Patrick was even more explicit in stating the obvious:

> Our analysis shows that a candidate's name is one of the most important items of information sought by a voter before casting his or her ballot for a particular candidate. . . For voters who need Chinese-language materials, the translation of candidates' names is important because Roman characters are completely different from Chinese characters. Consequently, it would be extremely difficult, if not impossible, for these voters to understand names written in English.[16]

The New York City Board of Elections conceded these points and modified its plan accordingly.

December 5, 1994 Objections: New York's Creation of Additional Elected Judgeships for the New York Supreme Court and Court of Claims Discriminates against African-American and Latino Voters: By 1994, the state of New York had continued to run elections for justices to the Supreme Court of New York – New York's court of first instance – as per the mandates of its constitution. Justices are elected by the voters from judicial districts that in some cases are coterminous with county boundaries in the city of New York. On a number of occasions, however, particularly in 1982, the state created additional positions for justices and allocated them among the districts without obtaining the necessary preclearance under Section 5. These positions were filled in the normal course – a process that limits the political party's nominees to a delegate convention conducted by the parties and not an open, competitive primary. Moreover, the state devised a practice of using its appointment power to select judges to the New York Court of Claims that were then transferred to the Supreme Court, thus circumventing the election process. These issues and others came to the forefront in 1994 when the state finally sought preclearance, retroactively, for some changes and prospectively for a number of proposed changes in the manner of elected justices to the Supreme Court. Specifically, the state sought retroactive preclearance to the creation of additional judgeships in the Supreme Court and the Court of Claims that dated back to 1982 and 1994, respectively. It also sought preclearance of legislation in 1994 that established new procedures designating candidates to particular Supreme Court positions and the creation of one additional Supreme Court judgeship. DOJ denied preclearance to each of these changes – five in all.[17]

DOJ completed an encompassing analysis of the closed door process of nominating judges for the Supreme Court through political party nominating conventions, "dominated by a relative handful of political leaders" and attacked repeatedly as being "racially discriminatory."[18] Effectively, party delegates, controlled by the party leaders, monopolized the selection of the candidates for the Democratic Party primaries – which, in a city like New York was tantamount

[16] Id.
[17] Letter of Loretta King, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, 5 December 1994, Re: Submission No. 93-0672. See www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed 8 June 2005).
[18] Id.

to securing victory in the general election.[19] The practice shut out voter participation in the primaries and hindered competition among potential judicial candidates.

In 1994, DOJ in this instance made a number of important findings to support its objection under Section 5: 1) that the "legislature was aware of the racially discriminatory nature of the election system" that was well documented before its 1994 proposed legislation; 2) that racial minorities were the majority of the voting age population in both the Second Judicial District (Kings and Richmond counties) and the Twelfth Judicial District (Bronx County); 3) that New York created and maintained 14 "unprecleared judgeships" in the Second Judicial District that produced "disproportionate results disfavoring minority voters;" 4) that patterns of racially polarized voting in the Section 5-covered counties of New York contributed to these election results; 5) that the "slating process used to nominate judicial candidates to the supreme court prevents minority voters from having an equal opportunity to elect candidates of their choice;" 6) that minority voters have less access to the slating process than white voters; 7) that under the present system, minority voters would have to wait "until well into the next century"[20] to have an equal opportunity to elect candidates of their choice because of the "long judicial terms of the office [14 year terms] and the ingrained tradition of renominating incumbent judges, most of whom are white;" 8) that the 1994 procedure designating specific candidates to particular positions on the court had no basis in state law and was *intended* instead to put minority candidates, not white candidates, at risk by designating them to unprecleared positions; and 9) that the state in 1982 and 1990 created fictitious Court of Claims judgeships, appointed by the Governor, of judges "who never sit on the court of claims" and are effectively transferred to the Supreme Court in violation of the New York constitution, thus changing "the method of selecting a class of supreme court judges from election to appointment."

The U.S. Attorney General concluded that New York was clearly unable to meet its burden that the previously unprecleared and currently proposed changes to judges' elections were made without a discriminatory purpose or with the absence of a discriminatory effect against racial and language minorities.

November 15, 1996 Objection: New York City Discriminates against African-American and Latino Voters by Replacing Elected Community School Board Members with Appointed Trustees: New York City ran its public schools under a dual system of local control (referred to as decentralization and embodied in 32 community school districts each led by a 9-member, elected community school board) and a central authority that resided in an appointed board of education. The mayor and each of the five borough presidents appointed members of the central board of education and they in turn, appointed a chancellor. Community school boards had the authority to appoint the superintendent of their respective community school district. In 1996, the chancellor advised the elected members of Community School District 12 in Bronx County that they would be relieved of their duties, replaced temporarily by three appointed trustees and then replaced by five appointed trustees who would assume their duties until the next scheduled

[19] Years later, these same findings were the basis of a successful constitutional challenge to the candidate selection process for these same primaries in Lopez Torres v. New York State Board of Elections, 04 CV 1129, E.D.N.Y. Gleeson, J., Slip Opinion dated January 27, 2006. For a full discussion of Lopez Torres, see Appendix D.

[20] A remarkably prescient observation in light of the Lopez Torres v. New York State Board of Elections decision in 2006. See Appendix D.

election. DOJ interposed an objection under Section 5 to the substitution of elected officials with appointed officials.[21]

DOJ found that Latinos made up 54 percent of the electorate in School District 12 and that blacks made up 36 percent of the electorate. There were more than 46,000 parent voters in Community School District 12. DOJ also noted that all nine school district members elected in May 1996 (to a three-year term) and replaced by the chancellor were either Latino (7) or African-American (2). Comparatively, DOJ found that blacks and Latinos comprised 49 percent of the city's population as per the 1990 Census. This distinction was telling, since black and Latino voters could only exert influence on the chancellor through their collective voting strength in the five boroughs and in the city as a whole, because the mayor and the borough presidents appoint the chancellor:

> Thus, it appears that Hispanic and black voters will have considerably less influence over the selection of CSB 12 board members through the choices of the appointing authority than they have under the direct-election system currently in place for CSB 12.[22]

Coupled with the finding that black and Latino voters had either "literally no input" or no "meaningful input" into the appointment of the temporary or permanent trustees, respectively, DOJ noted that the city failed to meet its burden under Section 5.

February 4, 1999 Objection: New York State Discriminates against African-American, Latino and Asian American Voters by Switching Method of Election of Community School Boards from Single Transferable Votes to Limited Voting: The decentralization of the city's board of education into 32 community school districts established a proportional representation system for election to these community school boards. The system used by the city since the inception of the community school board is choice voting or the Single Transferable Votes method (STV). It allows voters to rank order their preferred candidates anywhere from one to nine. Votes are then tallied in the order of the first-preference candidate; once that candidate receives the threshold number sufficient for election to the board all remaining votes exhibiting a first-preference for that candidate are tallied in favor the second-preference candidate on that ballot. This process continues until all nine members are elected. Under this system, minority voters[23] need only to constitute 10 percent of the electorate to elect candidates of choice because the threshold for representation for one seat is 10 percent and every 10 percent jump in a voting group's share provides an opportunity to win another seat.

In 1998, New York state passed a series of measures ostensibly to increase voter turnout in New York City school board elections. As DOJ noted in its letter,[24] most of the measures that would

---

[21] Letter of Deval L. Patrick, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, 15 November 1996, Re: Submission No. 96-3759. See www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed 8 June 2005).

[22] Id.

[23] For Section 5 purposes we refer to racial and language minorities but STV allows for any other minority bloc to successfully elect their candidates.

[24] Letter of Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, 4 February 1999, Re: Submission No. 98-3193. See www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed 8 June 2005).

reasonably lead to higher turnout rates, were precleared. However, DOJ was unconvinced that a switch from STV to Limited Voting, another form of proportional representation, would increase turnout.

More importantly, it concluded that the switch would actually diminish minority voting strength in violation of its non-retrogression standard. Limited Voting provides for fair representation of minority voting blocs (whether or not they are racial minorities) because each voter has fewer votes than the total of seats to be filled in a legislative body. Voters may combine their votes in favor of one or more candidates but they will always have fewer votes than seats to be filled. In this instance, the state proposed a Limited Voting system with four votes per voter in a nine-member school board. DOJ calculated that the minority threshold for electability is 10 percent under the STV method and 31 percent under the Limited Voting method. It then found that there were 18 school districts where the minority groups' share of the voting age population was more than 10 percent but less than 31 percent thus putting at risk their ability to elect candidates of choice if Limited Voting with four votes were instituted.

While this comparison alone would have justified an objection, DOJ made a more important and related finding: voting in community school board elections was racially polarized. Citing two VRA cases decided in New York,[25] and relying on its own analysis of election returns provided by the state, DOJ concluded:

> [T]he information we have indicates that the degree of racial bloc voting in Community School Board elections, in the covered counties and throughout the city, is such that the ability of minority voters to elect their candidates of choice will be considerably reduced under the submitted change in voting method.[26]

The state ultimately abandoned its attempts to alter the method of elections in New York City community school board elections.

B. Department of Justice More Information Requests Post-1982

Rigorous analysis of the impact of More Information Requests in the context of assessing the effectiveness of Section 5 for protecting racial and language minorities is of recent vintage. In one of the few projects of its type, research conducted in 2005 by Luis Ricardo Fraga and Maria Lizet Ocampo at Stanford University set forth a number of objective factors that can document the full, deterrent effect of Section 5 on covered jurisdictions. Simply put, the number of actual objections interposed in the Section 5 process does not fully explain the reach of the VRA in preventing voting rights abuses. More Information Requests ("MIR") by DOJ provide another way to measure the impact of Section 5, as well as the episodes of discriminatory conduct that jurisdictions were prepared to implement but have decided to forego. In other words, any

[25] Puerto Rican Legal Defense and Education Fund v. Gantt, 796 F. Supp. 681 (E.D.N.Y. 1992); Butts v. City of New York, 614 F. Supp. 1527 (S.D.N.Y. 1985). For a discussion of both of these cases see Section VI below and Appendix B.

[26] Letter of Bill Lann Lee, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, 4 February 1999, Re: Submission No. 98-3193. See www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed 8 June 2005).

analysis of Section 5 activity that does not account for MIR does not fully analyze the deterrent, prophylactic effect of the VRA.

More Information Requests are merely requests for additional data or information that will allow DOJ to make a final decision on a preclearance request. A submitting authority can decide to provide the information, withdraw the request, supersede the request to preclear a change with another proposed change, or simply refuse to respond. Since changes that are not precleared are, by definition, inoperable and illegal, the effect of withdrawal, substituting changes for other changes, and not responding are equivalent to denials of preclearance. "The purpose of an MIR is to make sure that the DOJ has the information it needs to comprehensively review a proposed change. In doing so, it can also send signals to submitting jurisdictions about the assessment of their proposed change."[27]

The significant deterrent effect of Justice Department activity is supported by the views of former Department of Justice officials, like Joseph D. Rich, former Acting Chief, then Chief, of the Department's Voting Section (from 1999 to 2005) and a 36-year veteran of the Department's Civil Rights Division. In testimony he provided to the National Commission on the Voting Rights Act in June 2005 in New York City, Mr. Rich noted that

> [O]n many occasions the department has deterred potential voting changes with discriminatory impact or purpose by sending letters seeking further information – letters which usually signal department concern with the law under review. These letters often result in abandonment of, or changes in, the proposed law to remove any discriminatory impact or purpose.[28]

Fraga and Ocampo analyzed data from 1990 to 2005, including the Department's Submission Tracking and Processing System. They created statistical reports that, for the first time, in or out of the Department, analyzed and coded data associated with submitted changes receiving an MIR. This data was coded by state, type of change, and outcomes (withdrawals, superceding changes, no responses, etc.). They conclude that MIRs play a critical role in the enforcement of Section 5: MIRs are issued at much higher rates than objections to preclearance; MIRs effectively double the number of changes that are prevented by DOJ; and MIRs have a separate impact on preventing illegal changes, separate from whether objections are issued. The conclusions reached by Fraga and Ocampo – that MIRs *double* the number of illegal changes reached directly by objection letters – point toward a strong deterrent effect upon submitting jurisdictions, which has yet to be fully realized by Congress and the VRA's protected classes:

> A total of 792 objections were made to proposed changes during 1990-2005, however only 365 of these objections contained the issuance of a MIR at some point in the process of review. However, the sum of the outcomes of withdrawals, superseded changes, and

[27] Luis Ricardo Fraga & Maria Lizet Ocampo, "The Deterrent Effect of Section 5 of the Voting Rights Act: The Role of More Information Requests," p. 4, Conference Paper, "Protecting Democracy: Using Research to Inform the Voting Rights Reauthorization Debate," Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity at the University of California, Berkeley School of Law and the Institute for Governmental Studies, University of California, Berkeley. February 9, 2005. See Appendix G.

[28] Joseph D. Rich, "Statement of Joseph D. Rich Before the National Commission on the Voting Rights Act," June 14, 2005. See Appendix G.

> no responses, resulting from an MIR, is 855. This means that MIRs have resulted in directly affecting 855 additional changes, making their implementation illegal, in addition to the 792 changes that resulted in objections. *MIRs increased the impact of the DOJ on submitted changes by 110 percent, i.e., doubling the number of changes that were not precleared by the DOJ*.[29]

In New York, between 1990 and 2005, the effect of MIRs is considerable.[30] New York's three covered counties collectively ranked 6th out of the 19 jurisdictions studied by Fraga and Ocampo with the highest number of changes prevented by MIRs – even when the jurisdictions analyzed included whole states like Louisiana, Texas, and the like. A total of 113 MIRs were issued to New York in the relevant time period, of which 28 resulted in no objection, four resulted in an objection, and 53 resulted in outcomes that are the equivalent of interposing an objection (withdrawals, superceding changes or no response). [31]

Thus, in effect, from 1990 to 2005, 53 voting changes to the 14 voting changes can be added that were subject to an objection, for a total of 67 changes that were thwarted by the Section 5 preclearance process.

II. Deployment of Federal Observers Post-1982

The Department of Justice has the authority under Section 8 of the VRA to assign federal observers to monitor elections. The decision to deploy federal observers is one that is not taken lightly by DOJ. Indeed, the decision reflects "evidence of potential voting rights act violations which arise most often in elections pitting minority candidates against white candidates, resulting in increased racial or ethnic tensions."[32] In the view of former DOJ officials like Joseph D. Rich, the "presence of federal observers serves an important deterrent – in this case to discriminatory actions during an election."[33]

In New York, federal observers and monitors have been deployed since 1985 precisely for these reasons. For the period November 1985 to November 2004, review of the instances when observers and monitors have been dispatched[34] to document potential violations of the Section 5 and Section 203, and otherwise deter potential violations, reveals the following:

County	Number of Observers/Monitors Dispatched
Bronx County	175
Kings County	286
New York County	353
Queens County	12 (Shared with Suffolk County. 2002)
Suffolk County	12 (Shared with Queens County. 2002)

[29] Id. at 15-16 (emphasis added).
[30] Id., Table 9 and text on p. 17. We have been unable to review MIRs issued to New York City between 1982 and 1989.
[31] The remainder received a follow-up letter from the Department seeking yet additional documentation.
[32] Joseph D. Rich, "Statement of Joseph D. Rich Before the National Commission on the Voting Rights Act," June 14, 2005. See Appendix G.
[33] Id.
[34] See Appendix G.

	55 (Suffolk only. 2004)
Total	**881**

Access to the reports and/or recommendations of any of the federal observers within the Department of Justice is not available to the public. However, DOJ has relied upon their observer coverage to gather information it reviews in the Section 5 preclearance process in New York. Finally, the deployment of observers on such a large scale, 881 in 19 years, is another indication of the state of voting rights in New York – and the need to continue to provide vigilance and redress.

Data available to us on the deployment of federal observers to elections in New York City (see Appendix G) do not include findings, reports, or final observations made by the Department of Justice election observers. However, in limited situations, the reasons underlying the assignment of observers to specific elections in specific counties are described in advance. On those limited occasions from 1985 to 2004, the data show that DOJ concerns over compliance with the language assistance mandates of Section 203 for Chinese voters led to the presence of federal observers on ten occasions in various elections and counties; concerns over Section 203 compliance for both Chinese-language and Spanish-language voters resulted in observers being dispatched on
seven occasions; and concerns for the treatment of Korean-language and Spanish-language voters led to assignment of observers on two occasions.

On the remaining occasions when federal observers were used to monitor elections, 25 occasions in all, no information was available to indicate the reason for the deployment. In effect, any potential violation of the VRA would have justified the order to send federal observers. Moreover, the 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 specifically because of concerns over Latino voters and bilingual assistance: September 2001 (Kings and New York counties); October 2001 (Bronx County); September 2004 (Queens County).

III. Language Assistance Litigation and Compliance Issues Post-1982

Language assistance for citizens who have yet to master the English language has been a feature of New York City elections since the adoption in 1965 of Section 4(e) of the Voting Rights Act, 42 U.S.C. § 1973b(e). Section 4(e) was specifically aimed at remedying the discriminatory election practices that prevented Puerto Ricans in New York City from voting because of their inability to pass an English literacy requirement as a prerequisite for voter registration.[35] Litigation under Section 4(e) of the VRA established meaningful access to the political process by creating a full system of language assistance for Puerto Ricans, who by operation of law were already U.S. citizens.[36] Indeed, these early Section 4(e) cases[37] led to the universally applicable pronouncement by the court in *Torres v. Sachs* that:

[35] Katzenbach v. Morgan, 384 U.S. 641, 652 (1966).
[36] In 1917 Congress declared Puerto Ricans citizens of the United States. This status was re-codified in 8 U.S.C. § 1402

> Plaintiffs cannot cast an effective vote without being able to comprehend fully the registration and election forms and the ballot itself.[38]

The language assistance provisions of the VRA, enacted nationally in 1975, relied, in part, on this model in New York City, especially since it reached close to 813,000 Puerto Ricans living in the city, plus thousands of other citizens who needed and used Spanish-language assistance in voting – demonstrating to Congress that language assistance could work on a very large scale.[39] In New York City, language assistance was provided to Spanish-language voters in Bronx, Kings, New York, and Queens counties; Chinese-language voters in New York, Kings and Queens counties; and to Korean voters in Queens County. Outside of New York City, Section 203 eventually required Westchester, Nassau, and Suffolk counties to provide language assistance in Spanish to Latino voters.

Recent research conducted in six Section 203 covered New York counties points to the salutary effects of providing language assistance for both Latino and Asian-American voters: namely, the positive correlation that exists between providing 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.), 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 and for both Spanish and Chinese-speaking voters.[40]

Nonetheless, the language assistance provisions of the VRA have never been fully implemented in New York City – and the problems with compliance have been especially detrimental to the Asian-American community. Since 1988, a comprehensive election-monitoring program created by the Asian American Legal Defense & Education Fund ("AALDEF") has documented a litany of recurrent problems, abuse, errors, and direct evidence of intimidation and discrimination visited upon Asian-American voters in need of language assistance in New York City. The AALDEF project is the only one of its kind in New York City and it provides a wealth of valuable information. The breadth and scope of the documentation provided by the AALDEF reports[41] leads to only one conclusion: New York has consistently failed to address the

---

[37] Lopez v. Dinkins, No. 73 Civ. 695 (S.D.N.Y. Feb. 14, 1973); Coalition for Education in District One v. Board of Elections, 370 F. Supp. 42 (S.D.N.Y. 1974); Torres v. Sachs, 381 F. Supp. 309 (S.D.N.Y. 1974).

[38] Torres v. Sachs, 381 F. Supp. at 312.

[39] In 1975 the House Committee on the Judiciary noted: "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 use of bilingual election inspectors." H.R. Rep. No. 94-196, at 24-25 (1975). See, Juan Cartagena, "Latinos and Section 5 of the Voting Rights Act: Beyond Black and White, 18 Nat'l Black L.J. 201, 209-210 (2005).

[40] Michael Jones-Correa & Karthick Ramakrishnan, "Studying the Effects of Language Provisions Under the Voting Rights Act," 2004 Paper, Western Political Science Association Meeting. See Appendix G.

[41] The reports, hereafter "AALDEF Reports," include: "Access to Democracy: Language Assistance and Section 203 of the Voting Rights Act," July 2000 [covering 1998 and 1999 Elections]; "Access to Democracy Denied: An assessment of the NYC Board of Elections compliance with the Language Assistance Provisions of the Voting Rights Act, Section 203, in the 2000 Elections," 2001; "Asian American Access to Democracy in the NYC 2001 Elections," April 2002; "Asian American Access to Democracy in the 2002 Elections in NYC," September 2003; "Asian American Access to Democracy in the 2003 Elections in NYC," May 2004; "The Asian American Vote

widespread nature of voter discrimination suffered by the Asian-American community. In 2006, AALDEF filed, on behalf of Chinese-language and Korean-language voters, one of the few Section 203 challenges in New York: *Chinatown Voter Education Alliance v. Ravitz*,[42] which is currently pending in federal district court.

The AALDEF reports, which were published beginning in 1998, document a number of categories of non-compliance with Section 203. A full discussion of the findings of AALDEF's research is found in Appendix A: Language Assistance Compliance & Asian American Voters. Some of the highlights include:

Erroneous or Ineffective Translations: In Queens County for the general election of 2000, the Democratic candidates for Congress, State Senate and Assembly, justices of the Supreme Court and judges for Civil Court, were listed under erroneously translated party headings, and misidentified as Republicans. Likewise, the Republican candidates were listed under the mistranslated heading as Democrats.[43] Notifying the board of elections of this major error by 9:45 A.M., election officials from the central board would not arrive to correct the mistake until 4:00, 5:30 and in one case, 6:55 P.M. In addition, paper ballots for justices of the Supreme Court required translation for the phrase "vote for any three" which was erroneously translated as "vote for any five." For the 2002 primary and general elections, of the more than 3,000 voters surveyed, 27 percent of Chinese voters and 30 percent of Korean voters reported having difficulty reading the ballot because of the small typeset used by the board of elections. Magnifying sheets issued by the board of elections ostensibly to solve this problem were not available in all sites and in Queens, one inspector was reported to have hidden the device to avoid its use. Transliteration of candidates' names surfaced as a problem again: "Mary O'Connor' was translated as "Mary O'Party;" and the Korean transliteration of John Liu's name was not what he submitted to the board or what he used in Korean media.

Racial Epithets or Hostile Remarks: During the 2001 elections monitored by AALDEF the following episode was documented: At IS 228, a polling site coordinator, trying to thwart interpreters from performing their duties, yelled "You f---ing Chinese, there's too many of you!" In their monitoring project for the 2002 elections, AALDEF documented other incidents: At PS 82 and at Botanical Garden, some of the comments made to Asian-American voters included calling South Asian voters "terrorists" and mocking the physical features of Asian eyes while stating: "I can tell the difference between a Chinese and a Japanese by their chinky eyes." And in 2003, the project reported that in PS 126 in Manhattan's Chinatown, poll inspectors ridiculed a voter's surname ("Ho"); in PS 115 in Queens, disparaging remarks were directed at South Asian voters, with one coordinator continuously referring to herself as a "U.S. citizen" and that she, unlike them, was "born here" and that the other workers needed to "keep an eye" on all South Asian voters; at Flushing Bland Center in Queens, the site coordinator complained that Asian-American voters "should learn to speak English."

2004: A Report on the Multilingual Exit Poll in the 2004 Presidential Election," 2005. See Appendix A: Language Assistance Compliance & Asian American Voters for a further discussion of the details of these reports and see Appendix G __ to __ for the reports themselves.

[42] 06 Civ 913 (NRB), S.D.N.Y. 2006 (Reice Buchwald, J.). The case includes claims under Section 203 of the VRA and under Section 208 of the VRA (the assistor provision of the Act). The Complaint in this matter is attached as Appendix G.

[43] This glaring mistake was observed in Queens at PS 22, JHS 189, JSH 185, PS 20, IS 145 and Senior Center.

Written Language Materials: The unavailability of written materials in the appropriate Asian languages, or the deliberate efforts to avoid displaying them, has been consistently documented in the AALDEF reports. For example, during the elections of 2002, survey results documented that 37 percent of Chinese voters and 43 percent of Korean voters need the assistance of translated materials. Instead, voter rights flyers, voter registration forms, affidavit ballots, and envelopes in Chinese were routinely missing as well. Korean language materials were kept in their supply packets and unavailable consistently in Queens. In 2003, 49 percent of the Chinese voters surveyed, and 47 percent of the Korean voters surveyed required the assistance of translated written materials. Yet, no ballots were translated for Chinese voters in PS 250 in Williamsburg despite its designation as a targeted site by the board of elections; voters were observed having difficulty voting as a result. Translated voter registration forms and affidavit ballot envelopes were frequently missing and once again, the requisite materials were found, unopened, in their original containers. Polling inspectors routinely refused to display the available materials, insisting that they were only required to do so if requested by a voter – with some remarking that they needed to keep their tables "clean" and others remarking that their manual required them to keep their tables free of "clutter."

Oral Language Assistance: The shortage of available interpreters is another constant problem in this area, as are the efforts of some poll workers to impede the work of the interpreters who are available. The reports noted that in 2002, 33 percent of Chinese voters surveyed and 46 percent of Korean voters reported needing the assistance of interpreters. Interpreters were in short supply in Queens and in Manhattan. In the 2003 elections, 36 percent of Chinese voters and 42 percent of Korean voters reported that they required the assistance of interpreters. Once again, the supply of interpreters could not meet the need. The monitoring revealed that, overall, one out of three interpreters assigned to the polling sites did not show up to work. And in 2004, slightly more than 7,200 Asian-American voters were surveyed in New York City, reporting that for Chinese voters in New York, Kings, and Queens counties, 37 percent needed an interpreter and 36 percent needed translated written materials to effectuate their right to vote.

The problems in complying with the language assistance guarantees of the VRA in the city were not limited to Asian-American voters, however. After the 2000 general elections the New York State Attorney General investigated "serious" allegations regarding the failure of the city board of elections to provide appropriate language assistance to Latino voters (and Asian Americans). His office also investigated allegations that Latino voters were harassed, intimidated and intentionally misinformed about voter registration laws and procedures in the city.[44] 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 New York City elections. In 2001, the board was short 3,371 poll inspectors – 15 percent of the total need. It was short 33 percent of the total number of Spanish interpreters it needed for that election.[46]

---

[44] Office of Attorney General Eliot Spitzer, Voting Matters in New York: Participation, Choice, Action, Integrity, February 12, 2001.
[45] Id.
[46] Ron Hayduk, Gatekeepers to the Franchise: Shaping Election Administration in New York, Northern Illinois University Press. Dekalb, 2005. P.198.

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 corresponding lower proficiency in English is clearly a continuing phenomenon 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 percent. In New York City, 51 percent 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 indicia, 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] And as noted above, the 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 specifically because of concerns over Latino voters and 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. Puerto Ricans, a sizeable force of more than 789,000, are the city's largest ethnic group and the largest national origin group among the city's 2.2 million Latino residents.[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, has not undergone any appreciable change, thus making their need for language assistance in elections today as viable as it was in the 1960s and 1970s.[50]

A. Language Assistance Litigation and Compliance Issues outside of New York City

Section 203 compliance problems are not limited to the four covered counties in New York City. Westchester, Suffolk, and Nassau counties are required to provide Spanish-language assistance to Latino voters. On-site compliance monitoring in 2005 by Cornell University students revealed that in Nassau and Suffolk counties, there were failures to provide voter registration materials in Spanish.[51] This research also evidenced less than full compliance in providing personnel capable of handling requests in Spanish.

---

[47] New York City data reported in this paragraph comes from the 2000 Census as analyzed by the Queens College Department of Sociology. Nina Bernstein, "Proficiency in English Decreases Over a Decade," The New York Times, 19 January 2005. National data is derived from the Census Bureau: Roberto R. Ramirez, We the People: Hispanics in the United States. Census 2000 Special Reports, issued December 2004.

[48] Nina Bernstein, "Proficiency in English Decreases Over a Decade," supra.

[49] Angelo Falcón, "De'tras Pa'lante: The Future of Puerto Rican History in New York City," in Gabriel Haslip-Viera, Angelo Falcón & Félix Matos Rodríguez, Boricuas in Gotham: Puerto Ricans in the Making of Modern New York City , Markus Weiner Publishers. Princeton 2004.

[50] Juan Cartagena, "Testimony of Juan Cartagena, General Counsel, Community Service Society Before the Subcommittee on the Constitution of the House Committee on the Judiciary of the United States House of Representatives," November 9, 2005.

[51] Michael Jones-Correa & Israel Waismel-Manor, "Verifying Implementation of Language Provisions in the Voting Rights Act," Conference Paper, "Protecting Democracy: Using Research to Inform the Voting Rights Reauthorization Debate," Chief Justice Earl Warren Institute on Race, Ethnicity and Diversity at the University of

Compliance problems with Section 203 generally led to litigation against Suffolk and Westchester counties filed by the Department of Justice in 2004 and 2005, respectively. Each of the suits resulted in settlements that improved the language assistance programs in each of the two covered counties. In *United States v. Suffolk County*[52] Suffolk County eventually agreed to a Consent Decree to create an improved Spanish-language assistance plan that would increase the number of Spanish-speaking election officials; increase the availability of Spanish-language written materials; improve the training of poll workers; and end the hostile treatment directed at Latino voters. The Consent Decree also allowed the Department of Justice to deploy federal observers in future elections. *United States v. Westchester County, New York*[53] similarly addressed the failure to provide adequate Spanish-language assistance to Latino voters, including the county's failure to post Spanish-language information at targeted polling sites under both Section 203 and the Help America Vote Act. A Consent Decree was entered in 2005 that improved the county's language assistance program considerably.

An additional Section 203 case was filed by the Department of Justice in Suffolk County against the Brentwood School District. *United States v. Brentwood Union Free District*.[54] The school district's failure to provide adequate oral and written language assistance in Spanish (including the failure to properly train personnel and the inability to curb hostilities against Latino voters) was the subject of a comprehensive Consent Decree that runs through January 2007.

IV. Voting Rights Litigation Post-1982

Litigation under the VRA in New York City has had limited success in the nearly 25 years that have elapsed since the continuation of Section 5 coverage to New York's three covered counties. It must be assessed alongside litigation filed under the Constitution and under the National Voter Registration Act (see below).

With respect to the VRA, it is important to differentiate between Section 5 and Section 2 litigation in this regard, however. In New York, Section 5 litigation is characterized by actions instituted by private litigants against election authorities of the state. These lawsuits are, by their nature, limited to seeking court orders to stop the implementation of election changes that have not been precleared. Once preclearance is granted the suit is effectively terminated, since only a subsequent challenge on racial discrimination grounds (e.g. a Section 2 case) can reach the merits. In addition, since Section 5 of the VRA exists to protect the rights of racial and language minorities to equal participation in the political process, Section 5 lawsuits that fail to raise issues of race add little to the focus contained in this report: the state of racial and language minority equality in the political process in New York since 1982.

California, Berkeley School of Law and the Institute for Governmental Studies, University of California, Berkeley. February 9, 2005 (on file with author); email correspondence from Michael Jones-Correa, 11 February 2005. See Appendix G.

[52] No. 04-2698 (E.D.N.Y. 2004).

[53] No. 05-0650 (S.D.N.Y. 2005).

[54] See www.uddoj.gov/crt/voting/litigation/caselist.htm (last viewed on February 27, 2006).

Approximately six cases filed since 1982 raised Section 5 claims directly.[55] In four of these cases, the U.S. Attorney General issued preclearance before the decision was issued, effectively rendering the lawsuits moot.[56] In two of these four cases, no issues were presented about the effect that such un-precleared election changes had, if any, on the city's racial and language minorities.[57] The remaining two unsuccessful decisions sought to extend the scope of Section 5 coverage: *Merced v. Koch* raised legitimate questions about the applicability of Section 5 to elections to "Area Policy Boards" in low-income neighborhoods that play a decisive role in the distributed anti-poverty funds to community based organizations; the second case, *African-American Legal Defense Fund v. New York State Department of Education*, presented a vague challenge to the composition of both the central and community boards of education that the court deemed too amorphous to consider without re-interpreting the allegations under the rubric of the VRA. Moreover, its challenge to the discriminatory nature of the composition of community school boards – considered one of the most racially diverse entities in city history since 1969 – is inexplicable. In effect, the Section 5 lawsuits, in spite of their results, have not enhanced or diminished the record of voting discrimination in New York in any meaningful way.

Section 2 litigation in New York City is also an important marker for potential voter related discrimination in the relevant jurisdiction. While the standards of proof are different than Section 5, the evidence of potential voter dilution, or in some cases discriminatory vote denial practices, do lend themselves to the assessment we make in this report. The Section 2 lawsuits summarized below run the gamut from challenges to structural impediments that potentially lead to vote dilution (redistricting plans; primary runoff requirements; nonvoting purges, etc.) to straight-forward vote denial claims (e.g. felon disfranchisement).

Fourteen cases raising Section 2 claims have been identified.[58] Cases that appeared to raise incontrovertible proof of unlawful discriminatory effects against racial and language minorities were settled, a not surprising result in this field.[59] These settled cases are significant in their own right. In *United Parents Associations v. Board of Elections*, proof of discriminatory effects upon black and Latino voters stopped the implementation of two successive legislative enactments to institute – and then re-institute – the discriminatory nonvoting purge law. At risk were hundreds of thousands of voter registrations. In *Ashe*, the Board of Elections was forced to begin a series of reviews and assessments regarding the training of its personnel and the deployment of adequately functioning machines. The settlement in *Ashe v. Board of Elections* was but the tip of the iceberg of recurring problems that faulty election administration has on racial and language minority voters. And in *Campaign For a Progressive Bronx v. Black*, language assistance for

[55] African-American Legal Defense Fund v. NYS Department of Education; Dobbs v. Crew; East Flatbush Election Committee v. Cuomo; Kolashi v. NYC Board of Elections; Merced v. Koch; and Rogers v. NYC Board of Directors. See Appendix B.
[56] Dobbs; East Flatbush Election Committee; Kaloshi; and Rogers.
[57] Kaloshi and Rogers.
[58] The 14 cases are summarized below in Appendix B. The only case, which defies categorization, in part, is Puerto Rican Legal Defense & Education Fund v. Gantt – it was brought to enjoin the Congressional elections of 1992 unless the districts were redrawn to meet one person, one vote and VRA guarantees. The case was subsequently dismissed as moot once the Legislature passed a last-minute redistricting plan that received preclearance just before the court's deadline.
[59] See, Ashe v. Board of Elections; Campaign for a Progressive Bronx v. Black; and United Parents Associations v. Board of Elections.

Latino voters in the most clearly identifiable Latino county in the state had to be forced once again on an election apparatus that could not implement the most basic of voting guarantees for language-minority citizens.

Other cases that alleged constitutional infirmities (or statutory violations) against election practices with decades or centuries of tradition were forced to judgment – some still pending and others upholding the state's position.[60] The bulk of the remaining cases are standard redistricting challenges where African-American and Latino voters sought to expand their opportunities above and beyond what they achieved through the Section 5 preclearance process – apparently with little success.[61] In many of the cases where plaintiffs were unsuccessful, district courts have ventured a number of opinions on the Senate factors that are used to assess a violation of Section 2 under the totality of circumstances – and as seen in Appendix B, these opinions lack the guidance of Second Circuit precedent.

A compendium of Section 5 and Section 2 cases appears in Appendix B.

Litigation under the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-1 ("NVRA"), was another significant tool in securing equal political rights for racial and language minorities. The litigation to date – summarized in Appendix C – is the culmination of years of efforts to establish agency-based voter registration in government agencies that serve low-income populations on a regular basis – and by extension in New York, racial and language minorities. All the cases to date address compliance issues in agencies that provide public benefits (federal means-tested public benefits) and the state agencies that provide for unemployment insurance. The settlements reached in these cases have worked to offer voter registration opportunities to thousands of black, Latino, and Asian-American voters.

Constitutional litigation in New York City – summarized in Appendix D – has also opened additional avenues to the full realization of equal opportunity to the political process. The 2006 opinion in *Lopez Torres v. New York State Board of Elections*, if upheld, will provide for competitive primaries for justices to the Supreme Court – a constant battle in New York over the last 25 years. Other constitutional cases, while not advancing access for racial and language minorities per se, do contain important findings about racially polarized voting (*Diaz v. Silver*) and about the city's historical inability to comply with the mandates of the VRA (*Ravitch v. City of New York*) and are thus useful for understanding the state of voting rights in New York today.

V. Racially Polarized Voting in New York

Whether voting is characterized by racial polarization is a critical indicator of discrimination in voting. Racially Polarized Voting ("RPV") is an indispensable element of voting rights analysis in redistricting and other cases where structural impediments are challenged as preventing full

[60] Such as challenges to the primary election run-off requirement (Butts v. City of New York); judicial elections that are nestled with the State's Constitution (France v. Pataki); and the still pending challenges to felon disfranchisement – a feature of New York election law since 1821 (Hayden v. Pataki and Muntaqim v. Coombe). Another pending Section 2 case is the challenge to the creation of a second Surrogate Court seat in Brooklyn (Maldonado v. Pataki).

[61] These include Rodriguez v. Pataki; Torres v. Cuomo; and FAIR v. Weprin.

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 relationships between the race of the voter and the race of the candidate, while controlling for other factors. Two related phenomena are analyzed: the level of political cohesion that may exist with 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.

New York has had numerous episodes where RPV has affected the outcome of its elections. Not all the data has been put to rigorous analysis, but there are enough episodes, in and outside of the realm of statistical scrutiny, that speak to a continued problem in the city.

One of the earlier documented examples of RPV – under more rigorous regression analyses – was conducted by Professor 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*.[62] Professor Engstrom analyzed two post-1982 elections: the 1982 Democratic primary for lieutenant governor where H. Carl McCall, an African American, ran against white candidates; and 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 American and Latinos for McCall and by black voters for Jesse Jackson. White voters,[63] on the other hand, only gave McCall 24 percent of their vote and virtually no support to Jackson in 1984 (4 percent). Coupled with an analysis of the 1973 run-off election between Herman Badillo (Puerto Rican) and Abraham Beame (white), and even considering the state's expert testimony of coalition voting by all groups in New York, the district 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."[64]

The Department of Justice has justified, in part, a number of its objections to preclearance under Section 5 in New York City on the basis of the existence of RPV. 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. While not specifying the evidence at hand, DOJ recognized "the prevailing patterns of polarized voting" in the area and found that the legislature was well aware of the discriminatory effects of its plan in Upper Manhattan.[65] The proposed changes in judicial elections in 1994, in

---

[62] Butts v. City of New York, 614 F. Supp. 1527, 1545 (S.D.N.Y. 1985). The findings of RPV by the District Court were left undisturbed by the Second Circuit in its reversal of Judge Brieant's judgment for the plaintiffs in Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985). Prof. Engstrom's analysis was subsequently cited by Prof. James Loewen as one of the earliest, probative examples of RPV in New York City. See, Richard Engstom, "Polarized Voting in Citywide Elections in New York: 1977-1984," cited in James Loewen, "Levels of Political Mobilization and Racial Bloc Voting Among Latinos, Anglos, and African-Americans in New York City," 13 Chicano-Latino L. Rev. 38, 41 (1993).

[63] The Engstrom analysis uses "other" voters to include both White, by far the bulk of this category, and Asian American voters.

[64] Butts v. City of New York, 614 F. Supp. at 1547. See Appendix B.

[65] Letter of James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, 24 June 1992, Re: Submission No. 92-2184. See www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed 8 June 2005).

1982, and in 1990, where the state sought retroactive preclearance, were denied, in part, based on the existence of RPV. DOJ finding that out of 10 judgeships created in 1982 for justice of the New York Supreme Court, not one resulted in the election of a minority judge, concluded:

> In the context of the apparent pattern of racially polarized voting which characterizes elections in the covered counties in New York City, we cannot say that like results would flow from a racially fair election system.[66]

In *France v. Pataki*, however, an unsuccessful Section 2 challenge to the closed nature of primary elections for justices of the Supreme Court of New York, the U.S. District Court for the Southern District accepted evidence of RPV in judicial elections and found that blacks and Latinos were politically cohesive in judicial elections in New York City.[67] Based on the evidence presented, however, the court did not find that white bloc voting in judicial elections in New York City existed.[68] Part of the reasoning in *France* was the evidence presented on coalition building in creating multi-racial slates of candidates in judicial elections and the role that African-American and Latino leaders within the Democratic party play as gate-keepers to the nomination and selection of justices to the Supreme Court. The court relied in part on the testimony of insiders like Assemblyman Herman Ferrell (New York County chair of the Democratic party), Assemblyman Clarence Norman (Kings County chair of the Democratic party), and Roberto Ramirez (at the time a significant operative of the Bronx County Democratic party). Almost 6 years later, the U.S. District Court for the Eastern District rejected the arguments that the same party delegate convention system for choosing judicial candidates for the primaries was necessary to promote racial diversity on the bench, in the face of system that unconstitutionally stifles voter participation. *Lopez Torres v. New York State Board of Elections*.[69] The focus in *Lopez Torres* was the raw monopolization that the party delegate convention system held over contenders who sought the Democratic primary nod, which operated to not only stifle competitive races among deserving candidates but to also curtail the right of voters to participate directly in deciding the party's nominee.

The 1991 elections for New York City Council and the 1990 elections for New York State Assembly in districts contained within New York City have been identified as evidence of RPV by at least two federal courts. *Puerto Rican Legal Defense & Education Fund v. Gantt*[70] and *Diaz v. Silver*.[71] The RPV analysis was proffered to support the creation of a third Latino Congressional district following the 1990 census. The court in *PRLDEF* was prepared to order its creation in a constitutional case that challenged the legislature's inability to decide on a new congressional redistricting plan. It found that plaintiffs met their initial burden under the seminal

---

[66] Letter of Loretta King, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, 5 December 1994, Re: Submission No. 93-0672. See www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm (last viewed 8 June 2005).
[67] France v. Pataki, 71 F. Supp. 2d at 327.
[68] Id. 71 F. Supp. at 329.
[69] 04 CV 1129, E.D.N.Y. Gleeson, J., Slip Opinion dated January 27, 2006, pp. 68-69
[70] Puerto Rican Legal Defense & Education Fund v. Gantt, 796 F. Supp. 677 (E.D.N.Y. 1992); 796 F. Supp. 681 (E.D.N.Y. 1992); 796 F.Supp. 698 (E.D.N.Y. 1992) are cases addressing the redistricting of New York's Congressional districts following the 1990 census. See Appendix B.
[71] Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y. 1997). See Appendix D.

case, *Thornburg v. Gingles*,[72] but eventually dismissed the case as moot once the Department of Justice precleared the legislature's plan creating two majority Latino districts in the city. Years later, in the constitutional challenge to the contours of one of the two Latino districts, *Diaz v. Silver*, the court held that District 12 was impermissibly drawn by using race as a predominant factor at the expense of traditional criteria for redistricting. In assessing the defendants' and defendant-intervenor's claim that the district was justified as a measure to protect Latinos as a distinct community of interest, the court did not contradict the presence of RPV that was found in *PRLDEF*, but only held that RPV alone does not establish a community of interest sufficient to justify the contours of District 12. The proof of RPV, accepted in both cases, addressed election returns for the 1991 city council and 1990 state assembly in which at least one Latino candidate ran. The statistical analysis performed by Professor Allan Lichtman found that:

> The elections examined show a pattern of polarized voting between Latinos and non-Latinos in elections with Latino and non-Latino candidates. The cohesion of Latino voters is extremely strong: almost invariably a substantial majority of Latino voters united behind Latino candidates. The pattern among non-Latino voters is more mixed given the multiracial character of the non-Latino vote (black, Asians, and non-Hispanic whites). Still, a substantial majority of non-Latino voters typically lined up behind non-Latino candidates, especially in city council contests.[73]

The 2004 case of *Rodriguez v. Pataki* offers a limited analysis of RPV in a portion of Bronx County in a case that challenged, *inter alia*, the alleged packing of State Senate districts in the 2000 round of redistricting in violation of Section 2. The court ruled in favor of the defendants, noting that the evidence of RPV failed to show a persistent and significant degree of RPV, and even if RPV were present, Latinos in the Bronx were proportionately represented in the state senate.[74] Despite its conclusion, the court made a number of relevant findings regarding RPV in the city. It found that Bronx Latino voters in State Senate Districts 34 and 35 were politically cohesive in 82 percent to 85 percent of the endogenous and exogenous elections analyzed when RPV analysis was conducted.[75] It also concluded that in all endogenous elections studied, white bloc voting defeated the Latino-preferred candidate.[76] 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 rejecting a Section 2 challenge to Congressional District 17, the court ruled that there was insufficient evidence of racial polarization to demonstrate that blacks and Latinos combined are politically cohesive; and without aggregating both minorities, a precondition of *Gingles* – that an effective majority in a compact district must be available – was unmet. [77] Nonetheless, the elections presented to the court and analyzed by

---

[72] 478 U.S. 30 (1986).
[73] Diaz v. Silver, 978 F. Supp. at 101.
[74] Rodriguez v. Pataki, 308 F. Supp. 2d 346, 433, 429 (S.D.N.Y.2004). See Appendix B.
[75] Id. at 420, footnote 116 and accompanying text.
[76] Id. at 425. Seven elections were at issue and the Latino voters supported the Latino preferred candidate with anywhere from 72 percent to 99 percent of their vote, while White voters provided anywhere from 27 percent to 40 percent of their votes. The elections included State Senate contests from 1996 to 2002 in Districts 34 and 35. Id. at 423.
[77] Id. at 441-445.

the intervenor's expert, Frank Lewis, were telling. In the 2001 mayoral primary where Fernando Ferrer, a Puerto Rican, ran against Mark Green and other white candidates, Latinos and blacks coalesced behind Ferrer – the only election cited by the court where they may have been cohesion between the two groups. In other contests, election results demonstrated political cohesion within each of the two minority groups. Thus, African-American voters demonstrate cohesion in the 1997 mayoral primary (63 percent voting for the Rev. Al Sharpton), and in the 2001 city comptroller race (where William Thompson, an African-American, defeated a white candidate, Harold Berman), but apparently did not coalesce behind Larry Seabrook and rejected the Latino-preferred candidate in the 1994 Congressional district primary (Willie Colon) and the 2001 citywide race for public advocate (Willie Colon, again). Similarly, Latino voters showed levels of political cohesion for Willie Colon, a Puerto Rican, 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).

In the Asian-American community in New York, racially polarized voting is exemplified in the very center of its community in the city: Manhattan's Chinatown.[78] As noted in Appendix F, the efforts to create an Asian-American presence in the expanded New York City council focused first on Manhattan's Chinatown community. Faced with redistricting proposals from competing Asian-American groups, the city opted to join Chinatown with communities to its west and north: Battery Park City, Tribeca, and SoHo. Reviewing the results in four separate City Council races (1991, 1993, 1997, and 2001) the Asian American Legal Defense & Education Fund ("AALDEF") concluded that racially polarized voting was a persistent feature in all of the elections studied – namely, that election districts with majority Asian populations voted in large proportions for Asian-American candidates while majority-white election districts rejected them. The conclusions were reached by apparently comparing homogeneous precincts instead of conducting a regression analysis. Thus in 1991, Margaret Chin, the sole Asian-American candidate, captured 33 percent of the Democratic primary vote. In 1993, Ms. Chin was the only Asian American candidate in the primary and was only able to capture 27 percent of the vote. In 1997, in the same primary, Ms. Jennifer Lim replaced Ms. Chin as the only candidate from Chinatown and captured 30 percent of the vote. In the 2001 primary – a race with no incumbent – three Asian-American candidates (Rocky Chin, Kwong Hui, Margaret Chin) amassed only 40 percent of the vote while all white candidates combined obtained 60 percent of the primary vote. "In all these races, Asian American candidates have always lost to white candidates coming from the west side of the district. The winners of the Democratic Primary Elections have always gone on to win the General Elections in District 1. . . District 1 was created as an 'Asian American district' in 1991, but Asian Americans in Lower Manhattan have never had a real chance to influence the elections."[79]

A comprehensive analysis of RPV in New York City was performed in 1991 by Prof. James Loewen for the Community Service Society in its Comment under Section 5 to the Department of Justice regarding the viability of the city council redistricting plan after the 1990 Census. The

[78] Data in this paragraph is derived by the New York City Council election results outlined in a publication by the Asian American Legal Defense & Education Fund, "Can an Asian American Win in District 1?" See Appendix G.
[79] Id.

study was subsequently expanded and published in 1993.[80] It analyzed a number of elections in the city where a minority candidate ran against a white candidate. Five elections were included:

> a) The 1985 mayoral race (where Herman Ferrell, African-American, ran against five white candidates, including the incumbent, Edward Koch);
> b) The 1985 contest for president of the city council (where Andrew Stein, the winner, ran against 3 Latino candidates and one black candidate);
> c) The 1988 presidential Democratic primary (where Jesse Jackson ran against Walter Mondale and other white candidates);
> d) The 1989 mayoral race (where David Dinkins bested the incumbent, Edward Koch, and two other white candidates);
> e) The 1989 race for president of the city council (pitting the incumbent Stein, against one Latino candidate, Ralph Mendez).

In presenting the results of voter behavior citywide, all the elections analyzed returns compared to the composition of city council districts. 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 Prof. Loewen concluded that in 1989, Mr. Stein, the incumbent, captured 90 percent of the white vote, Mr. Ralph Mendez captured 75 percent of the Latino vote and blacks split among the two, but generally supported the white candidate.

The remaining elections included in the Loewen analysis are effectively black-white contests. The 1985 mayoral contest, where the incumbent, Edward Koch won, did not produce "legally meaningful" RPV[81] but did demonstrate differences between black and white voters. Herman Ferrell "was not a major candidate [and] received less than 40 percent of the African-Americans votes, virtually no white votes, and perhaps one Latino vote in seven."[82] Whites bloc voted overwhelmingly for the white candidates, to the level of 98 percent. In the 1989 mayoral primary election, Prof. Loewen also analyzes RPV among the "roll on" vote (i.e., the percentage of voters whose votes counted) and demonstrates that white voters gave Dinkins 23 percent of their vote, blacks gave him 93 percent of their votes and Latinos gave him 56 percent of their votes. Finally, in the 1988 presidential primary, the analysis again shows that New Yorkers voted along racial lines. Black voters had a higher "roll on" rate than whites, demonstrating an energized African-American electorate, and gave 92 percent of their votes to Jesse Jackson, Latinos gave 49 percent of their votes to Mr. Jackson and the rest to the remaining white candidates, while white voters gave only 9 percent of their votes to Mr. Jackson. The Loewen study has a separate analysis for Asian-American voting behavior in Lower Manhattan – required in part because of the deficient data in the 1980s, which collapsed Asians into the white category.

---

[80] James Loewen, "Levels of Political Mobilization and Racial Bloc Voting Among Latinos, Anglos, and African-Americans in New York City," 13 Chicano-Latino L. Rev. 38, 41 (1993).
[81] Id. at 56.
[82] Id. at 57.

Prof. Loewen also made a number of other important findings. He found that in general, white voters were the "most polarized group" among the voters he analyzed.[83] 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. He also found that Latinos were less like to roll on (cast votes) as they go down the ticket to lesser offices.[84] African Americans exhibited higher roll on rates (turn out in proportion to their Voting Age Population) than even whites in the 1988 Presidential primary and the 1989 Mayoral election.[85]

Finally, it is important to note the Loewen study was completed in advance of the newly expanded city council, which increased to 51 seats from 35 – an improvement in the opportunities that would be afforded to the city's growing racial and language minorities. 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."[86]

CONCLUSION

New York still has its fair share of voting rights abuses, impediments, and practices that have yet to be fully eradicated in the nearly 25 years covered by this report. This is evident in the numerous ways that racial and language minorities must still avail themselves of the preventative features of Section 5 review to stop administratively what they lack in political strength to stop outright. Recent denials of preclearance addressing methods of election or access to the voting booth for language minority citizens continue to raise the specter of increased and necessary screening.

Equally important, the racial tensions that surface when emerging communities start growing in the city and seek their place in the halls of legislative bodies are manifested in stark ways even today. Yelling at South Asian voters and labeling them "terrorists" or intimidating the burgeoning community of Chinese American citizens with epithets like "You f***ing Chinese, there's too many of you" puts in context the consistently documented concerns of the city's Asian-American citizens. For them, forcing compliance in New York City for language assistance through the courts, like the litigation outside of the city for Spanish-language voters, is still required today.

In many ways, New York has made great strides in electing candidates of their choice – but in a city with such a large proportion of African-American, Latino and Asian-American voters, the accomplishments of a number of important "firsts" do little today to counter an imbalance between electoral outcomes and the active and growing minority electorate from these communities. Much of this, albeit not all, is placed in the manifestation of the phenomenon of racially polarized voting. In that regard, New York City, like so many jurisdictions benefiting

[83] Id. at 48.
[84] Id. at 62.
[85] Id. at 61.
[86] Id. at 72.

from protections of Section 5, Section 203, and Section 8, has a long road ahead to overcome the episodic, but still critically important and debilitating, episodes of polarized voting today.

Equally important, recent trends regarding election administration in New York City portend additional problems for racial and language minorities. The recently published research of Professor Ron Hayduk documents in detail[87] the level of misinformation, faulty voting machines, and mismanagement that is disproportionately found in minority polling sites in this decade. Indeed, with the state's inability to resolve political stalemates, federal funds under the Help America Vote Act have yet to make a dent in the real-life experiences of Election Day in African-American, Latino, and Asian-American communities. New York state has recently been sued by the Department of Justice for failing to comply with these HAVA mandates, potentially forfeiting more than $49 million dollars in federal funds for machine upgrades.[88] In recent elections, Prof. Hayduk documents that the city board of elections in 2001 was short 25 percent of the Chinese interpreters it needed, 33 percent of the Spanish interpreters it needed, and 59 percent of the Korean interpreters it needed. Documented "undervotes" – the number of votes lost when voters go to the polls but do not cast a vote – caused primarily by the deactivation of a special latch on the 40-year old voting machines (which was not fixed until 2004) resulted in New York City having a higher proportion of undervotes in 2000 than all of Florida. The pattern of "undervotes" in New York City was racially skewed (and even more so than Florida in 2000) with the Bronx having a rate of 4.7 percent to Staten Island's 1.6 percent. Using multiple regression analysis of the presence of poll site, and administrative, and voting machine problems, Prof. Hayduk found that blacks and Latinos had a higher proportion of election machine problems. Finally, the Hayduk study focuses on the 1993 mayoral election (Dinkins - Giuliani) and concludes that the pattern of excessive challenges to eligible voters, disruptions, and an unusually high incidence of the use of affidavit ballots (signifying a greater possibility of administrative error and correspondingly higher rate of disfranchisement) occurred in neighborhoods where predominately low-income and minority voters reside. This is not surprising news to the cadre of voting rights advocates in New York.

This report documents not only what has occurred since 1982 with respect to the promise of an open, fair, and equitable democracy in the city. It also points to what could have happened if the temporary provisions of the VRA were not in place; if every discriminatory change stopped in its tracks had been implemented, nonetheless; if 881 federal observers were not dispatched to the beacon of urban America that is New York; if cavalier decisions about not translating candidates' names in Chinese were allowed to reach fruition; and if the deterrence embodied in Section 5 were never there to help the small handful of voting rights advocates in their quest to monitor 25,000 poll workers, 6,000+ outdated and faulty voting machines, nearly 5,800 election districts, millions of voters, and another million or more, eligible, but not registered voters, in the biggest city in America.

[87] Ron Hayduk, Gatekeepers to the Franchise: Shaping Election Administration in New York, Northern Illinois University Press. DeKalb 2005.
[88] United States v. New York State Board of Elections, Civil Action No. 06-CV-0263 (N.D.N.Y. 2006) at www.usdoj.gov/crt/voting/hava/ny_hava.htm (last viewed 6 March 2006).

It is hard to imagine what an election in this part of the country would be like without the protections of the Voting Rights Act. But it is easier to imagine a future where its tools would be put to full use to eradicate what is left of a history of exclusion.

Language Assistance Compliance and Asian American Voters

The following is a summary of critical language assistance compliance problems in Asian American communities post-1982 that are documented by the Asian American Legal Defense & Education Fund ("AALDEF") in a series of written reports starting in 1998.[1]

1998 Primary, 1998 General and 1999 School Board Elections: AALDEF monitored twenty-two polling sites, seventeen sites and nineteen sites, respectively in the these elections in Chinatown (New York County); Flushing (Queens County) and Sunset Park (Kings County) and found the following: *Erroneous or Ineffective Translations*: A referendum on campaign finance reform translated the term "prohibiting corporate contributions" to "prohibiting contributions from community organizations." Candidates' names were incorrectly transliterated on the ballots. And the Chinese translations were too small in typeface to be effective. *Oral Language Assistance*: Chinese translators were not available or did not appear on Election Day or were assigned to do other tasks at the polls. *Written Language Materials*: Chinese language materials, if available, were not available for affidavit ballots, affidavit ballot envelopes, voter registration forms, ballot proposals and the voting rights flyer. In Queens and Kings

[1] The reports, hereafter "AALDEF Reports," include: "Access to Democracy: Language Assistance and Section 203 of the Voting Rights Act," July 2000 [covering 1998 and 1999 Elections]; "Access to Democracy Denied: An assessment of the NYC Board of Elections compliance with the Language Assistance Provisions of the Voting Rights Act, Section 203, in the 2000 Elections," 2001; "Asian American Access to Democracy in the NYC 2001 Elections," April 2002; "Asian American Access to Democracy in the 2002 Elections in NYC," September 2003; "Asian American Access to Democracy in the 2003 Elections in NYC," May 2004; "The Asian American Vote 2004: A Report on the Multilingual Exit Poll in the 2004 Presidential Election," 2005. See Appendix G __ to __ for the reports themselves.

counties some polling sites had no Chinese language materials. Others, such as in Queens, had the materials but would not open it for use by voters. *Signage*: Signs announcing the availability of interpreters were either missing or not readily visible.

2000 Primary and 2000 General Elections: Approximately 2,000 AALDEF volunteers monitored 22 polling sites in the primary and 20 polling sites in the general elections in Kings, New York and Queens counties and documented: *Erroneous or Ineffective Translations*: In Queens for the general election the Democratic candidates for Congress, State Senate and Assembly, Justices of the Supreme Court and Judges for Civil Court were listed under erroneously translated party heading and misidentified as Republicans. Likewise, the Republican candidates were listed under the mistranslated heading as Democrats.[2] Notifying the Board of Elections of this major error by 9:45 A.M., election officials from the central board would not arrive to correct the mistake until 4:00, 5:30 and in one case, 6:55 P.M. Paper ballots for Justices of the Supreme Court required translation for the phrase "vote for any three" which was erroneously translated as "vote for any five." In an attempt to address the typeface used for Chinese translations, the Board issued magnifying devices in the Chinese language supply kits – poll workers were unaware of their existence, or untrained in their use. *Oral Language Assistance*: In New York County, assigned interpreters failed to show up for their assignments for the primary election.[3] At some of these sites the same noncompliance was repeated at the general election. At Lands End I, the lack of sufficient interpreters resulted in two voters

[2] This glaring mistake was observed in Queens at PS 22, JHS 189, JSH 185, PS 20, IS 145 and Senior Center.
[3] This was observed at Lands End II. PS 2, PS 124, PS 131, PS 130, Little Italy Senior Center and St. Patrick's Youth Center.

losing their votes because of their inability to understand the operating instructions in English. In Queens County and Kings County many sites failed to have fully staffed interpreters.[4] *Written Language Materials*: In Queens County at Cardozo HS, ED56/AD 35,[5] no bilingual materials were available for the primary and for the general election at JHS 189 there pages were missing in the translated referendum, and no bilingual registration forms or affidavit ballot envelopes were available. Other sites had missing bilingual materials in either the primary or general election.[6] In Kings County for both the primary and general elections, similar problems were reported, along with reports that poll workers would keep all Chinese language materials in their original envelopes without displaying them, at the following sites.[7]

2001 Primary, 2001 Primary Runoff, 2001 General Elections: In these elections AALDEF volunteers monitored 35 polling sites in Chinatown (New York County), Flushing, Elmhurst, Floral Park, Richmond Hill (Queens County), and Sunset Park and Homecrest in Kings County and documented: *Erroneous or Ineffective Translations*: 71 Chinese voters in the primary and 135 Chinese voters the general election had difficulty reading the typeset used for the Chinese-language ballot. The magnifiers issued by the Board of Elections were missing in New York County at Confucius Plaza, Little Italy Senior Center and JHS 185. *Oral Language Assistance*: Poll workers interfered with the

[4] These included PS 162, IS 145, PS 22, PS 89, St. Sebastian's School, and Senior Center in Queens and PS 194 in Kings.
[5] Election districts in New York are cross-referenced by their location in New York State Assembly districts. ED refers to election district and AD refers to Assembly District.
[6] PS 89, Senior Center, Newton HS, IS 145, and PS 162.
[7] These reports came from PS 314, ED15/AD48, PS 94 ED19/AD48, ED20/AD51, and PS 105, ED17/AD48. At PS 94 compliance was worse for the general election than it was in the primary election.

right of Asian American voters to receive help from the available language interpreters. At Rutger Houses in Chinatown, the workers would not allow the interpreter to enter the booth with the voter to provide assistance – a practice that is legal as longer as the voter requests it. At PS 94 in Sunset Park (Kings County) poll workers would interfere with Chinese voters who brought their own assistors to help them navigate the ballot. *Written Language Materials*: Insufficient language materials were reported in Queens County[8] and poll workers deliberately refused to display Chinese language materials (or lie about their existence) at others.[9] *Improper Demands for Identification*: Nearly 350 Chinese voters were asked to produce identification before exercising their right to vote, especially in polling sites in Chinatown, New York and Flushing, Queens. At Senior Center ED20/AD25, one polling inspector refused to allow the vote to Chinese voters who failed to carry identification. *Racial Epithets or Hostile Remarks*: At IS 228 a polling site coordinator reacted in extreme fashion to thwart interpreters from performing their duties, yelling out "You f---ing Chinese, there's too many of you!"

2002 Primary and 2002 General Elections: More than 3,000 Asian American voters were surveyed in these elections by AALDEF volunteers in 56 polling sites in the primary election and 50 polling sites in the general election in Queens (Flushing, Bayside, Elmhurst/Jackson Heights, Woodside/Sunnyside, Jamaica/Briarwood, Richmond Hill, Floral Park); Brooklyn (Sunset Park, Williamsburg, Sheepshead Bay) and Manhattan (Chinatown). The findings are: *Erroneous or Ineffective Translations*: Of the more than 3,000 voters surveyed, 27% of Chinese voters and 30% of Korean voters reported having

[8] Reports from (JHS 189) and Kings County (PS 94 and PS 314).
[9] Observed at JHS 189, Newton HS, Senior Center, ED25/AD25 and PS 314.

difficulty reading the ballot because of the small typeset used by the Board of Elections. Once again, magnifying sheets were not available in all sites and in Queens (Bayside HS) one inspector was reported hiding the device to avoid its use. Transliteration of candidates' names surfaced as a problem again: "Mary O'Connor' was translated as "Mary O'Party;" and the Korean transliteration of John Liu's name was not what he submitted to the Board or what he used in Korean media. *Oral Language Assistance*: Thirty-three percent of Chinese voters surveyed and 46% of Korean voters reported needing assistance of interpreters. Interpreters were in short supply in Queens[10] and in Manhattan (Lands End II). At least one voter left without voting as a result (PS 12). The quality and training of interpreters was also suspect with some in PS 2 (New York) unable to understand English and at PS 169 Korean interpreters who did not know that written materials in Korean were available. Once again poll workers would interfere with the provision of language assistance by interpreters or assistors of choice: at ED40/AD22, a polling inspector insisted that the curtain to the booth remain open if the interpreter was allowed in; at JHS 189, the worker prohibited assistors of choice to help with language problems; at PS 314 requests for language assistance went ignored. *Written Language Materials*: Survey results documented that 37% of Chinese voters and 43% of Korean voters need the assistance of translated materials. Instead, voter rights flyers, voter registration forms, affidavit ballots and envelopes in Chinese were routinely missing as well.[11] Korean language materials were kept in their supply packets and unavailable consistently in Queens.[12] At least one Korean-language voter in St

[10] At PS 82, JHS 185, Bayside HS, PS 12, JHS 185, and Cardozo HS.
[11] See reports for Botanical Gardens, PS 154, PS 163, PS 13, PS 82 PS 250.
[12] These occurred at St. Sebastian's, Flushing Bland Center, PS 46.

Sebastian's left without voting because these materials were not displayed. In polling sites where both Chinese and Korean language assistance is required, materials were also absent.[13] *Signage*: Numerous reports of missing or hardly visible signage were made in both Chinese and Korean neighborhoods.[14] Despite AALDEF's warning to the Board in advance, the predictable confusion between Chinese signs and Korean signs was problematic, and AALDEF documented multiple episodes where the poll workers did not know the difference, e.g., at Flushing House and Botanical Gardens. *Improper Demands for Identification*: Botanical Gardens and PS 250 (Williamsburg) were the source of these complaints with one instance where a voter was advised to return with three forms of identification. *Racial Epithets or Hostile Remarks*: Calling South Asian voters "terrorists" and mocking the physical features of Asian eyes while stating: "I can tell the difference between a Chinese and a Japanese by their chinky eyes" are some of the comments made to Asian American voters at PS 82 (ED50/AD25) and at Botanical Gardens.

The AALDEF report for the 2002 elections also faulted the Board of Elections for failing to adequately advertise the availability of Korean-language assistance by failing to use Korean-language media to advertise the service. The Board also failed to deploy Korean language speakers on its telephone hotline service.

[13] PS 150, Flushing HS, PS 12, and JHS 189.
[14] See PS 145, IS 237, PS 314, PS 154, PS 105, PS 169, Newton HS, JHS 189, PS 2, St.Sebastian's, PS 46, PS 150, PS 11, PS 69 and others.

2003 Primary and 2003 General Elections: AALDEF volunteers monitored 42 polling sites in the primary and 70 polling sites in the general election in Queens (Flushing, Jackson Heights, Fresh Meadows, Jamaica, Bayside, Elmhurst, Woodside, Sunnyside, Forest Hills, Floral Park, Richmond Hills), Brooklyn (Sunset Park, Bensonhurst, Sheepshead Bay, Williamsburg) and Manhattan (Chinatown, Battery Park City, Lower East Side). In addition, 981 Asian Americans were included in their survey which was available in twelve Asian languages and dialects. This effort revealed the following: *Erroneous or Ineffective Translations*: Interpreters at PS 134 and Masaryk Towers in Chinatown complained that the Chinese translations were too small to read. This echoed the survey findings that 37% of Chinese voters in Chinatown and 22% of Korean voters in Flushing had difficulty reading the ballot because of the small typeset. Once again, AALDEF volunteers reported that the magnifying sheets were routinely missing from the tables and the voting machines. *Oral Language Assistance*: For the 2003 elections, 36% of Chinese voters and 42% of Korean voters reported that they required the assistance of interpreters. Once again, the supply of interpreters could not meet the need. The monitoring revealed that, overall, one out of three interpreters assigned to the polling sites did not show up to work. Moreover, 6 polling sites where interpreters were assigned had no oral language assistance available at all.[15] At Civil Court in Chinatown, interpreters were required to perform general election duties because of a shortage of poll inspectors. In Newton HS poll inspectors in ED44/AD35 would not direct Asian American voters to interpreters – and at least one voter lost his vote as a result. Interpreters at PS 250 in Williamsburg were not given tables and chairs and told instead

[15] Reported at Southbridge Towers in Manhattan; PS 212, PS 131, JHS 217, PS 5, and CWV Post 970 in Queens.

that they had to stand all day. *Written Language Materials*: Forty-nine percent of the Chinese voters surveyed, and 47% of the Korean voters surveyed require the assistance of translated written materials. Yet no ballots were translated for Chinese voters in PS 250 in Williamsburg despite its designation as a targeted site by the Board of Elections and voters were observed having difficulty voting as a result. Translated voter registration forms and affidavit ballot envelopes were frequently missing and once again, the requisite materials were found, unopened, in their original containers. Polling inspectors routinely would refuse to display the available materials, insisting that they were only required to do so if requested by a voter – with some remarking that they needed to keep their tables "clean" and others remarking that their manual required them to keep their tables free of "clutter." At PS 69 in Queens, poll inspectors defiantly refused to display the materials – even after directed to do so by a Board of Elections official. *Signage*: Chinese and Korean "Interpreter Available" and "Vote Here" signs were reported missing on poll site entrances where they belong. *Improper Demands for Identification*: A total of 85 Asian American voters, almost 10% of the voters surveyed, reported that they were required to produce identification in order to vote -- and this was above and beyond the new Help America Vote Act identification requirement for first-time voters. *Racial Epithets or Hostile Remarks*: At PS 126 in Manhattan's Chinatown, 17ED/AD64, poll inspectors ridiculed a voter's surname ("Ho"); in PS 115 in Queens, disparaging remarks were directed at South Asian voters, with one coordinator continuously referring to herself as a "US citizen" and that she, unlike them, was "born here" and that the other workers needed to "keep an eye" on all South Asian voters; at Flushing Bland Center in

Queens, the site coordinator complained that Asian American voters "should learn to speak English."

2004 General Election: In this election AALDEF conducted a broad exit poll of close to 11,000 Asian American voters in 23 cities across 8 states, including New York. Slightly more than 7,200 voters were surveyed in New York City. Among the issues covered in the survey was the reliance on written and oral language assistance by Asian American voters. This report documents that in November 2004, for Chinese voters in New York, Kings and Queens counties, 37% reported needing an interpreter and 36% reported needing translated written materials to effectuate their right to vote.

Section 2 and Section 5 Litigation Post 1982

This section gathers every reported and unreported decision we have identified alleging Section 5 and Section 2 violations from 1982 to the present. We have focused on litigation affecting New York City, with one exception (FAIR v. Weprin). Our focus is dictated by the exploration of discriminatory practices in voting in New York City's Section 5 and Section 203 covered counties, and in practices targeted at the Latino populations of the three counties outside New York City that are covered under Section 203 (Westchester, Nassau and Suffolk counties). Critically important cases like Goosby v. Town Board of the Town of Hempstead, 180 F.3d 476 (2d Cir. 1999) are not included despite its presence in Nassau County because it does not address discrimination against the minority group that engendered Section 203 coverage in the first place. We urge the reader to explore the Goosby opinion for an excellent summary of how African Americans have had to overcome voter discrimination against that Town's government.

African American Legal Defense Fund v. New York State Department of Education, 8 F. Supp. 2d 330 (S.D.N.Y. 1998) (Owen, J.). This is an unsuccessful, generalized VRA challenge to the composition of the central Board of Education and the manner of electing Community School Board members. The suit combined a constitutional and statutory challenge to the financing mechanisms of New York City's public schools. The court dismissed all claims related to the public financing of the schools. The general VRA challenge to the composition of the appointed central Board of Education was interpreted by the Court to be a challenge under Section 5. Such a claim was dismissed

in the absence of allegations that the City switched from an elective body to an appointed body. To the extent that the complaint set forth a Section 2 dilution claim to the composition of the Board of Education, the court rejected that as well since the central Board is composed of appointees – not persons directly elected to office. Another Section 2 dilution claim was made to the method of election for community school boards in the City. This claim was dismissed as well since there were no allegations made concerning the basic elements of a dilution claim under Thornberg v. Gingles – especially, any allegations of racially polarized voting.

Ashe v. Board of Elections of the City of NY, 88 Civ. 1566 (E.D.N.Y. 1988 (Sifton, J.); 1988 U.S. Dist. LEXIS 10067 (E.D.N.Y. 1988). Settled in 1993 this successful Section 2 case challenged the Board's failure to: a) train Poll Inspectors; b) process affidavit ballots correctly; c) assign Poll Coordinators; d) provide language assistance in Spanish and Chinese in the completion of voter registration forms; e) inspect and certify operable voting machines; and f) ensure that repairs of inoperable machines in African American and Latino communities were completed expeditiously. The settlement included increased training requirements for Poll Inspectors, Translators and other personnel, requirements for the designation of Poll Coordinators and Information Clerks, signage requirements, outreach to black and Latino communities, modifications to the voter registration forms, and requirements for the use of certified voting machines.[1]

[1] Ashe v. Board of Elections, 88 Civ. 1566 (CPS). See, Stipulation of Settlement, Appendix G.

Baker v. Cuomo (Baker v. Pataki) 842 F. Supp. 718 (S.D.N.Y. 1993); 85 F.3d 919 (2d Cir. 1996). This is an unsuccessful Section 2 and constitutional law challenge to New York's felon disfranchisement law, Election Law § 5-106. Plaintiffs' claims were dismissed by the District Court. The District Court made no findings under Section 2's totality of circumstances except to say that the "[d]isproportionate racial impact of felon disenfranchisement on a minority voting population does not establish a violation of the Voting Rights Act absent other reasons to find discrimination."[2] The Second Circuit reversed on the Section 2 claim, then granted a rehearing *en banc* limited to the Section 2 claim. The sole issue addressed in the 1996 divided opinion was whether a Section 2 claim lies against a state's felon disfranchisement law in the face of proof of discriminatory results only. The Second Circuit, *en banc*, was evenly split, five to five, on this issue. Accordingly, the decision of the District Court dismissing the claims was affirmed with Second Circuit noting *per curiam* that its decisions are without precedential effect.

Butts v. City of New York, 614 F. Supp. 1527 (S.D.N.Y. 1985), 779 F.2d 141 (2d Cir. 1985). The imposition of the primary run-off law in 1972 (Election Law § 6-162) – requiring that in primary elections for New York City's three city-wide offices, a primary run-off is required if no candidate obtains at least 40% of the primary vote – was the subject of this constitutional and Section 2 challenge by black and Latino voters. The District Court held that the law was passed with a discriminatory purpose to make it more difficult for African American and Latino voters to win citywide contests. The court

[2] Baker v. Cuomo, 842 F. Supp. at 722.

credited evidence that the Legislature sought to cure the "Badillo scare" – the 1969 Democratic Primary when Herman Badillo (Puerto Rican) nearly captured the nomination for Mayor. It also found that the law violated Section 2 because of its discriminatory purpose and discriminatory effects. The Second Circuit reversed on appeal and upheld the legality of Election Law § 6-162. The appellate court credited the Legislature with other, nondiscriminatory motives for passing the primary run-off law. On the VRA claim the court clearly noted that Section 2 could not apply to the electoral mechanism challenged in this case – applying Section 2 jurisprudence based on access to multimember legislative bodies cannot be reconciled with notions of equal political opportunity in elections for single-member offices. "There can be no equal opportunity for representation within an office filled by one person."[3] Despite this threshold conclusion, the Second Circuit went on, in dicta,[4] to counter a number of findings made by the District Court regarding the Senate Factors. It observed that the proof presented to the District Court could not support a finding of a history of official discrimination in voting rights, episodes of racial appeals in campaigns, or a lack of success by minorities in securing elected positions. The Second Circuit, however, left undisturbed all the findings of Racially Polarized Voting made by the District Court in certain elections from 1973 to 1984.

Years later in 2001, the primary run-off law would force Fernando Ferrer (Puerto Rican) – who came in first in the mayoral primary but had less than 40% of the vote– into a

[3] Butts v. City of New York, 779 F.2d at 148.
[4] The court first noted that by applying the correct standard for determining Section 2's applicability as a threshold matter, an analysis of the Section 2's objective factors was not even triggered (id. at 149) and was indeed, "immaterial." Id. at 150. Then it went ahead and analyzed them nonetheless. Id. at 150-151.

primary run-off with Mark Green. Mr. Green won the primary then lost the general election. The primary run-off law is still part of New York's election law.

Campaign For A Progressive Bronx v. Black, 85 Civ. 6443 (S.D.N.Y., Knapp, J.). See, 631 F. Supp. 975 (S.D.N.Y. 1986). Thus suit is a successful Section 2 challenge by Latino voters to the Board of Election's failure to assign adequate and properly trained bilingual election inspectors and polling clerks in Bronx County. Injunctive relief was stipulated to by the parties in September 1985 requiring an educational campaign in Spanish to advise voters that voter identification cards provided by the Board of Elections were not required to cast a ballot; requiring notice to the plaintiffs of the election districts targeted for language assistance; and requiring cooperation with the plaintiffs to secure an adequate number of bilingual election inspectors.[5]

Denis v. New York City Board of Elections, 1994 U.S. Dist. LEXIS 15819 (S.D.N.Y. 1994) (Wood, J.). Unsuccessful Section 2 and constitutional challenge to a series of irregularities (broken lights, unsealed polling booths, machine malfunctions) in the conduct of the 1994 primary election for State Assembly in the 68th District in East Harlem. Plaintiffs Equal Protection Clause and Due Process Clause claims were dismissed.[6] Plaintiffs' brought a Section 2 vote dilution claim premised in large part on allegations that the irregularities they experienced in minority neighborhoods of the 68th Assembly District were not present in the white neighborhoods of the district. Their motion for preliminary injunction was denied when the court ruled that they were

[5] Campaign For A Progressive Bronx v. Black, 631 F. Supp. 975, 978-979 (S.D.N.Y. 1986)
[6] Denis v. New York City Board of Elections, 1994 U.S. Dist. LEXIS 15819, *11 (S.D.N.Y. 1994).

unlikely to succeed on the merits. Plaintiffs conceded a lack of Racially Polarized Voting in the 68th District and, in the court's opinion, failed to substantiate any of the Section 2 Senate Factors that would lead to a finding of a Section 2 violation.[7]

Dobbs v. Crew, 1996 U.S. Dist. LEXIS 20129 (E.D.N.Y. 1996). These were consolidated cases that unsuccessfully challenged under Section 5, the suspension of elected Community School District Board members in Boards 17, 9 and 7 without obtaining preclearance. The court denied the motion for preliminary injunction on mootness grounds after the Department of Justice granted preclearance. The court noted that the preclearance granted by the Attorney General was limited to the suspensions at hand, and that any future suspensions or removal required preclearance anew.[8] This position is consistent with the November 15, 1996 objection to preclearance issued by the Attorney General regarding the removal of the entire board of Community School District 12, described in Section II, A of the Final Report. For a related case, see Green v. Crew, below.

East Flatbush Election Committee v. Cuomo, 643 F. Supp. 260 (E.D.N.Y 1986). This is a Section 5 challenge to changes in a number of polling places and the modification of the schedule to submit specifications to substantiate nominating petitions (from 6 to 3 days) in advance of a Community School Board election, where plaintiffs sought injunctive relief to order a new school board election. The court denied the request for injunctive relief holding that the polling site changes were "retroactively precleared"

[7] Id. at *21, *25.
[8] Dobbs v. Crew, 1996 U.S. Dist. LEXIS 20129, at *9.

eventually by the Department of Justice and that such practice, while a concern to the court, did not violate Section 5. The court also delayed any issuance of a court order regarding the modification of the candidate challenge schedule until the Department of Justice could finish its Section 5 review of the change upon a resubmission of the schedule change.

Fund for Accurate and Informed Representation (FAIR) v. Weprin, 796 F. Supp. 662 (N.D.N.Y. 1992). This is a general constitutional and Section 2 challenge to 1990s Assembly redistricting plan alleging unlawful packing and fracturing of minority communities throughout the State and general one person, one vote claims applicable to the entire state. The court denied all Section 2 claims – specifically holding that there was no unlawful fracturing of minority communities in the Assembly plan for Monroe, Nassau, Erie or Westchester counties. The court acknowledged the U.S. Attorney General's denial of preclearance in June 1992 to two Assembly districts (A.D. 71 & 72) in Manhattan (see Section II,A of the Final Report) and merely ordered a Special Master to redraw those districts alone to bring them in compliance with the VRA. All other claims were likewise dismissed.

France v. Pataki, 71 F. Supp. 2d 317 (S.D.N.Y. 1999) (Sprizzo, J.). Filed on behalf of black and Latino plaintiffs, this is Section 2 challenge to the selection, nomination and election of New York State Supreme Court Justices. Plaintiffs sought the creation of single-member subdistricts of each Judicial District in New York City. The court rejected the Section 2 challenge holding that proof on Gingles One was lacking because

the plans proposed by the plaintiffs were primarily driven by considerations of race and did not survive strict scrutiny, had failed to meet the equal population criteria of the one person, one vote standard; did not abide by traditional criteria used in redistricting; and failed to account for citizenship voting age population. The court did find that Gingles Two was present in that black and Latino voters were politically cohesive. The court failed to find sufficient proof of Gingles Three (bloc voting by whites against minority-preferred candidates) and noted that defendant's expert report on the lack of white bloc voting in Supreme Court elections went unchallenged. Finally, the court found that the under the totality of circumstances rubric of Section 2, blacks and Latinos were not deprived of an equal opportunity to participate in the political process of electing Supreme Court justices

Green v. Crew, 1996 U.S. Dist. LEXIS 20227 (E.D.N.Y. 1996) (Sifton, J.). This is an unsuccessful Section 2 and Equal Protection Challenge to the removal, continued suspension and replacement of elected Community School Board members from District 17 in Kings County with appointed trustees.

The court ruled that a Section 2 challenge may be raised in conjunction with the removal and replacement of elected officials and relied in part on the Department of Justice's interpretation that such removals were a voting practice subject to preclearance under Section 5. The court did deny, however, the plaintiffs' motion for a preliminary injunction because of a failure to show that they would likely succeed on the merits of their Section 2 dilution claim in the absence of evidence of political cohesion by racial minority voters or racially polarized voting by white voters. The court, however, did

allow the Equal Protection Clause claim to go forward on the showing that the Chancellor lifted the suspension of some, but not all School Board members.

Hayden v. Pataki, 2004 WL 1335921 (S.D.N.Y. June 14, 2004) (McKenna, J.). This is a Section 2 and constitutional law challenge to New York's felon disfranchisement law that is currently consolidated on appeal for Section 2 purposes only with Muntaqim v. Coombe (see below). The case alleges that Election Law § 5-106 is discriminatory in purpose and effect. The allegations concerning intentional discrimination in the enactment and perpetuation of New York's felon disfranchisement law are also on appeal to the Second Circuit. Plaintiffs' discriminatory impact allegations center on their assertions that African Americans and Latinos are disproportionately stopped, arrested, charged, convicted, and sentenced to prison more than similarly situated whites in the State of New York. The District Court ruled that the complaint in this case failed to state a claim under the various theories advanced by the plaintiffs. As to the Section 2 claims, however, the court refused to reach them and relied on the lower court opinion in Muntaqim v. Coombe to dismiss them in their entirety.

Kaloshi v. New York City Board of Elections, 2003 U.S. App. LEXIS 13423 (E.D.N.Y. 2002). Section 5 case alleging that the modification of a candidate petitioning period in June 2002, without preclearance, was illegal. The court dismissed the Section 5 claim upon a showing that the Department of Justice had precleared the changes without objection, on June 7, 2002. The case raised no issues of discriminatory purpose or discriminatory effect against racial and language minorities in New York City.

Maldonado v. Pataki, 2005 U.S. Dist. LEXIS 36933 (05 Civ. 5158, E.D.N.Y., Townes, J.) This is a pending challenge under Section 2 to the creation of a new judgeship, the second Surrogate Court position in Kings County in 2005. In fashioning the effective date of the law past the first day of circulating nominating petitions, the Legislature avoided holding a primary election in Kings County for the new Surrogate's seat and instead, pursuant to New York Election Law §6-116, the Kings County Democratic Party selected its nominee directly. In the 2005 general election, Frank Seddio, a Caucasian male, won election to a 14-year term as a Kings County Surrogate. Black and Latino registered Democratic voters in Brooklyn brought suit alleging that Section 2 afforded them a right to a primary election under these circumstances and sought a preliminary injunction to stop the certification of the election results. No proof was presented to the court to demonstrate racially polarized voting if the primary election were to have been held. The court denied the motion holding that plaintiffs failed to prove a likelihood of success on the merits. Effectively, the court ruled that plaintiffs failed to show that the application of the state's election code deprived them of an equal opportunity to participate in the political process since all voters in Brooklyn, irrespective of race, were denied the a primary election.[9] The court also rejected the argument that plaintiffs had a statutory right to a primary election.[10] The case is still pending in the Eastern District.

Muntaqim v. Coombe, 366 F.3d 102 (2d Cir. 2004); 396 F.3d 95 (2d Cir. 2004)(order granting rehearing *en banc*). This is a Section 2 challenge to New York's felon

[9] Maldonado v. Pataki, 2005 U.S. Dist. LEXIS 36933 at *11.
[10] Id. at *12-*16.

disfranchisement law, now consolidated on appeal with Hayden v. Pataki and awaiting decision on a rehearing *en banc* to the Second Circuit. The first panel in Muntaqim ruled that Section 2 does not apply to New York's felon disfranchisement statute, Election Law § 5-106, and indicated that under the circumstances of felon disfranchisement some causal connection between purposeful discrimination and the discriminatory effects of the challenge rule would be necessary. It deliberately did not address the type or quantum of statistical evidence needed to assert a Section 2 claim in the context of felon disfranchisement: "We also do not purport to decide what type of statistical evidence might be sufficient to support an inference that racial bias exists at any given state in the criminal process."[11] Nor would it opine on the relevance of any of the Senate Factors (accompanying the passage of the amendments to Section 2 in 1982) to Section Two's treatment of felon disfranchisement.[12] Since Mr. Muntaqim did allege racial disparities in the sentencing of felons in New York Courts, the panel concluded that if Section 2 did apply to felon disfranchisement, the plaintiff stated a valid initial claim.[13] In the Second Circuit order granting rehearing en banc, however, the Circuit requested briefing on a number of issues directly relating to the alleged discriminatory effects of the criminal justice system in New York and its effect on the political participation of African American and Latino voters.[14] It also asked for briefing on the Section 2 vote dilution claim raised in Hayden v. Pataki case as well. A decision on those issues, plus the

[11] Muntaqim v. Coombe, 366 F.3d at 118.
[12] Id.
[13] Id.
[14] Muntaqim v. Coombe, 396 F.3d 95 (specifically asking the parties to brief what kind of data demonstrating racial bias in conviction and sentencing, statistical and otherwise, should a court rely upon if the case were remanded).

constitutional issues raised by the original panel regarding applying Section 2 to felon disfranchisement, is still pending

Merced v. Koch, 574 F. Supp. 498 (S.D.N.Y. 1983). This is a Section 5 action to enjoin Area Policy Board elections – which determined how anti-poverty funds would be distributed within Neighborhood Development Areas administered by the City's Community Development Agency – for failure to obtain preclearance of changes in the method of election. Plaintiffs alleged that changes in the composition of each Area Policy Board would have a discriminatory impact upon black and Latino voters. The court denied the injunction and questioned whether these Area Policy Board elections were elections covered under Section 5 of the VRA. The complaint was subsequently withdrawn.

Puerto Rican Legal Defense & Education Fund v. Gantt, 796 F. Supp. 677, 796 F. Supp. 681, 796 F. Supp. 698 (E.D.N.Y. 1992). This litigation addressed a Legislative stalemate to redistrict New York's congressional districts into 31, rather than the current 34, districts as a result of population shifts documented by the 1990 Census. In its June 1992 decision the court conditionally adopted the proposed plan of a Special Master it commissioned to devise a 31-seat congressional plan. Ultimately, the Special Master's plan was unnecessary once the Department of Justice precleared the Legislature's last-minute congressional plan. For Latino and African American voters in New York City there was a marked difference between the Special Master's plan and the Legislature's plan: the Master's plan created 3 majority-Latino districts and 4 majority-African

American districts, while the Legislature's plan maintained the current, 2 majority-Latino districts in place and created five majority-black districts. Plaintiffs in Puerto Rican Legal Defense & Education Fund sought to raise a Section 2 challenge to 1990s Congressional redistricting plan finally adopted by the Legislature. The court, however, denied that request in its July 1992 decision and dismissed the suit as moot once preclearance was issued. Nonetheless, the court did recognize that the Special Master's plan it adopted satisfied Section 2 and found that "groups purporting to represent the African-American and Latino voters have established their initial burden under Gingles."[15] The Gingles factors include the existence of a compact district that is composed of a majority of minority group members; the existence of political cohesion within that minority group; and the existence of white bloc voting that tends to defeat the minority-preferred candidate. These last two prongs evidence Racially Polarized Voting, discussed further in Section VI of the Final Report.

Rodriguez v. Pataki, 308 F. Supp.2d 346 (S.D.N.Y. 2004). This was an unsuccessful Section 2 and constitutional challenge to 2002 Congressional and State Senate redistricting plan as it applied to Bronx, Suffolk and Nassau Counties. A three-judge District Court granted summary judgment to the defendants on some counts, and granted judgment after trial to defendants on all other counts. The court rejected the plaintiffs' constitutional challenge on basis of the one person, one vote doctrine of the Equal Protection Clause. The court noted that the plan overall was within the maximum population deviation allowed by law and was still legal even if the State Senate created

[15] PRLDEF v. Gantt, 796 F. Supp. at 693.

overpopulated districts "downstate" and more under-populated districts upstate.[16] The court rejected section 2 claims against the State Senate districts in Nassau and Suffolk counties as well. In the challenge to Nassau County Senate Districts 6 through 9, the court ruled that the plaintiffs failed to show the existence of an alternative plan where blacks in Nassau County would constitute the majority in a compact Senatorial district – thus failing to satisfy the first preconditioin of Thornberg v. Gingles. The attempt to prove intentional discrimination in the Legislature's deliberate failure to create a black majority district in Suffolk County was rejected as well by the District Court – at best, the court ruled, the plaintiffs demonstrated that the Legislature was aware of the racial effect the final plan would have. In the court's words, "consciousness of minority groups is not evidence of intentional discrimination."[17] The remaining Section 2 challenges to the Senate Districts in Bronx County were rejected after a trial. The challenge to Senate Districts 34 and 35 are discussed below in the section on Racially Polarized Voting. See Section VI of the Final Report. This challenge was ultimately unsuccessful because under the "totality of circumstances" test under Section 2, the court found that Bronx Latinos were proportionately represented in the Senate overall. The court also rejected a Section 2 challenge to Senate District 31 (New York-Bronx counties) filed by Latino intervenors in the case primarily because of the failure to present evidence that white voters voted as a bloc to defeat minority preferred candidates – the 3rd factor under Thornberg v. Gingles. Finally, the court rejected a Section 2 challenge to Congressional District 17 (Bronx-Westchester-Rockland counties) asserted by African American intervenors. It ruled that Gingles One could not be met when the intervenors sought to

[16] Rodriguez v. Pataki, 308 F. Supp. at 370-371.
[17] Id.

combine black voters and Latino voters to create an effective majority-minority congressional district because they failed to prove that blacks and Latinos combined in District 17 are politically cohesive.[18]

Rogers v. New York City Board of Directors, 988 F. Supp. 409 (S.D.N.Y. 1997) (Scheindlin, J.). Plaintiff, a mayoral candidate in 1997 brought this Section 5 case but failed to allege any discriminatory purpose or discriminatory effect that emanated from the imposition, without preclearance, of a firm deadline for applications for matching public funds from the Campaign Finance Board. The court dismissed the Section 5 claim because the case did not allege that race or color had anything to do with the imposition, administration or effect of the Campaign Finance Board's deadline.

Torres v. Cuomo, 1993 U.S. Dist. LEXIS 1165 (S.D.N.Y. 1993). This is an unsuccessful Section 2, 14th Amendment and 15th Amendment challenge to the 1992 New York Congressional District plan for failing to create a third Latino majority district as per the recommendations of the Special Master appointed by the court in PRLDEF v. Gantt, above. The court denied motions to dismiss the claims on the basis that Latino voters were precluded from litigating the challenge anew since they participated in previous court cases to assert their rights to create majority-Latino congressional districts. Ultimately, however, the court rejected the statutory and constitutional claims to create a 3rd Latino congressional district in New York.

[18] Id. at 441-445.

United Parents Associations v. Board of Elections. 89 Civ. 0612 (Sifton, J.). This is a successful Section 2 challenge to Election Law § 5-406, New York's nonvoting purge law. The law allowed the Board of Elections to cancel the voter registration of any voter who failed to vote in four years. Plaintiffs' submitted expert testimony that law's application had an unlawful, racially discriminatory effect as black and Latino voters were 32% more likely to be purged for non-voting than whites. In 1989 the court preliminarily enjoined the Board of Elections from continuing its nonvoting purge. The State Legislature amended its nonvoting purge law to allow for the cancellation of a voter's registration for failure to vote in all elections in a period covering two successive presidential elections. In 1992 plaintiffs secured another court order prohibiting the implementation of the new purge law upon a statistical analysis that it too had a racially discriminatory effect under Section 2. With the passage of National Voter Registration Act of 1993 looming, the parties agreed to a Consent Decree, upheld by court order, that permanently enjoined purging in New York for nonvoting in any stated period.[19]

[19] Consent Decree, United Parents Associations v. Board of Elections, May 6, 1993. See Appendix G.

NVRA Litigation Related to Racial and Language Minority Voters

The passage of the National Voter Registration Act of 1993, 42 U.S.C. § 1973gg-1 ("NVRA"), presented racial and language minorities in New York City an opportunity to further an agenda of requiring government agencies to actively register the large number of eligible, but unregistered, voters among poor populations in the City.[1] The NVRA, made effective in 1995, and created agency-based voter registration requirements for certain State agencies, eliminated the requirements for in-person registration by mandating mail-in voter registration throughout the country, and placed curbs on a number list maintenance policies that purged voters from state voter lists.

The NVRA requires agencies that provide public benefits (e.g., Temporary Aid to Needy Families, Medicaid, and Food Stamps) to offer voter registration opportunities to all persons applying for benefits or reinstatements. Given the relatively low socio-economic status of racial and language minorities in the City, NVRA registrations have the potential of closing the gap in political participation between poor racial and language minority communities and the rest of the electorate. In New York City, NVRA litigation,

[1] In 1990 voters and advocates sued in state court to enforce the Governor's Executive Order 136 that required facilitation of agency-based voter registration throughout the state, particularly in agencies serving poor communities in New York City. 100%VOTE v. New York State Board of Elections (Supreme Court of the State of New York, New York County, Index No. 21920/90). On February 21, 1991, Justice Santaella granted plaintiffs a writ of mandamus to force compliance with the executive order. In 1995 another suit in state court sought to fully implement voter registration in City mayoral agencies in In the Matter of the Application of Disabled in Action of Metropolitan New York v. Giuliani (Supreme Court of the State of New York, New York County, Index No. 110646/95, Freidman, J.) with the courts only upholding the right of the Commissioner of the New York City Voter Assistance Commission to obtain annual reports on compliance.

initiated exclusively to force compliance with these mandates, forced a reticent and indifferent agency apparatus to provide access to voter registration in agencies processing Medicaid, "welfare," and, as a result of a State designation, unemployment insurance benefits.

In National Congress for Puerto Rican Rights v. Sweeney, 95 Civ. 8742, S.D.N.Y. (Owen, J.) Latino voters and others forced the New York State Department of Labor to offer voter registration at Unemployment Insurance Offices reaching 80,000 applicants per year as per the requirements of New York's enabling statute that enforced the NVRA. The court entered a Consent Decree[2] in January 1996 that established a comprehensive mechanism of integrating voter registration opportunities in the intake procedures for new applicants.

In Disabled in Action v. Hammons, 96 CV 5894, E.D.N.Y. (Block, J), consolidated with United States v. New York, 3 F. Supp. 298 [CHECK CITE] (E.D.N.Y. 1998), aff'd in part, rev'd in part, 203 F.3d 110 (2d Cir. 2000) disabled litigants sought to increase the reach of the NVRA by seeking full NVRA compliance in every setting where Medicaid applications were processed – from hospitals to medical offices. The State had effectively delegated the responsibilities of accepting Medicaid applications in a number of settings, including those in the private sector. As a means-tested benefit program, full compliance along the lines of that sought by the plaintiffs in this action would have captured thousands of eligible racial and language minority registrants. Instead, the court

[2] See Appendix G.

rejected the full sweep of the relief plaintiffs sought and ruled that NVRA obligations could only be extended to public hospitals. In 2000 the parties settled the case along the lines of the Second Circuit's opinion.[3]

Finally, in United States v. New York, 96 CV 5562, E.D.N.Y. (Block, J.) the federal government sued the State of New York to force adequate and consistent NVRA compliance in public assistance agencies and in state agencies that primarily serve the disabled. Regarding the claims concerning public benefits, U.S. v. N.Y., overlapped in part with Disabled in Actions v. Hammons, supra. This case is still pending.

[3] See Appendix G.

Constitutional Litigation Related to Voting by Racial and Language Minorities

In 1992 in a case challenging the composition of the New York City Districting Commission, the City defended racial and language minority diversity on the commission and conceded that it engaged in a "history of discrimination specific to voting rights in New York City and its earlier districting and council bodies." Ravitch v. City of New York, 1992 U.S. Dist. LEXIS 11481, *16 (S.D.N.Y. 1992). At issue was a City Charter provision adopted by referendum in 1989 that required that subsequent City Council redistricting commissions reflect the City's racial and language minorities protected by the Voting Rights Act, "in proportion, as close as practicable, to their population in the City." New York City Charter, § 50(b)(1). After the provision was granted preclearance under Section 5 by the Department of Justice the plaintiffs in Ravitch challenged the constitutionality of the provision as creating an impermissible race-based criterion for participation in the Districting Commission. The City of New York vigorously defended the constitutionality of § 50(b)(1) by convincing the court that it was required to take all necessary steps to remedy its prior violations of the Voting Rights Act. In particular, the City was forced to adopt remedies to prior intentional discrimination against African American and Latino voters in the City Council redistricting plan that was adopted after the 1980 Census. Id. at 17. In addressing the concerns confronting the Charter Commission that recommended § 50(b)(1), the District Court found that:

> "[T]he defendants did, in fact, have a firm and substantial basis for believing that remedial action was warranted. *The [Charter] Commission was faced with the*

> *task of making substantial changes to the structure of New York City's government, which had been found to discriminate in a variety of ways over the previous twenty years*."

Id. at 16 (emphasis added). The court accepted the defense that the City had a compelling governmental interest in adopting remedial legislation to counter-act the official voting discrimination that existed against the VRA's protected minorities, but eventually ruled that § 50(b)(1) was not narrowly tailored to pass strict scrutiny under the Equal Protection Clause. Id. at *18.

Another constitutional law case affecting voting rights in New York City is the successful Shaw[1] challenge to New York's 12th Congressional District represented by Congresswoman Nydia Velázquez, the first and only Puerto Rican woman elected to Congress. Diaz v. Silver, 978 F. Supp. 96 (E.D.N.Y. 1997). The three-judge District Court upheld the Equal Protection Clause challenge by holding that the creation of the 12th Congressional District, covering portions of three counties, was significantly motivated by race to the detriment of other traditional criteria for redistricting and could not withstand strict scrutiny analysis. The court rejected the defense that the 12th Congressional District was created to preserve a Latino community of interest and inferred that Asian Americans in the district were a community of interest.[2] Defendants and defendant-intervenors presented proof of racially polarized voting between Latinos

[1] Shaw v. Reno, 509 U.S. 630 (1993). A Shaw challenge is based on the Equal Protection Clause and alleges that race was a dominant factor in the creation of majority minority districts at the expense of other traditional criteria for redistricting.
[2] Id. 978 F. Supp. at 123-126.

and non-Latinos in the 12th Congressional District. The court, however, ruled that polarized voting, by itself, would not establish a community of interest that would justify the contours of 12th Congressional District.[3] It found the 12th Congressional District to be unconstitutional as configured, and ordered New York State to redistrict the District and other affected congressional districts. The Legislature subsequently passed a new redistricting plan reconfiguring the 12th Congressional District and its neighboring districts, shortly thereafter.

Finally, in a recent case alleging violations of both the First Amendment and the Equal Protection Clause, a federal court found that the delegate convention system of selecting candidates for elected Supreme Court Justices unconstitutionally deprived voters of the right to choose their parties' judicial candidates and hindered competitive primaries. Lopez Torres v. New York State Board of Elections, 04 CV 1129, E.D.N.Y. Gleeson, J., Slip Opinion dated January 27, 2006. The case represents the culmination of previous, unsuccessful attempts – alleging VRA violations – in the delegate selection process for these same judicial positions. France v. Pataki, 71 F. Supp. 317 (S.D.N.Y. 1999). Racial fairness in the system challenged in Lopez Torres was raised directly by the defendants who argued that the delegate convention system of nominating judges to primaries serves the goal of racial and ethnic diversity, a legitimate goal of the State. The court ultimately ruled that the delegate convention system was not narrowly tailored to meet the State's interest in racial diversity. It specifically found that the challenged system severely curtails voter participation in the primaries. The court also recognized the existence of

[3] Id. at 124.

proportional representation methods of election that would allow minority voters to exercise their collective voting strength to their advantage. And finally, the court recognized that alterations in the judicial district lines may also serve to protect minority voters' interests. Lopez Torres, Slip Op. pp. 68-71.

Abbreviated History of Official Voter Related Discrimination in New York [1]

The history of voter discrimination in New York has yet to receive a full exploration by the Second Circuit and the recent challenges to felon disfranchisement appear to point the way to an appropriate discussion between race and citizenship in the Empire State.[2] In the 18th and 19th centuries both the New York State Legislature and delegates to various New York State Constitutional Conventions intended to, and did, discriminate against blacks with respect to the franchise and made their intentions explicitly known. Starting in with the 1777 New York Constitution, blacks suffered from a number of *de jure* limitations on their ability to vote: In 1777 suffrage was limited to property holders and free men;[3] in 1801 the legislature eliminated property restrictions from the voting requirements to New York's first Constitutional Convention – but then expressly excluded blacks from participating. The 1821 Constitutional Convention – the very Convention that enacted the State's first felon disfranchisement law – was dominated by racist invective. Delegates to this Convention expressed their views that blacks, as a "degraded" people, were unfit to participate in the body politic by virtue of their natural

[1] For a discussion of historical developments in the election of minority Justices to the Supreme Court of New York, see Appendix F, Minority Elected Officials in New York Post 1982.
[2] Hayden v. Pataki in particular (discussed in Appendix B of this report) addresses these historical developments because of its allegations of intentional discrimination in the enactment and perpetuation of New York's felon disfranchisement laws in the 19th and 20th centuries. The references in the next two paragraphs come from the pleadings, briefs and materials presented to the District Court and the Second Circuit in this litigation. The intentional discrimination claim in Hayden is on appeal to the Second Circuit at this time.
[3] N.Y. Const., art. VII (repealed 1826).

inferiority[4] and created new property requirements applicable only to "men of color" in state.[5] The same Convention enacted a new felon disfranchisement provision, which was done with the express purpose of further denying the franchise to blacks in New York. The debate surrounding this new disqualification clearly reflects the racist nature of its motivation[6] summed up in the observation of one delegate who stated:

> "Survey you prisons – your alms houses – your bridewells an your penitenciaries and what a darkening host meets your eye! More than one-third of the convicts and felons which those walls enclose, are of your sable population."[7]

Subsequent Constitutional Conventions continued to debate the *de jure* racial qualification placed on voting in New York, and each one was as equally brazen as the next. In the 1846 Convention one statement summed up the majority's opposition to repealing the racial classification: "[Blacks] were an inferior race to whites, and would always remain so."[8] In the 1866-1867 Constitutional Convention the delegates would only place the issue of eliminating the racially based property qualification as a separate

---

[4] Nathanial Carter, William Stone & Marcus Gould, Reports of the Proceedings and Debates of the Convention of 1821, 198 (Albany: E. & E. Hosford, 1821) (hereafter "Debates of 1821").
[5] Blacks were required to posses a freehold estate worth at least $250. N.Y. Const. (1821), art. II, § 1 (repealed in 1870). This property qualification "was an attempt to do a thing indirectly which we appeared to either be ashamed of doing, or for some reason chose not to do directly . . This freehold qualification is [for Blacks] a practical exclusion [from the franchise]." New York State Constitutional Convention Committee, Problems Relating to Home Rule and Local Government, 143, n. 13 (Albany, NY: J.B. Lyon Company, 1938). The property requirement "was merely a subterfuge for keeping suffrage from the Negro." Id. at 161. The requirement worked effectively as only 1% of the Black population met the new requirements.
[6] One delegate summed up the goals of the 1821Constitutional Convention by stating that "all who are not white ought to be excluded from political rights." Debates of 1821, p.183.
[7] Debates of 1821, p. 199.
[8] Constitutional Convention of 1846, p. 1033.

question to the voters where it was known to fail.[9] In 1869, New Yorkers, as expected, voted to maintain the racially discriminatory language of the 1821 Constitution.[10]

Not until the adoption of the Fifteenth Amendment to the U.S. Constitution – which New York *opposed* by attempting to withdraw its earlier ratification of the Amendment,[11] and not until the passage of the Federal Enforcement Acts of 1870 and 1871, did equal manhood suffrage reach New York State, despite the opposition of New York's voters and political leadership, dominated by anit-black Democrats in 1870 and 1871.[12] According to Professor David Quigley, New York's first election in which black men were freely allowed to vote occurred in the presence of federal militia, deployed to the City to ensure order.[13]

The next major development in the protection of the exclusionary features of New York election laws was the adoption of literacy tests for voting. In New York the antecedents of the provision eventually adopted in the 20th century to back go the 1872-1873 Constitutional Commission where the incorporation of a literacy test for suffrage was first proposed for the State in the aftermath of the passage of the Fifteenth Amendment.[14] In the 1900s New York's literacy test requirement had a history of discriminatory use

[9] Documents of the Convention of the State of New York, 1867-1868, No. 16, 3, Volume One. Albany: Weed, Pearsons and Co., 1868.
[10] David Nathaniel Gellman & David Quigley, Jim Crow New York: A Documentary History of Race and Citizenship, 1777-1877, 293, (NYU Press 2003).
[11] Cong. Globe, 41st Cong. 2d Sess. At 1447-81.
[12] David Quigley, Second Founding: New York City, Reconstruction, and the Making of American Democracy, Chapter 5, (2004).
[13] Id.
[14] Journal of the Constitutional Commission of the State of New York, Begun and Held in the Common Council Chamber, in the City of Albany, on the Fourth Day of December, 1872, 339-393 (Weed, Parsons & Co. 1873).

against vulnerable populations of the state. In general, historians have identified Southern and Eastern European immigrants as the target for literacy tests' exclusionary function in the area of immigration.[15] 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.[16]

The English literacy requirement became the linchpin for the Voting Rights Act's application to New York in a number of ways. In 1965 one of the biggest obstacles to the full enfranchisement of African Americans and a clear target of the VRA were literacy tests. Despite the Supreme Court's pronouncement that literacy tests were facially constitutional,[17] the danger of the tests in the Deep South was also 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 was not within the exclusive domain of Southern states. New York was a prime example. Indeed, New

---

[15] The tests "provided a highly 'respectable' cultural determinant which could also minister to Anglo-Saxon sensibilities." John Higham, Stangers in the Land: Patterns of American Nativism, 1860 – 1925, Atheneum, p.101. New Brunswick, 1985 (1955).

[16] One New York constitucional delegate noted: "More precious even than the forms of government are the mental qualities of our race. They are exposed to a single danger, and that is that by constantly changing our voting citizenship through the wholesale but necessary and valuable infusion of Southern and Eastern European races, whose traditions and inheritances are wholly different from our own, without education, we shall imperil the structure we have so laboriously struggled to maintain. The danger has begun. It is more imminent than ever before. We should check it." Record of the Constitutional Convention of the State of New York 1915, Begun and Held at the Capitol in the City of Albany on Tuesday the Sixth Day of April, Vol. III, p. 2912, J.B. Lyon Co. Albany 1915.

[17] Lassiter v. Northampton County Bd. Of Election, 360 U.S. 45 (1959).

York's English literacy requirement prompted the enactment of Section 4(e) of the 1965 Act, a provision which was directed exclusively to benefit the Puerto Rican community. Section 4(e)[18] was prompted not only by concerns in Congress to the way New York's Puerto Rican community – all U.S. citizens by operation of law – were excluded from the franchise but also by the discriminatory *application* of the requirement to Puerto Rican registrants.[19]

Section 5 coverage to New York's three covered counties after the Census determinations following the 1970 Census are also linked to the discrimination that resulted from New York's English literacy requirement. By 1971 the U.S. Attorney General determined that New York's literacy requirement was a "test or device" under the VRA and the Census certified that Bronx, Kings and New York counties met the threshold criteria regarding registration and turnout based on the 1968 elections. New York won a declaratory judgment exempting it from coverage under Section 5[20] only to be brought back into coverage by the finding that New York did in fact use its English literacy requirement in a discriminatory fashion as proven in a series of suits filed by Puerto Rican voters under Section 4(e).[21]

---

[18] 42 U.S.C. § 1973b(e).
[19] The testimony of Herman Badillo, Irma Vidal Santaella and Gilberto Gerena Valentin to Congress in 1965 is summarized in Juan Cartagena, "Latinos and Section 5 of the Voting Rights Act: Beyond Black and White," 18 Nat'l Black Law J. 201 (2005).
[20] New York v. United States, 65 F.R.D. 10, 11 (D.D.C. 1974).
[21] Id. at 12. For a full discussion of the interplay between Section 4(e) cases and Section 5 coverage in New York City, see Juan Cartagena, "Latinos and Section 5 of the Voting Rights Act: Beyond Black and White," 18 Nat'l Black Law J. 201 (2005).

Language assistance as a feature of election practice and policy thus began as early as the 1965 Voting Rights Act and culminated with the decision in Torres v. Sachs, 381 F. Supp. 309 (S.D.N.Y. 1974) that to cast a meaningful vote requires full understanding of the ballot and all registration procedures. By the time of the 1975 amendments to the VRA, creating language assistance in voting for Asian Americans, Native Americans, and other Latino national origin groups, New York City had been operating a bilingual election apparatus, albeit with major problems in compliance, for a number of years. Section 203 – a self regulating provision that targets coverage for language assistance on demographics – eventually required Chinese-language assistance in New York, Kings and Queens counties and Korean-language assistance in Queens County as well.

The Second Circuit Court of Appeals has addressed New York's record of official discrimination in voting on limited occasions. In Butts v. City of New York in 1985 the court in dicta, noted that the proof of official discrimination in voting presented to the District Court was insufficient to consider under the Senate Factors listed for Section 2's totality of the circumstances analysis. Instead the court observed that New York allowed African Americans the right to vote on equal terms with whites since 1874 after the adoption of the Fifteenth Amendment. At no time in the District Court or in the Second Circuit, did the tortured history of resistance to African American suffrage in New York in the 1800s, summarized herein, get to the attention of the court. The Second Circuit

also credited New York with affirmative steps in ensuring minority voting such as a Task Force created by Governor Cuomo and the adoption of mail registration.[22]

In 1999, however, in its decision in Goosby v. Town Board of the Town of Hempstead, the Second Circuit let stand as not clearly erroneous a District Court finding that the relevant Senate Factor under Section 2 of the VRA (whether there is a history of official discrimination in the area of voting) was satisfied on the basis of two historical events: a) application of New York's nonvoting purge law had a discriminatory effect upon African American voters in the Town of Hempstead in the early 1990s; and b) there was proof of a "fair inference" that the English literacy test administered in Nassau County form 1922 to 1969 pursuant to New York law had a discriminatory impact on black voters.[23]

The Goosby standard for proof of a history of official discrimination in voting in a Section 2 case is markedly different than the dicta in Butts. In New York City the United Parents Associations case sets forth the discriminatory nature of New York's former nonvoting purge on minority voters in the City. That plus the numerous incidents of discrimination that resulted from New York's English literacy requirement should easily meet the Goosby standard. Finally, the historical events outlined herein on how racial and language minorities in New York have fared over time in the Empire State add considerable historical evidence that should satisfy any court in exploring the record of official discrimination in the area of voting in New York.

---

[22] After Butts a number of District Courts interpreting Section 2 repeated these and other ameliorative efforts to increase minority voting by the State of New York. See, France v. Pataki; Green v. Crew; Rodriguez v. Pataki; and Denis v. NYC Board of Elections summarized in Appendix B.
[23] Goosby v. Town Board of the Town of Hempstead, 180 F.3d 476, 494 (2d Cir. 1999).

Minority Elected Officials in New York Post 1982

Among the numerous elected offices that are available to New York City's racial and language minority voters, and the sporadic success that they have enjoyed in achieving direct representation in those positions, four distinct episodes stand out: 1) the short-lived tenure of New York's first African-American mayor, David Dinkins; 2) the statewide election of New York's first African-American Comptroller, H. Carl McCall; 3) the 2005 Mayoral election where the first Latino candidate to capture the Democratic primary election for Mayor, Fernando Ferrer, ran and lost; and 4) the shattering of the glass ceiling on Asian American representation with the 2001 election of John Liu to one of 51 seats on the New York City Council in a City that is 10% Asian American.

David Dinkins: The 1989 election of the New York City's first African American mayor, an historic event in its own right, should be assessed in the context of the success of African American mayoral candidates in other municipalities. By the time Mr. Dinkins secured the mayoralty, New York City was the largest city in the country that never had a African American or Latino mayor. Cities like Los Angeles, Chicago, Philadelphia, Detroit, Washington, D.C., Atlanta, Cleveland, New Orleans, Newark and Birmingham had elected African American mayors. Other major cities like San Antonio, Denver and Miami had elected Latino mayors. Under these circumstances, with a majority of the City comprised of racial and language minorities, the election of any minority member to lead the City was a long time coming.

Mr. Dinkins secured the mayoralty after beating the incumbent, Edward Koch, in the Democratic Primary. Mayor Koch had not consistently enjoyed the support of the majority of black voters – despite incredibly wide over all margins of victory in his mayoral bids. Previously, Mr. Dinkins had won the 1985 election for Manhattan Borough President – the same year that then State Senator José Serrano, Puerto Rican, lost to a white, incumbent Bronx Borough President and that State Assemblyman Al Vann, African American, came in third, behind two white candidates, for Brooklyn Borough President. It took blacks and Latinos years to replicate the string of victories in the Borough Presidencies that were made decades earlier with the election of Percy Sutton, African American, in Manhattan and Herman Badillo, Puerto Rican, in the Bronx. After Mr. Dinkins secured the Manhattan Borough Presidency, an African American female, C. Virginia Fields was elected to two consecutive terms that ended in 2005. This position is no longer held by a racial or language minority member. In the Bronx, decades later, the voters returned another Puerto Rican to the borough presidency (Fernando Ferrer) for multiple terms and another Puerto Rican, Adolfo Carrion, now occupies the seat. In Brooklyn, no Latino or black has ever won the Borough Presidency. But in Queens, Helen Marshall, African American, secured the Borough Presidency in 2001 and was reelected in 2005. Ms. Marshall's 2001 bid was important in that she had captured 53% of the vote against two prominent Democrats in the primary (Carol Gresser & Sheldon Leffler) and then went on to win the general election with 68% of the vote. In Staten Island, no Latino or African American has ever captured the Borough Presidency –

indeed, as of 1991 there were only two African American elected officials in Staten Island and both were members of Community School Board 31.

Mr. Dinkins was voted out of office after one term as the overwhelmingly Democratic City jumped parties to elect Rudolph Giuliani, a Republican in 1993 – whom Mr. Dinkins defeated in the general election of 1989. The defeat for Mr. Dinkins was the first time an incumbent Mayor in the City of New York had failed to secure reelection after only one term. Mr. Giuliani was the first Republican to gain the Mayor's seat since John Lindsay in the 1960s who ran on both Republican and Liberal Party lines. Indeed, prior to the 1993 general election U.S. Senator Alfonso D'Amato (Republican) captured only 38% of the City's vote in 1992, President George H. Bush (Republican) captured only 23% of the City's vote in 1992 and "GOP candidates for president, senator, governor or mayor who weren't incumbents frequently garnered less than a fifth of the city's vote."[1] The results of the 1993 vote for Mayor revealed a divided and racially polarized city:

> "How could a mere lawyer who'd never been elected to any public office, and whose last public service ended almost five years before the 1993 election, expect to [beat Dinkins]? What besides race could explain why, according to exit polls, 64 percent of the city's white Democrats and 77 percent of all white voters would vote for him?"[2]

Professor John Mollenkopf studied the election returns of the 1993 Mayor's race as part of his research on the makings of the Koch Coalition. With respect to the Dinkins – Giuliani race in 1993, he concluded:

[1] Wayne Barrett, Rudy: An Investigative Biography of Rudolph Giuliani. Basic Books, New York, 2000.
[2] Id. at 266.

> "To the extent that Dinkins' weaknesses among his core constituencies contributed to his defeat, his greatest failure was among his strongest supporters. The outcome of the election, however, was not decided within constituencies that had favored Dinkins in 1989, but among those that had opposed him . . . As a result, the 1993 electorate was slightly more white and less black and Latino than in 1989 and its preferences were also slightly more racially polarized. The higher the percentage of registered voters who were white, the less likely an ED was to experience a vote decline between 1989 and 1993 and the more likely it was to shift toward Rudolph Giuliani."[3]

According to some exit polls Latino voters strongly supported Dinkins giving him anywhere from 65% to 73% of their vote in 1989 and 60% of their vote in 1993.[4]

The Democratic Party nomination for mayor would not go to another African American or Latino candidate until 2005 with the contest between Fernando Ferrer and Michael Bloomberg.

H.Carl McCall: H. Carl McCall was appointed New York State Comptroller in 1993 to fill an unexpired term. In 1994 he became the first member of New York's racial and language minorities to capture the nomination of any of the two major parties to run for this statewide office and the first African-American to win a statewide office. It has been noted by one court that this 1994 election had one of the lowest levels of racially polarized voting in some time.[5] Previous to McCall's run in 1994, only Herman Badillo (Puerto Rican) captured any of the two major party's nomination for statewide office.

---

[3] John Hull Mollenkopf, A Phoenix in the Ashes: The Rise and Fall of the Koch Coalition and New York City Politics, 212, Princeton University Press. Princeton 1994.
[4] Doug Muzzio, "The Hispanic Vote," Gotham Gazette, 26 March 2003, www.gothamgazette.com (last viewed: 18 February 2006).
[5] See France v. Pataki in Appendix B.

Mr. Badillo, running for Comptroller on the Democratic Party line, lost in 1986 to Edward Regan, the incumbent. In 1998 Carl McCall won his reelection bid garnering 2.9 million votes statewide, more than any other statewide candidate. Indeed, since his election as Comptroller, and his subsequent failed bid to oust Governor George Pataki on the Democratic Party line in 2002, there has only been one other minority candidate for statewide office on either the Republican or Democrat line: Dora Irizarry, Puerto Rican, who ran for Attorney General on the Republican ticket becoming the first Latina woman to run for statewide office in New York. She lost convincingly to the incumbent, Eliot Spitzer by a margin of 66% to 30%. With only four statewide offices in New York (Governor, Lieutenant Governor, Comptroller, and Attorney General) the opportunities to run on that scale on a major party line are limited, making Mr. McCall's election all the more extraordinary.

Fernando Ferrer: Former Bronx Borough President and Puerto Rican Fernando Ferrer launched two credible campaigns for Mayor this decade, becoming the first serious Latino candidate for Mayor since Herman Badillo thirty years before. In the Democratic Primary of 2001, Mr. Ferrer came in first place but failed to secure the nomination outright. Latino voters, according to exit polls, came out in record numbers representing 23% of the votes cast and supporting Mr. Ferrer with 72% of their vote.[6] Mark Green forced a runoff election, won the nomination, then lost to Michael Bloomberg. Four years later Ferrer captured the nomination and become the first Latino candidate ever to win the nomination of any of the two major political parties in New York in his

[6] Doug Muzzio, "The Hispanic Vote," Gotham Gazette, 26 March 2003, www.gothamgazette.com (last viewed: 18 February 2006).

unsuccessful quest to become the first Latino mayor in New York City. Capturing close to 80% of the Latino vote,[7] Mr. Ferrer lost nonetheless, to the incumbent Michael Bloomberg in 2005. In many ways the Ferrer 2005 candidacy revealed other fissures in the City's electorate: once again, white voters abandoned the Democratic Party and voted for the Republican incumbent at just shy of 90%. African American voters gave Ferrer only 46% of their vote and Asian Americans gave him 22% of their vote.[8] Incumbency, obviously, is a major factor in electability in New York City mayoral politics – except, ironically and tellingly, in the re-election bid of David Dinkins.

Asian Americans: The limited success of electing Asian Americans to positions in New York City requires separate analysis in light of the fact that New York City enjoys the largest number of Asian residents of any city in the country and that it was not until 2001, when they composed 10% of the population, that the first Asian American was elected to the 51 member New York City Council. Structural impediments, manifested by council district formations, and racially polarized voting explain in large part the absence of direct Asian American representation in the 1980s and 1990s.

The Asian American population in the City more than doubled from 1980 to 1990 (three to seven percent) and the City's Chinatown in New York County remained divided among multiple assembly districts, school districts and community board districts. Each of these districts contains less population than a New York City Council district and

[7] Andrew Beveridge, "Hispanics and the Ferrer Candidacy," Gotham Gazette, 22 December 2005, www.gothamgazette.com (last viewed 13 February 2006).
[8] Id.

could have provided the spawning ground for higher office if the historic epicenter of the Asian community was not fractured in two. In Flushing, Queens, however, Chinese and Korean neighborhoods were also experiencing rapid growth during this period as well. An expansion to 51 councilmanic districts along with the publication of the 1990 Census, allowed the City another opportunity to create districts that would fairly reflect the growing voting strength of the Asian American community. Competing and conflicting proposals to the Districting Commission from Asian American advocates over the Chinatown district alternated between adjoining it to the Latino, working class neighborhoods of the Lower East Side or to the white, more affluent neighborhoods of Battery Park City, Tribeca and SoHo. The Districting Commission opted for a Chinatown district that expanded west to encompass Battery Park, Tribeca and SoHo and was 39% Asian American, 37% white, 17 % Latino and 6% black.[9] Whites, however, had a decided advantage in the registered voter pool and Margaret Chin, an elected Democratic Party delegate from Chinatown, garnered only 33% of the 1991 Democratic primary vote and only 25% of the general election tallies (when she ran on the Liberal Party line) to Kathryn Freed's 53%, with another Asian American, Fred Teng (Republican) coming in third with 23%. Subsequently, in the 1993 Democratic Party, Ms. Chin was again the sole Asian American candidate, but was only able to garner 27% of primary vote.[10] In the 1997 Democratic primary, Ms. Jennnifer Lim was the sole Asian American candidate but received only 30% of the primary vote and in 2001

[9] For an account of the fate of Asian American candidates in New York City in the 1980s and 1990s, see Keith Aoki, "Asian Pacific American Electoral and Political Power: A Tale of Three Cities: Thoughts on Asian American Electoral and Political Power After 2000," 8 U.C.L.A. Asian Pac. Am. L.J. 1 (2002).
[10] Asian American Legal Defense & Education Fund, "Can an Asian American Win in District 1?" See Appendix G.

Democratic Primary, three Asian American candidates collectively received only 40% of the primary vote.[11]

To date, Chinatown has yet to elect an Asian American to the City Council. The Asian American Legal Defense & Education Fund attributes the failure to elect an Asian American in what was purportedly an "Asian American district" to the existence of racially polarized voting and to the combination of Chinatown with the more affluent areas of Lower Manhattan which do not vote along the same patterns.[12]

In Flushing, Queens, however, Asian Americans finally overcame years of competing Asian American candidates vying for the same office to secure a seat on the City Council with the historic election of John Liu, a Korean-American, in 2001. The 1990 Districting Commission created a councilmanic district (District 20) that was 31% Asian American and 40% white. In 1991 the incumbent, Julia Harrison, defeated Pauline Chu in the Democratic primary and Chun Soo Pyun, a Republican, in the general election. In 1995 the Asian American primary vote was split between Pauline Chu and John Liu allowing Ms. Harrison to win again and again defeat Mr. Soo Pyun in the general election. Ms. Harrison was noted for making a number of anti-Asian and anti-immigrant remarks in this period; at one time describing the arrival of Asians to Flushing as an "invasion not an assimilation."[13] In 2001, with Ms. Harrison no longer eligible because of term limits, Mr. Liu defeated Ethel Chen in the Democratic primary and went on to win the general

[11] Id.
[12] Id.
[13] Keith Aoki, supra, at 30.

election. Mr. Liu credits the VRA with allowing Asian American voters to access the political process in Queens: "I would never be standing before you as the first Asian elected official if it were not for the bilingual provisions of the Voting Rights Act," he noted in 2005.[14]

In 2004 Jimmy Meng made history when he was elected as the first Asian American to serve in the New York State Assembly. He represents the 22nd Assembly District in Queens.

Asian Americans had also obtained obtain a measure of success at the community school board level up through the dismantling of that system in the late 1990s. As noted above, community school board elections used a form of proportional representation known as choice voting (specifically, Single Transferable Votes) which allowed voters to rank order their preferences for candidates. The Asian American Legal Defense & Education fund reported that in the 1996 school board elections, eleven out of fifteen Asian American candidates for community school boards, were elected under this system.[15]

Judicial Elections

As noted above, questions about the fairness of the current system of electing judges in New York have surfaced repeatedly in the last 25 years from in various forums: the 1994

[14] Gerson Borrero, "Lo que sabe un chino sobre el VRA" ["What the Asian knows about the VRA"], El Diario, La Prensa, 5 August 2005 (translation provided).
[15] Comment Letter of Margaret Fung & Tito Sinha, Asian American Legal Defense and Education Fund, 8 October 1998, to the Department of Justice [Re: Submission No. 98-3193]. See Appendix G.

denial of preclearance to various changes for elections to the Supreme Court; the 1999 decision by Judge Sprizzo in France v. Pataki and the 2006 decision by Judge Gleeson in Lopez Torres v. New York State Board of Elections.

Historically, integrating the bench in New York State, however, has never been easy. On numerous occasions the judicial branch itself has commented on the need to increase diversity and fairness within its ranks. In New York these efforts have manifested themselves in the Franklin H. Williams Judicial Commission on Minorities – an important component of the New York State judiciary that seeks, *inter alia*, to review the processes of appointments and elections to the bench to determine how greater minority representation could be achieved. Created in 1988 the Williams Judicial Commission has issued a number of reports and has documented, in part, the inroads that have been made by African American, Latino and Asian American lawyers in the judiciary.

Judges in two courts in the State are subject to elections administered by the election boards of the state and county governments: Justices to the Supreme Court elected to 14-year terms, and Judges to the New York City Civil Court elected to 10-year terms. The ability to elect minority judges has not been as easy as it would seem given the large share of the electorate and the populace that minorities have held in the last 25 years. Through the work of the Williams Judicial Commission we have learned[16] that in New York City African American judges first secured positions on the bench via appointments. One of the earliest Justices to be elected from the black community was

[16] Franklin H. Williams Judicial Commission on Minorities, "Equal Justice: A Work In Progress: Five Year Report, 1991-1996."

the Hon. Harold Stevens in 1955. Decades later, the Hon. Edith Miller became the first African American woman to be elected to a New York Court. Within the last 25 years a few more "firsts" were accomplished: in 1990 the first African American woman was elected in Kings County Supreme Court, Justice Michele Weston Patterson and in 1986 the Hon. Yvonne Lewis became the first African American woman to be elected to the Civil Court of the City of New York. For Latino judges the history was much shorter: the Hon. Emilio Nuñez became the first Latino elected to the Supreme Court in 1968 in New York County. In 1982, the Hon. Carmen Beauchamp Ciparick became the first woman elected to the Supreme Court. And for Asian Americans the history is even younger still: not until 1987 did an Asian American win election to the court with the election of the Hon. Dorothy Chin-Brandt and the Hon. Peter Tom to the New York City Civil Court in New York County.

The 1996 report of the Williams Judicial Commission notes that out of 1,163 judges in New York State, elected and appointed, only 87 were African American (7%), only 37 were Latino (3%) and only 8 were Asian American (0.6%). When judicial elections are analyzed separately, the Commission found[17] that 14.3% of all Supreme Court Justices were minority. By 2000, the Commission reported that 15.1% (52/344) of the Justices of the Supreme Court, statewide, were minority. Using 2003 data the Commission reported

[17] Id. Appendix A, p. 67. The data provided for New York City Civil Court in this table did not disaggregate Civil Court Judges who are elected from Housing Court Judges who are appointed.

in 2005 that statewide for both appointed and elected judges in New York, minorities were 13.2% of the total.[18]

A comparison of the total number of New York City Civil Court judgeships for 2004-2005 reported by the City[19] for the boroughs of Bronx, Brooklyn, Manhattan and Queens only with the roster of minority elected officials included in this report (see below) reveals that there are approximately 115 judgeships in that court and that approximately 20 judges from minority backgrounds have been elected to that court at present for a proportion of 17%.

Post 1982 Roster of African American, Latino and Asian American Elected Officials:

(*Former Elected Officials in Italics*.)

New York Statewide Offices

H. Carl McCall (B), New York State Comptroller, 1993 to 2002

New York Citywide Offices

William Thompson (B), New York City Comptroller, 2001 to present

David Dinkins (B), New York City Mayor, 1989 to 1993

[18] Franklin H. Williams Judicial Commission on Minorities, "Findings from the Leadership Development Conference: Courts for the 21st Century, Upstate Conference," January 2005.
[19] See, The 2004-2005 Green Book: Official Directory of the City of New York.

Borough Wide Offices

Adolfo Carrion (L), Bronx Borough President, 2001 to present

Robert Johnson (B), Bronx District Attorney, 1988 to present

Margarita Lopez Torres (L), Kings County Surrogate Judge, 2005 to present Helen

Marshall (B), Queens Borough President, 2001 to present

David Dinkins (B), Manhattan Borough President, 1985 to 1989

C. Virginia Fields (B), Manhattan Borough President, 1997 to 2005

Fernando Ferrer (L), Bronx Borough President, 1987 to 2001

U.S. Congress

Gregory Meeks (B), District 6, Queens, 1998 to present

Major Owens (B), District 11, Brooklyn, 1982 to present

Charles Rangel (B), District 15, Manhattan, 1970 to present

José Serrano (L), District 16, Bronx 1990 to present

Edolphus Towns (B), District 10, Brooklyn, 1982 to present

Nydia Velázquez (L), District 12, Brooklyn, 1992 to present

Floyd Flake (B), District 6, Queens 1986 to 1998

Robert García (L), District 18, Bronx 1982 to 1990

New York State Senate

Carl Andrews (B), District 20, Brooklyn, 2002 to present

Rubén Díaz (L), District 32, Bronx, 2002 to present

Efrain González (L), District 33, Bronx, 1989 to present

Ruth Hassell-Thompson (B), District 36, Bronx/Westchester 2000 to present

Martin Malave Dilán (L), District 17, Brooklyn, 2002 to present

Velmanette Montgomery (B), District 18, Brooklyn, 1985 to present

Kevin Parker (B), District 21, Brooklyn, 2003 to present

John L. Sampson (B), District 19, Brooklyn, 1996 to present

David Patterson (B), District 30, New York, 1985 to present

José M. Serrano (L), District 28, New York/Bronx, 2005 to present

Ada L. Smith (B), District 10, Queens, 1989 to present

Malcolm A. Smith (B), District 14, Queens, 2000 to present

Pedro Espada (L), District , Bronx,

Andrew Jenkins (B), District 10, Queens, 1985-1990

Joseph Galiber (B), District 33, Bronx, Pre-1982 to 1996

Olga Mendez (L), District 30, New York/Bronx, 1982-2004

David Rosado (L), District 32, Bronx, 1997-2002

Israel Ruiz (L), District 32, Bronx, Pre-1982-1989

Nellie Santiago (L), District 17, Brooklyn, 1993-2002

New York State Assembly

Carmen Arroyo (L), District 84, Bronx, 1994 to present

Jeffrion Aubrey (B), District 35, Queens, 1992 to present

Michael Benjamin (B), District 79, Bronx, 2003 to present

William Boyland, Jr. (B), District 55, Brooklyn, 2003 to present

Barbara Clark (B), District 33, Queens, 1986 to present

Adam Clayton Powell, IV (L-B), District 68, New York, 2000 to present

Vivian Cook (B), District 32, Queens, 1990 to present

Luis Díaz (L), District 86, Bronx, 2000 to present

Ruben Díaz, Jr. (L), District 75, Bronx, 1997 to present

Adriano Espaillat (L), District 72, 1996 to present

Herman Ferrell (B), District 71, New York, Pre-1982 to present

Diane Gordon (B), District 40, Brooklyn, 2000 to present

Roger Green (B), District 57, Brooklyn, Pre-1982 to 2005

2006 to present

Aurelia Greene (B), District 77, Bronx, 1982 to present

Carl Heatsie (B), District 83, Bronx, 2004 to present

Jimmy Meng (A), District 22, Queens, 2004 to present

Felix Ortíz (L), District 51, Brooklyn, 1994 to present

José Peralta (L), District 39, Queens, 2004 to present

N. Nick Perry (B), District 58, Brooklyn, 1992 to present

José Rivera (L), District 78, Bronx, 2000 to present

District 77, Bronx, 1982 - 1987

Naomi Rivera (L), District 80, Bronx, 2005 to present

Peter Rivera (L), District 76, Bronx, 1992 to present

Annette Robinson (B), District 56, Brooklyn, 2002 to present

William Scarborough (B), Disrict 29, Queens, 1994 to present

Darryl Towns (B), District 54, Brooklyn, 1993 to present

Keith Wright (B), District 70, New York, 1992 to present

Geraldine Daniels (B), District 70, New York, Pre 1982-1992

Gloria Davis (B), District 78, Bronx, Pre-1982 to present

Angelo Del Toro (L), District 68, New York, 1985-

Nelson Denis (L), District 68, New York, 1996-2000

Francisco Díaz, Jr. (L), District 68, New York, 1994-1996

Héctor Díaz (L), District 74, Bronx, 1985-

Cynthia Jenkins (B), District 29, Queens, 1985-2000

Helen Marshall (B), District 35, Queens, 1982-1992

Gregory Meeks (B), District 31, Queens, 1992-1998

Clarence Norman (B), District 43, Brooklyn, 1985-2005

Roberto Ramirez (L), District __ Bronx, 1990-2000

David Rosado (L), District 17, Bronx, 1990-1993

Larry Seabrook (B), District 82, Bronx, 1985-

José Serrano (L), District 73, Bronx, Pre 1982-1990

Albert Vann (B), District 56, Brooklyn, Pre 1982-2001

New York City Council

María Del Carmen Arroyo (L), District 17, Bronx, 2005 to present

María Baez (L), District 14, Bronx, 2002 to present

Charles Barron (B), District 42, Brooklyn, 2002 to present

Yvette Clark (B), District 40, Brooklyn, 2002 to present

Leroy Comrie (B), District 27, Queens, 2002 to present

Inez Dickens (B), District 9, Manhattan, 2006 to present

Helen Foster (B), District 16, Bronx, 2002 to present

Sarah González (L), District 38, Brooklyn, 2002 to present

Robert Jackson (B), District 7, Manhattan, 2002 to present

Letitia James (B), District 35, Brooklyn, 2003 to present

John Liu (A), District 20, Queens, 2002 to present

Melissa Mark Viverito (L), District 8, Manhattan/Bronx, 2006 to present

Erik Martin-Dilan (L), District 37, Brooklyn, 2001 to present

Miguel Martínez (L), District 10, Manhattan, 2002 to present

Darlene Mealy (B), District 41, Brooklyn, 2006 to present

Rosie Méndez (L), District 2, Manhattan, 2006 to present

Hiram Monserrate (L), District 21, Queens, 2001 to present

Annabel Palma (L), District 18, Bronx, 2004 to present

Diana Reyna (L), District 34, Brooklyn, 2002 to present

Joel Rivera (L), District 15, Bronx, 2002 to present

James Sanders (B), District 31, Queens, 2002 to present

Larry Seabrook (B), District 12, Bronx, 2001 to present

Kendall Stewart (B), District 45, Brooklyn, 2001 to present

Albert Vann (B), District 36, Brooklyn, 2002 to present

Thomas White, Jr. (B), District 28, Queens, 2006 to present

Tracy Boyland (B), District 41, Brooklyn, 1997-2005

Adolfo Carrion (L), District 14, Bronx, 1997-2001

Rafael Castaneira Colón (L), District 11, Bronx, 1982-1994

Hilton Clark (B), District 5, Manhattan, 1985-

Una Clarke (B), District 40, Brooklyn, 1997-

Adam Clayton Powell, IV (L-B), District 8, Manhattan, 1992-1997

Lucy Cruz (L), District 18, Bronx, 1997-2001

James Davis (B), District 35, Brooklyn, 2001-2003

Ruben Díaz (L), District 18, Bronx, 2001-2002

Fernando Ferrer (L), District 13, Bronx, 1982-1987

C. Virginia Fields (B), District 9, Manhattan, 1989-1997

Wendel Foster (B), District 9, Bronx, 1982-

Pedro Gautier Espada (L), District 17, Bronx, 1997-2001

Allan Jennings (B), District 28, Queens, 2001 to 2005

Guillermo Linares (L), District 10, 1991-2001

Margarita Lopez (L), District 2, Manhattan, 1997-2005

Martin Malave Dilan (L), District 37, Brooklyn, 1992-2002

Helen Marshall (B), District 21, Queens, 1991-2001

Luis Olmedo (L), District 27, Brooklyn Pre-1982 -1984

Antonio Pagán(L), District 2, Manhattan, 1992-1997

Bill Perkins (B), District 9, Manhattan, 1997-2005

Mary Pinkett (B), District 28, Brooklyn, 1982-

Phillip Reed (B), District 8, Manhattan, 1997-2005

José Rivera (L), District 15, Bronx, 1987-1999???

Annette Robinson (B), District 36, Brooklyn, 1991-2002

Victor Robles (L), District 27, Brooklyn, 1985-2001

Angel Rodríguez (L), District 38, Brooklyn, 1997-2001

David Rosado (L), District 17, Bronx, 1993-1997

Frederick Samuel (B), District 5, Manhattan, 1982-1985

José M. Serrano (L), District 17, Bronx, 2001-2004

Archie Spigner (B), District 17, Queens, Pre 1982-

Enoch Williams (B), District 26, Brooklyn, 1982-

Priscilla Wooten (B), District 24, Brooklyn, 1982-2002

Justices of the New York State Supreme Court

Sheila Abdus-Salaam (B), 1st District, New York, 1993 to present

Rolando Acosta (L), 1st District, New York, 2002 to present

Efrain Alvarado (L), 12th District, Bronx, 1996 to present

Bettsy Barros (L), 2nd District, Kings-Richmond, 1996 to present

Bernadette Bayne (B), 2nd District, Kings-Richmond, 2002 to present

Ariel Belen (L), 2nd District, Kings-Richmond, 1995 to present

Peter Benitez (L), 12th District, Bronx, __ to present

Juanita Bing Newton (B), 1st District, New York, 1996 to present

Laura Blackburne (B), 11th District, Queens, 1993 to present

Janice Bowman (B), 12th District, Bronx, 1996 to present

Valerie Brathwaite Nelson (B), 12th District, Bronx, __ to present

Maryann Briganti-Hughes (L), 12th District, Bronx, __ to present

Bert Bunyan (B), 2nd District, Kings-Richmond, __ to present

Gregory Carro (L), 1st District, New York, __ to present

John Carter (B), 12th District, Bronx, __ to present

Cheryl Chambers, 2nd District, Kings-Richmond, 1998 to present

Gloria Dabiri (B), 2nd District, Kings-Richmond, 1994 to present

Leland DeGrasse (B), 1st District, New York, 2003 to present

Lewis L. Douglass (B), 2nd District, Kings-Richmond, 1990 ?? to present

Deborah Dowling (B), 2nd District, Kings-Richmond, 1996 to present

Luther Dye (B), 11th District, Queens, __ to present

Carol Edmead (B), 1st District, New York, 2003 to present

Randall Eng (A), 11th District, Queens, 1983 to present

Nicholas Figueroa (L), 1st District, New York, __ to present

Fern Fisher (B), 1st District, New York, 1993 to present

Yvonne González (L), 12th District, Bronx, 1998 to present

L. Priscilla Hall (B), 2nd District, Kings-Richmond, 1993 to present

Duane Hart (B), 11th District, Queens, 2001 to present

Ronald Hollie (B), 11th District, Queens, 2001 to present

Carol Huff (B), 1st District, New York, 2003 to present

Alexander Hunter, Jr. (B), 12th District, Bronx, 1994 to present

Allen Hurkin-Torres (L), 2nd District, Kings-Richmond, 2001 to present

M. Randolph Jackson (B), 2nd District, Kings-Richmond, 1999 to present

Debra James (B), 1st District, New York, __ to present

Diana Johnson (B), 2nd District, Kings-Richmond, 2000 to present

Theodore Jones, Jr., 2nd District, Kings-Richmond, __ to present

Leslie Leach (B), 11th District, Queens, 2002 to present

Daniel Lewis (B), 11th District, Queens, 1995 to present

Yvonne Lewis (B), 2nd District, Kings-Richmond, 1991 to present

Doris Ling-Cohan (A), 2nd District, Kings-Richmond, 2002 to present

Plummer Lott (B), 2nd District, Kings-Richmond, 1994 to present

Richard Lowe, III (B), 1st District, New York, __

Nelida Malave (L), 12th District, Bronx, __ to present

Sallie Manzanet (L), 12th District, Bronx, __ to present

Louis Marrero (L), 2nd District, Kings-Richmond,

Larry Martin (B), 2nd District, Kings-Richmond, 1993 to present

La Tia Martin (B), 12th District, Bronx, 1994 to present

Donna Mills (B), 1st District, New York, __ to present

Jose Padilla, Jr. (L), 1st District, New York, __ to present

Eduardo Padro (L), 1st District, New York, 2002 to present

Kibbie Payne (B), 1st District, New York, __ to present

Charles Ramos (L), 1st District, New York, 1993 to present

Dianne Renwick (B), 12th District, Bronx, 2001 to present

Jaime Rios (L), 11th District, Queens, 1994 to present

Francois Rivera (L), 2nd District, Kings-Richmond, 1996 to present

Nelson Román (L), 12th District, Bronx, 2002 to present

Norma Ruiz (L), 12th District, Bronx, 1999 to present

Patricia Satterfield (B), 11th District, Queens, 1998 to present

Faviola Soto (L), 1st District, New York, __ to present

Mark Spires (B), 11th District, Queens, 1990 to present

James Sullivan (B), 2nd District, Kings-Richmond, 2002 to present

Janice Taylor (B), 11th District, Queens, 1997 to present

Charles Tejada (L), 1st District, New York, 1994 to present

Kenneth Thompson (B), 12th District, Bronx, 1995 to present

Milton Tingling, Jr. (B), 1st District, New York, 2001 to present

Analisa Torres (L), 12th District, Bronx, __ to present

Edwin Torres (L), 1st District, New York, 1982 to present

Robert Torres (L), 12th District, Bronx, __ to present

Alison Tuitt (B), 12th District, Bronx, __ to present

George Villegas (L), 12th District, Bronx, __ to present

Laura Visitacion-Lewis (L), 1st District, New York, __ to present

Lottie Wilkens (B), 1st District, New York, 1991 to present

Patricia Anne Williams (B), 12th District, Bronx, 1995 to present

Douglas Wong (A), 11th District, Queens, __ to present

Carmen Beauchamp Ciparick (L), 1st District, New York, 1982-1994

William Davis (B), ___ District, ___, 1987-1996

Thomas R. Jones (B), 2nd District, Kings-Richmond, Pre-1982 to 1985

Gilbert Ramirez (L), 2nd District, Kings-Richmond, Pre 1982 to 1997

Irma Santaella (L), 12th District, Bronx, 1983 to __

Lucindo Suarez (L), 1st District, New York, 1996 to__

Peter Tom (A), 1st District, New York, 1990-1994

Frank Torres (L), 12th District, Bronx, 1984 to 1998

Michelle Weston Patterson (B), 2nd District, Kings-Richmond, 1990 to __

Bruce Wright (B), 1st District, New York, Pre 1982 to 1994

Judges of the New York City Civil Court

Dorothy Chin Brandt (A), New York, 1987 to present

Raul Cruz (L), Bronx, 2002 to present

Laura Douglas (B), Bronx, __ to present

Genine Edwards (B), Brooklyn, __ to present

Lizbeth Gonzalez (L), Bronx, __ to present

Marguerite Grays (B), Queens, __ to present

Wilma Guzman (L), Bronx, 1998 to present

Kathy King (B), Brooklyn, 2003 to present

Howard Lane (B), Queens, 2003 to present

Milagros Matos (L), New York, __ to present

Manuel Melendez (L), New York, 2003 to present

Jeffrey Oing (A), New York, 2003 to present

Diccia Pineda-Kirwan (L), Queens, 2002 to present

Julia Rodríguez (L), Bronx, 2003 to present

Anil Singh (A), New York, 2002 to present

Fernando Tapia (L), Bronx, 2002 to present

Dolores Thomas (B), Brooklyn, 2002 to present

Dolores Waltrous (B), Brooklyn, 1998 to present

Troy K. Webber (B), New York, 1994 to present

Geoffrey Wright (B), New York, 1997 to present

Antonio Brandveen (B), 1985 to __

Leland DeGrasse (B), 1985 to __

Doris Ling-Cohan (A), 1995-2002

Margarita Lopez Torres (L), Kings, 2002-2005

José Padilla (L), New York, __ to __

Charles Ramos (L), 1984 to 1993

Peter Tom (A), 1987-1990

Analisa Torres (L), New York, 1999 to __

Robert Torres (L), Bronx, 1996 to __

George Villegas (L), Bronx, 2002 to __