

# LAW, LANGUAGE AND STATEHOOD: The Role of English in the Great State of Puerto Rico

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## Introduction

On March 4, 1998, the United States House of Representatives approved the Young Bill by a one-vote majority.<sup>1</sup> That bill

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In this Article, all Spanish words and names—even of judicial decisions—appear in the correct Spanish spelling, irrespective of whether they so appear in the original sources.

1. H.R. 856, 105th Cong. (1998). Rep. Donald Young (R-AK) is the Chairman of the House Committee on Resources. He has championed the cause of Puerto Rican statehood in that committee for several years and has been the main force behind the drive to organize a federally-sponsored plebiscite on the political status of Puerto Rico.

The final vote was 209-208 in favor of statehood. See 144 CONG. REC. H837 (daily ed. Mar. 4, 1998). Rep. Earl Pomeroy (D-ND) cast the deciding vote when he changed his negative vote at the last minute, purportedly at the urging of Rep. Patrick Kennedy (D-RI) and of Puerto Rico Resident Commissioner Carlos Romero Barceló. See Lizette Alvarez, *House Approves Measure on Self-Determination for Puerto Rico*, N.Y. TIMES, Mar. 5, 1998, at A24; *Comisionado Persuasivo*, EL NUEVO DÍA, Mar. 6, 1998, at 3; Robert Friedman, *Pomeroy Casts Deciding Ballot in Tense Vote*, SAN JUAN STAR, Mar. 5, 1998, at 5; James McDonough, *Tie-Breaking Vote on Plebiscite Attributed to CRB*, SAN JUAN STAR, Mar. 6, 1998, at 4; Leonor Mulero, *Por Virazón la Victoria*, EL NUEVO DÍA, Mar. 5, 1998, at 4; Nancy E. Román, *Puerto Rico Bill Advances in Senate: 1-Vote Margin Dims Prospects in Senate*, WASH. TIMES, Mar. 5, 1998, at A1. The vote was unexpectedly partisan for a measure which had seemed to have the backing of the Republican leadership: Of

would have required Puerto Rico to conduct a federally-sponsored plebiscite geared toward the solution of its political status problem.<sup>2</sup> One of the proposed alternative solutions was statehood.<sup>3</sup> Thus, the people of the United States, whether or not they are aware of it, embarked on a discussion that could lead to the admission of a fifty-first state. Although the Senate failed to act on the Young Bill<sup>4</sup> and the Puerto Rico electorate thereafter refused to endorse statehood,<sup>5</sup> the issue will not become moot until a final decision is taken concerning the political status of Puerto Rico.

Any serious discussion of the prospect of statehood for Puerto Rico must pay particular attention to the single most important difference between that potential state and the first fifty: language. That is the objective of this Article.

Part I explores the history and juridical status of English as an official language of Puerto Rico. It then contrasts that legal abstraction with a simple sociological fact: Puerto Rico is a monolingual society where Spanish reigns and English plays an absolutely minor role.

Part II considers three aspects of the linguistic dilemma of statehood for Puerto Rico: (a) the predominant view of supporters of the statehood solution who assert that Puerto Rico's culture and Spanish language are not negotiable under statehood and would not be affected by that change of status; (b) the requirements of international law concerning integration of a colonial enclave to the metropolitan power; and (c) the recent Congressional attitudes toward the question of language in a State of Puerto Rico. I conclude that the two most recent Congressional treatments of the Puerto Rican statehood alternative have not complied with the requirements of international law because Congress has not addressed

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the 209 ayes, there were 165 Democrats, 43 Republicans and 1 Independent; of the 208 nays, there were 31 Democrats and 177 Republicans. See Mulero, *supra*.

2. See H.R. 856 § 4(a).

3. See *id.*

4. The Chairman of the Senate Committee on Energy and Natural Resources, Sen. Frank Murkowski (R-AK), was unable to persuade a significant number of the 11 Republican members of the Committee to support any bill on Puerto Rico in 1998. See Robert Friedman, *Murkowski: No Committee Vote in '98*, SAN JUAN STAR, Sept. 11, 1998, at 5.

5. On December 13, 1998, the pro-statehood government of Puerto Rico held a referendum among five alternatives: 1) Commonwealth, defined as a colonial status; 2) free association; 3) statehood, defined in the most favorable terms; 4) independence; and 5) none of the above. "None of above," defended by the pro-Commonwealth Popular Democratic Party, garnered a majority of the vote (50.2%), followed by statehood (46.5%), independence (2.5%), free association (0.3%) and colonial Commonwealth (0.1%). See John Marino, *'None of the Above' Wins*, SAN JUAN STAR, Dec. 14, 1998, at 5.

the issue of language with the clarity necessary to foster a knowledgeable exercise of Puerto Rico's right to self-determination.

Part III explores the impact of the official English movement throughout the United States and addresses the different constitutional arguments that have been proffered against a federal statute that would require a State of Puerto Rico to recognize true and effective official status to the English language. I conclude that considerable doubt exists as to what the ultimate solution to those constitutional questions might be and that such uncertainty is a formidable barrier to an authentic exercise of Puerto Rican self-determination with regard to the statehood alternative.

Part IV considers two queries: (a) whether the Puerto Rican question is analogous to that posed by Quebec in the Canadian context; and (b) whether there is a reasonable analogy between Puerto Rico and pockets of other Spanish-speaking inhabitants of the United States. My conclusion is that Puerto Rico presents a "problem" for the United States which is similar to the Quebec-Canada dilemma; if anything, I contend, Puerto Rico's linguistic and cultural identity is stronger than Quebec's. Concerning the second issue, I maintain that the Puerto Rican "problem" is different in nature to that presented by Hispanic communities throughout the United States, and would pose a serious challenge to the idea of the "melting pot."

Part V asserts that the prospect of Puerto Rican statehood must be the subject of ample debate in the United States, poses some questions that should be addressed, and pleads for a clearer articulation of the terms on which the United States would be willing to admit Puerto Rico into the Union.

Part VI concludes that the issue of language in Puerto Rico simply will not go away through inattention or neglect, and that the issue of Puerto Rican statehood bears the seed of another debate which the United States confronted more than a century ago: secession.

## **I. Law and Reality: The "Official" Status of English in Puerto Rico**

In a speech at the "Foreign in a Domestic Sense Conference," held at Yale Law School on March 27-28, 1998, the governor of Puerto Rico, Dr. Pedro J. Rosselló, reminded the audience that since 1902 both Spanish and English have been official languages of government in Puerto Rico, predating the declaration of English

as an official language in any of the states.<sup>6</sup> That fact, however, does not respond to a sociological reality. Rather, it underscores the peculiar nature of Puerto Rican colonial politics.

#### A. *English in Puerto Rico: The Law*

In 1898, Puerto Ricans were beginning to experience the first true measure of self-government under Spanish rule, the Autonomic Charter of 1897.<sup>7</sup> Then, an act of war produced drastic changes.

On July 25, 1898, as the Spanish American War drew to a close,<sup>8</sup> United States troops under the command of General Nelson A. Miles, of Wounded Knee infamy,<sup>9</sup> landed on the southern coast of Puerto Rico. Miles's invasion met with little armed resistance,<sup>10</sup> although there were several skirmishes which caused some casualties.<sup>11</sup> Miles had been preceded by Admiral William T. Sampson, who was sent to look for the Spanish fleet under Admiral Cervera. Before dawn on May 12, 1898, while the capital city of San Juan

6. See Honorable Pedro J. Rosselló, Address at the "Foreign in a Domestic Sense" conference (Mar. 28, 1998) (transcript on file with author). Governor Rosselló reiterated this in a subsequent op-ed piece. See Pedro Rosselló, *Puerto Rico's American Dream*, WASH. TIMES, Apr. 2, 1998, at A17.

The first state to declare the official status of English as a language of government was Nebraska in 1920. See NEB. CONST. art. I, § 27; see also RAYMOND TATALOVICH, NATIVISM REBORN? THE OFFICIAL ENGLISH LANGUAGE MOVEMENT AND THE AMERICAN STATES 33 (1995). That action came "at the height of the 1920s nativism that followed in the wake of World War I and reached a climax with the enactment of federal quotas on immigration." *Id.*

7. For an English version, see 1 José Julián Alvarez González, *Puerto Rico, in CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES* 45 (Albert P. Blaustein ed., 1991) [hereinafter 1 Alvarez González, *Puerto Rico*]. The United States invasion of Puerto Rico ended that experiment at its inception. For a general critical analysis of the Charter, see José Julián Alvarez González, *El Viejo Pacto: El Elemento de Bilateralidad en la Carta Autonómica de 1897*, 67 REV. JUR. U.P.R. 983 (1998) [hereinafter Alvarez González, *El Viejo Pacto*].

8. Before departing for Cuba with his "Rough Riders," Theodore Roosevelt, then Undersecretary of the Navy, pleaded in a telegram to Sen. Henry Cabot Lodge not to make peace with Spain until Puerto Rico could be had. See RAYMOND CARR, *PUERTO RICO: A COLONIAL EXPERIMENT* 25 (1984); JULIUS W. PRATT, *EXPANSIONISTS OF 1898* 231, 327 (1936); CARMELO ROSARIO NATAL, *PUERTO RICO Y LA CRISIS DE LA GUERRA HISPANOAMERICANA (1895-1898)* 201 (1989); 1 JOSÉ TRÍAS MONGE, *HISTORIA CONSTITUCIONAL DE PUERTO RICO* 144 (1980) [hereinafter 1 TRÍAS MONGE, *HISTORIA*]. According to Carr, Lodge soon responded: "Puerto Rico is not forgotten and we mean to have it." CARR, *supra*.

9. See REX ALAN SMITH, *MOON OF POPPING TREES* 4 (1975); John Rhodes, *An American Tradition: The Religious Persecution of Native Americans*, 52 MONT. L. REV. 13, 31 (1991).

10. See CARR, *supra* note 8, at 28-29.

11. See ÁNGEL RIVERO, *CRÓNICA DE LA GUERRA HISPANOAMERICANA EN PUERTO RICO* 196-205, 235-49, 256-80 (1922).

slept, Sampson opened fire and continued the bombardment for three hours. The attack killed four civilians and two soldiers, wounded sixteen civilians and thirty-six soldiers, caused general panic and seriously damaged several buildings, both military and civilian.<sup>12</sup>

At that time, Puerto Rico was culturally and linguistically a homogenous society where few people spoke English.<sup>13</sup> There was no official language law, nor any need for one. That need emerged—for the United States—when their troops invaded the Island. One of the first official acts of General Miles was to issue a bilingual proclamation to the inhabitants of Puerto Rico.<sup>14</sup> Four days after disembarking in Puerto Rico, Miles announced that the United States had waged war against Spain “in the cause of liberty, justice and humanity.”<sup>15</sup> Its purpose was to bring protection to the inhabitants of Puerto Rico and their property, to promote their prosperity, and to bestow upon them “the immunities and blessings of the liberal institutions of our Government,” as well as the “advantages and blessings of enlightened civilization.”<sup>16</sup> Subsequent events would prove that Miles’s promise was not meant to be kept.<sup>17</sup>

During the nearly two years of military government that followed, under three successive military governors,<sup>18</sup> English became a *de facto* official language. It was the language in which the military governors issued their General Orders,<sup>19</sup> and the native

12. *See id.* at 65-108.

13. *See* MARÍA M. LÓPEZ LAGUERRE, *EL BILINGÜISMO EN PUERTO RICO* 8 (1989).

14. A photographic reproduction of the Spanish version of this proclamation, issued on July 28, 1898, is found in RIVERO, *supra* note 11, at 232. An English version is found in 1 Alvarez González, *Puerto Rico, supra* note 7, at 67.

15. 1 Alvarez González, *Puerto Rico, supra* note 7, at 67.

16. *Id.*

17. *See* CARR, *supra* note 8, at 32:

A closer examination of American actions would have revealed Miles's proclamation to be a weapon in psychological warfare, not a pledge that bound Congress. Both in the armistice negotiations (August 1898) and in the hard bargaining that followed in Paris, it was evident that the United States meant to keep Puerto Rico subject to the sovereign will of Congress.

*Id.*

18. Concerning this period, see EDWARD J. BERBUSSE, *THE UNITED STATES IN PUERTO RICO: 1898-1900*, at 77-110 (1966); MARÍA D. LUQUE DE SÁNCHEZ, *LA OCUPACIÓN NORTEAMERICANA Y LA LEY FORAKER* 27-81 (1980); 1 TRÍAS MONGE, *HISTORIA, supra* note 8, at 159-85; JOSÉ TRÍAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* 30-35 (1997) [hereinafter TRÍAS MONGE, *COLONY*]; José Julián Alvarez González, *The Protection of Civil Rights in Puerto Rico*, 6 *ARIZ. J. INT'L & COMP. L.* 88, 91 (1989) [hereinafter Alvarez González, *Protection*].

19. *See* U.S. DEPT. OF WAR, *GENERAL ORDERS AND CIRCULARS, 1898-1900*, at 1-

tongue of the cabinet members with whom the second military governor, General Guy V. Henry, substituted the Puerto Rican officeholders<sup>20</sup> who had been elected in 1898.<sup>21</sup> Thereafter, when Congress approved the first Organic Act for Puerto Rico, the Foraker Act of 1900,<sup>22</sup> it did not issue a general provision on language of government.<sup>23</sup> That dubious honor would correspond to the colonial government of Puerto Rico.

The Foraker Act created a classic colonial government for Puerto Rico. The President of the United States, with the advice and consent of the Senate, appointed the governor, the judges of the Supreme Court and the members of the upper house of the legislative assembly, a strange body called the Executive Council that merged both legislative and executive functions.<sup>24</sup> Only the lower house of the legislature, the House of Delegates, was an elective body. Its real power *vis-à-vis* the Executive Council and the governor was very slight.<sup>25</sup> Passage of the Foraker Act polarized the Island's political parties. The pro-statehood Republican Party generally applauded it, while the autonomist Federal Party denounced it.<sup>26</sup> The Federals eventually decided to boycott the 1900 elections for the House of Delegates which resulted in Republican control of all thirty-five seats.<sup>27</sup>

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3 (1900), cited in 1 TRÍAS MONGE, HISTORIA, *supra* note 8, at 165. For a summary of the most important of these General Orders, see 1 TRÍAS MONGE, HISTORIA, *supra* note 8 at 165-72.

20. See TRÍAS MONGE, COLONY, *supra* note 18, at 31-32.

21. See *supra* note 7 and accompanying text.

22. Pub. L. No. 56-191, 31 Stat. 77 (1900).

23. The Foraker Act contained few provisions concerning the English language: (1) it provided that all books in that language would enter Puerto Rico from the United States duty free (§ 2, 31 Stat. 77); (2) it required that members of the lower house of the legislature, the House of Delegates, be literate in either Spanish or English (§ 30, 31 Stat. 83); (3) it provided that the federal District Court therein created to succeed the provisional federal court established by order of the last military governor would conduct all proceedings in English (§ 34, 31 Stat. 84); (4) it provided that all appellate proceedings in the United States Supreme Court concerning Puerto Rico would also be conducted in English (§ 35, 31 Stat. 85); (5) it required that the Resident Commissioner of Puerto Rico to the United States be able to read and write in English (§ 39, 31 Stat. 86); and (6) it created a commission to compile and revise the laws of Puerto Rico, which would render a report to Congress in both Spanish and English (§ 40, 31 Stat. 86).

24. See Alvarez González, *Protection*, *supra* note 18 at 91 & n.12. While the Executive Council appeared to resemble a parliamentary body, foreign to United States traditions, in fact it was quite different, since its members were not elected and, therefore, were not responsible to parliament, but only to the President who appointed them.

25. See *id.*

26. See 1 TRÍAS MONGE, HISTORIA, *supra* note 8, at 273-81.

27. See *id.* at 279-80; see also TRÍAS MONGE, COLONY, *supra* note 18, at 54. The magnitude of the Federal electoral boycott is illustrated by the following facts: (1)

This was the state of affairs when on February 21, 1902, Spanish and English became official languages of government in Puerto Rico.<sup>28</sup> This 1902 Act provided:

In all the departments of the Commonwealth government and in all the courts of this island, and in all public offices the English language and the Spanish language shall be used indiscriminately; and, when necessary, translations and oral interpretations shall be made from one language to the other so that all parties interested may understand any proceedings or communications made therein.<sup>29</sup>

At a time when the governor of Puerto Rico was a United States-born Presidential appointee and the upper house of the legislature was dominated by other United States-born Presidential appointees, who were also the heads of the executive departments, the 1902 law was deemed necessary to permit these Anglophone colonial administrators to function. More important, the 1902 law was a vital element of the policy of Americanizing Puerto Rico immediately, which became a prime goal of colonial administrators.<sup>30</sup> That policy had been advocated early in the military government period by the United States Consul in Puerto Rico, Phillip C. Hanna, who had urged that all things Spanish, including language and culture, should be discarded.<sup>31</sup> In these efforts to

in the 1898 elections for the local parliament under Spanish rule, the predecessors to the Federals had trounced all opposition by a margin of nearly five to one; (2) less than 59,000 electors voted in the election of 1900, while some 144,000 had voted in that of 1898, *id.* at 129, 280; (3) while the predecessors to the Federals had garnered 82,627 votes in 1898, the Republicans only received 58,367 votes in 1900. See 1 TRÍAS MONGE, *HISTORIA*, *supra* note 8, at 129, 280.

28. See 1902 P.R. Laws Feb. 21, P.R. LAWS ANN. tit. 1 § 51 (1982), *repealed by* 1991 P.R. Laws 4, P.R. LAWS ANN. tit. 1 § 56 (Supp. 1993), *repealed by* 1993 P.R. Laws 1, P.R. LAWS ANN. tit. 1 § 59 (Supp. 1995-1996).

29. P.R. LAWS ANN. tit. 1 § 51 (1982) (*repealed*).

30. See TRÍAS MONGE, *COLONY*, *supra* note 18, at 55.

The department heads were the subject of frequent criticism by the Federal party and its successors. The policy of Americanizing Puerto Rico as fast as possible, one of the major matters on which there was enthusiastic consensus among the governor and the department heads, was singled out for special attack. The Commissioners of Education ordered all school-children to start the school day by saluting the American flag, declaiming the Pledge of Allegiance, and singing the national anthem and other patriotic songs. The teachers, often in broken English, would lead the exercise while the children mouthed words that most did not understand. The teaching in English of the whole public school curriculum started as soon as teachers became available.

*Id.* at 57. On the wholesale substitution of United States laws for institutions of the Civil Law during this period, see *id.*; see also Manuel Rodríguez Ramos, *Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico*, 23 TUL. L. REV. 1, 345 (1948-49); Eulalio A. Torres, *The Puerto Rican Penal Code of 1902-1975: A Case Study of American Legal Imperialism*, 45 REV. JUR. U.P.R. 1 (1976).

31. See Carmelo Delgado Cintrón, *Pensamiento Jurídico e Idioma en Puerto*

Americanize Puerto Rico, the lower house of the legislature, exclusively composed of pro-statehood delegates until 1902, and dominated by that party until 1904, cooperated willingly.<sup>32</sup>

The 1902 statute suffered no change until 1991. In 1990, the pro-Commonwealth Popular Democratic Party, which then controlled the governorship and the legislature, decided to underscore its autonomist tendencies and to put pressure on its rival, the pro-statehood New Progressive Party.<sup>33</sup> At a time when the United States Senate was taking another look at the question of Puerto Rico's political status, the governing *Populares* decided to make things more difficult for the statehood movement.<sup>34</sup> Thus, in March 1990, they took up a bill originally filed one year earlier, held public hearings and finally approved it on April 4, 1991 over the opposition of the pro-statehood forces.<sup>35</sup> Governor Hernández Colón signed it into law the next day.<sup>36</sup> This 1991 law repealed the 1902 statute and made Spanish the only official language.<sup>37</sup> That action earned the people of Puerto Rico the Prince of Asturias award, one of the most coveted distinctions granted by the Spanish crown.<sup>38</sup>

The 1991 statute may have been a strategic mistake. Puerto Rico is a very homogeneous society, as the statement of purposes of that statute itself recognized.<sup>39</sup> Puerto Rico, therefore, does not need an official language statute, such as more linguistically diverse societies may need. The simple repeal of the 1902 statute, which was once necessary to permit Anglophone colonial administrators to function, would have been sufficient. To make Spanish the sole official language only served to fuel partisan fires, without

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*Rico: Un Problema Ético, Jurídico y Lingüístico*, 10 REV. JUR. U.I.P.R. 200, 202 (1976).

32. See TRÍAS MONGE, COLONY, *supra* note 18, at 52-60.

33. The story that follows is told in further detail in EDGARDO MELÉNDEZ, MOVIMIENTO ANEXIONISTA EN PUERTO RICO 275-77 (1993).

34. See *id.*

35. See Carmelo Delgado Cintrón, *Historia de las Luchas por el Idioma Español en Puerto Rico*, in CARMELO DELGADO CINTRÓN, EL DEBATE LEGISLATIVO SOBRE LAS LEYES DEL IDIOMA EN PUERTO RICO 17-22 (1994).

36. See *id.* at 22.

37. See 1991 P.R. Laws 4, 1 P.R. LAWS ANN. tit. 1 § 56 (Supp. 1993) (repealed):

It is hereby declared and established that Spanish shall be the official language of Puerto Rico to be used in all its departments, municipalities or other political subdivisions, agencies, offices and government dependencies of the Executive, Legislative and Judiciary Branches of the Commonwealth of Puerto Rico.

*Id.*

38. See Delgado Cintrón, *supra* note 35, at 24.

39. 1991 P.R. Laws 4, available in WESTLAW, PR-LEGIS 4 (1991) (Statement of Motives) ("Puerto Rico [is] a homogeneous cultural and linguistic society").



altering the sociological reality of the overwhelming predominance of Spanish in Puerto Rico.

The return to power of the pro-statehood New Progressive Party in 1993 turned the clock back to 1902. The new government immediately repealed the 1991 statute and again made both Spanish and English official languages, in terms similar to the 1902 statute.<sup>40</sup>

### *B. English in Puerto Rico: A Dose of Reality*

After a century of United States presence in Puerto Rico, what is the linguistic reality of the Island? According to the 1990 Census, 98.2% of all residents of Puerto Rico speak Spanish, 52.6% of all residents of Puerto Rico do not speak English at all, and an additional 23.8% have very limited command of that language.<sup>41</sup> At best, only 23.6% of the population is truly fluent in English.<sup>42</sup> And fluency in English does not run along the lines of political status preferences, but rather, along the lines of socioeconomic class and of urban or rural residence.<sup>43</sup>

40. See 1993 P.R. Laws 1, P.R. LAWS ANN tit. 1 § 59 (Supp. 1995-1996).

Spanish and English are established as official languages of the Government of Puerto Rico. Both languages may be used, indistinctively, in all departments, municipalities or other political subdivisions, agencies, public corporations, offices and government dependencies of the Executive, Legislative and Judiciary Branches of the Commonwealth of Puerto Rico, pursuant to the provisions of this Act or by that which is provided by a special law.

*Id.* An excellent collection of articles, essays and statutory materials concerning the issue of government language in Puerto Rico is DELGADO CINTRÓN, *supra* note 35; see also Luis Muñiz Argüelles, *The Status of Languages in Puerto Rico*, in CARMELO DELGADO CINTRÓN, *EL DEBATE LEGISLATIVO SOBRE LAS LEYES DEL IDIOMA EN PUERTO RICO* 69-82 (1994).

41. See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION: SOCIAL AND ECONOMIC CHARACTERISTICS, PUERTO RICO 46 (1993) [hereinafter CENSUS]. The Census only measures language ability for persons of at least five years of age.

42. See *id.*

43. The Census does not attempt to correlate ability to speak English with socioeconomic conditions, such as schooling and income. However, it may safely be predicted that there exists a strong correlation between such factors and the ability to speak English, although reverse migration of Puerto Rican families from the United States to Puerto Rico may have begun to weaken it.

The Census does correlate the ability to speak English of persons older than four with an urban or rural dwelling, however imprecise such categories may have become in modern day Puerto Rico. The following table shows that, in comparison to the island-wide figures, fluency in English is somewhat higher in the urban setting and appreciably lower in rural areas:

It is often said in Puerto Rico that if Census employees conducted their interviews in English, rather than in Spanish, the statistics on English proficiency would be still lower. Census statistics are assailed as unreliable because they depend on the self-evaluation of interviewees, which in the political climate of Puerto Rico tends to overestimate English proficiency.<sup>44</sup> That caveat aside, the Census statistics are confirmed in a more recent study conducted in 1993 for the Ateneo Puertorriqueño, the oldest private organization for the promotion of Puerto Rican culture.<sup>45</sup> Among other findings, that study found that only 25% of the inhabitants of Puerto Rico consider their command of English as "good" or "excellent," while only 20.6% consider themselves bilingual.<sup>46</sup>

Notwithstanding the long-standing status of English as an official language of Puerto Rico, the 1902 legislation exemplifies an abyss between law and reality. Let me offer some examples.

### 1. Judicial Proceedings

All proceedings in the courts of Puerto Rico are conducted *only* in Spanish. That is the law of Puerto Rico, as interpreted by its courts in the leading case of *Pueblo v. Tribunal Superior*.<sup>47</sup> In that case the Supreme Court of Puerto Rico found against an Anglophone attorney who invoked the 1902 law in support of a claimed right to a trial in English. The Court stated:

It is a fact, not subject to historical rectification, that the vehicle of expression, the language of the Puerto Rican people—an integral part of our origin and our Hispanic culture—has been

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English fluency (%)	Island wide	Rural	Urban	San Juan
Easily	23.6	14.5	27.2	28.3
With difficulty	23.8	20.0	25.3	24.6
Unable	52.6	65.5	47.5	47.1

CENSUS, *supra* note 41, at 32, 71.

44. See LÓPEZ LAGUERRE, *supra* note 13, at 86.

45. See *Resumen del Estudio del Ateneo Puertorriqueño Respecto al Uso, Dominio y Preferencia de los Idiomas Español e Inglés en Puerto Rico*, in CARMELO DELGADO CINTRÓN, EL DEBATE LEGISLATIVO SOBRE LAS LEYES DEL IDIOMA EN PUERTO RICO 83 (1994) [hereinafter *Ateneo Study*].

46. See *id.* at 84. The Ateneo Study poll was designed by three distinguished sociolinguists from the United States: Dr. Kenji Hakuta of Stanford University, Dr. Leonni Huddy of the State University of New York and Dr. David Sears, Dean of Social Sciences of the University of California at Los Angeles.

The very definition of "bilingualism" has been the object of debate. See LÓPEZ LAGUERRE, *supra* note 13, at 43-56. In this Article, I use the term to describe an individual who is able to communicate in two languages with an analogous competence to that possessed by the monolingual users of each language. See *id.* at 45.

47. *People v. Superior Court*, 92 P.R.R. 580 (1965).

and continues to be Spanish. . . .

The determining factor as to the language to be used in judicial proceedings in Commonwealth courts does not arise from the law of [1902], which Mr. Rout invoked in his petition that the trial be held in English because he did not have good command of Spanish. It arises from the fact that the means of expression of our people is Spanish, and that is a reality that cannot be changed by any law.<sup>48</sup>

The pro-statehood legislature of Puerto Rico expressly endorsed this view when it restored the official status of English in 1993.<sup>49</sup> It stated then:

No provision of this bill harbors the unfounded speculation that, upon its approval, the Legislature would be authorizing or validating the use of a language other than Spanish in judicial proceedings in the Courts of the Commonwealth of Puerto Rico. The matter of judicial language was resolved by our Supreme Court in the case of *Pueblo v. Tribunal Superior* (1965) and what was established therein does not suffer any change whatsoever by the approval of this measure. Neither does it alter Rule 8.5 of the Rules of Civil Procedure to the effect that "the allegations, petitions and motions shall be filed in Spanish" in the Courts of Puerto Rico.<sup>50</sup>

Under the law of Puerto Rico, therefore, anyone who does not have an adequate command of Spanish will need an interpreter in order to testify or to follow the proceedings. The state will provide that interpreter only to a criminal defendant.<sup>51</sup>

## 2. Legislative and Executive Proceedings

Legislative proceedings and executive rulemaking or adjudicatory hearings are in Spanish.<sup>52</sup> With regard to legislative activi-

48. *Id.* at 588-89 (footnotes omitted); *see also* P.R. R. CRIM. P. 96(d); P.R. LAWS ANN. tit. 34 Ap. II, R. 96(d) (1991) (criminal jurors must read and write in Spanish); P.R. R. CIV. P. 8.5, P.R. LAWS ANN. tit. 32 Ap. III, R. 8.5 (1983) (all pleadings and motions must be in Spanish; documents in other languages must be accompanied by a Spanish translation).

49. *See* 1993 P.R. Laws 1, *available in* WESTLAW, PR-LEGIS 1 (1993) (Statement of Motives).

50. *Id.*

51. *See* 92 P.R.R. at 590. The United States Court of Appeals for the First Circuit later held that a criminal trial in Spanish, with a right to translation services where the accused does not speak that language, satisfies due process. *See* *Jackson v. Cintrón García*, 665 F.2d 395 (1st Cir. 1981).

52. *See* Muñoz Argüelles, *supra* note 40, at 80-81. As Professor Muñoz recognizes: "Governmental affairs are, as a matter of fact, conducted in Spanish, except for isolated cases: official dealings with the federal government, foreign consultations—basically where the consultant is from the United States—and similar affairs." *Id.* at 81.

Pro-statehood Secretary of State Baltasar Corrada del Río, now a Puerto Rico Supreme Court Justice, while testifying in 1993 in support of official language

ties, even though the Constitution of Puerto Rico requires legislators to be able to read and write in Spanish or in English,<sup>53</sup> modern legislators almost never address the assembly in English, except for isolated instances in which a few of them have sought to underscore their support for statehood.<sup>54</sup> In the overwhelming majority of instances, laws are approved in Spanish and subsequently translated.<sup>55</sup> Article 13 of the Civil Code of Puerto Rico provides certain language rules for interpreting statutes, which generally favor the Spanish version.<sup>56</sup>

In the executive branch, there are some exceptions to the overwhelming practice of operating exclusively in Spanish, but such exceptions are both rare and of minor importance.<sup>57</sup>

### 3. Public Education

At all public school levels all instruction is in Spanish, except for English courses.<sup>58</sup> The story behind this fact is another classic

status for English, also conceded that: "On April 4, 1991, Spanish was used in the immense majority of official businesses in all branches of the Government of Puerto Rico." Baltasar Corrada del Río, *Ponencia del Secretario de Estado, Hon. Baltasar Corrada del Río*, in CARMELO DELGADO CINTRÓN, *EL DEBATE LEGISLATIVO SOBRE LAS LEYES DEL IDIOMA EN PUERTO RICO* 614 (1994) (author's translation).

53. See P.R. CONST. art. II, § 5.

54. See, e.g., Pepo García, *Llega el 'English only' al Senado*, EL NUEVO DÍA, Apr. 23, 1997, at 14 (Senator Kenneth McClintock-Hernández addressed the Senate in English while defending a Senate resolution in that language in praise of the Shriners Hospital of Philadelphia).

55. In recent years, the pro-statehood legislative majority in Puerto Rico has approved several measures in both languages, while specifically providing that in case of conflict the English version shall prevail. Statutes of this type include: *The Emergency Management Assistance Compact*, 1996 P.R. Laws 178 art. 15, P.R. LAWS ANN. tit 31, § 621 (Supp. 1998); *The Uniform Interstate Family Support Act*, 1997 P.R. Laws 180 § 9.905, P.R. LAWS ANN tit. 8, § 541 (Supp. 1998); *The Commercial Transactions Act*, 1996 P.R. Laws 241, art. 19, P.R. LAWS ANN. tit. 19, § 401 (1998); *The Puerto Rico Timeshare and Vacation Act*, 1995 P.R. Laws 252, § 13-106, P.R. LAWS ANN. tit. 31, § 1269d (Supp. 1995-1996).

56. See P.R. LAWS ANN. tit. 31 § 13 (1993).

In case of discrepancy between the English and Spanish texts of a statute passed by the Legislative Assembly of Puerto Rico, the text in which the same originated in either house, shall prevail in the construction of said statute, except in the following cases: (a) If the statute is a translation or adaptation of a statute of the United States or of any State or Territory thereof, the English text shall be given preference over the Spanish. (b) If the statute is of Spanish origin, the Spanish text shall be preferred to the English. (c) If the matter of preference cannot be decided under the foregoing, the Spanish text shall prevail.

*Id.*

57. For a collection of instances where official government business may be conducted in English or in both languages, see Raúl Serrano Geyls & Carlos Gorín Peralta, *Puerto Rico y la Estadidad: Problemas Constitucionales*, 42 REV. COL. AB. P.R. 1, 43-46 (1981).

58. At the University of Puerto Rico there are some courses in English, espe-

vignette of colonial politics.<sup>59</sup> At the start of its colonial administration of Puerto Rico, the United States attempted the transculturation of the Puerto Rican people, through several measures. One of the most important of these measures occurring in 1905 was the imposition of English as the language of instruction in the public school system, with the cooperation of important segments of the local, minoritarian statehood movement. That policy, supported by all United States Presidents, including Franklin D. Roosevelt,<sup>60</sup> lasted officially until 1949. It was then revoked by an administrative order of the Commissioner of Education, Mr. Mariano Villaronga, a member of the then ruling Popular Democratic Party. That administrative order was not enacted into law until 1990.<sup>61</sup>

When the Puerto Rico legislature restored the official language status of English in 1993,<sup>62</sup> it expressly reaffirmed this policy:

No provision of this measure harbors or validates the unfounded speculation that, upon its approval, the Legislature would be opening the doors to the use of a language other than Spanish as a vehicle for teaching in the public schools of Puerto Rico. This bill does not repeal, nor change, nor amends Section 1.02 of the Organic Act of the Department of Education—Act No. 68 of August 28, 1990—which in its pertinent section establishes that “education shall be imparted in the vernacular language, Spanish. English shall be taught as a second language.” We hereby reiterate the public policy to that

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cially where the instructor is an English-speaker. Still, the overwhelming majority of university courses in Puerto Rico, at public and private institutions, are in Spanish.

59. For a broader discussion of that story, see DENNIS BARON, *THE ENGLISH-ONLY QUESTION: AN OFFICIAL LANGUAGE FOR AMERICANS?* 166-70 (1990); ALFONSO L. GARCÍA MARTÍNEZ, *IDIOMA Y POLÍTICA EN PUERTO RICO* (1976); LÓPEZ LAGUERRE, *supra* note 13, at 7-31; AIDA NEGRÓN DE MONTILLA, *AMERICANIZATION IN PUERTO RICO AND THE PUBLIC SCHOOL SYSTEM: 1900-1930* (1971); JUAN J. OSUNA, *A HISTORY OF EDUCATION IN PUERTO RICO* (1949); Alfonso L. García Martínez, *Language Policy in Puerto Rico: 1898-1930*, 42 *REV. COL. AB. P.R.* 87 (1981); Muñiz Argüelles, *supra* note 40, at 72-74; Serrano Geysls & Gorrín Peralta, *supra* note 57, at 31-39.

60. As late as 1937, President Roosevelt instructed his appointee, Puerto Rico Commissioner of Education José M. Gallardo, to teach English on the Island “with vigor, purposefulness and devotion, and with the understanding that English is the official language of our country . . . Only through the acquisition of this language will Puerto Rican Americans secure a better understanding of American ideals and principles.” 6 *THE PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT* 160-61 (1941), *cited in* BARON, *supra* note 59, at 169.

61. See 1990 P.R. Laws 68 § 1.02, *available in* WESTLAW, PR-LEGIS 3RS 68 (1990) (“It is hereby provided that education shall be imparted in Spanish, the vernacular language. English shall be taught as a second language.”).

62. See 1993 P.R. Laws 1, P.R. LAWS ANN tit. 1 § 59 (Supp. 1995-1996).

effect.<sup>63</sup>

There is bilingual education in some public classrooms in Puerto Rico. It used to be geared principally toward developing the Spanish language proficiency of Anglophones, so that they might participate fully in the affairs of Puerto Rican society. Congress expressly authorized this policy in the 1978 amendments to the federal Bilingual Education Act, which provided that Puerto Rico could assist children with insufficient knowledge of Spanish, the language of instruction in Puerto Rican public schools.<sup>64</sup>

Recently, there have been a few experiments with English immersion laboratories.<sup>65</sup> It is too early to tell what their chances for success are.<sup>66</sup>

#### 4. Operation of the Federal Government in Puerto Rico

The federal government functions in English throughout the United States. The reality in Puerto Rico, however, is strikingly

63. 1993 P.R. Laws 1, available in WESTLAW, PR-LEGIS 1 (1993) (Statement of Motives).

A pro-statehood former Secretary of Education, Dr. Ramón Mellado Parsons, concluded in 1979 that Spanish would continue being for the foreseeable future the native tongue of all Puerto Ricans, which required that the policy of instruction in Spanish be maintained, along with the teaching of English as a second language. See RAMÓN MELLADO PARSONS, *LA EDUCACIÓN EN PUERTO RICO* 71-72 (1979). He also advocated the establishment of special schools, in order to develop the Spanish language proficiency of the children of Puerto Ricans who return from the United States. See *id.* He further proposed that bilingualism should be a goal of the public education system, and recognized that the attainment of this goal requires bilingual teachers who also have an adequate understanding of the cultures of both Puerto Rico and the United States. See *id.*; see also LÓPEZ LAGUERRE, *supra* note 13, at 92-93.

64. See Pub. L. 95-561, § 721(d), 92 Stat. 2275 (1978). The current version of this provision is found in 20 U.S.C. § 7432 (1994). See generally Juan Cartagena et al., *United States Language Policy: Where Do We Go from Here?*, 18 REV. JUR. U.I.P.R. 527, 532 (1984); Serrano Geyls & Gorrín Peralta, *supra* note 57, at 44-46.

65. See DEPARTMENT OF EDUCATION, GOVERNMENT OF PUERTO RICO, PROJECT FOR THE DEVELOPMENT OF A BILINGUAL CITIZEN (1997) [hereinafter DEPARTMENT OF EDUCATION]; see also Wanda I. Matías, *Inician Laboratorio en Pro del Bilingüismo*, EL NUEVO DÍA, Mar. 2, 1998, at 27; Wanda I. Matías, *Rinde Frutos el Laboratorio de Inmersión en Inglés*, EL NUEVO DÍA, Mar. 6, 1998, at 32.

66. On the pitfalls of immersion as a general method of learning a second language, see KENJI HAKUTA, *MIRROR OF LANGUAGE: THE DEBATE ON BILINGUALISM* 225 (1986) (“[C]hildren are not the instantaneous second-language learners painted in our folklore . . . [I]t may take them even longer to learn the kinds of language necessary to perform well in school.”). Dr. Hakuta is recognized as an authority in the Puerto Rico Department of Education publication cited *supra* note 65, at 31. He also helped design the *Ateneo Study*. See *supra* note 45; see also BARON, *supra* note 59, at 196 (stating that immersion may be successful with highly motivated middle class students, but not with unmotivated potential drop-outs).

different.<sup>67</sup>

*a. Federal Executive Agencies*

All formal proceedings in federal agencies in Puerto Rico are conducted in English, but Spanish translations are invariably a fact of life. All forms have an English version, but in most agencies there are Spanish versions as well. Informal dealings with federal employees in Puerto Rico, however, are usually conducted in Spanish, as the bulk of federal employees on the Island are native Puerto Ricans whose vernacular is Spanish. Spanish is most prevalent among the federal agencies that serve the general public, such as the Postal Service, the Department of Labor, the Social Security Administration, the Internal Revenue Service, the Immigration and Naturalization Service, the Small Business Administration, the Farmers Home Administration, the Department of Housing and Urban Development, the National Labor Relations Board, the Customs Service and the Veterans Administration.<sup>68</sup>

*b. The United States District Court for the District of Puerto Rico*

Federal law requires that all formal business in the United States District Court for the District of Puerto Rico be conducted in English,<sup>69</sup> notwithstanding that usually all participants share Spanish as their native tongue. This often leads to situations which border on the ridiculous. As Professor Muñiz Argüelles states:

Use of English there is at times absurd, as when attorneys, parties, jurors and the judge are all native Spanish speakers, and yet all is translated back and forth between English and Spanish for no other reason than to comply with a statutory mandate, for no one pays any attention to the English translations.<sup>70</sup>

This court has always been a bone of contention in United States-Puerto Rico relations,<sup>71</sup> but all efforts to abolish it or to

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67. Statements in this section are based on the author's first-hand knowledge and on Serrano Geys & Gorrín Peralta, *supra* note 57, at 48-50.

68. For a more detailed treatment of the situation in some of these agencies, see Serrano Geys & Gorrín Peralta, *supra* note 57, at 49.

69. See Puerto Rico Federal Relations Act § 42, 48 U.S.C. § 864 (1994).

70. Muñiz Argüelles, *supra* note 40, at 79.

71. On the role of the federal court in Puerto Rico as one of the principal agents of transculturation, see, for example, Carmelo Delgado Cintrón, *El Tribunal Federal como Factor de Transculturación en Puerto Rico*, 34 REV. COL. AB. P.R. 5 (1973); Muñiz Argüelles, *supra* note 40, at 79; Ángel Tapia Flores, *Language in the Federal Court*, 40 REV. COL. AB. P.R. 333 (1976); Roberto Tschudin, *The United*

permit it to operate in Spanish have failed.<sup>72</sup> Even in this theoretically English-only setting, judges and attorneys will often go into chambers to confer in Spanish.<sup>73</sup>

### 5. Private Affairs

In the private realm, Spanish reigns.<sup>74</sup> The pro-statehood Puerto Rican legislature said as much when it restored the official status of English in 1993: "Through this measure, the Legislature does not pretend to establish by legislative fiat, a condition of bilingualism alien to the everyday reality of the Puerto Rican People."<sup>75</sup>

It is very rare for two Puerto Ricans whose native tongue is Spanish to carry on a private conversation in English.<sup>76</sup> Their use

*States District Court for the District of Puerto Rico: Can an English Language Court Serve the Interests of Justice in a Spanish Language Society?* 37 REV. COL. AB. P.R. 41 (1976).

72. See Muñiz Argüelles, *supra* note 40, at 79; Serrano Geyls & Gorrín Peralta, *supra* note 57, at 50.

73. See Muñiz Argüelles, *supra* note 40, at 79.

74. See, e.g., Manuel Alvarez Nazario, *Sobre la Intención Legislativa de Instaurar al Español como Lengua Oficial Única de Puerto Rico*, in CARMELO DELGADO CINTRÓN, *EL DEBATE LEGISLATIVO SOBRE LAS LEYES DEL IDIOMA EN PUERTO RICO* 378-79 (1994); Serrano Geyls & Gorrín Peralta, *supra* note 57, at 55-56.

The *Ateneo Study*, *supra* note 45, at 84-85, contains the following additional findings concerning the residents of Puerto Rico:

- (a) 95% prefer Spanish as their only official language;
- (b) 97% prefer that the government communicate with them in Spanish;
- (c) 96% prefer that all legislation be in Spanish;
- (d) 96% prefer that all government instructions, such as traffic signs, be in Spanish (which they are);
- (e) 95% prefer government forms in Spanish;
- (f) 93% claim that they will never renounce Spanish, even if Puerto Rico becomes a state and English is imposed as the only official language;
- (g) 87% find important cultural differences between Puerto Rico and the United States;
- (h) 91% consider themselves Puerto Rican first and American second;
- (i) 97% consider themselves Puerto Rican, while only 58% consider themselves American;
- (j) 87% confess to harbor great patriotic sentiments toward the Puerto Rican flag;
- (k) 95% manifest great love for Puerto Rico, while only 4.2% harbor similar feelings toward the United States;
- (l) 78% consider their Puerto Rican identity extremely important, while only 26% make similar claims about their American identity.

*Id.*

75. See 1993 P.R. Laws 1, available in WESTLAW, PR-LEGIS 1 (1993) (Statement of Motives).

76. See Serrano Geyls & Gorrín Peralta, *supra* note 57, at 55. Popular parlance in Puerto Rico refers to English as "*el difícil*" ("the difficult one"). See, e.g., Ramón López, *La Controversia del Español y el Inglés*, in CARMELO DELGADO



of English will be reserved for the rather few occasions when they may need to communicate with Anglophones, usually in the workplace.<sup>77</sup> Cultural manifestations in Puerto Rico, by or involving Puerto Ricans, such as literature, theater and film, are almost exclusively in Spanish, even where the participants are fully bilingual.<sup>78</sup> Literature in English by Island Puerto Ricans is not very common and is usually reserved for exportation. That is the case with professional<sup>79</sup> and popular literature.<sup>80</sup>

In a political rally, no politician will address the audience in

CINTRÓN, EL DEBATE LEGISLATIVO SOBRE LAS LEYES DEL IDIOMA EN PUERTO RICO 188 (1994).

77. According to the *Ateneo Study*, *supra* note 45, at 84, only 11% of the residents of Puerto Rico use English with significant frequency at work; *see also* Muñiz Argüelles, *supra* note 40, at 81 ("Despite this lack of legislation, Spanish is the language in the workplace and many American businessmen in Puerto Rico find they must learn it if they hope to bypass the foreman, who, until then, must act as his translator.")

78. *See, e.g.*, Alvarez Nazario, *supra* note 74, at 379; Serrano Geys & Gorrín Peralta, *supra* note 57, at 55. Concerning film, Puerto Rican film production has been to date, with very few exceptions, exclusively in Spanish and is evidence of Puerto Rico's political and ethnic collective identity. *See* Silvia Alvarez Curbelo, *Vidas Prestadas: El Cine y la Puertorriqueñidad*, in 2 REVISTA CIENCIAS SOCIALES 68 (1997). One recent exception is director Marcos Zurinaga's Hollywood production THE DISAPPEARANCE OF GARCÍA LORCA (A Triumph Releasing 1997).

79. *See, e.g.*, TRIAS MONGE, COLONY, *supra* note 18. Mr. Trias Monge is one of Puerto Rico's leading attorneys, a former Chief Justice of its Supreme Court, one of the principal architects of the Commonwealth relationship and the current President of the Puerto Rican Academy of the Spanish Language. His most recent book is clearly addressed to the United States audience, while his prior, monumental five-volume constitutional history of Puerto Rico is not. *See* 1 TRIAS MONGE, HISTORIA, *supra* note 8.

80. The latest episode of colonial politics concerns Ms. Rosario Ferré, a well-known writer of novels, short stories and poetry. Ms. Ferré, the daughter of the patriarch of the statehood movement, former Governor Luis A. Ferré, surprised her countrymen in the early 1970s, when she announced her embrace of the cause of independence for the Island. That announcement coincided with her decision to enter the literary arena, where she was well received by the Puerto Rico *intelligentsia*. She wrote exclusively in Spanish for two decades. Recently, she started writing in English, with success. *See, e.g.*, ROSARIO FERRÉ, ECCENTRIC NEIGHBORHOODS (1998); ROSARIO FERRÉ, THE HOUSE ON THE LAGOON (1995). On March 20, 1998, Ms. Ferré published an op-ed piece in the *New York Times* where she announced that in view of, among other things, President Clinton's statement to the effect that statehood for Puerto Rico would not, in his view, alter the Island's culture or Spanish language, *see infra* note 390 and accompanying text, she had reconverted to the cause of statehood. Rosario Ferré, *Puerto Rico, U.S.A.*, N.Y. TIMES, Mar. 19, 1998, at A21. Among her most memorable statements in that op-ed column, is the following: "When I travel to the States I feel as Latina as Chita Rivera. But in Latin America, I feel more American than John Wayne." *Id.* This statement immediately caught the attention of the press in Puerto Rico. *See, e.g.*, SAN JUAN STAR, Mar. 21, 1998, at 13. In spite of Ms. Ferré's claim, it is very improbable that a substantial number of Puerto Ricans feel any kinship with John Wayne, and least of all in Latin America.

anything but Spanish.<sup>81</sup> Those politicians who are fluent in English will only use that language when catering to the tiny segment of Anglophone voters.

All Hollywood movies shown in Puerto Rico's commercial cinemas are subtitled in Spanish. Puerto Rico's Resident Commissioner,<sup>82</sup> former Governor Carlos Romero Barceló, recently tried to challenge this fact on the floor of the United States House of Representatives.<sup>83</sup> Anyone who has ever watched a film in San Juan knows that he is wrong.<sup>84</sup> His remarks were televised in Puerto Rico by the government channel. Curiously, while the audio was the original English version, it was accompanied by Spanish subtitles. On some commercial TV channels, viewers were constantly reminded that a radio station carried the Spanish translation.

Lastly, it is in business affairs and in certain liberal profes-

81. Serrano Geys & Gorrín Peralta, *supra* note 57, at 55, provide an account of the 1980 Presidential primaries in Puerto Rico, when Anglophone Presidential contenders became virtual hostages of Puerto Rican political figures, on whom they depended for effective communication with the masses. In subsequent Presidential primaries that history has repeated itself.

82. The Resident Commissioner of Puerto Rico to the United States, a post created in section 39 of the Foraker Act of 1900, 31 Stat. 86 (1900), and retained under section 36 of the Puerto Rico Federal Relations Act, 49 U.S.C. §§ 891-94 (1987), is Puerto Rico's representative before the federal government. This elected official has a voice but no vote in the House of Representatives and may speak and vote in those of its committees to which he is appointed.

83. Mr. Romero's attempt to deny this fact is perplexing. Rep. Luis Gutiérrez (D-IL) argued that Hollywood movies were shown in Puerto Rico with Spanish *subtitles*. Mr. Romero denied that movies in Puerto Rico were *dubbed* into Spanish:

MR. GUTIÉRREZ: Let me give my colleagues an example, gentlemen. If I walk into a theater, a movie theater today anywhere in Puerto Rico, anywhere in Puerto Rico, there are *subtitles* to everything said in English, in every movie theater in Puerto Rico. Why? So that the people can grasp what is going on in the movie. Many times I would laugh two seconds ahead of the rest of the audience because by the time they read the translation, I am an English native speaker, and I would understand that. So I bring that as an issue that even in movie theaters, even in entertainment, and this is much more important than that.

144 CONG. REC. H768 (daily ed. Mar. 4, 1998) (statement of Mr. Gutierrez) (emphasis added).

MR. ROMERO-BARCELÓ: This morning, earlier today, we had the gentleman from Illinois saying that in Puerto Rico the movies were dubbed. The majority of the movies shown in Puerto Rico are not *dubbed*. They are in English and the movie houses are full.

At the Blockbusters, the majority of the films that are rented out are not *subtitled* and neither are the movies *subtitled*. And in Puerto Rico the people who are watching these proceedings now on C-SPAN understand what is going on.

*Id.* at H802 (emphasis added). Concerning Mr. Romero's C-SPAN claim, see the conclusion of the paragraph in the main text.

84. The only exception is a movie house specializing in art films, which sometimes shows films in English without Spanish subtitles.

sions, such as medicine, engineering and accounting, where English is most often used.<sup>85</sup> That influence of English, however, is not much more pervasive than the similar influence felt in such contexts all over the Western world.<sup>86</sup> And in spite of that influence, the language of the workplace in Puerto Rico is overwhelmingly Spanish.<sup>87</sup>

### C. *The Current Role of English in Puerto Rico: Final Thoughts*

#### 1. The Façade of Official Bilingualism in Puerto Rico

The role of English as a language of government in Puerto Rico is truly negligible. It is essentially limited to the possibility of performing some executive affairs, filing government forms and recording deeds in that language.<sup>88</sup> But no one has a right to force the government of Puerto Rico to conduct a proceeding in English.<sup>89</sup>

Ignorance about the façade of official bilingualism in Puerto Rico is alarming. Recently, a student commentator characterized Puerto Rico as a jurisdiction which "permits statutes of Spanish origin to be printed in Spanish," and suggested that "functionally monolingual states, which wish to effectively address problems associated with growing multilingual populations, could learn from the bilingual official language laws of Guam, Hawaii, and Puerto Rico, states which have had more experience dealing with multi-

85. See Serrano Geysls & Gorrín Peralta, *supra* note 57, at 41-43; Muñiz Argüelles, *supra* note 40, at 82.

86. See BARON, *supra* note 59, at 177-79.

87. See Muñiz Argüelles, *supra* note 40, at 81.

88. Concerning the latter activity, see P.R. LAWS ANN. tit. 30 § 2210 (1993). For an argument against this practice, see Luis Mojica Sandoz, *Voto Disidente Respecto de la Regla 24, Sobre el Idioma a Ser Utilizado en los Instrumentos Públicos*, in CARMELO DELGADO CINTRÓN, EL DEBATE LEGISLATIVO SOBRE LAS LEYES DEL IDIOMA EN PUERTO RICO 99 (1994) (stressing that the Puerto Rico Land Registry, in contrast to those in Canada and Belgium, is not truly bilingual, because it does not require recordation in both official languages, but in either of them). For an analysis of some of the problems that such practice engenders, see Muñiz Argüelles, *supra* note 40, at 78.

89. This point was eloquently made in 1989 by Resident Commissioner Romero Barcelo, during his initial appearance before the Senate Committee on Energy and Natural Resources, which was then considering a plebiscite bill for Puerto Rico. He stated: "Locally in our local legislature and our local judiciary and the executive, the official language is both except that Spanish is the language that is used, not English. However, if someone needs a translation or wants a translation, a translation is provided." *Political Status of Puerto Rico: Hearings on S. 710, S. 711, and S. 712 Before the Senate Comm. on Energy and Natural Resources*, 101st Cong. 364 (1989) [hereinafter *1989 Hearings*].

lingual populations."<sup>90</sup> This commentator does not recognize that, as I have shown, Puerto Rico is a "functionally monolingual" jurisdiction, and that the only language is Spanish, not English. Her pairing of Puerto Rico with Guam and Hawaii is untenable. In Guam and Hawaii, the autochthonous language—Chamorro and Hawaiian, respectively—clearly has second-class status, since it "shall not be required for . . . public acts and transactions."<sup>91</sup> Concerning the supposed permission to print Puerto Rican statutes in Spanish, suffice it to say that the collection of the laws of Puerto Rico in Spanish—*Leyes de Puerto Rico Anotadas*—is supplemented annually, while the supplementation to the English version—*Puerto Rico Laws Annotated*—is running years behind. By the same token, publication of the English version of the decisions of the Supreme Court of Puerto Rico stopped in 1972 with volume 100 of the *Puerto Rico Reports*. Meanwhile, the Spanish version—*Decisiones de Puerto Rico*—has reached volume 132.<sup>92</sup>

## 2. Resistance to English and Nonnegotiability of Spanish

The fact that more than three-fourths of Island Puerto Ricans are not fluent in English after a century of United States presence is not due to a collective genetic flaw. It is undeniable that educational policies have been much less than perfect.<sup>93</sup> But, besides the lack of need to master English in order to take part in the affairs of

90. Lucy Chiu, *The Emerson English Language Empowerment Act: The House's 'Straw Man' Bill: A Plea to the Senate Not to Pass the Emerson English Language Empowerment Act of 1997*, 23 J. LEGIS. 231, 239 (1997).

91. 1 GUAM CODE ANN. § 706 (1996); HAW. REV. STAT. § 1-13 (1993).

92. Resident Commissioner Romero Barceló denounced this fact in his 1989 appearance before the Senate Committee on Energy and Natural Resources. See *1989 Hearings*, *supra* note 89, at 364.

93. For a review of criticisms on the subject, see LÓPEZ LAGUERRE, *supra* note 13, at 7-31, 71-82. According to this author, the most complete study on the subject is still the one commissioned by the Puerto Rico Council on Higher Learning in 1958. See *id.* at 31; ISMAEL RODRÍGUEZ BOU, *ESTUDIO DEL SISTEMA EDUCATIVO DE PUERTO RICO* (1960).

The Puerto Rico Department of Education recently published an indictment of the policies of past administrations, in the course of arguing in support of its new proposal to foster bilingualism. See DEPARTMENT OF EDUCATION, *supra* note 65, at 6-9. Two studies cited in that report, critical of methods on teaching English in Puerto Rico's public schools, are J. Rodríguez, *A Case Study of an Exemplary District English Supervisor in Puerto Rico* (1977) (unpublished dissertation, Pennsylvania State University) (on file with the author), and N. Lladó-Torres, *Puerto Rican Student Attitudes Toward English as a Second Language*, 8(4) J. EDUC. RES. Q. 92 (1984).

Additionally, the Department's own statistics show that by March 1997, 5400 out of 9300 English teachers were not properly certified, as well as that only 19% of students from third to twelfth grade reached "competency" level in English. See Carmen Millán, *Rezago Lingüístico*, EL NUEVO DÍA, Mar. 10, 1997, at 8.

Puerto Rican society,<sup>94</sup> there may be a deeper factor at work. For very many Puerto Ricans, English may be a proxy for attempts at political and cultural domination, which began in 1898 and have been resisted ever since.<sup>95</sup>

Even supporters of statehood evince their own version of this trait. According to their leaders, the Spanish language and Puerto Rican culture are non-negotiable. In 1976, the New Progressive Party included that statement on page one of its electoral platform.<sup>96</sup> In 1984, that party approved three resolutions concerning statehood.<sup>97</sup> The second of these resolutions, demanding that Spanish be the official language of any State of Puerto Rico, declared that "Spanish language and culture will not be a matter of negotiation upon [Puerto Rico's] request for admission as the 51st State of the Union" and announced that under statehood "education will still be offered in Spanish, and English will be taught as well as other languages."<sup>98</sup> Statehood leaders have coined a term for their brand of statehood: "*Jibaro* Statehood," alluding to the popular name for the erstwhile Puerto Rican peasant who is today an endangered species.<sup>99</sup>

The most eloquent exponent of the nonnegotiability thesis used to be Resident Commissioner Romero Barceló.<sup>100</sup> In recent years he has toned down this view. That process began in 1989. During his initial appearance before the Senate Committee on Energy and Natural Resources, Mr. Romero proposed that the plebi-

94. See Serrano Geyls & Gorrín Peralta, *supra* note 57, at 55.

95. See BARON, *supra* note 59, at 170 ("Language in Puerto Rico has always been more a political issue than an educational one, tied up with issues of statehood or independence, cultural pluralism and Americanization. With no clear solution to the political problem in sight, observers are tempted to describe the language problem as hopeless."); TRÍAS MONGE, COLONY, *supra* note 18, at 86 ("The Americanization policy was not working. Puerto Ricans were as resistant to learning English as most of the American governors were to learning Spanish."); see also BARON, *supra* note 59, at 197; LÓPEZ LAGUERRE, *supra* note 13, at 87-88.

96. See 1 REECE B. BOTHWELL GONZALEZ, PUERTO RICO: CIEN AÑOS DE LUCHA POLÍTICA 1293 (1979).

97. See Laurence H. Tribe, Memorandum of Law Re: NPP Statehood Resolutions 20 (Oct. 12, 1984) (co-authored with the law firm of Covington & Burling) (on file with the author).

98. *Id.*

99. Governor Luis Ferré coined this term. See LUIS A. FERRÉ, EL PROPÓSITO HUMANO 50, 61-62 (1972); see also 4 REECE B. BOTHWELL GONZALEZ, PUERTO RICO: CIEN AÑOS DE LUCHA POLÍTICA 472-80 (1979) [hereinafter 4 BOTHWELL GONZALEZ]. The underlying idea was not new. It had been elaborated by other pro-statehood ideologues in the 1930s and 1940s. See EDGARDO MELÉNDEZ, PUERTO RICO'S STATEHOOD MOVEMENT 75-76, 130 (1988).

100. See CARLOS ROMERO BARCELÓ, LA ESTADIDAD ES PARA LOS POBRES 13 (1976); Carlos Romero Barceló, *Puerto Rico, U.S.A.: The Case for Statehood*, 59 FOREIGN AFF. 60, 64, 65, 69, 72, 78 (1980).

scite bill guarantee that Spanish would be an official language of a State of Puerto Rico, as well as that English would not be imposed on that State.<sup>101</sup> Thereafter, however, he acquiesced to the view that the plebiscite bill not address the question of language.<sup>102</sup> Since that time, the statehood movement has not requested that Congress provide any written assurance concerning the role of Spanish in a State of Puerto Rico. In fact, during consideration of House Bill 856, Mr. Romero opposed an amendment that would have made Spanish the official language of Puerto Rico, arguing—incorrectly—that persons currently have the right to have “their business with [the Puerto Rican] government transacted in either Spanish or English.”<sup>103</sup> Additionally, Mr. Romero has consistently downplayed the linguistic and cultural differences between Puerto Rico and the United States.<sup>104</sup> Finally, he recently abandoned all attempts to defend another long-standing claim of the statehood movement: the right of a State of Puerto Rico to retain after statehood the international Olympic personality that Puerto Rico currently enjoys.<sup>105</sup>

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101. See *1989 Hearings*, *supra* note 89, at 364-72.

102. See MELÉNDEZ, *supra* note 33, at 270-71.

103. 144 CONG. REC. H803 (daily ed. Mar. 4, 1998).

104. See *supra* note 83; see also *1989 Hearings*, *supra* note 89, at 141, 368.

105. During the House debate on H.R. 856, Mr. Romero rose in opposition to an amendment offered by Mr. Gutiérrez that would have allowed a State of Puerto Rico to retain its Olympic personality. After claiming that such a decision would be in the hands of the International Olympic Committee, which could decide to continue recognizing Puerto Rico, Mr. Romero went on to argue that even if that did not occur, statehood was of paramount importance:

However, whether or not we participate in the Olympic games every 4 years for 2 weeks cannot be put in the same table of consideration as the economic welfare of the people of Puerto Rico and the political equality of the people of Puerto Rico; the right to vote, the right to representation and the right to participate in a democratic system. We believe in democracy.

We cannot put that aside in order to participate in the games every 4 years for 2 weeks. That is not in the same table of consideration.

144 CONG. REC. H830 (daily ed. Mar. 4, 1998). He had sounded that same note on national television on the eve of the House debate. Appearing in the CNN program *Crossfire* on the evening of March 2, 1998, co-host Pat Buchanan asked Mr. Romero: “Are you willing to give up your Olympic team, the Spanish language?” *Crossfire*, Transcript no. 98030200V20 (CNN television broadcast, Mar. 2, 1998). He responded:

For equality, let us vote on that. For equality, for equal participation, for equal rights, for the right to vote and the right to representation, you cannot put us at the same status. You can't put it at the same level. At the same, participation in the Olympic Games every four years for two weeks is not on the same level with the right to vote and the right to participate.

*Id.* Mr. Romero subsequently asserted that statehood would not mean having to give up the Spanish language, but did not make that argument extensive to Olympic participation. See *id.*

Governor Rosselló also espoused the nonnegotiability rhetoric.<sup>106</sup> He soon followed Mr. Romero in toning down that rhetoric. In a speech on April 8, 1991, Dr. Rosselló suggested that "the term 'jíbaro statehood' should be put aside in future status discussions."<sup>107</sup> One week after that statement, he explained his reasoning: "statehood is the same for all states; there is no such thing as a different statehood and, therefore, what has been termed *jíbaro* statehood is simply classic statehood with some individual elements that a state has."<sup>108</sup>

Similarly, former pro-statehood Senate President Roberto Rexach Benítez stated in 1993:

Our Spanish language has never been in danger; better yet, as a consequence of the development of our educational system during the last ninety years, it is of higher quality and richness than the one we spoke at the beginning of the century. I assure you that in Puerto Rico we will continue speaking Spanish for centuries and centuries.

Our culture is irreducible; non-renounceable. The problem is different. During these last years the government of Mr. Hernández Colón has tried to put obstacles on the road to statehood. To legislate Spanish as the only official language was a gesture of rejection toward Washington, it was a pro-independence fit.

I believe that it is useless to legislate on language because it is clear that Puerto Rico has a different culture from the rest of the United States. But that is not a problem for us to resolve; it is a problem for the Americans themselves to resolve.

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For a consideration and rejection of the statehood leaders' claim that a State of Puerto Rico could retain its Olympic franchise, see Raúl Serrano Geyls & Carlos Gorrín Peralta, *Puerto Rico y la Estadidad: Problemas Constitucionales*, 41 REV. COL. AB. P.R. 1 (1980). Professors Serrano Geyls and Gorrín Peralta cogently argue that not only is it improbable that the International Olympic Committee would approve such a course of action, but that Congress would have to amend the federal statute that grants the United States Olympic Committee exclusive jurisdiction over all matters pertaining to participation of the United States in the Olympic and Pan-American Games. *See id.* For the current version of that statute, see Amateur Sports Act of 1978, Pub. L. 95-606, 92 Stat. 3045 (codified as 36 U.S.C. §§ 371-396 (1988)).

That amendment was precisely what Mr. Gutiérrez proposed and Mr. Romero opposed. The amendment would have read: "Notwithstanding the Amateur Sports Act of 1978, Puerto Rico retains its separate Olympic Committee and ability to compete under its own flag and national anthem in international athletic competitions, even against the United States." 144 CONG. REC. H829 (daily ed. Mar. 4, 1998).

106. *See, e.g.*, Pedro J. Rosselló, *Ponencia del Dr. Pedro J. Rosselló*, in CARMELO DELGADO CINTRÓN, *EL DEBATE LEGISLATIVO SOBRE LAS LEYES DEL IDIOMA EN PUERTO RICO 395-96* (1994) ("Spanish is not negotiable under any circumstance or political change.") (author's translation).

107. MELÉNDEZ, *supra* note 33, at 276 n.26 (author's translation).

108. *Id.*

It is they who must decide whether in the political community of the United States there is room for a state that is different culturally and linguistically.<sup>109</sup>

I fully agree with Senator Rexach Benítez that Puerto Rican statehood would pose a serious problem for the United States, but only *if* there is certainty that Puerto Rico will, after statehood, retain forever its separate linguistic and cultural identity. I have more reservations than he appears to have concerning the latter hypothesis.

## II. Gazing at the Crystal Ball: The "Official" Status of English Under Statehood

A long-standing debate in Puerto Rico centers on the role that English would play under statehood, if Puerto Rico were ever admitted as a state of the United States. Several factors have figured prominently in that debate: the opinions of pro-statehood Puerto Ricans; the requirements of International Law; and the views of members of Congress. Let me briefly consider each of these factors.

### A. *English and Puerto Rican Statehood: The Views of Pro-Statehood Puerto Ricans*

As just stated, among supporters of statehood, the prevailing view is that joining the Union will not have a significant impact on the current use of Spanish as *the* language of government, instruction and common understanding in Puerto Rico. The leaders of the statehood movement have claimed for decades that statehood will not affect Puerto Rico's culture, language or way of life.<sup>110</sup> That view deserves critical attention, lest any voter—let alone hundreds of thousands of them—be deceived by it, were it to prove unjustified. That view also deserves the attention of the United States electorate and of its representatives in Congress, lest they be deemed to have embraced it tacitly through their silence.

### B. *Statehood and the Requirements of International Law*

The two latest Congressional efforts to steer a solution to the Puerto Rican status question—those of 1989-1991 and 1996-1998—have recognized Puerto Rico's right to self-determination under international law.<sup>111</sup> That is a welcome development. For too long

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109. *Delgado Cintrón*, *supra* note 35, at 42 (author's translation).

110. *See supra* notes 96-109.

111. *See* S. 712, 101st Cong. (1990), as preliminarily approved by the Senate



the United States claimed that the Puerto Rican question was a domestic affair, off-limits to the world community.<sup>112</sup>

Under any reasonable definition, Puerto Rico is a nation, with a separate culture, a distinct personality and a characteristic language.<sup>113</sup> That is precisely why United Nations' Resolutions

Committee on Energy and Natural Resources on September 6, 1990, S. REP NO. 101-120 (1990), (providing in section 1(1): "[T]he United States of America recognizes the principle of self-determination and other applicable principles of international law with respect to Puerto Rico."); see also H.R. 856, 105th Cong. (1998). This latter bill refers to this subject several times: (1) it mentions in section 2(6) the international legal standards for the attainment of self-government, as set in United Nations General Assembly Resolution 1541 (XV), U.N. GAOR, Supp. No. 16, at 29, U.N. Doc. A/4684 (1960); (2) it recognizes in sections 2(8)-(9) that the United States has never formally consulted Puerto Rico regarding its ultimate political status; and (3) it announces in section 3(a) the federal commitment to encourage attainment of a permanent political status by the Puerto Rican people.

112. See TRÍAS MONGE, COLONY, *supra* note 18, at 136-40. A collection of resolutions on Puerto Rico by the United Nations Decolonization Committee is found in 2 José Julián Alvarez González, *Puerto Rico, in CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES* 203-33 (Albert P. Blaustein ed., 1991) [hereinafter 2 Alvarez González, *Puerto Rico*]. For other views on that process, see LOIDA FIGUEROA, EL CASO DE PUERTO RICO A NIVEL INTERNACIONAL (1979); CARMEN GAUTIER MAYORAL & MARÍA DEL PILAR ARGÜELLES, PUERTO RICO Y LA ONU (1978); José Axtmayer, *Non-Self-Governing Territories and the Constitutive Process of the United Nations: A General Analysis and the Case Study of Puerto Rico*, 45 REV. JUR. U.P.R. 211 (1976); Humberto García Muñiz, *Puerto Rico and the United States: The United Nations Role 1953-1975*, 53 REV. JUR. U.P.R. 1 (1984); Carlos Rivera Lugo, *Puerto Rico ante la ONU (1976-1983): Autodeterminación y Transferencia de Poderes*, 53 REV. JUR. U.P.R. 267 (1984).

113. See José Julián Alvarez González, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans*, 27 HARV. J. LEGIS. 309, 313 n.14 (1990) [hereinafter Alvarez González, *Empire*] citing F. HINSLEY, NATIONALISM AND THE INTERNATIONAL LEGAL SYSTEM 22 (1973) (nationality means "that sense or sentiment of being a nation ethnically, culturally or linguistically which undoubtedly can exist before the political loyalty is nationalized"); Patrica McGarvey-Rosendahl, *A New Approach to Dual Nationality*, 8 HOUS. J. INT'L L. 305, 305-06 (1986) ("[N]ationality refers to the bonds an individual has with those with whom he shares a common heritage, because nations can exist without sovereignty."); see also Lisa Napoli, *The Puerto Rican Independentistas: Combatants in the Fight for Self-Determination and the Right to Prisoner of War Status*, 4 CARDOZO J. INT'L & COMP. L. 131, 144 (1996) ("Puerto Rico has a racial, religious, linguistic, and territorial identity distinguishable from that of the metropole.").

At least two sitting Justices of the Supreme Court of Puerto Rico have argued recently that Puerto Rico is a nation. See *De Paz Lisk v. Aponte Roque*, 124 D.P.R. 472, 507 (1989) (Negrón García, J., dissenting); *Ramírez de Ferrer v. Mari Brás*, 97 J.T.S. 134, 208 (Hernández Denton, J., concurring).

On the other hand, while persuasively arguing that the Quebec situation is not comparable to that of Hispanic communities throughout the 50 States, a recent article unwittingly, but powerfully underscores the parallelism between the cases of Quebec and Puerto Rico. See Deborah E. Richardson, *Recent Development. The Quebec Independence Vote and its Implications for English Language Legislation*, 26 GA. J. INT'L & COMP. L. 521 (1997).

French-Canadians were not immigrants, but were a founding race, guaranteed equal status from the beginning. Immigrants to the United States, on the other hand, expect to assimilate into American culture and accept

1514 (XV)<sup>114</sup> and 1541 (XV)<sup>115</sup> apply to the Puerto Rican people in the first place.<sup>116</sup> According to the President of the Puerto Rican Independence Party, the principal pro-independence political party in Puerto Rico:

#### PUERTO RICO IS A NATION

Puerto Rico's heart is not American. It is Puerto Rican. The national sentiment of Puerto Ricans is entirely devoted to our *patria*, as we call our homeland in Spanish, our language. We are Puerto Ricans in the same way that Mexicans are Mexicans and Japanese are Japanese. For us, "we the people" means we Puerto Ricans. Only through the distorted prism of Coca-colonization would any observer confuse U.S. cultural influence in Puerto Rico with inclusion in the melting pot that has kept the United States *e pluribus unum*. Puerto Ricans

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that knowledge of English is an economic necessity. Furthermore, Hispanics in the United States lack the cohesiveness to pose a serious secessionist threat, whereas the French of Quebec share a cultural, political and linguistic history which ultimately gave rise to their secessionist vote.

*Id.* at 534; see *infra* notes 321-357 and accompanying text.

114. U.N. GAOR, Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); see 2 Alvarez González, *Puerto Rico*, *supra* note 112, at 191-92. Resolution 1514 (XV), entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples," declares that colonialism is a denial of fundamental human rights, an act contrary to the Charter of the United Nations; recognizes that all peoples have the right to self-determination and independence; calls for the end to all repressive measures against dependent peoples and for respect for their territorial integrity; and urges that immediate steps be taken to transfer all powers to the peoples of all territories which have not yet attained independence. See *id.*

115. G.A. Res 1514 (XV), *supra* note 111; see 2 Alvarez González, *Puerto Rico*, *supra* note 112, at 193-96. Resolution 1541 (XV) establishes a set of principles to determine whether member States must, pursuant to article 73(e) of the Charter, transmit certain information concerning non self-governing territories under their administration. That obligation ceases whenever a territory attains one of three political conditions which reflect a full measure of self-government. See *infra* notes 121-126 and accompanying text.

116. For obvious reasons, those resolutions are not applicable to nation-states, which have attained a full measure of self-government, but to the *peoples* of inchoate nation-states, which have not.

A recognition by Congress of the international law of self-determination, as expressed in Resolutions 1514 and 1541 (XV), and its assumption of obligations under such resolutions, as S. 712 and H.R. 856 would have entailed, would moot the much discussed question concerning whether General Assembly resolutions are international law or merely "recommendations" by international bodies. See *Sei Fujii v. State*, 242 P.2d 617, 619-22 (Cal. 1952) (holding that UN charter provisions did not supersede domestic legislation); see also *Dispute between Texaco Overseas Petroleum Company/California Asiatic Oil Company and the Government of the Libyan Arab Republic*, 17 INT. LEG. MAT. 1 at ¶¶ 83-91 (1978), partially reproduced in HENRY J. STEINER ET AL., *TRANSNATIONAL LEGAL PROBLEMS - MATERIALS AND TEXT* 491-96 (4th ed. 1994). In any event, as the 1977 *Texaco v. Libya* arbitral award recognizes, *id.* at 87, the general acceptance of certain General Assembly resolutions may signify that such resolutions embody customary international law. That is precisely the case of Resolutions 1514 and 1541 (XV), as the International Court of Justice proclaimed in 1975. See generally *Western Sahara Advisory Opinion*, 1975 I.C.J. 12.

are U.S. citizens, but they are not Americans. Although Puerto Rico is not a politically independent nation, it is no less distinguishable from the United States than the non-independent Palestinian nation is from Israel.<sup>117</sup>

Resident Commissioner Romero recently conceded on the floor of the House that Puerto Rico may be a nation from a sociological, but not from a legal standpoint.<sup>118</sup> That was a telling admission. The concept of nationality is cultural and sociological.<sup>119</sup>

117. Rubén Berríos Martínez, *Puerto Rico's Decolonization*, 76 FOREIGN AFF. NOV./DEC. 1997, at 102-03.

118. His complete statement also deserves a full quote:

MR. ROMERO-BARCELÓ: Mr. Chairman, we have been hearing about the nation of Puerto Rico, and once again I repeat, Puerto Rico in geopolitical terms is not a nation. One might consider Puerto Rico a nation in *sociological* terms, but not in geopolitical position.

We are a *community*. What the gentleman from Illinois and the gentlewoman from New York are trying to do here is trying to confuse the issue by saying Puerto Rico is a nation, a different nation; therefore we have to treat it differently from what we treat all the other U.S. citizens. But the issue before us is clear. The issue before us is, are we going to allow self-determination or not to the U.S. citizens in Puerto Rico.

144 CONG. REC. H829 (daily ed. Mar. 4, 1998) (emphasis added).

Mr. Romero's concept of "community" is curious. No other "community" in the United States has an international legal right to self-determination, except, perhaps, the original inhabitants of the several states and territories. See, e.g., Catherine J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199 (1992); Lisa Cami Oshiro, *Recognizing Na Kanaka Maoli's Right to Self-Determination*, 25 N.M. L. REV. 65, 79 (1995) ("Although the United States has invoked the principle of self-determination many times in pursuit of its own goals . . . the United States has a poor history of allowing peoples within its territories to invoke the principle against itself."); Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, 16 YALE J. INT'L L. 127, 156 (1991) ("The proliferation of domestic and international declarations, the publication of various studies, the creation of international bodies dealing exclusively with indigenous issues, and the attention given by states to indigenous concerns are all evidence of the crystallization of a norm protecting indigenous rights.")

For a suggestion of several other parallelisms between the situation of Puerto Rico and that of Native Americans, see Alvarez González, *Empire*, *supra* note 113, at 313 n.14. Another such parallelism concerns the subject of language. The movement to educate Native Americans exclusively in English, see for example, Michael DiChiara, *A Modern Day Myth: The Necessity of English as the Official Language*, 17 B.C. THIRD WORLD L.J. 101, 103 (1997), roughly coincided with instruction in English in Puerto Rican public schools. See *supra* note 57.

For a consideration of the right of self-determination of another relevant community, native Hawaiians, see S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 314-19 (1994) (addressing the United States' annexation of Hawaii); William H. Rodgers, Jr., *The Sense of Justice and the Justice of Sense: Native Hawaiian Sovereignty and the Second "Trial of the Century"*, 71 WASH. L. REV. 379, 379-81 (1996) (addressing the struggle for sovereignty by native Hawaiian people).

119. See RAFAEL GARZARO, DICCIONARIO DE POLÍTICA 245 (1977) ("Nationality is a psycho-sociological category.") (author's translation); see also BENEDICT AN-

Its legal relevance ensues when law ascribes some consequence to that concept. And that is precisely what the international law of self-determination does.

To recognize that what is at stake is the right of self-determination under International Law has serious repercussions. The Young bill,<sup>120</sup> recognizes that the relevant principles of International Law are found in United Nations General Assembly Resolution 1541 (XV).<sup>121</sup> One of the three solutions to a colonial problem which that resolution accepts is integration into another nation-state.<sup>122</sup> But that Resolution also requires that integration take place without any distinction or discrimination concerning fundamental rights,<sup>123</sup> and only after the subject territory has

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DERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM 26 (1991) ("The idea of a sociological organism moving calendrically through homogeneous, empty time is a precise analogue of the idea of the nation, which also is conceived as a solid community moving steadily down (or up) history."); ELIE KEDOURIE, NATIONALISM 62-68 (1966) ("[P]eople who speak an original language are nations, and . . . nations must speak an original language."); HANS KOHN, THE IDEA OF NATIONALISM: A STUDY OF ITS ORIGINS AND BACKGROUND 10-13 (1944) ("Nationalism is first and foremost a state of mind, an act of consciousness."); LOUIS L. SNYDER, THE DYNAMICS OF NATIONALISM 2 (1964) ("Nationalism is a condition of mind, feeling, or sentiment of a group of people living in a well defined geographical area, speaking a common language, possessing a literature in which the aspirations of the nation have been expressed, being attached to common traditions, and, in some cases, having a common religion."); Carlton J.H. Hayes, *Nationalism: Historical Development*, in 11 ENCYCLOPEDIA OF THE SOCIAL SCIENCES 240 (Edwin R.A. Seligman & Alvin Johnson eds., 1937) (describing a nationality as cultural group of people who speak a common language or closely related dialects and who possess a community of historical traditions, including religious, territorial, political, military, economic, artistic, and intellectual).

Mr. Gutiérrez also brought this message to the House of Representatives in the March 4, 1998 session:

I want people to understand. It did not happen in Alaska and it did not happen in Hawaii and it did not happen in Texas. Why can we bring up all these issues, and it happened in Puerto Rico, of language and culture? And the resident commissioner said it was not geopolitical. Okay. But he said it was sociological. That is pretty incredible. That is an admission here. Sociological nationality. Let us examine what that means. That means it is a separate and distinct people.

144 CONG. REC. H830 (daily ed. Mar. 4, 1998).

120. H.R. 856, 105th Cong. (1998).

121. *See id.*, § 2(6), citing G.A. Res. 1541 (XV), *supra* note 111.

122. *See* G.A. Res 1541 (XV), *supra* note 111, at Principles VI(c), VIII & IX. The other internationally accepted solutions are full independence and free association to another nation-state. *See id.* at Principles VI(a) & (b); 2 Alvarez González, *Puerto Rico*, *supra* note 112, at 194-95.

123. *See* G.A. 1541 (XV), *supra* note 111, at Principle VIII. And the Charter of the United Nations denounces discrimination on the basis of language at least four times. *See* U.N. CHARTER arts. 1(3), 13(b), 55(c) and 76(c). Other sources of international law that protect linguistic rights are article 2 of the Universal Declaration of Human Rights of 1948, G.A. Res. 217, U.N. GAOR, 3d Sess. (1948), article 2(2) of the International Covenant on Economic, Social and Cultural Rights of 1966,

“attained an advanced stage of self-government,”<sup>124</sup> and after its people act in an “informed and democratic process,”<sup>125</sup> “with full knowledge of the change in their status.”<sup>126</sup>

*C. Statehood, International Law and Congress: An Exercise in Avoidance*

The statehood option, as framed in the two recent Congressional processes concerning the status of Puerto Rico, does not comply with the principles of International Law to which Congress has adhered. The 1989-1991 process did not comply with those principles by studied silence; the 1996-1998 process, by insufficient specificity.

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993 U.N.T.S. 3 (1966), and articles 2(1), 14, 24(1), 26, and 27 of the International Covenant on Civil and Political Rights of 1966, 999 U.N.T.S. 171 (1966). See generally Ramsey Clark, *A Legal Opinion on International Law, Language and the Future of French Speaking Canada*, in CARMELO DELGADO CINTRÓN, *EL DEBATE LEGISLATIVO SOBRE LAS LEYES DEL IDIOMA EN PUERTO RICO* 193-204 (1994); Joseph P. Gromacki, *The Protection of Language Rights in International Human Rights Law: A Proposed Draft Declaration of Linguistic Rights*, 32 VA. J. INT'L L. 515 (1992).

While dealing with the case of Quebec, former Attorney General Clark had this to say regarding Puerto Rico:

Remember Puerto Rico which, though dominated by the United States for nearly a century, saturated with its culture and products, taught in its English language schools for generations, has defied foreign political, economic and cultural intervention and revived its cultural heritage, its Spanish language and its own rich literature, art and music. Among the reasons for this success must be the vitality of its people, its remote island location, its affirmative legislation to protect the Spanish language and its intense psychological commitment shared throughout Latin America to its own identity in the shadow of its giant northern neighbor.

Clark, *supra*, at 201-02.

124. G.A. 1541 (XV), *supra* note 111, at Principle IX(a).

125. *Id.*

126. *Id.* at Principle IX(b).

The full text of Principle IX, concerning integration as a measure of self-government, reads:

Integration should have come about in the following circumstances:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;

(b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.

*Id.* at Principle IX.

### 1. The 1989-1991 Process: The Vice of Silence

At the inception of the 1989-1991 process, statehood advocates requested that the plebiscite bill expressly acknowledge that Spanish would be an official language of a State of Puerto Rico.<sup>127</sup> The then Chairman of the Senate Committee on Energy and Natural Resources,<sup>128</sup> Senator J. Bennett Johnston,<sup>129</sup> rejected that proposal, claiming that it was better to "just be silent on the question, just leave it out altogether."<sup>130</sup> On such an important issue for the overwhelming majority of Puerto Ricans, however, silence is unacceptable. Mr. Johnston argued that insistence on posing the language issue could lead federal legislators to conclude that Puerto Rico is too distinct and separate to join the Union.<sup>131</sup> In this he was surely right, which is precisely why silence on that issue, rather than golden, would be fraudulent.<sup>132</sup>

The language issue was clearly one of the main factors which derailed that first process.<sup>133</sup> After initial approval of Senate Bill 712 in the Senate Committee on Energy and Natural Resources, the Senate Finance Committee conducted its own set of hearings which revealed widespread preoccupation with the economic aspects of the bill, particularly as concerned the transition to statehood.<sup>134</sup> Ultimately, the plebiscite proposal did not survive the mark-up in the Senate Committee on Energy and Natural Resources.

127. See S. 712, 101st Cong., tit. II, § 17 (1989). That request complied with the command of the 1984 resolutions of the pro-statehood New Progressive Party. See *supra* note 98 and accompanying text.

128. That committee is the Senate committee with primary jurisdiction over Puerto Rican affairs, since it is the successor to the former Committee on Interior and Insular Affairs. See Alvarez González, *Empire*, *supra* note 113, at 310-11 n.3.

129. Mr. Johnston, a Democrat, was the senior Senator from Louisiana until he chose not to run again in 1992. In late 1996 he became a lobbyist for the statehood cause. See Leonor Mulero, *De Cabildero Johnston*, EL NUEVO DÍA, Mar. 7, 1997, at 18 [hereinafter Mulero, *Johnston*]; Leonor Mulero, *Líder la Isla en Gastos de Cabildero en el Congreso*, EL NUEVO DÍA, Apr. 8, 1997, at 12; Leonor Mulero, *Millonario el Cabildero por la Estadidad*, EL NUEVO DÍA, Oct. 29, 1997, at 17; Magdalys Rodríguez, *Paga Bien la Experiencia*, EL NUEVO DÍA, Apr. 19, 1997, at 7; Ms. Wanda Rubianes, then Director of the Puerto Rico Administration for Federal Affairs (PRAFA), confirmed that Johnston & Associates, Mr. Johnston's firm, was then receiving a monthly fee of \$20,000 for its services. See Mulero, *Johnston*, *supra*.

130. *1989 Hearings*, *supra* note 89, at 370.

131. See *id.* at 371. For Mr. Johnston's further views concerning this subject, see *id.* at 364-72; 388-92; 779-80.

132. See José Julián Alvarez González, *Don't Gamble with Puerto Rico's Vernacular*, SAN JUAN STAR, July 14, 1989, at 14 [hereinafter, Alvarez González, *Vernacular*].

133. See MELÉNDEZ, *supra* note 33, at 274.

134. See *Puerto Rico's Political Status: Hearings on S. 712 Before the Senate Committee on Finance*, 101st Cong. (1989).

sources itself.<sup>135</sup>

This turn of events was due to the retirement in 1990 of the Committee's ranking minority member, Senator James McClure (R-ID). His replacement, Senator Malcolm Wallop (R-WY), proved to be an outspoken foe of Senate Bill 244, the modified successor bill to Senate Bill 712,<sup>136</sup> particularly because of his opposition to Puerto Rican statehood.<sup>137</sup> As Professor Edgardo Meléndez convincingly argues, it was opposition to statehood, particularly because of the linguistic and cultural issues which killed the 1989-1991 Senate process.<sup>138</sup> It was after that defeat that Puerto Rican statehood leaders began to tone down the *jíbaro* statehood rhetoric.<sup>139</sup>

## 2. The 1996-1998 Process: The Vice of Imprecision

In the 1996-1998 process, key members forced the House to address the language issue. The main player was Representative Gerald Solomon (R-NY), Chairman of the Rules Committee and a prime supporter of the official English movement. In 1996 Mr. Solomon had required, as the price that the Young Bill would need to pay to sail through his committee, that it include a provision making English the language of instruction in the public school system of a State of Puerto Rico. Resident Commissioner Romero opposed this condition and prevailed upon Representative Young to withdraw the bill from consideration.<sup>140</sup> In 1998, Mr. Solomon agreed to let the bill go to the floor, but required an open debate where he and others could present amendments on language and

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135. See Bill McAllister, *Puerto Rico Referendum Killed*, WASH. POST, Feb. 28, 1991, at A6; Harry Turner, *Plebiscite Bill Shot Down*, SAN JUAN STAR, Feb. 28, 1991, at 1.

136. See S. 244, 102d Cong. (1991).

137. See *supra* note 135; see also *Statehood Foes Surface: Outcome Uncertain for P.R. Plebiscite Bill*, SAN JUAN STAR, Feb. 21, 1991, at 1. See generally MELÉNDEZ, *supra* note 33, at 261-62.

138. See MELÉNDEZ, *supra* note 33, at 274 (quoting statements of Sens. Wallop, Nickles (R-OK) and Conrad (D-ND)); see also 2 JUAN M. GARCÍA PASSALACQUA & CARLOS RIVERA LUGO, *PUERTO RICO Y LOS ESTADOS UNIDOS: EL PROCESO DE CONSULTA Y NEGOCIACIÓN DE 1989 Y 1990* at 281-90, 379 (1991); Rafael Hernández Colón, *Reflexiones sobre la Autodeterminación Puertorriqueña (1989-1991)*, 65 REV. JUR. U.P.R. 431 (1996); McAllister, *supra* note 135.

139. See *supra* notes 101-108 and accompanying text.

140. See Robert Friedman, *Young Finally Shepherds Status Bill to House Floor*, SAN JUAN STAR, Mar. 4, 1998, at 4; Leonor Mulero, *Con Piel de Camaleón el Plan Young*, EL NUEVO DÍA, Mar. 2, 1998, at 5; Leonor Mulero, *Encendida la Discordia Congressional*, EL NUEVO DÍA, Feb. 26, 1998, at 4; Leonor Mulero, *Sin Reversa Pese al Inglés Exclusivo*, EL NUEVO DÍA, Feb. 27, 1998, at 8; Gerardo Reyes, *Possibility of Statehood Stirs Language Debate in Puerto Rico*, MIAMI HERALD, Mar. 4, 1998, at 1A.

on other issues.<sup>141</sup> While his amendment to make English the official language of all government in the United States was defeated, a substitute amendment, sponsored by Representatives Dan Burton (R-IN), Bill McCollum (R-FL), George Miller (D-CA), ranking member of the House Resources Committee, and Mr. Young, was approved instead.<sup>142</sup>

The Young bill, as approved by the House, devotes three provisions to language. First, section 3(b) states that in the event of statehood, "the official English language requirements of the Federal Government shall apply to Puerto Rico in the same manner and to the same extent as throughout the United States."<sup>143</sup> That statement, which would be on the plebiscite ballot,<sup>144</sup> is striking since currently there are no federal official language requirements applicable to state governments.<sup>145</sup> Yet, that statement is quite significant. It is no coincidence that in 1996 this same House approved a bill to make English the official language of the federal government.<sup>146</sup> Some of the key proponents of the Young bill voted in favor of that measure.<sup>147</sup> Second, section 3(c) states that "[i]t is

141. See Friedman, *supra* note 140, at 4; Leonor Mulero, *En Su Hora Decisiva el Plan Young*, EL NUEVO DÍA, Mar. 4, 1998, at 4.

142. See Robert Friedman, *Officials: Teaching in English Not a Mandate*, SAN JUAN STAR, Mar. 7, 1998, at 5; Robert Friedman, *Young Bill Passes 209 to 208*, SAN JUAN STAR, Mar. 5, 1998, at 5; Leonor Mulero, *Por Virazón la Victoria*, EL NUEVO DÍA, Mar. 5, 1998, at 4.

143. H.R. 856, 105th Cong. § 3(b) (1998).

144. See *id.* § 4(a)(C)(7). The statement on the ballot on this subject would be: "Official English language requirements of the Federal Government apply in Puerto Rico to the same extent as Federal law requires throughout the United States." *Id.*

145. The juridical situation concerning the federal government is not much different:

[N]owhere in the U.S. Constitution is English privileged over other languages, and while a few subsequent federal laws require the use of English for special, limited purposes—air traffic control, product labels, warnings, official notices, service on federal juries, and naturalization of immigrants—no law establishes English as the language of the land.

BARON, *supra* note 59, at 1 (citation omitted).

146. See *The English Language Empowerment Act of 1996*, H.R. 123, 104th Cong. (1996) approved by the House on August 1, 1996 by a vote of 259-156. 142 CONG. REC. H9771-72 (daily ed. Aug. 1, 1996). It was again filed on January 7, 1997, after the Senate did not act in 1996. See H.R. 123, 105th Cong. (1997). See generally Chiu, *supra* note 90.

147. That is the case, for example, of Rep. Young himself, as well as of Reps. Burton and McCollum. All three again cosponsored a similar measure in 1997. See H.R. 123, 104th Cong. (1997). This is the second time that key players in a process geared to the self-determination of Puerto Rico happen to be supporters of the official English campaign. That was also the case with Sens. Johnston and McClure, the main figures behind the 1989-1991 process. See Alvarez González, *Empire*, *supra* note 113, at 347-48 n.157.



in the best interest of the [United States] for Puerto Rico to promote the teaching of English as *the* language of opportunity and empowerment in the United States in order to enable students in public schools to achieve English language proficiency by the age of 10."<sup>148</sup> Lastly, section four requires that in the event of a vote for statehood, the President shall prepare for Congress's approval a transition plan.<sup>149</sup> That plan, the bill states, "*shall . . . include proposals and incentives . . . including teaching in English in public schools [and] promote the use of English by the United States citizens in Puerto Rico in order to ensure . . . efficiency in the conduct and coordination of the official business activities of the Federal and State Governments.*"<sup>150</sup>

It appears that the House is suggesting that Spanish cannot be *the* language of instruction in a State of Puerto Rico,<sup>151</sup> and that efficient coordination requires that Spanish *not* be *the* language of government in Puerto Rico, as it currently is and has been for 500 years. If that is the intent of Congress, it should appear clearly on the ballot in order to comply with International Law and to avoid voter confusion.<sup>152</sup>

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148. H.R. 856 § 3(c) (emphasis added). This promise of a better future through English, however, is under scrutiny:

[R]esearchers are now finding that the large numbers of Hispanics who have become monolingual English speakers are not reaping the promised benefits of assimilation. Their competence in English does not readily translate into increased salaries and greater job opportunities: apparently the discrimination against American Hispanics is deeper than language alone.

BARON, *supra* note 59, at 23; see also *id.* at 194, quoting Joshua Fishman, "English Now": *Its Ghosts, Myths and Dangers*, 74 INT'L J. SOC. LANGUAGE 125, 131 (1988) ("Mastery of English is almost as inoperative with respect to Hispanic social mobility as it is with respect to Black social mobility.").

149. See H.R. 856 § 4(b)(1)(A), (C).

150. *Id.* at § 4(b)(1)(C)(i) & (ii)(I) (emphasis added).

151. A Puerto Rican commentator agrees about the importance of the "in English" provision on public school classes. See Juan M. García Passalacqua, "English Now" Is Key Effect of House Vote, SAN JUAN STAR, Mar. 15, 1998, at V2. He argues—correctly—that this requirement would operate even before statehood, as soon as the transition plan is approved by Congress, after a first vote for statehood. See *id.* Mr. García Passalacqua's column contains references to messages sent to House members by the sponsors of the Burton-McCollum-Miller-Young substitute amendment, as well as to Mr. Burton's remarks on the floor, which stressed that the objective was to make English the language of instruction in Puerto Rican public schools long before statehood is granted. See *id.*

152. Controversy over the meaning of this language arose immediately. See *id.* (quoting statements denying the literal thrust of the "in English" provision); see also Burton Add-on Stirs English-Only Controversy, SAN JUAN STAR, Mar. 11, 1998, at 6; Friedman, *supra* note 142, at 5.

### III. Language Requirements and the Federal Constitution

The Constitution of the United States is silent concerning a language of government, either federal or state.<sup>153</sup> It is undeniable, however, that English is the *de facto* national language of the United States, as stated in several court decisions,<sup>154</sup> and as claimed by Franklin Delano Roosevelt, while venting his frustration in 1937 over the lack of success of English in Puerto Rico.<sup>155</sup> In the last two decades a movement has been afloat, both at the federal and state levels, to formally make English the official language of government throughout the United States. At the federal level, various constitutional amendments and statutes have been proposed to either make English the language of the federal government, or to proclaim its official character both for the federal and state governments. Such efforts began in 1981 and have not abated, although none of the constitutional amendment proposals has yet been approved by any Congressional committee.<sup>156</sup>

It has been suggested that the official English campaign will never succeed at the federal level.<sup>157</sup> I do not find any evidence that such movement is dying; quite the contrary seems to be the

153. See BARON, *supra* note 59, at 1.

154. See, e.g., Meyer v. Nebraska, 262 U.S. 390, 401 (1923); *Frontera v. Sindell*, 522 F.2d 1215, 1220 (6th Cir. 1975).

155. See 6 THE PUBLIC PAPERS OF FRANKLIN D. ROOSEVELT 160-61 (1941); see also Baron, *supra* note 59, at 177 ("[T]he English language continues to function as the language of the laws, the courts, the schools, and the business community in the United States."); Arnold Leibowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME LAW. 7, 50 (1969) ("[The] implicit premise in American law is that English is the official language of the United States.").

156. Concerning proposed constitutional amendments, see for example, H.R.J. Res. 109, 104th Cong. (1995); H.R.J. Res. 171, 103d Cong. (1993); H.R.J. Res. 81, 102d Cong. (1991); H.R.J. Res. 81, 101st Cong. (1989); S.J. Res. 13, 100th Cong., (1987); H.R.J. Res. 96, 99th Cong. (1985); S.J. Res. 20, 99th Cong. (1985); H.R.J. Res. 169, 98th Cong. (1983); S.J. Res. 167, 98th Cong. (1983); S.J. Res. 72, 97th Cong. (1981).

Typical of these proposed amendments is H.R.J. Res. 37, 105th Cong. (1997), introduced by Rep. Doolittle on February 4, 1997. It would provide:

Section 1. The English language shall be the official language of the United States. As the official language, the English language shall be used for all public acts including every order, resolution, vote or election, and for all records and judicial proceedings of the Government of the United States and the governments of the several States.

Section 2. The Congress and the States shall enforce this article by appropriate legislation.

*Id.*

Concerning proposed statutes, see *supra* note 146 and accompanying text.

157. See, e.g., BILL PIATT, ¿ONLY ENGLISH? LAW AND LANGUAGE POLICY IN THE UNITED STATES 28-29 (1990); BARON, *supra* note 59, at 191.

case, as even opponents of that movement admit.<sup>158</sup> The rapid increase in popular support for a *federal* official language law is illustrated by two National Election Studies in 1990 and 1992.<sup>159</sup> Persons polled were asked: "Do you favor a law making English the official language of the United States, meaning government business would be conducted in English only, or do you oppose such a law?"<sup>160</sup> Responses in the affirmative were 54.4% in 1990 and 64.5% only two years later.<sup>161</sup>

On the other hand, the success of the official English drive at the state level has been swift and dramatic. In 1981, only two states—Nebraska (1920) and Illinois (1923)—had official language laws.<sup>162</sup> By 1998, English was an official language of at least twenty-two states: Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Mississippi, Montana, Nebraska, New Hampshire, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Virginia and Wyoming.<sup>163</sup> Other states are weighing similar measures,<sup>164</sup> while

158. See, e.g., Michele Arington, *English-Only Laws and Direct Legislation: The Battle in the States over Language Minority Rights*, 7 J.L. & POL. 325, 325-29 (1991); DiChiara, *supra* note 118, at 101 ("Recently, the campaign to make English the official language of the United States (U.S.) has been gaining momentum."); Rachel F. Moran, *Irritation and Intrigue: The Intricacies of Language Rights and Language Policy*, 85 NW. U. L. REV. 790, 791 (1991) (discussing success of English-only movements at the state and local level); Michael A. T. Pagni, *The Constitutionality of English-Only Provisions in the Public Employee Speech Arena: An Examination of Yñiguez v. Arizonans for Official English*, 24 HASTINGS CONST. L.Q. 247, 248-49 (1996); Richardson, *supra* note 113, at 524.

159. See TATALOVICH, *supra* note 6, at 178-80.

160. *Id.*

161. See *id.*

162. See Arington, *supra* note 158, at 325-26 & n.7. Those two laws were a product of the nativist era following World War I. See TATALOVICH, *supra* note 6, at 33-62 (Nebraska) and 65-69 (Illinois).

163. See ALA. CONST. amend. 509; ARIZ. CONST. art. XXVIII, §§ 1-4; ARK. CODE ANN. § 1-4-117 (Michie 1996). The governor who signed this statute was Bill Clinton. See TATALOVICH, *supra* note 6, at 222. In the 1992 Presidential campaign he claimed that he should have vetoed it, but that it was passed with a veto-proof majority. See *id.* As Tatalovich rejoins, that is not a particularly principled stand. See *id.*; CAL. CONST. art. III, § 6; COLO. CONST. art. II, § 30a; FLA. CONST. art. II, § 9; GA. CODE ANN. § 50-3-100 (1998); HAW. CONST. art. XV, § 4; 5 ILL. COMP. STAT. 460/20 (West 1993); IND. CODE § 1-2-10-1 (Michie 1998); KY. REV. STAT. ANN. § 2.013 (Michie 1996); MISS. CODE ANN. § 3-3-31 (1991); MONT. CODE ANN. § 1-1-510 (1997); NEB. CONST. art. I, § 27; N.H. REV. STAT. ANN. § 3-C:1 (Supp. 1998); N.C. GEN. STAT. § 145-12 (1996); N.D. CENT. CODE § 54-02-13 (1989); S.C. CODE ANN. § 1-1-696 (Law Co-op. Supp. 1998); S.D. CODIFIED LAWS §§ 1-27-20 to 1-27-26 (Michie Supp. 1999); TENN. CODE ANN. § 4-1-404 (1998); VA. CODE ANN. § 7.1-42 (Michie 1998); WYO. STAT. ANN. § 8-6-101 (Michie 1997). Some commentators include Louisiana as a twenty-third state. See, e.g., Chiu, *supra* note 90, at 239 (citing LA. REV. STAT. ANN. § 1:52 (West 1987)). That is inexact. That statute is not a general declaration of the official status of English, but is limited to govern-

still others have English language requisites for certain public functions.<sup>165</sup>

Moreover, while academics have been accused of dealing exhaustively with matters of no practical significance,<sup>166</sup> the fact that thousands of pages have been published in the last decade alone on the alleged unconstitutionality of official English proposals, both at the federal and state levels,<sup>167</sup> better reflects another

ment advertisements: "It is sufficient in all the parishes of the state to publish advertisements, judicial or otherwise, notices, and publications required by law, in the English language only." *Id.* Other analogous Louisiana statutes are found in LA. REV. STAT. ANN. §§ 43:201-03 (West Supp. 1999), § 43:204 (West 1982), § 47:2181 (West Supp. 1999).

164. According to a 1996 student note, 12 states had similar bills then pending in the legislature. See Pagni, *supra* note 158, at 248 & n.4.

165. At least 15 additional states, although lacking an official English language statute, require English for certain governmental transactions. See ALASKA STAT. § 21.09.310 (Michie 1998) (English translations of documents of alien insurers); CONN. GEN. STAT. ANN. § 36b-18 (West Supp. 1998) (English translations for registrations of securities); DEL. CODE ANN. tit. 18, § 6210 (Supp. 1998) (all documents of fraternal benefit societies must be filed in English); IOWA CODE ANN. §§ 49.90, 490A.120 (West Supp. 1999) (all documents of limited liability companies must be filed in English); MICH. COMP. LAWS ANN. §§ 457.62, 457.683 (West 1989) (documents of French-language fraternal societies and alien insurers must be filed in English); *id.* § 730.404 (West 1993) (jurors must speak English); MINN. STAT. § 331A.02 (1998) (public notices must be published in English language newspapers or in English in grandfathered foreign language newspapers); *id.* § 546.44 (1998) (English translation of court testimony); N.J. STAT. ANN. § 26:8-40.10 (West 1996) (English translation of foreign birth records); *id.* §§ 35:1-2 to 1-2.2 (official advertisements must be published in English language newspapers); N.M. STAT. ANN. §§ 72-16-4, 72-16-14, 72-17-4, 72-17-14, 72-19-4, 72-19-14 (Michie 1997), §§ 74-10-4, 74-10-22 (Michie 1993) (certain official advertisements must be published in English language newspapers); N.Y. UNCONSOL. LAW § 5711-q (McKinney 1979) (policemen must speak English); OR. REV. STAT. § 726.280 (1998) (all entries in the register of pawnbrokers shall be made in the English language); R.I. GEN. LAWS § 17-11-12 (1996) (election officials shall be able to read the Constitution of the state in the English language); TEX. ELEC. CODE ANN § 61.031 (West 1986) (election officials must communicate in English, except when the voter cannot); W. VA. CODE § 31A-8F-9(a)(2) (1996) (foreign banks must file English translations of its charter); WIS. STAT. ANN. § 7.30(2)(c) (West Supp. 1998) (election officials shall be able to read and write English).

166. See generally Kenneth Lasson, *Scholarship Amok: Excesses in the Pursuit of Truth and Tenure*, 103 HARV. L. REV. 926 (1990); see also J. M. Balkin & Sanford Levinson, *How to Win Cities and Influence People*, 71 CHI.-KENT L. REV. 843, 855 (1996) (offering a tongue-in-cheek piece of advice for would-be writers of law review articles: "Never confuse what's important in the world outside law schools with what's important in law reviews."); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1825-26 (1997) (telling the story of academics holding symposia to discuss the correct characterization and political significance of a recently unearthed old document which is obviously—for everyone else—a recipe for fried chicken).

167. The number of books, law review articles and newspaper columns opposing the official English thrust, both at the state and federal levels, is impressive. The following list, limited to this decade and omitting newspaper columns, is simply illustrative: BARON, *supra* note 59; JAMES CRAWFORD, HOLD YOUR TONGUE:

charge also leveled at academics: that we take legal stances against measures which we feel have a good chance of enact-

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BILINGUALISM AND THE POLITICS OF ENGLISH ONLY (1992); CARL GUTIÉRREZ-JONES, *RETHINKING THE BORDERLANDS: BETWEEN CHICANO CULTURE AND LEGAL DISCOURSE* (1995); PIATT, *supra* note 157; TATALOVICH, *supra* note 6; Mark L. Adams, *Fear of Foreigners: Nativism and Workplace Language Restrictions*, 74 OR. L. REV. 849 (1995); Arington, *supra* note 158; Laura A. Cordero, *Constitutional Limitations on Official English Declarations*, 20 N.M. L. REV. 17 (1990); DiChiara, *supra* note 118; Daniel J. Garfield, *Don't Box Me In: The Unconstitutionality of Amendment 2 and English-Only Amendments*, 89 NW. U. L. REV. 690 (1995); Donna M. Greenspan, *Florida's Official English Amendment*, 18 NOVA L. REV. 891 (1994); José Roberto Juárez, Jr., *The American Tradition of Language Rights: The Forgotten Right to Government in a "Known Tongue,"* 13 LAW & INEQ. J. 443 (1995); John J. Louizos, *¿Qué, Ya No Hablan Inglés en este País?: A Look at the Constitutionality of English Only Provisions Under the Free Speech Clause of the First Amendment*, 3 RACE & ETHNIC ANCESTRY L. DIG. 14 (1997); Frank M. Lowrey, IV, *Through the Looking Glass: Linguistic Separatism and National Unity*, 41 EMORY L.J. 223 (1992); Lori A. McMullen & Charlene R. Lynde, *The "Official English" Movement and the Demise of Diversity: The Elimination of Federal Judicial and Statutory Minority Language Rights*, 32 LAND & WATER L. REV. 789 (1997); Alfredo Mirande, *En la Tierra del Ciego, El Tuerto Es Rey (In the Land of the Blind, the One Eyed Person Is King): Bilingualism as a Disability*, 26 N.M. L. REV. 75 (1996); Moran, *supra* note 158; Yxta Maya Murray, *The Latino-American Crisis of Citizenship*, 31 U.C. DAVIS L. REV. 503, 546-59, 582-89 (1998); Wendy Olson, *The Shame of Spanish: Cultural Bias in English First Legislation*, 11 CHICANO-LATINO L. REV. 1 (1991); Pagni, *supra* note 158; Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992) [hereinafter Perea, *Demography*]; Juan F. Perea, *English-Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. MICH. J.L. REFORM 265 (1990); Juan F. Perea, *Hernández v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1 (1992); Juan F. Perea, *Los Olvidados: On the Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995) [hereinafter Perea, *Los Olvidados*]; Hiram Puig-Lugo, *Freedom to Speak One Language: Free Speech and the English Language Amendment*, 11 CHICANO-LATINO L. REV. 35 (1991); Richardson, *supra* note 113; Karla C. Robertson, *Out of Many, One: Fundamental Rights, Diversity, and Arizona's English-Only Law*, 74 DENV. U. L. REV. 311 (1996); Leila Sadat Wexler, *Official English, Nationalism and Linguistic Terror: A French Lesson*, 71 WASH. L. REV. 285 (1996); Martina Susan Kiyomi Serrano, *Rethinking Race for Strict Scrutiny Purposes: Yñiguez and the Racialization of English Only*, 19 U. HAW. L. REV. 221 (1997); Stewart, *English-Only Laws, Informational Interests, and the Meaning of the First Amendment in a Pluralistic Society*, 31 HARV. C.R.-C.L. L. REV. 539 (1995); Andre Solé, *Official English: A Socratic Dialogue/Law and Economics Analysis*, 45 FLA. L. REV. 803 (1993); Yvonne A. Tamayo, *"Official Language" Legislation: Literal Silencing/Silenciando la Lengua*, 13 HARV. BLACKLETTER L.J. 107 (1997); Aileen María Ugalde, *"No Se Habla Español": English-Only Rules in the Workplace*, 44 U. MIAMI L. REV. 1209 (1990); Cecilia Wong, *Language Is Speech: The Illegitimacy of Official English After Yñiguez v. Arizonans for Official English*, 30 U.C. DAVIS L. REV. 277 (1996).

A few articles have recently appeared rejecting the alleged unconstitutionality of official English statutes. See, e.g., Chris Boehler, *Yñiguez v. Arizonans for Official English: The Struggle to Make English the Official Language*, 34 HOUS. L. REV. 1637 (1998); Michael W. Valente, *One Nation Divisible by Language: An Analysis of Official English Laws in the Wake of Yñiguez v. Arizonans for Official English*, 8 SETON HALL CONST. L.J. 205 (1997).

ment.<sup>168</sup>

I find no solace in the various assurances on the unconstitutionality of any federal law which attempted to force the Puerto Rican government to function in English. Illustrative of such arguments are: (1) Professor Paul Gewirtz's statement on behalf of the Puerto Rico statehood movement before the Senate Committee on Energy and Natural Resources during the 1989-1991 process,<sup>169</sup> (2) a recent memorandum by the Congressional Research Service's Senior Specialist on United States Constitutional Law, Mr. Johnny H. Killian,<sup>170</sup> and (3) a two-volume study authored by a group of pro-statehood Puerto Rican professionals, which is in fact a brief for that cause.<sup>171</sup>

These sources make various claims: (1) that a law conditioning Puerto Rican statehood upon an English language requirement would violate the equal footing doctrine; (2) that no independent federal powers exist to justify a general federal official language statute applicable to states; (3) that such a federal statute would violate the principle of state sovereignty found in the Tenth Amendment; and (4) that such a federal statute would violate individual rights to equal protection of the laws and of freedom of expression.<sup>172</sup> Yet, from the Puerto Rican perspective such claims do not seem so obviously right as to provide an adequate guarantee.<sup>173</sup> Many such arguments must rely on current, unsta-

168. See, e.g., Lasson, *supra* note 166, at 933-34 (collecting accusations that view law review articles as pieces of advocacy). Lest it be thought that such a charge fits this Article, I hasten to plead *nolo contendere*. I did not set out to write a detached, neutral piece on language and political integration of nations; that would have been both impossible and contrived, since the nation whose future is at stake is my own.

169. See 1989 Hearings, *supra* note 89, at 339-40. For my two brief replies to Professor Gewirtz, see Alvarez González, *Empire*, *supra* note 113, at 347-48 n.157, and Alvarez González, *Vernacular*, *supra* note 132, at 14.

170. See CONGRESSIONAL RESEARCH SERVICE, POWER OF CONGRESS TO IMPOSE USE OF ENGLISH AS CONDITION ON ADMISSION OF PUERTO RICO AS A STATE (Oct. 20, 1997) [hereinafter CRS LANGUAGE MEMORANDUM]. For my rejoinder to Mr. Killian's 1989 memorandum on the United States citizenship of Puerto Ricans, see Alvarez González, *Empire*, *supra* note 113, replying to CONGRESSIONAL RESEARCH SERVICE, DISCRETION OF CONGRESS RESPECTING CITIZENSHIP STATUS OF PUERTO RICANS (Mar. 9, 1989). Mr. Killian's latest memorandum is much better researched and argued than his first. Still, it has serious omissions, drawbacks and limitations, which I discuss throughout this part of this Article.

171. See GRUPO DE INVESTIGADORES PUERTORRIQUEÑOS, BREAKTHROUGH FROM COLONIALISM: AN INTERDISCIPLINARY STUDY OF STATEHOOD 1379-1478 (1984) [hereinafter BREAKTHROUGH].

172. See 1989 Hearings, *supra* note 89, at 339-46; CRS LANGUAGE MEMORANDUM, *supra* note 170, at 8-23 (expressly refusing to address individual rights claims); BREAKTHROUGH, *supra* note 171, at 1147, 1456-78.

173. For a rejection of all such claims, see Tribe, *supra* note 97, at 28-46.

ble 5-4 Supreme Court majorities.<sup>174</sup> No people should rest their future on such constitutional quicksand.

Let me briefly sketch the problems that those constitutional arguments present.

### A. Federalism-Based Arguments

Arguments based on different notions of federalism have been offered against a federal statute that would force a State of Puerto Rico, in particular, or all of the States, in general, to function in English. Such arguments are respectable, but not necessarily irresistible.

#### 1. The Equal Footing Doctrine

The judicially-created equal footing doctrine holds that in a state admission process Congress may not impose conditions that would place the new state "upon a plane of inequality with its sister States in the Union."<sup>175</sup> Some have argued that an official English language condition to statehood would violate this doctrine, as expounded in *Coyle v. Oklahoma*,<sup>176</sup> a 1911 decision concerning the location of the capital of Oklahoma.<sup>177</sup> That argument is not as compelling as its proponents appear to believe.

There is a significant difference between the site of a state capital and the language a state government uses to communicate with the general public.<sup>178</sup> The decision of where to locate the capital of a state is an eminently local matter, which should not be of any concern to the federal government or to the other states. In which language a state government communicates with its citizens, as well as with citizens of other states and with legally admitted aliens, however, does involve important issues of federalism since it may affect interstate commerce, the effective right of interstate travel and the privileges and immunities of United States citizenship.<sup>179</sup>

Moreover, the equal footing argument necessarily supposes

174. See *infra* notes 195-203 and accompanying text.

175. *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911) (invalidating Congressional requirement that the capital of Oklahoma remain at Guthrie until 1913).

176. *Id.*

177. See 1989 Hearings, *supra* note 89, at 339-40; CRS LANGUAGE MEMORANDUM, *supra* note 170, at 4-11; BREAKTHROUGH, *supra* note 171, at 1445-55; see also Ediberto Román, *Empire Forgotten: The United States's Colonization of Puerto Rico*, 42 VILL. L. REV. 1119, 1173, 1176 (1997).

178. See Tribe, *supra* note 97, at 26.

179. See *id.* at 26-30.

that all Congressional precedents on imposition of English language requirements to new states were unconstitutional.<sup>180</sup> However, at least five United States Supreme Court Justices have stressed the relevance and importance of delving into early history to interpret the Constitution.<sup>181</sup> That history contains four examples of such language conditions: Louisiana, very early, in 1811,<sup>182</sup> Oklahoma in 1906,<sup>183</sup> and New Mexico and Arizona in 1910,<sup>184</sup> all states with a substantial number of non-English speakers.<sup>185</sup> Was that not Congress's way of guaranteeing equal footing to *all* states? It seems unlikely that the Supreme Court would intervene under the judge-made equal footing doctrine to invalidate whatever decision Congress made on government language in Puerto Rico in a statehood admission process.<sup>186</sup>

Of course, the argument of advocates of statehood for Puerto Rico concerning the alleged unconstitutionality of an English-language condition to statehood may ultimately backfire. Faced with a none too veiled threat that such a condition would be as-

180. See 1989 Hearings, *supra* note 89, at 346-48; CRS LANGUAGE MEMORANDUM, *supra* note 170, at 8-11; BREAKTHROUGH, *supra* note 171, at 1147.

181. See, e.g., *Printz v. United States*, 521 U.S. 98, 103 (1997) (opinion of the Court written by Scalia, J., in which Rehnquist, C.J., O'Connor, J., Kennedy, J., and Thomas, J., joined): "[E]arly congressional enactments provide contemporaneous and weighty evidence of the Constitution's meaning. Indeed, such contemporaneous legislative exposition of the Constitution, acquiesced in for a long term of years, fixes the construction to be given its provisions." (quotations and citations omitted).

182. See Louisiana Enabling Act, ch. 21 § 3, 2 Stat. 641, 642 (1811) (after the admission of Louisiana, "the laws which such state may pass shall be promulgated, and its records of every description shall be preserved, and its judicial and legislative written proceedings conducted, in the language in which the laws and the judicial and legislative written proceedings of the United States are now published and conducted").

183. See Oklahoma Enabling Act, ch. 3335 § 3, 34 Stat. 267, 271 (1906) (Oklahoma public schools "shall always be conducted in English").

184. See Joint Enabling Act for New Mexico and Arizona, ch. 310 §§ 2, 20, 36 Stat. 557, 559, 570 (1910) (public schools "shall always be conducted in English"; "ability to read, write, speak, and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter shall be a necessary qualification for all state officers and members of the state legislature"). On the history of the New Mexico and Arizona drives to statehood, see BARON, *supra* note 59, at 94-106.

185. For a discussion of these four precedents from different perspectives, see 1989 Hearings, *supra* note 89, at 346-48; CRS LANGUAGE MEMORANDUM, *supra* note 170, at 8-11; BREAKTHROUGH, *supra* note 171, at 1147; Tribe, *supra* note 98, at 24-26; TRÍAS MONGE, COLONY, *supra* note 18, at 185.

In none of these four territories, however, was the role of English as insignificant as it is in Puerto Rico. In New Mexico, for example, on the eve of statehood the court system operated in English, albeit with frequent need for translators. See BARON, *supra* note 59, at 99.

186. *Accord Serrano Geysls & Gorrín Peralta*, *supra* note 57, at 75-79.



sailed in the courts *after* statehood,<sup>187</sup> Congress could decide to follow well-settled historical practice and announce that it will not consider granting statehood to Puerto Rico until there is an English-speaking majority on the Island.<sup>188</sup>

Speaking specifically of the case of Puerto Rico, Senator Daniel Patrick Moynihan has written:

Congressional resistance [to a plebiscite which includes statehood as an alternative] arises largely from the question of whether the island should have the option to choose statehood whilst retaining Spanish as an official language. In two centuries, the United States Congress has admitted thirty-seven new states to the original union of thirteen. But always a stated or unstated condition was that English be the official language. Louisiana, for example, might and did retain the *Code Napoléon*, but trials were to be in English. This position may seem arbitrary, but it is defensible. *E pluribus unum*.<sup>189</sup>

## 2. The Interstate Commerce Clause and State Sovereignty

Even some of those who rely on *Coyle* admit that a condition to statehood would be valid and enforceable if Congress has independent powers over the subject.<sup>190</sup> In fact, to hold that Congress

187. See Georgie Anne Geyer, *Puerto Rico Status Act Leaves U.S. Open to Bilingualism*, CHI. TRIB., Feb. 27, 1998, at 25 (quoting Eric Pelletier, legislative aide to Rep. Gerald Solomon, who claimed that statehood leaders made that threat).

188. See Serrano Geysl & Gorrín Peralta, *supra* note 57, at 75. As another author points out:

The United States has generally withheld statehood from territories until they contained English-speaking majorities. Louisiana is the one striking exception. It became a state in 1812 despite its French-speaking majority, and although the constitution of 1812 does not protect the French language in the state, the subsequent constitutional history of Louisiana reveals alternative periods of protection, toleration, and prohibition of the language. Statehood was delayed for Michigan, originally settled by the French. State boundaries in the American Southwest were drawn to ensure English-speaking majorities for Colorado, Nevada, and Arizona. And statehood was withheld from New Mexico for over sixty years because of nativist opposition in Congress to the territory's Mexican American majority population and to the prevalence of Spanish in New Mexican life. Spanish was both restricted and supported by legislation in the state. Hawaiian statehood was affected by a similar racial and linguistic prejudice, which could preclude statehood for Puerto Rico as well.

BARON, *supra* note 59, at xv-xvi (citations omitted); see also HEINZ KLOSS, THE AMERICAN BILINGUAL TRADITION 128 (1977), (showing that Congress only consented to New Mexico statehood once there was a majority of English speakers in that territory, after a statehood drive that lasted some sixty years).

189. DANIEL PATRICK MOYNIHAN, PANDAEMONIUM: ETHNICITY IN INTERNATIONAL POLITICS 73-74 (1993).

190. See 1989 Hearings, *supra* note 89, at 326-27, 342-46; CRS LANGUAGE MEMORANDUM, *supra* note 170, at 8-11 (recognizing that *Coyle*, 221 U.S. at 568, validated conditions "intended to operate *in futuro*, which are within the scope of the conceded powers of Congress over the subject"). For a similar argument, by

lacks any such powers over government language would read into the Constitution the sovereign right of every state to impose upon its sisters a multilingual confederation. Citizens of the United States need not be motivated by nativist or racist impulses<sup>191</sup> in order to oppose such a result,<sup>192</sup> which certainly was not contemplated by the founders of the United States republic.<sup>193</sup>

The commerce clause and state sovereignty arguments are two sides of the same coin. If the commerce clause does not authorize Congress to enact a language of government applicable to all states, its enactment would infringe state sovereignty.<sup>194</sup> However, the state of the law in this area is highly unstable. As

one who does believe that Congress has the power to impose language requirements, see Tribe, *supra* note 98, at 27.

191. That is the usual indictment of the official English campaign. See, e.g., TATALOVICH, *supra* note 6, at 32, 243-57. But see *id.* at 187, 189, 252. See also PIATT, *supra* note 56, at 20-23; McMullen & Lynde, *supra* note 167, at 824; Perea, *Demography and Distrust*, *supra* note 167, at 361-62.

192. See BARON, *supra* note 59, at xiv, xviii, 5-7, 22-23, 28, 31, 41 (accepting that, for some, the monolingual tenet may be based upon a philosophical notion of the connection between language and nationality, instead of on a racist impulse). Among the promoters of the idea of English as an official language of the United States one can find Benjamin Franklin, John Adams, Thomas Jefferson, John Quincy Adams, John Marshall, Theodore Roosevelt, Oliver Wendell Holmes and Franklin D. Roosevelt. See *id.* at 2, 28-29, 64-67, 134, 148-49, 169; see also Lowrey, *supra* note 167, at 292:

While racist and xenophobic impulses may explain a certain portion of the official English constituency, the broad and diverse support for such measures suggests that some concern for the political and social unity of the nation is reflected in the recent surge of official English declarations. Clearly the official English movement attracts the support of those who favor the exclusion of ethnic and racial minorities from American society for bigoted and prejudicial reasons. The overwhelming approval by a diverse mix of constituencies in those states officializing English by constitutional amendment, however, suggests that these measures are supported by many who are not motivated by mere racial or ethnic prejudice. In each case a large percentage of the votes cast by Democrats and ethnic minorities favored official English declarations.

*Id.*

The approval of state constitutional amendments through referenda has indeed produced lopsided margins in all states, except Arizona. The favorable margins were: 88.5% in Alabama, 73.25% in California, 64% in Colorado and 83.9% in Florida. See TATALOVICH, *supra* note 6, at 101, 122, 158, 182. In Arizona, the amendment passed with only 50.5% of the vote, *id.* at 145, after an especially acrimonious campaign. See *id.* at 131-46. Arizona's amendment, however, was undoubtedly the most restrictive official language law in the United States. See *id.* at 23.

193. See BARON, *supra* note 59, at 191 (pointing out that "[t]he founders were certain that national and linguistic unity went hand in hand and never conceived of the United States as permanently multilingual. They may even have resisted designating an official language because they could not decide on an appropriate name for it, whether American, English, or Federal").

194. See, e.g., Stephen E. Gottlieb, *Does Federalism Matter to its Devotees on the Court*, 23 OHIO N.U. L. REV. 1179, 1180 (1997).

the Congressional Research Service is forced to admit,<sup>195</sup> its argument ultimately rests on the proposition that the collective effect of *Gregory v. Ashcroft*,<sup>196</sup> *New York v. United States*,<sup>197</sup> *United States v. López*<sup>198</sup> and *Printz v. United States*<sup>199</sup> is implicitly to overrule *García v. San Antonio Metropolitan Transit Authority*<sup>200</sup> and *South Carolina v. Baker*.<sup>201</sup> *García*, another 5-4 decision, had overruled *National League of Cities v. Usery*,<sup>202</sup> yet another 5-4 decision, which in turn had overruled *Maryland v. Wirtz*.<sup>203</sup> It seems that this area of Constitutional Law is currently characterized by *stare indecisus*. If Justices, law professors and lawyers cannot make up their minds, it would not seem particularly appropriate to ask more than two million Puerto Rican voters to make such a momentous decision against this background of absolute uncertainty.

This area of Constitutional Law had been very stable from the late 1930s until 1976, when *National League of Cities v. Usery* was decided.<sup>204</sup> And that stability reflected the Supreme Court's utmost reluctance to find internal limits to federal affirmative powers and to find in the Tenth Amendment's concept of state sov-

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195. See CRS LANGUAGE MEMORANDUM, *supra* note 170, at 13-19.

196. 501 U.S. 452 (1991) (holding as a matter of statutory interpretation, to avoid the constitutional issue, that the federal Age Discrimination Act did not preempt a state constitutional provision for mandatory retirement of judges at age 70).

197. 505 U.S. 144 (1992) (invalidating on Tenth Amendment grounds, a provision of a federal law that required states to legislate on the disposal of radioactive waste).

198. 514 U.S. 549 (1995) (denying Congress' power under the commerce clause to make it a federal offense to possess a firearm within a school zone).

199. 521 U.S. 98 (1997) (invalidating a temporary provision of the Brady Gun Control Act which required state and local law enforcement agents to conduct background checks on applicants for gun permits; held on state sovereignty grounds that the federal government may not command state officers to enforce a federal regulatory program).

200. 469 U.S. 528, 531, 555 (1985) (holding valid the application of federal wage and hour laws to a municipal transportation system; rejecting, except for undefined egregious instances, judicial enforcement of Tenth Amendment and holding that protection of state sovereignty should be entrusted to the political system).

201. 485 U.S. 505 (1988) (upholding the imposition of a federal tax on interest from state bonds, but refusing to evaluate the actual operation of the federal political system).

202. 426 U.S. 833, 845 (1976) (holding invalid application of federal wage and hour laws to virtually all state employees, since it was a regulation "directed . . . to the States as States").

203. 392 U.S. 183 (1968) (holding valid federal wage and hour law applicable to non-professional employees of state-run schools and hospitals).

204. See JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 4.8 (5th ed. 1995).

ereignty an external limit on such powers.<sup>205</sup> Under the state of the law that prevailed during that forty-year period, the constitutionality of a federal language law applicable to state governments would have seemed almost certain.<sup>206</sup> And it does not seem at all obvious that such a law would be invalid under the somewhat less deferential judicial standards that exist today.<sup>207</sup> It would not require much effort for Congress "to make formal findings as to the substantial burdens [that a state government functioning in a language other than English would have] on interstate commerce."<sup>208</sup> A Congressional finding that "intercourse and traffic" between citizens of different states<sup>209</sup> would be substantially obstructed by a state court system which functions exclusively in Spanish and by the difficulty of gaining access to laws, legislative materials, and rules and regulations in English, would make it much more difficult for the courts to substitute their judgment for the judgment of Congress on "whether the regulated activity 'substantially affects' interstate commerce."<sup>210</sup> The reasonableness of such a conclusion would even seem to be "visible to the naked eye."<sup>211</sup>

Moreover, it has been suggested that federalism arguments by members of the conservative faction of the Supreme Court cannot be taken at face value; that such arguments often mask other unstated considerations and values which are actually the decisive factors, and which fit a conservative agenda.<sup>212</sup> If that explanation

205. *See id.* at 156.

206. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 559 (1954) ("[T]he Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interests of the states."); *see also* Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977) (arguing that courts should abandon the protection of states from exercises of federal power).

207. *See* Tribe, *supra* note 98, at 30-32 (arguing that Congress would have a rational basis for determining that a uniform national language would remove obstacles to interstate commerce and communication, and citing examples of federal laws that prescribe English language requirements in activities that constitute such commerce).

208. *United States v. López*, 514 U.S. at 562-63 (asserting that such a lack of formal findings makes it more difficult for the courts to defer to a Congressional judgment).

209. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (quoting *Hoke v. United States*, 227 U.S. 308, 320 (1913)).

210. *López*, 514 U.S. at 559.

211. *Id.* at 563 (suggesting the standard applicable in the absence of formal Congressional findings).

212. *See* Gottlieb, *supra* note 194, at 1179 ("[F]ederalism is the specific means necessary to accomplish another principle which is significant for the conservative Justices—but which they are reticent to discuss"), 1181 ("federalism is the depend-

is plausible, as I think it is, then any prediction of the Court's future behavior on an official language law would have to take into account whether the values embodied in such a law are consistent with a conservative agenda. The answer seems obvious.<sup>213</sup>

### 3. Other Congressional Powers

While making the federalism arguments already discussed, the Congressional Research Service—surprisingly—has failed to address the issue of Congress's power under section five of the Fourteenth Amendment<sup>214</sup> or its spending power to create conditional grant programs.<sup>215</sup> Mr. Killian's CRS Memorandum recognizes that "[t]he setting of language policies *per se* is not beyond Congress' reach,"<sup>216</sup> and cites several Congressional actions, anchored on these two federal powers, which have resisted constitutional attack.<sup>217</sup> The CRS, however, does not deal adequately with either of these two potential moorings for a federal language law. Let me briefly address each of them.

#### *a. Section Five of the Fourteenth Amendment*

The CRS asserts that section Five of the Fourteenth Amendment "is particularly preemptive of state powers, in ways that the powers conferred by Article I of the Constitution are not."<sup>218</sup> At

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ent variable in the calculations of the conservative Justices and therefore explains little. It is partly beside the point, partly a rationalization, and partly a means to entirely different ends.") (citation omitted), 1192-93 ("when [United States v. López] and other cases restricting national power under the Commerce Clause for expressed reasons of federalism are compared with cases in which the members of the Court sustain or advance national power over state power, it is not apparent why federalism applies to the first group and not to the second. The Court has simply made too many decisions which restrict important exercises of state power on flimsy grounds. López can hardly stand for the proposition that this Court has been or intends to be a significant defender of state authority.") (citation omitted), 1196 ("[T]he easiest conclusion, quite consistent with the facts, is that federalism is a red herring."); see also *id.* at 1183 & n.24 (citing other commentators who also view the federalism discourse with skepticism).

213. See *id.* at 1191 (stating that race is an area where talk of federalism masks results which conform with other values, such as maintenance of homogeneous communities), 1192 ("Conservative support for homogeneous localism is evident in other areas, supporting localities when they decide in favor of a strong moral code, but overruling localities when they opt for diversity or liberty.") (footnotes omitted).

214. See CRS LANGUAGE MEMORANDUM, *supra* note 170, at 12-13.

215. See *id.* at 12, 24.

216. *Id.* at 12.

217. See *id.* at 12-13, 24.

218. *Id.* at 13. Section five provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend XIV § 5.

that point, when one would expect a thorough analysis of how the "particularly preemptive" section Five is still insufficient to permit Congress to impose an official language requirement, the CRS departs with a puzzling *non sequitur*: "But for purposes of imposing upon the States an English-Only, or an official-English, requirement, it is to the authority under the commerce clause that one must look."<sup>219</sup> Just why Congress's power on this subject must stand or fall on commerce clause analysis, and may not rely on the "particularly preemptive" section five, we are never told.<sup>220</sup>

The fact is that *Katzenbach v. Morgan*<sup>221</sup> held in 1966 that section five enabled Congress to set certain language policies. Congress had banned state English literacy requirements for voting, as applied to persons who completed the sixth grade in Puerto Rico. *Morgan*, however, does not prohibit Congress, acting under section five of the Fourteenth Amendment or under section two of the Fifteenth, from setting uniform English literacy requirements.<sup>222</sup> And it has been argued that Congress may act under this power to establish a national language of government, in order to enforce the privileges and immunities of national citizenship and the right of interstate travel.<sup>223</sup> Thus, an analysis of section five powers may prove crucial in the enactment of a federal language law.

#### *b. Congress's Powers to Create Conditional Grant Programs*

Since 1936 it has been black-letter law that Congress's power

219. CRS LANGUAGE MEMORANDUM, *supra* note 170, at 13.

220. Interestingly, the CRS also failed to deal with that affirmative grant of Congressional power when in 1989 it considered the citizenship status of persons born in Puerto Rico. See Alvarez González, *Empire*, *supra* note 113, at 337-38.

221. 384 U.S. 641 (1966) (holding valid Congressional enfranchisement of persons educated in Spanish in Puerto Rico).

222. That is, at least, as long as the Supreme Court continues to refuse to hold that English literacy requirements violate equal protection. See *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959). Some commentators went beyond this, and argued that Congress, acting under section five, might even dilute Fourteenth Amendment rights. See, e.g., Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 259-60 (1971). That view was apparently rejected in *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress may not resort to section five in order to alter judicial pronouncements concerning the substantive reach of the Fourteenth Amendment).

For the view that *Lassiter* is probably still good law, see Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms and Constitutionalism*, 27 J. LEGAL. STUD. 725, 745-47 (1998).

223. See Tribe, *supra* note 97, at 28-30, 32-39. See generally John E. Nowak, *The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments*, 75 COLUM. L. REV. 1413 (1975).

to spend for the general welfare is an independent power, which "is not limited by the direct grants of legislative power found in the Constitution."<sup>224</sup> Subsequent decisions have interpreted this power broadly and have legitimated Congressionally-imposed conditions with which the states must comply in order to receive federal moneys.<sup>225</sup> The Court has specifically asserted that these conditions do not intrude upon state sovereignty since the states remain free to reject such funding.<sup>226</sup>

The CRS treatment of this issue is even more perfunctory than its treatment of section five of the Fourteenth Amendment. It states:

Briefly, it should be noted that it is likely that Congress has power to condition receipt of federal moneys upon Puerto Rico as a State agreeing to adopt English to the degree Congress chooses . . . . The condition would be imposed after Puerto Rico's admission to the Union, because the spending power is ordinarily contractual, not coercive. That is, since a State may choose to receive or to reject the proffered funds, it may accede to or reject the condition in its discretion. *This approach to the issue raises analytically different questions, which are not dealt with here.*<sup>227</sup>

The question is analytically different only because the CRS chose to limit its analysis to the validity after statehood of conditions imposed before statehood. But the critical question is whether Congress could force Puerto Rico to conduct all or part of its governmental operations and educational system in any language other than Spanish. Whether the imposition occurs before or after statehood is irrelevant from the Puerto Rican perspective. Still, what little the CRS did say concerning the question of spending conditions speaks volumes.

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224. *United States v. Butler*, 297 U.S. 1, 66 (1936). See generally NOWAK & ROTUNDA, *supra* note 204, at § 5.6.

225. See *South Dakota v. Dole*, 483 U.S. 203 (1987); *Oklahoma v. United States Civil Serv. Comm'n*, 330 U.S. 127 (1947); *Helvering v. Davis*, 301 U.S. 619 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

226. See, e.g., *Dole*, 483 U.S. at 213 ("Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action . . . is a valid use of the spending power."); *Bell v. New Jersey*, 461 U.S. 773, 790 (1983) ("Requiring States to honor the obligations assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty. The State chose to participate in the . . . program and, as a condition of receiving the grant, freely gave its assurances that it would abide by [its] conditions."); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'").

227. CRS LANGUAGE MEMORANDUM, *supra* note 170, at 24 (citations omitted; emphasis added).

This question is crucial for Puerto Rico. To cite just one of many examples, the Elementary and Secondary Education Act,<sup>228</sup> the huge federal funding program for public education in the United States, is a conditional grant program.<sup>229</sup> Just one further amendment—on language of instruction—would radically alter a central factor in the preservation of Puerto Rican culture and identity.<sup>230</sup> Of course, a sovereign State of Puerto Rico, unwilling to negotiate its language and culture,<sup>231</sup> theoretically could decide to forego all federal aid, and finance its costly public school system entirely out of its own Treasury. Needless to say, it seems extremely unlikely that such a theoretical possibility could ever become a concrete reality.<sup>232</sup>

### B. Individual Rights

While federalist arguments are exclusively addressed to a federal statute which attempted to impose English as the language of government of a state, or of all states, individual rights arguments are equally applicable to federal and state attempts to legislate a language of government.

#### 1. Equal Protection of the Laws

The typical equal protection arguments against an official English federal statute—that it would eliminate statutory rights

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228. Act of April 11, 1965, Pub. L. 89-10, 79 Stat. 27 (1965).

229. See, e.g., 20 U.S.C. §§ 2721-22 (1994).

230. Other amendments to that program have been proposed already, such as the elimination of its Title VII, which covers bilingual education. For a description of such an amendment, see TATALOVICH, *supra* note 6, at 15-16.

231. See *supra* note 96 and accompanying text.

232. It must be recognized that Puerto Rico has refused to accept conditional federal grants in an area where all States have accepted them. Puerto Rico has refused to increase its legal drinking age from 18 to 21 and, consequently, each year it loses a significant amount of federal funding for highways. See 23 U.S.C. § 158 (1990). While one might view that decision as a commitment to preserve "culture," which could be extended to the public education context, the argument is not convincing for two reasons. First, the refusal to raise the drinking age in Puerto Rico is best explained in electoral, rather than "cultural" terms. Both principal political parties who have governed the Island in the last decade perceive that decision as a poison pill which could signify an electoral defeat for that party who adopts it, particularly in view of the high percentage of young people among the Island's population. See CENSUS, *supra* note 41, at 923 (44.6% of Puerto Rico's population is 24 years old or younger). In other words, the drinking age limit has absolutely no connection to political status preferences, while that connection is more probable concerning language of instruction in public schools. Second, the amount of federal funding involved in the highway context is a pittance, compared to the level of funding that would be at issue under a hypothetical amendment to the Elementary and Secondary Education Act.



already recognized by federal law in important areas, such as voting and education, and that derogation of such rights would unconstitutionally discriminate against Hispanics—have a major, evident flaw. Such arguments presuppose either that Congress may not directly abrogate these statutory rights or that even if abrogated such rights would continue to exist as a *constitutional* matter.<sup>233</sup> It is implausible that absent federal legislation on these subjects the Supreme Court would have ruled that these rights flow directly from the Constitution or that, somehow they now flow from the Constitution once Congress created them.<sup>234</sup>

Most equal protection arguments hinge decisively on the application of some kind of heightened scrutiny. But that would require the Supreme Court to do something that it has consistently refused to do since the days of the Burger Court: to find a new suspect class, in this case one composed of people who speak languages other than English.<sup>235</sup> It is quite revealing that the only

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233. See, e.g., Cordero, *supra* note 167, at 26; Garfield, *supra* note 167, at 694-95; Lowrey, *supra* note 167, at 298; McMullen & Lynde, *supra* note 167, at 811-15; Perea, *Demography*, *supra* note 167, at 356-71; Perea, *Los Olvidados*, *supra* note 167, at 985-91; Puig-Lugo, *supra* note 167, at 47; Robertson, *supra* note 167, at 329-32; Serrano, *supra* note 167, at 258-62; Solé, *supra* note 167, at 818-20; Stewart, *supra* note 167, at 557-58; see also Andrew Averbach, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity?*, 74 B.U. L. REV. 481 (1994); Antonio J. Califa, *Declaring English the Official Language: Prejudice Spoken Here*, 24 HARV. C.R.-C.L. L. REV. 293, 330-46 (1989); Edward M. Chen, *Garcia v. Spun Steak Co.: Speak-English-Only Rules and the Demise of Workplace Pluralism*, 1 ASIAN L.J. 155 (1994); Marc Douglas Francis, *The Constitutional Future of the All-English Ballot*, 16 PAC. L.J. 1029, 1041-45 (1985); "Official English: Federal Limits on Efforts to Curtail Bilingual Services in the States", 100 HARV. L. REV. 1345, 1353-56 (1987).

234. Even a commentator who is sympathetic to cultural and linguistic assertions recognizes that this is not at all probable. See Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 356 (1986). "[None of the decisions] by the Supreme Court suggest that the public schools have a constitutional obligation to provide instruction in students' native languages. Recognition of such a claim would require a major expansion of equal protection doctrine." *Id.* To my knowledge, no one has seriously predicted that the present Supreme Court will undertake "a major expansion of equal protection doctrine." *Id.*

235. See *Language Rights and the Legal Status of English-Only Laws in the Public and Private Sector*, 20 N.C. CENT. L.J. 65, 75 (1992) [hereinafter, *Language Rights*] ("The standard of judicial review under the Equal Protection Clause will continue to be a major issue in the area of language rights. The current interpretation of the equal protection analysis does not recognize language discrimination as a subset of national origin discrimination. Therefore, English-only laws are not deemed suspect."); see also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1567-68 (1990) ("Nor is it clear that language-based classifications, even if [animus is] demonstrated, warrant enhanced scrutiny under current doctrine."); Serrano, *supra* note 167, at 224 ("[u]nless the Court finds grounds for heightened constitutional scrutiny, [a] facially neutral [language law] will be subject to rational basis review"); Kathryn J. Zoglin, *Recognizing a Human Right to*

two Courts of Appeals cases which made that finding were vacated as moot in 1987 and 1989.<sup>236</sup> Moreover, in order to find a constitutional violation under the equal protection component of Fifth Amendment due process,<sup>237</sup> the Court would have to impute to Congress an intent to discriminate against such class.<sup>238</sup> This prospect is even more improbable under the present composition of the Court.<sup>239</sup>

People who speak languages other than English have not fared well in their claims of constitutional or statutory rights to have government communicate with them in their native tongues or to participate in governmental affairs in those tongues. Such arguments have been rejected by both state<sup>240</sup> and federal

*Language in the United States*, 9 B.C. THIRD WORLD L.J. 15, 24 (1989) ("In sum, current U.S. constitutional analysis does not accord strict scrutiny to state action affecting linguistic minorities."). *But see* Serrano, *supra* note 167, at 234-63 (arguing for a definition of "race" that is not biologically-based but rather socially constructed).

236. *See* Gutiérrez v. Municipal Court, 838 F.2d 1031, 1045 (9th Cir. 1988) (issuing preliminary injunction issued under Title VII against employer's English-only rule), *vacated as moot*, 490 U.S. 1016 (1989); Olagues v. Russoniello, 797 F.2d 1511, 1521 (9th Cir. 1986) (finding the investigation of voting fraud directed at registrants who requested bilingual ballots discriminatory on the basis of race and national origin), *vacated*, 484 U.S. 806 (1987), *vacated as moot*, 832 F.2d 131 (9th Cir. 1987).

237. *See* Bolling v. Sharpe, 347 U.S. 497 (1954) (although the equal protection clause is not applicable to the federal government, fifth amendment due process prohibits invidious discrimination).

238. *See, e.g.*, Hernández v. New York, 500 U.S. 352, 359-60 (1991) (Kennedy, J., plurality opinion); Personnel Adm'r. of Mass. v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

239. In essence, the Supreme Court would have to adopt the words of a commentator: "[An official English norm] is an insult to the twenty million people in this country who speak a mother tongue that is not English, and a gratuitous insult at that." Karst, *supra* note 234, at 351. On the difficulty of proving discriminatory intent, particularly in language referenda, see Eule, *supra* note 235, at 1567.

240. *See, e.g.*, Alfonso v. Bd. of Review, 444 A.2d 1075 (N.J.), *cert. denied*, 459 U.S. 806 (1982) (holding that notice of unemployment insurance benefits need not be translated into Spanish); Hernández v. Dept. of Labor, 416 N.E.2d 263 (Ill. 1981) (no requirement of notice in Spanish); Jara v. Municipal Court, 578 P.2d 94 (Cal. 1978) (no constitutional right to an interpreter in a civil case); DaLomba v. Director of the Div. of Employment Sec., 337 N.E.2d 687 (Mass. 1975) (holding non-English speaking immigrant not entitled, under procedural due process, to notice in native tongue on unemployment compensation hearing); Commonwealth v. Olivo, 337 N.E.2d 904, 911 (Mass. 1975) (criminal conviction for violating an eviction notice in English; the court stated: "This is not an officially multilingual country, and notification of official matters in the sole official language of both this nation and this Commonwealth is patently reasonable."); Guerrero v. Carleson, 512 P.2d 833 (Cal. 1973), *cert. denied*, 414 U.S. 1137 (1974) (no right to notice in Spanish of termination of welfare benefits, even where known that recipients did not understand English); Castro v. State, 466 P.2d 244 (Cal. 1970) (no constitu-

courts.<sup>241</sup>

In another equal protection case, in 1991, the Supreme Court sustained a prosecutor's use of peremptory challenges to exclude Hispanic *bilingual* potential jurors after finding no proof of purposeful discrimination.<sup>242</sup> Justice Kennedy's plurality opinion refused to address the question of whether "Spanish-language ability bears a close relation to ethnicity, and . . . as a consequence, it violates the Equal Protection Clause to exercise a peremptory challenge on the ground that a Latino potential juror speaks Spanish."<sup>243</sup> That opinion also stated that "[i]t may well be, for certain ethnic groups and in some communities, that proficiency in a particular language, like skin color, should be treated as a surrogate for race under an equal protection analysis."<sup>244</sup> However, that is an entirely different proposition than that involved in the official English scenario: Whether a classification which discriminates against persons *who are not proficient in English* is based on race or on another suspect or quasi-suspect criterion. All of the

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tional right to a bilingual electoral system).

241. See *Toure v. United States*, 24 F.3d 444 (2d Cir. 1994) (deciding no right to notice in French of administrative seizure; rational basis test used); *García v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993), *cert. denied*, 510 U.S. 1190 (1994) (finding that English-only workplace rules do not violate Title VII of the Civil Rights Act of 1964); *Viález v. New York City Hous. Auth.*, 783 F. Supp. 109 (S.D.N.Y. 1991) (holding that housing documents in English do not discriminate on racial or ethnic basis); *Soberal-Pérez v. Heckler*, 717 F.2d 36 (2d Cir. 1983), *cert. denied*, 466 U.S. 929 (1984) (finding that the Social Security system is under no constitutional or statutory obligation to provide Spanish-language forms to Hispanic applicants; rational basis test used); *Pabón v. MacIntosh*, 546 F. Supp. 1328 (E.D. Pa. 1982) (holding that English-only classes are not a violation of equal protection); *García v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981) (upholding English-only workplace rule); *Guadalupe Org., Inc. v. Tempe Elementary Sch.*, 587 F.2d 1022 (9th Cir. 1978) (no constitutional right to bilingual education); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (finding no equal protection right to civil service examinations in Spanish; since language is not a suspect class, rational basis test applies); *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973) (finding no right to employment notices in Spanish).

*But see* *Yñiguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), *vacated as moot sub nom.*, *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997), discussed *infra*, text beginning with note 271, where at the end of its opinion devoted to freedom of expression the court stated that "the equal protection ramifications of [the Arizona official English provision's] restrictive impact strongly supports our holding, as well." 69 F.3d at 948. For criticisms of the Ninth Circuit's handling of the equal protection issue, which claim that this argument should have been better developed, see *Robertson*, *supra* note 167, at 329-32; *Serrano*, *supra* note 167, at 222, 231-32.

242. See *Hernández v. New York*, 500 U.S. 352 (1991). Although there was no majority opinion, six Justices joined in this holding. See *id.* at 369, 372 (Kennedy, J.), 372 (O'Connor, J.).

243. *Id.* at 360.

244. *Id.* at 371.

Justices in *Hernández* apparently assumed the validity of the federal statute that requires proficiency in *English* to be eligible for jury duty.<sup>245</sup> That official English requirement is the pertinent analogy, and, in the case of Puerto Rico, it excludes more than 75% of its residents from jury duty in the federal court. Thus, a "jury of his peers"<sup>246</sup> in federal proceedings in Puerto Rico has quite a different meaning from that accorded the term throughout the United States. This fact, however, has not moved federal courts to find a constitutional violation.<sup>247</sup>

For all of these reasons, equal protection does not appear to be a particularly propitious argument against language laws.<sup>248</sup> It would be an ironic twist that after refusing to find that residents of Puerto Rico are a suspect class for purposes of their exclusion from certain welfare programs,<sup>249</sup> the Court were to find otherwise concerning their inclusion in a federal statute of general applicability.

## 2. Freedom of Expression

The most recent—and in another sense, the oldest—argument against official English provisions is freedom of expression.<sup>250</sup> That was the main ground on which the Ninth Circuit re-

245. See 28 U.S.C. §§ 1865(b)(2), (3) (1994). Justice Kennedy's plurality opinion expressly cited this statute. See 500 U.S. at 371.

246. *Duncan v. Louisiana*, 391 U.S. 145, 156 (1969).

247. See *United States v. Aponte-Suarez*, 905 F.2d 483, 492 (1st Cir.), *cert. denied*, 498 U.S. 990 (1990) (holding that even if the English-only requirement results "in a smaller pool of eligible jurors and a 'systematic exclusion' in the jury selection process, the overwhelming national interest served by the use of English in a United States court justifies conducting proceedings in the District of Puerto Rico in English and requiring jurors to be proficient in that language."); see also *United States v. Flores-Rivera*, 56 F.3d 319, 326 (1st Cir. 1995); *United States v. Benhumar*, 658 F.2d 14, 19 (1st Cir. 1981), *cert. denied*, 457 U.S. 1117 (1982).

248. For other pessimistic views on equal protection as a barrier against language laws, see *Murray*, *supra* note 167, at 583; *Arington*, *supra* note 158, at 335-37 and *Valente*, *supra* note 167, at 238, 251.

The recent decision of the Supreme Court of Arizona which invalidated that State's official English constitutional amendment on federal constitutional grounds, relied in part on equal protection, asserting that the Arizona provision discriminated on the basis of the exercise of the fundamental right of freedom of expression. See *Ruiz v. Hull*, 957 P.2d 984, 1000-02 (Ariz. 1998), *cert. denied*, 119 S.Ct. 850 (1999), discussed *infra*, text beginning with note 280. This additional ground is meaningless. Whether the Arizona provision violates the federal Constitution will hinge decisively on whether it infringes freedom of speech. If the United States Supreme Court were to hold that it does not, it is inconceivable that the Court would reach a different conclusion via the fundamental rights strand of equal protection analysis. See NOWAK & ROTUNDA, *supra* note 204, at § 14.40 (if the fundamental right itself is not violated, neither is equal protection).

249. See *Califano v. Torres*, 435 U.S. 1 (1978); *Harris v. Rosario*, 446 U.S. 651 (1980).

250. For commentators who have embraced the First Amendment argument see

lied to invalidate the Arizona constitutional provision on official language<sup>251</sup> in the *en banc* 6-5 *Yñiguez* decision which the Supreme Court later vacated on a mootness rationale.<sup>252</sup> It was also the principal basis on which the Supreme Court of Arizona relied to justify its subsequent invalidation of that provision on federal constitutional grounds, a decision which the Supreme Court chose not to review.<sup>253</sup> I will consider each of these decisions separately.

### a. *The Yñiguez Case*

In *Yñiguez* the Ninth Circuit termed the Arizona provision, which orders all state employees to "act in English and no other language"<sup>254</sup> except for what that court considered to be "narrow exceptions,"<sup>255</sup> "by far the most restrictively worded official-

Murray, *supra* note 167, at 584-88; Robertson, *supra* note 167, at 313-16, 326-27; Wexler, *supra* note 167, at 357-69; McMullen & Lynde, *supra* note 167, at 810-11, 815-20; Tamayo, *supra* note 167, at 111-22; Louizos, *supra* note 167, *passim*; see also Arington, *supra* note 158, at 337-39; DiChiara, *supra* note 118, at 113-19; Chiu, *supra* note 90, at 242-46.

251. See ARIZ. CONST. art. XXVIII.

252. See *Yñiguez v. Mofford*, 730 F. Supp. 309 (D. Ariz. 1990), *aff'd sub nom.*, *Yñiguez v. Arizonans for Official English*, 69 F.3d 920 (9th Cir. 1995), *vacated as moot sub nom.*, *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997). The Supreme Court held that the fact that plaintiff *Yñiguez* did not litigate her case as a class action, and voluntarily ceased her state employment in 1990, made the case moot. See 117 S.Ct. at 1059-60, 1071-72. The Court also held that if the case had not become moot, the lower federal courts should have certified the interpretation of the new Arizona constitutional provision in dispute to that state's Supreme Court. See *id.* at 1059, 1061, 1072-75. In view of the extraordinary history of the litigation before the lower courts, the Court further suggested that the case may have become feigned or collusive. See *id.* at 1070-71. Lastly, the Court stated that it expressed "no view on the correct interpretation of Art. XXVIII or on the measure's constitutionality." *Id.* at 1060.

253. See *Ruiz v. Hull*, 957 P.2d 984 (Ariz. 1998), *cert. denied*, 119 S.Ct. 850 (1999).

254. ARIZ. CONST. art. XXVIII, §§ 1(3)(a)(iv), 3(1)(a).

255. 69 F.3d at 931, *citing* ARIZ. CONST. art. XXVIII, §§ 3(2)(a) (when otherwise required by federal law), 3(2)(e) (in order to protect the rights of criminal defendants and victims of crime). The complete list of exceptions, as quoted in an appendix both by the Ninth Circuit, 69 F.3d at 949-50, and by the Supreme Court, 117 S.Ct. at 1075-76, is:

- (a) to assist students who are not proficient in the English language, to the extent necessary to comply with federal law, by giving educational instruction in a language other than English to provide as rapid as possible a transition to English.
- (b) to comply with other federal laws.
- (c) to teach a student a foreign language as a part of a required or voluntary educational curriculum.
- (d) to protect public health or safety.
- (e) to protect the rights of criminal defendants or victims of crime.

ARIZ. CONST. art. XXVIII, § 3(2).

English law to date."<sup>256</sup> The court refused to give that provision a narrow construction, even though the state Attorney General suggested one,<sup>257</sup> and struck it down on its face as unconstitutionally overbroad.<sup>258</sup>

The Ninth Circuit's overbreadth analysis is problematic.<sup>259</sup> In order to reach its 6-5 conclusion, that court had to surmount several hurdles which it did in a rather unconvincing fashion. It

256. Arington, *supra* note 158, at 337.

257. See 69 F.3d at 928-30, citing Op. Atty. Gen. Az. No. I89-009 (1989).

258. See 69 F.3d at 931-48. The majority joined an opinion by Judge Reinhardt. Judge Brunetti, while joining the majority opinion, filed a brief concurring opinion. See *id.* at 950. The dissenters issued three different opinions: one by Judge Fernández, joined by Chief Judge Wallace and Judges Hall and Kleinfeld, see *id.* at 954, one by Chief Judge Wallace, see *id.* at 959, and another by Judge Kozinski, also joined by Judge Kleinfeld. See *id.* at 960. That latter dissent provoked a rare, highly personalistic separate concurrence by Judge Reinhardt, the author of the majority opinion. See *id.* at 952.

Judge Kozinski later explained his stance in *Yñiguez* as influenced by his own life experience:

My approach in *Yñiguez* and *Gutiérrez* was deeply influenced by the ethnic strife and mistrust I saw growing up in Romania between the Romanian-speaking majority and the Hungarian-speaking minority. From this experience, I walked away with the firm conviction that differences in language lead to differences in thinking, which lead to mistrust and hatred and, eventually, to war. This experience convinced me that we are very lucky indeed to share a common language and made me most reluctant to strike down rules that ensure that everyone use that language.

Alex Kozinski, *Teetering on the High Wire*, 68 U. COLO. L. REV. 1217, 1221-22 (1997). The reference to *Gutiérrez* is to *Gutiérrez v. Municipal Court*, 838 F.2d 1031, 1045 (9th Cir. 1988) (issuing preliminary injunction under Title VII against employer's English-only rule), 861 F.2d 1187, 1188 (9th Cir. 1988) (Kozinski, J., dissenting from denial of rehearing en banc), *vacated as moot*, 490 U.S. 1016 (1989), discussed *supra* note 236 and accompanying text.

259. See Bohler, *supra* note 167, at 1651-64 (criticizing both the analysis and the result of *Yñiguez*, arguing that the Arizona provision was not aimed at any communicative impact and should have been sustained as a reasonable restriction of manner); see also Pildes, *supra* note 222, at 744 ("If English-only laws are unconstitutional, it must be because their justification reflects a view of the common good that government cannot endorse. Only after courts reach this conclusion can it make any sense to conclude that such policies violate the 'rights' of public employees.").

Even some who applaud the *Yñiguez* result agree with the assessment in the text. See, e.g., Scott H. Angstreich, Recent Case, *Speaking in Tongues: Whose Rights at Stake*, 19 HARV. J. L. & PUB. POL'Y 634, 635, 642-43 (1995) (criticizing emphasis on employee speech); Pagni, *supra* note 158, at 252, 259-79 (criticizing the use of the speech/conduct dichotomy, arguing that the majority misapplied the overbreadth doctrine and the public employee speech doctrine, and that it never decided on the applicable standard of review); Robertson *supra* note 167, at 325-27 (criticizing emphasis on employee speech and suggesting that the effect on Arizona legislators would have been a better ground).

For non-critical praises of *Yñiguez*, see Wexler, *supra* note 167, at 357-69; Tamayo, *supra* note 167, at 111-22; Louizos, *supra* note 168, *passim*; see also Chiu, *supra* note 90, at 242-46.

first held that choice of language is speech, not conduct or symbolic speech, thus clearing the way for application of the strongest First Amendment standards.<sup>260</sup> For that holding, the court essentially relied on *Cohen v. California*<sup>261</sup> although it was unable to identify a particular content against which the Arizona provision was directed.<sup>262</sup> It would seem reasonable to conclude that there is a crucial difference between regulating specific words that carry a communicative impact—which is what *Cohen* prohibited—and regulating the language to be used, irrespective of the message conveyed.<sup>263</sup> So viewed, the Arizona provision could reasonably be characterized as a manner restriction which is not directed at any particular message and is, therefore, subject to less stringent First Amendment review.<sup>264</sup> Curiously, if the Ninth Circuit was looking for Supreme Court precedents on medium as content, it is surprising that it failed to invoke the “money is speech” holding of *Buckley v. Valeo*.<sup>265</sup> Even that analogy would not be perfect, however, since a political contribution implies an endorsement of the views of its recipient.<sup>266</sup>

Second, the *Yñiguez* majority weakly characterized cases that refused to find a right to government communications in a tongue other than English<sup>267</sup> as standing for the proposition that there is

260. See 69 F.3d at 934-36. However, toward the end of its opinion the court signaled that its conclusion would be the same whether the applicable standard were strict scrutiny or a balancing approach. See *id.* at 947.

261. 403 U.S. 15 (1971) (reversing conviction for “offensive conduct” for wearing a jacket with the message “Fuck the draft”).

262. That criticism was the essence of Chief Judge Wallace’s dissent. See 69 F.3d at 959-60. It was also central to Judge Fernández’s dissent. See *id.* at 957-58.

263. See *Boehler, supra* note 167, at 1656-58; *Valente, supra* note 167, at 222-25.

264. See *Boehler, supra* note 167, at 1658-64 (arguing that under the test of *United States v. O’Brien*, 391 U.S. 367, 377 (1968), as subsequently modified in *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989), the Arizona provision would pass constitutional muster); *Valente, supra* note 167, at 225-27.

265. 424 U.S. 1 (1976). It is conceivable that this omission reflects the severe criticism to which the *Buckley* decision has been subjected. See, e.g., LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 13-27 (2d ed. 1988); J. Skelly Wright, *Politics and the Constitution: Is Money Speech?* 85 *YALE L.J.* 1001 (1976); see also Statement in Support of Overturning *Buckley v. Valeo* (Mar. 4, 1998) (on file with author) (statement by 209 scholars in support of overruling that case).

266. See *Buckley*, 424 U.S. at 15. It could be argued, of course, that by speaking Spanish plaintiff *Yñiguez* was making a statement about herself, her identity and her heritage. That was one of her arguments before the Ninth Circuit. See *Serrano, supra* note 167, at 221 & n.4. But that court refused to base its holding on that argument, and chose to focus on the interests of the recipients of *Yñiguez*’s message, rather than on any independent right of her own to convey a message. See *id.*

267. See *supra* note 241.

no such affirmative right, while characterizing plaintiff Yñiguez's claim as involving a negative right, the right not to be prevented from speaking a foreign language while discharging her governmental duties.<sup>268</sup> Yet, the court's protracted dissertation on the importance of government speech in a non-English language *for its recipients* went a long way toward recognizing the affirmative right that it disclaimed.<sup>269</sup>

Third, while recognizing that government has wider latitude to regulate the activities of its employees, rather than private affairs, the court held that Arizona had gone too far in its attempt to regulate the language used by its employees in discharging their duties.<sup>270</sup> That analysis is flawed because it invokes a line of cases which is inapplicable to the issue in *Yñiguez*.<sup>271</sup> The court relied on what it termed the *Waters/Pickering* line of cases.<sup>272</sup> Those cases generally prevent government from taking action against employees who speak on matters of public concern. But as the Supreme Court later held in *United States v. National Treasury Em-*

268. See 69 F.3d at 936-37. The Court also suggested that it had found in freedom of expression a stronger constitutional mooring, by distinguishing cases which refused to find "affirmative rights" to government communication in other languages as based on equal protection or procedural due process. See *id.* at 937.

269. See *id.* at 940-42. That fact was not lost to one of the six members of the majority. In his concurring opinion, Judge Brunetti recognized that "there may be some tension between the public interest in receiving Yñiguez's public services in Spanish as described by the majority, and our prior cases which hold that there is no right to receive government services in a language other than English," but went on to assert—equally unconvincingly: "[W]e are only considering the *interest* of the public in receiving speech when government employees exercise *their right* to utter such speech, and we do not create an independently enforceable public *right* to receive information in another language." *Id.* at 951. Italics or not, the distinction seems unfounded, since it produces the very result that its author disclaims. For Judge Fernández's reply in dissent, see *id.* at 958.

But see Angstreich, *supra* note 259, at 640 (proposing a right to receive government communications in a native tongue *if* there are government employees who speak that language). That is a very small right, with no corresponding governmental duty.

270. See 69 F.3d at 937-44. The court, in the course of rejecting the narrowing construction by the Arizona Attorney General, had previously engaged in a meaningless distinction between "official acts" of state governmental entities," *id.* at 923, and acts by "all government officials and employees during the performance of government business," *id.* at 929. Judge Fernández's dissent found "no substantial difference between employees and state officials when the officials are performing the business of the state." *Id.* at 954 n.2.

271. See Angstreich, *supra* note 259, at 635, 640; Robertson, *supra* note 167, at 326; Valente, *supra* note 167, at 227-31; see also Judge Fernández's dissent, taking the majority to task for its employee speech analysis; *id.* at 955-56 (listing examples of government regulations of public employees that have been sustained).

272. See 69 F.3d at 938-47 (citing *Waters v. Churchill*, 511 U.S. 661 (1994)); *Pickering v. Bd. of Educ. of Township High Sch. Dist.*, 391 U.S. 563 (1968).



*ployees Union*,<sup>273</sup> the type of employee utterances that particularly deserved protection were "addressed to a public audience, were made outside the workplace, and involv[ing] content largely unrelated to their [g]overnment employment."<sup>274</sup> The *Yñiguez* "speech" did not satisfy any one of these three categories.

Fourth, the court was not particularly persuasive in its attempt to distinguish Supreme Court precedents that accord the government wider latitude to regulate the content of speech when the government itself speaks or subsidizes the speech of others.<sup>275</sup>

Lastly, the Ninth Circuit recognized that since 1973 the Supreme Court has required that overbreadth be "both real and substantial judged in relation to its plainly legitimate sweep"<sup>276</sup> and has stressed that "a law will not be facially invalidated simply because it has some conceivably unconstitutional applications,"<sup>277</sup> but rather that "there must be a substantial number of instances in which the provision will violate the First Amendment."<sup>278</sup> It is questionable, however, whether the *Yñiguez* analysis satisfies that standard.

In his dissent, joined by three other judges, Judge Fernández characterized the issue in *Yñiguez* as follows:

This case, then, presents a confluence of lines of argument. Employees of the State are subject to numerous restrictions upon their freedoms, their actions, and their speech, which the government could not impose upon the general public. The State can, in general, control the content and mode of its own speech, and the general public does not have a constitutional right to have the State provide services in any particular language. In the face of all of that, it is well nigh unintelligible to say that individual officers and employees of the State can perform state business in a language of their own choice, despite the State's direction that they shall use a particular lan-

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273. 513 U.S. 454 (1995).

274. *Id.* at 466.

275. See 69 F.3d at 940 n.24, discussing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 832-34 (1995), and *Rust v. Sullivan*, 500 U.S. 173 (1991). *But see Constitutional Law—First Amendment—Ninth Circuit Invalidates Arizona Constitution's Official English Requirement*, 109 HARV. L. REV. 1827, 1830-32 (1996) (suggesting that *Rust* requires that there be some reasonable nexus between the restriction on employee speech and a permissible governmental program; and arguing that defining the "program" in *Yñiguez* as "fostering a common language" would constitute too high a level of generality).

276. 69 F.3d at 931 (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

277. *Id.* at 932 (citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984)).

278. *Id.* at 932 (citing *New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988)).

guage.<sup>279</sup>

It would seem that only the recognition of a constitutional right to governmental services in the native tongue of non-English speakers would lend coherence to the *Yñiguez* holding. It also would seem that such a development is highly unlikely in the foreseeable future.

b. *Ruiz v. Hull*

In *Ruiz v. Hull*,<sup>280</sup> the Supreme Court of Arizona held that the Arizona language provision is unconstitutional both under federal freedom of expression and equal protection principles. Since the equal protection ground is itself based on freedom of expression,<sup>281</sup> I will limit my analysis to the First Amendment ground.

The Arizona Supreme Court refused to give the state official language provision the limiting construction that the Arizona Attorney General had proposed in *Yñiguez*.<sup>282</sup> The court held that choice of language is speech, and that the Arizona prohibition of government use of any language other than English is too broad.<sup>283</sup> As so interpreted, the court found that it unconstitutionally inhibits the free discussion of governmental affairs by persons not proficient in English and infringes upon their right to petition for redress of grievances.<sup>284</sup> The court also held that the Arizona provision infringed upon the rights of elected officials and public employees to communicate with the public in a language in which both the official or employee and the member of the public are proficient.<sup>285</sup> The court stated that the Arizona provision was not content neutral but that, even if so viewed, it unconstitutionally suppressed too much expression.<sup>286</sup>

In general, the *Ruiz* decision is subject to the same criticism as the Ninth Circuit's *Yñiguez* decision on which the Arizona Supreme Court expressly relied.<sup>287</sup> The *Ruiz* court chose to deal with some of the problems which plagued the *Yñiguez* decision by ignoring them, while reaching the same conclusion. This is the case, for example, with the issues of government speech and govern-

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279. *Id.* at 958 (Fernández, J., dissenting).

280. 957 P.2d 984 (Ariz. 1998), *cert. denied*, 119 S.Ct. 850 (1999).

281. *See supra* note 248.

282. *See* 957 P.2d at 991-94.

283. *See id.* at 996.

284. *See id.* at 996-97.

285. *See id.* at 997-98.

286. *See id.* at 998-1000.

287. *See id.* at 987 n.1 ("[w]e agree with the result and with much of the reasoning of the Ninth Circuit opinion.").

ment control of employee speech. The Court also disclaimed reliance on the overbreadth doctrine<sup>288</sup> while stressing at several points that the vice of the Arizona provision was its overly broad inhibition of speech.<sup>289</sup>

On the other hand, *Ruiz's* discussion of the impact of the Arizona provision on non-English speakers is better than the Ninth Circuit's. Yet, even that discussion is plagued by the same essential incoherence that beset the *Yñiguez* decision: if Arizonans do not have a constitutional right to force the government to communicate with them in their native tongues, their rights of freedom of expression, to participate in public affairs and to petition for redress of grievances ultimately depend on the fortuitous event of finding some government employee who is able and willing to speak that language.

Finally, the *Ruiz* decision itself emphasizes the narrowness of its holding, which should not satisfy any Puerto Rican who claims that language and culture are not negotiable.<sup>290</sup> Thus, *Ruiz* stresses "that nothing in this opinion compels any Arizona governmental entity to provide any service in a language other than English,"<sup>291</sup> that it does "not hold, or even suggest, that any governmental entity in Arizona has a constitutional obligation to provide services in languages other than English, except, of course, to the extent required by federal law."<sup>292</sup> It also assumes the validity and propriety of the Arizona Enabling Act requirement that Arizona public schools "shall always be conducted in English," and that all state officers and legislators shall have the "ability to read, write, speak and understand the English language sufficiently well to conduct the duties of the office without the aid of an interpreter."<sup>293</sup> It additionally argues that if the Arizona provision were similar to less restrictive provisions in other states, such as Wyoming, Montana, or California, "it might well have passed constitutional muster."<sup>294</sup> It furthermore assumes for purposes of the discussion "that the government may, under certain circumstances

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288. *See id.* at 999 n.11.

289. *See id.* at 993, 996-1000.

290. Resident Commissioner Romero Barceló, however, expressed his satisfaction with the decision. *See* Leonor Mulero, *Alborozado Romero Barceló por la Decisión de Arizona*, EL NUEVO DÍA, Apr. 30, 1998, at 10.

291. 957 P.2d at 987.

292. *Id.* at 1002-03.

293. *Id.* at 990, quoting Act of June 20, 1910, ch. 310 § 20, 36 Stat. 557, 569 (1910). Arizona voters who do not speak English, therefore, cannot participate in Arizona public affairs by becoming state officers or legislators, nor can they seek redress of grievances by electing one of their own to office.

294. 957 P.2d at 994-96.

and for appropriate reasons, restrict public employees from using non-English languages to communicate while performing their duties,"<sup>295</sup> but asserts that the vice of the Arizona provision is that its "reach is too broad."<sup>296</sup>

In sum, the vindication in *Ruiz* of the rights of freedom of speech and to equal protection of the laws of non-English speakers does not, by any stretch of the imagination, transform them into full-fledged members of the Arizona political community. They can be excluded from public office or employment and from jury duty. They have no right to receive written governmental communications in their native tongue. Their only "right" is to have a meaningless document explained to them in their native tongue, but only if they are able to find some state employee or officer who is able and willing to speak that language. Small victory, indeed.

### c. *Yñiguez and Ruiz: Some Concluding Comments*

Both the *Yñiguez* and *Ruiz* courts attempted to find support for their arguments in the great-grandfather of all language cases, *Meyer v. Nebraska*.<sup>297</sup> Others had previously argued that *Meyer* would stand in the way of official English laws, but they viewed that case unabashedly as what it originally was, a substantive due process decision.<sup>298</sup> And while *Meyer* long before had been recast by some as a First Amendment case,<sup>299</sup> it was only after the Ninth

295. *Id.* at 996.

296. *Id.*

297. 262 U.S. 390 (1923). For the *Yñiguez* majority's recourse to *Meyer*, see 69 F.3d at 923, 937, 941, 945-46 & n.29, 948 & n.38. For the view that "there is little if any First Amendment content to *Meyer*," see Wexler, *supra* note 167, at 347. See also Howard O. Hunter, *Problems in Search of Principles: The First Amendment in the Supreme Court from 1791-1930*, 35 EMORY L.J. 59, 117, 128 (1986) (arguing that *Meyer* offers no particular protection to speech).

The Arizona Supreme Court refused to take sides in this debate. It disclaimed any reliance on *Meyer* for its First Amendment analysis, but relied on that case for its equal protection argument. See 957 P.2d at 1000-01 & n.13.

298. See, e.g., 1989 Hearings, *supra* note 89, at 345-46; BREAKTHROUGH, *supra* note 171, at 1461-66; see also Bill Piatt, *Toward Domestic Recognition of a Human Right to Language*, 23 HOUS. L. REV. 885, 885-86, 901-02 (1986). For the view that *Meyer* may be viewed today as an equal protection decision protecting language minorities, see Perea, *Demography and Distrust*, *supra* note 167, at 358. The *Yñiguez* court also expressed that view, 69 F.3d at 948 n.33, taking note of *Meyer*'s citation in the plurality opinion in *Hernández v. New York*, 500 U.S. 352, 371 (1991) (Kennedy, J., concurring). The *Ruiz* court also relied on *Meyer* for its equal protection argument. See 957 P.2d at 1001 & n.13.

299. Most notably by the Supreme Court itself in *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). See David Yassky, *Eras of the First Amendment*, 91 COLUM. L. REV. 1699, 1733 (1991). For an extended analysis of *Meyer*, its origin, consequences, subsequent reinterpretation and present-day significance, see William G. Ross, *A Judicial Janus: Meyer v. Nebraska in Historical Perspective*, 57 U. CIN. L.

Circuit expressly made the connection between *Meyer*, the First Amendment and official English laws in *Yñiguez*,<sup>300</sup> that others joined the bandwagon.<sup>301</sup>

*Meyer*, however, irrespective of methodology, is a very poor base on which to ground arguments against the constitutionality of official English laws. On the contrary, *Meyer* would serve to sustain such laws, at least as applied to the public school setting.<sup>302</sup> The precise question in *Meyer* was whether a state could absolutely prohibit the teaching of a foreign language in a private school. The Supreme Court ruled that it could not. But the Court did not prohibit states from requiring that the whole curriculum be taught in English, except for teaching of foreign languages. Far from it, in an extended *dictum* the Court recognized such powers in the states:

The power of the State to compel attendance at some school and to make reasonable regulations for all schools, *including a requirement that they shall give instructions in English*, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court [of Nebraska].<sup>303</sup>

Thus, *Meyer*, even if viewed as a manifestation of freedom of expression, only stands for the right to use foreign languages in a private setting.<sup>304</sup> More important, that case goes a long way toward recognizing that English is indeed the official language of the United States.

If the *Yñiguez* and *Ruiz* decisions are the best jobs that federal and state courts can perform to invalidate a state official English provision, I would not be confident that such provisions, or a comparable federal statute, would meet a similar fate when the Supreme Court finally decides to face this issue.<sup>305</sup> And the emphasis by both the Ninth Circuit and the Arizona Supreme Court

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REV. 125 (1988).

300. 69 F.3d at 945-46 n.29.

301. See *supra* note 250.

302. Accord BARON, *supra* note 59, at 148; TATALOVICH, *supra* note 6, at 60; Serano Geysls & Gorrín Peralta, *supra* note 57, at 57.

303. 262 U.S. at 402 (emphasis added).

304. See TATALOVICH, *supra* note 6, at 60-62; NOWAK & ROTUNDA, *supra* note 204, at §§ 14.27, 14.28, 14.30, 14.45.

305. The Court's denial of certiorari in *Ruiz*, see 119 S.Ct. 850 (1999), of course, carries no precedential weight. See *Maryland v. Baltimore Radio Show*, 338 U.S. 912, 917-18 (1950) (Frankfurter, J.). It may only mean that the Court is not ready yet to address this issue on the merits; see also the special concurrence of Justice Martone in *Ruiz*, which suggested some justiciability problems in that case. See 957 P.2d at 1003.

on the extreme restrictions of the Arizona provision suggests that even if the *Yñiguez* and *Ruiz* First Amendment rationales are sound, they might be unavailable for other types of official English statutes which contain more and broader exceptions.<sup>306</sup>

Finally, even if the Supreme Court ultimately endorsed the *Yñiguez* and *Ruiz* rationales, these could be turned around to produce unexpected results in the Puerto Rican context. Suppose that Congress admitted Puerto Rico into the Union with no language restrictions. Suppose further that the State of Puerto Rico then repealed its current language statute and made Spanish the only official language, as was the case between 1991 and 1993,<sup>307</sup> or that its courts continue interpreting the current statute as not requiring Puerto Rico to conduct a proceeding in any language but Spanish.<sup>308</sup> What would be the constitutional rights of non-Spanish speaking United States citizens in Puerto Rico? According to both *Yñiguez* and *Ruiz*, they would only have the constitutional right to receive governmental information in English *if* they could find a Puerto Rican public employee who was able and willing to provide it. *E pluribus unum?*

### C. Official English and Puerto Rico: A Recapitulation and a Proposal

I do not contend that the declaration of English as the official language of government in the United States is a desirable occurrence. It probably is not, and would only serve to exacerbate ethnic and cultural divisiveness. But I do contend that in view of the broad electoral support for such a measure throughout the United States,<sup>309</sup> its chances of enactment, at least in the form of a federal statute, are relatively good in the long run. Legislators have a natural propensity to follow the wishes of their constituents.

If that federal statute becomes a reality, I further contend that there is a great deal of uncertainty as to whether the Supreme Court would uphold it. I do not share the seemingly politically correct current view that such measure would easily be found

306. See, e.g., Arington, *supra* note 158, at 337-39; Murray, *supra* note 167, at 584. As more fully discussed *supra* note 294 and accompanying text, the *Ruiz* court itself suggests that other, less restrictive language provisions may pass constitutional muster.

307. See *supra* notes 33-40 and accompanying text.

308. See *supra* part I-C.

309. See *supra* notes 158, 192; see also Valente, *supra* note 167, at 208 n.18 (referring to polls which show that between 65% to 86% of the population favors making English the official language of government in the United States).

unconstitutional.<sup>310</sup>

The people of Puerto Rico should not be forced to place their vernacular on this table of constitutional roulette. And even if Congress is found to lack the power to enact any such law, the Constitution may be amended, as many have urged.<sup>311</sup> Against the prospect of that dealer's blackjack, no insurance is available.<sup>312</sup>

I am not suggesting that the amendment route is likely to be successful in the near future, but its chances for success increase each time another state approves an official English statute. That was precisely the strategy designed by its supporters, when initial attempts at the constitutional amendment method failed.<sup>313</sup> And, if eventually approved, an English language amendment would pose a formidable obstacle for the future survival of Spanish as the principal language of common understanding in Puerto Rico.

In short, to force Puerto Ricans to gamble, without adequate knowledge and understanding, on a matter so essential to their integrity as a people is neither "informed consent" nor "full knowledge of the change in their status," as United Nations Resolution 1541 (XV) requires.<sup>314</sup> As a matter of basic ethics, the United States must resolve this issue of language rights before Puerto Rico is asked to take any vote on whether to join the Union.<sup>315</sup> Puerto Rico already was a guinea pig in a United States constitutional experiment, as the *Insular Cases* clearly show.<sup>316</sup> It is sim-

310. For a list of those who hold that view, in one form or another, see *supra* note 167.

311. See *supra* note 156.

312. A student commentator stated in 1985:

The ELA [English Language Amendment] would surely destroy any chance of Puerto Rican statehood. Members of the statehood movement rely heavily on the proposition that Puerto Rico would be able to choose Spanish as its official language upon entry to the Union. They base this assumption on the Tenth Amendment and the "equal footing" doctrine, and repeatedly asseverate that it would take a constitutional amendment to remove this power. The ELA is just that amendment.

Joseph Leibowicz, *The Proposed English Language Amendment: Shield or Sword?* 3 YALE L. & POL'Y REV. 519, 548 (1985) (footnotes omitted). If the ELA would "destroy any chance of Puerto Rican statehood," what would such an amendment destroy if enacted *after* Puerto Rico becomes a state? *Id.*

313. See *id.* at 523-24.

314. G.A. Res. 1541 (XV) *supra* note 111.

315. While the constitutionality of the Arizona provision was under consideration by the Supreme Court of that state, one commentator remarked that some type of United States Supreme Court pronouncement on this issue was not far on the horizon. See Serrano, *supra* note 167, at 223-24. The Court's denial of certiorari in *Ruiz*, see 119 S.Ct. 850 (1999), may simply signify a postponement of that pronouncement.

316. See *Downes v. Bidwell*, 182 U.S. 244 (1901); *infra* note 320 and accompanying text.

ply unconscionable to subject it to another such experiment.

If, however, the federal government is intent on subjecting Puerto Rico to another constitutional experiment, that experiment should be undertaken and its results evaluated before any plebiscite is held. Since the House of Representatives claims that the federal government has plenary powers over Puerto Rico,<sup>317</sup> there is a solution available that would release Puerto Rican voters from the burden of engaging in at least some of the risky prophecies of constitutional law already discussed. Instead of waiting for all of these issues to be resolved *after* Puerto Rico becomes a state, Congress could facilitate that at least some answers emerge *now*, before any vote is taken. Let it legislate and make English *the* official language of the Commonwealth government *now*, as well as *the* language of instruction in all public schools on the Island. Among nearly four million people, enough plaintiffs with justiciable, individual rights cases will surely appear.<sup>318</sup> It would be most fitting that the colonial experiment which began with *Downes v. Bidwell*,<sup>319</sup> a test case framed in Congress in 1900,<sup>320</sup> approach its end with another test case of Congress's making. That would certainly precipitate a more knowledgeable exercise of self-determination, both by Puerto Rico and by the United States.

317. H.R. 856, 105th Cong. § 3(b), §§ 2(2), (4), (7) & (12) (1998).

318. So many potential plaintiffs would make it extremely unlikely that the issue could become moot. Thus, the Supreme Court would even more certainly have the opportunity to decide on the merits whether the individual rights issues were correctly decided in *Yñiguez* and in *Ruiz*.

319. 182 U.S. 244 (1901).

320. See JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 32-39 (1985); Jaime B. Fuster, *The Origins of the Doctrine of Territorial Incorporation*, 43 REV. JUR. U.P.R. 259, 278-88 (1974). Citing an impressive array of sources, both Professor Fuster—now a Justice of the Supreme Court of Puerto Rico—and Judge Torruella—now Chief Judge of the United States Court of Appeals for the First Circuit—tell the following story. In 1899 the McKinley administration was determined to establish free trade between Puerto Rico and the United States. The Foraker bill so envisaged it, in its original form. But its final version discriminated against Puerto Rico by establishing a tariff barrier of 15% of the tariff applicable to international commerce. While supporters of the Act justified the measure as necessary to provide revenue urgently needed to administer Puerto Rico, its opponents denounced this tariff barrier as a ploy designed to obtain a definitive Supreme Court ruling that would serve as a precedent for Congress's future dealings with the problem that was perceived as truly important: the Philippines. The historical evidence amply supports the minority's claim. Thus, the political branches of the federal government embarked on a course of action that would finally require—as they understood it and desired it—the intervention of the judiciary. See generally TORRUELLA, *supra*; Fuster, *supra*; accord Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225, 240 (1996).



#### IV. Quebec, Puerto Rico and Bilingualism in the United States: Some Necessary Elucidations

##### 1. The Quebec-Puerto Rico Comparison

Supporters of official English, arguing against Puerto Rican statehood, have used the example of Quebec to buttress their claim that the United States does not need to take on a problem that has vexed the Canadian state since its birth.<sup>321</sup> Politicians and scholars who support independence for Puerto Rico have also stressed the Quebec analogy in order to emphasize to policymakers in the United States the different nature of the problem at hand, in contrast to other statehood processes.<sup>322</sup> Others have replied that the case of Puerto Rico is unlike that of Quebec, and have argued that millions of Spanish-speakers throughout the United States prove that the Quebec analogy is fallacious.<sup>323</sup> In this controversy, those

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321. See Patrick Buchanan, *Let Puerto Rico Be a Nation*, N.Y. POST, May 16, 1990, at 1; Patrick Buchanan, *Puerto Rico as Our 51st State?*, SAN JUAN STAR, Mar. 23, 1990, at 16; U.S. English Foundation, Inc., *Avoiding an American Quebec: The Future of Puerto Rico and the United States*, (visited Mar. 25, 1998) <<http://www.us-english.org/prissue.htm>>. Another important official English supporter who is on record as opposing the model of Quebec is the former Speaker of the House of Representatives, Newt Gingrich. See *Citing Quebec Referendum, Calls Bilingualism Divisive*, INT'L HERALD TRIB., Oct. 31, 1995, at 8.

That point was echoed in 1991 by several Senators on the Energy and Natural Resources Committee, while considering Senate Bill 244, 102d Cong., the modified successor to the 101st Congress's Senate Bill 712. SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES, 102 Cong., Business Meeting, Feb. 20, 1991, at 19-20 (remarks of Sen. Ford), 28-29 (remarks of Sen. Conrad), 33-34 (remarks of Sen. Wallop) [hereinafter *S. 244 Hearings*]. These exchanges are reproduced in Hernández Colón, *supra* note 138, at 458-59, 461-62, 464-65.

322. See, e.g., Rubén Berrios Martínez, *Independence for Puerto Rico: The Only Solution*, 55 FOREIGN AFF. 578, 583 (1976) (recalling that just three decades ago support for independence in Quebec hovered around only 8.8% of the popular vote); Rubén Berrios Martínez, *supra* note 117, at 110 ("Is the United States willing to risk a Caribbean Quebec or a tropical Northern Ireland?"); Manuel Rodríguez Orellana, *Quebec y Puerto Rico: Un Hemisferio y Dos Soledades*, 67 REV. JUR. U.P.R. 1079 (1998) (reviewing the many parallelisms between Quebec and Puerto Rico).

Acceptance of the Quebec-Puerto Rico analogy has come from other quarters. See Wexler, *supra* note 167, at 377 n.21:

I am often asked why I do not compare the United States to Quebec, rather than to France. But the comparison to Quebec is much less appropriate than one might think. Francophone Canadians are a linguistic minority with respect to Canada as a whole; thus, in terms of political status and position, the best analogy to Quebec is probably Puerto Rico. Within the province of Quebec, francophones are a linguistic majority, of course, and a strong argument can be made that their demands for a unilingual Quebec are largely due to many years of repressive anglophone policies.

*Id.*

323. See, e.g., Romero-Barceló, *supra* note 100, at 63, 68-69, 72. Yet, even for-

who stress the similarities between Puerto Rico and Quebec are on firmer ground.

There are, of course, important differences between Quebec and Puerto Rico. Quebec's geographic and economic position makes it a much more important issue in Canadian politics than Puerto Rico could ever aspire to be in the political debate in the United States.<sup>324</sup> The United States survived for more than a century without Puerto Rico and would certainly survive without it, while there is a serious question as to whether Canada, as presently constituted, could survive without Quebec.<sup>325</sup> Obviously, that puts Quebec in a stronger bargaining position *vis-à-vis* Canada than Puerto Rico could ever hope to be in its relation to the United States.

That stronger bargaining position is reflected in the issue of language rights in Canada, both at the federal level and in the province of Quebec.<sup>326</sup> For more than a century after the enactment of the British North America Act of 1867,<sup>327</sup> Francophones clamored for stronger and clearer recognition of their linguistic re-

mer Governor Romero saw fit to add: "So long as individual rights—including those pertaining to our language and culture—continue to be respected in Puerto Rico, there will be no civil disorder, nor any significant upsurge in terrorism." *Id.* at 69. The rejection of the Quebec-Puerto Rico analogy, premised on cultural and linguistic diversity in the United States, was also central to the remarks of several Senators during the consideration of Senate Bill 244 in 1991. See S. 244 Hearings, *supra* note 321, at 23-25 (Sen. Bradley), 31-33 (Sen. Wirth), 46-48 (Sen. Akaka), quoted in Hernández Colón, *supra* note 138, at 459-60, 462-63, 466-67.

The argument against the Quebec-Hispanic analogy is powerfully made, but without any reference to the special case of Puerto Rico, in Richardson, *supra* note 113.

324. On the *Québécois* question, see generally, RICHARD HANDLER, NATIONALISM AND THE POLITICS OF CULTURE IN QUEBEC (1988); JONATHAN LEMCO, TURMOIL IN THE PEACEABLE KINGDOM: THE QUEBEC SOVEREIGNTY MOVEMENT AND ITS IMPLICATIONS FOR CANADA AND THE UNITED STATES (1994); JEREMY WEBBER, REIMAGINING CANADA: LANGUAGE, CULTURE, COMMUNITY AND THE CANADIAN CONSTITUTION (1994); Lowrey, *supra* note 167; Salvatore Massa, *Secession by Mutual Assent: A Comparative Analysis of the Dissolution of Czechoslovakia and the Separatist Movement in Canada*, 14 WIS. INT'L L.J. 183, 217 (1995); Richardson, *supra* note 113; Kevin Sneesby, *National Separation: Canada in Context—Legal Perspective*, 53 LA. L. REV. 1357 (1993).

325. See TATALOVICH, *supra* note 6, at 3; Lowrey, *supra* note 167, at 258-65; Massa, *supra* note 324, at 217-18; Sneesby, *supra* note 324, at 1387-88.

326. For a more detailed exploration of this issue, see JOSÉ TRIAS MONGE, EL CHOQUE DE DOS CULTURAS JURÍDICAS EN PUERTO RICO 23-26 (1991); Lowrey, *supra* note 167, at 224-65; Terrence Meyerhoff, *Multiculturalism and Language Rights in Canada: Problems and Prospects*, 9 AM. U.J. INT'L L. & POL'Y 913 (1994); Richardson, *supra* note 113, at 525-30.

327. 30 Vict., ch. 3 (Eng.). Although the Act proclaimed that both English and French were official languages of the national parliament and of Quebec's legislature, French actually had second-class status in the federal government and no official status in the provinces. See Lowrey, *supra* note 167, at 226-30.

ality. That clamor led to the enactment of the Official Languages Act of 1969,<sup>328</sup> which in section two conferred to the English and French languages official status within the federal government. That was followed in 1974 by the enactment in the province of Quebec of the Official Language Act,<sup>329</sup> which proclaimed French as the only official language of that province, and in 1977 by the Charter of the French Language,<sup>330</sup> which made French the only official language of the Quebec parliament and of the provincial judicial system.<sup>331</sup> Finally, in 1982, at the request of Canada, the United Kingdom approved the Canada Act of 1982,<sup>332</sup> which empowered Canada to control its constitutional operations and included the Canadian-drafted Constitution Act of 1982, with a Charter of Rights and Freedoms.<sup>333</sup> The Charter reiterates that Canada is officially bilingual<sup>334</sup> and guarantees Anglophones and Francophones linguistic equality in federal government functions,<sup>335</sup> as well as rights to education of children in a minority language.<sup>336</sup> Quebec, however, has refused to endorse the Constitution Act of 1982, and two proposed agreements to grant that province certain rights in exchange for its endorsement—the Lake Meech and Charlestown Accords—have failed to gain the ratification of all of the Anglophone provinces.<sup>337</sup>

It is evident that from a legal perspective Francophones in Canada—however dissatisfied they may feel—are on a superior plane to Puerto Ricans, both at the federal and at the local level. But from a sociological standpoint, the predominance of Spanish in Puerto Rico is even stronger than that of French in Quebec.

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328. S.C. 1968-69, ch. 54, R.S.C. chs. 0-2 (1970) (Can.).

329. S.Q., ch. 6 (1974) (Can.).

330. S.Q., ch. 5 (1977) (Can.).

331. The act also imposed serious restrictions on access to schools in English. Some of these restrictions were later overturned by the Supreme Court of Canada. See *A.G. Quebec v. Quebec Protestant School Bds.*, [1984] 2 S.C.R. 66; TRIAS MONGE, *supra* note 326, at 24-25; Lowrey, *supra* note 167, at 242-43.

332. Canada Act, 1982, ch. 11 (U.K.).

333. Constitution Act of 1982, Part I, §§ 1-34. (Can.)

334. See *id.* § 16(1).

335. See *id.* §§ 16-20.

336. See *id.* § 23.

337. See Meyerhoff, *supra* note 326, at 977-96; Richardson, *supra* note 113, at 528-30. From a purely legal standpoint, the Constitution of 1982 is binding on Quebec; prior to 1982, constitutional amendments did not require the unanimous consent of the provinces. See Lowrey, *supra* note 167, at 248 n.134. However, that is another example of the limits of law. The generalized *Québécois* view as to that Constitution's lack of political legitimacy has led to calls for secession and to strenuous attempts from Anglophone Canadian leaders to engineer an agreement to appease Quebec. See Lowrey, *supra* note 167, at 247-65.

Puerto Rico is a monolingual society, where less than a quarter of its residents are truly fluent in English, while fewer than 2% of those residents do not speak any Spanish.<sup>338</sup> In contrast, in Quebec there coexists a sizeable group—18%—whose native tongue is not French, of which little more than half are functional in that language, with a majoritarian segment (82%) whose native tongue is French, of which one-third are fluent in English.<sup>339</sup> The statistics for the principal metropolitan areas in Quebec and in Puerto Rico show the same contrast. While 41% of Montreal's population is unilingually Francophone, 48% is bilingual and 11% is unilingually Anglophone,<sup>340</sup> 70.4% of the population of the San Juan metropolitan area is only fluent in Spanish, 27.9% is bilingual and 0.4% is unilingually Anglophone.<sup>341</sup> Bilingualism in Quebec is evidently more widespread than in Puerto Rico. Furthermore the sense of separate identity of Puerto Ricans considerably exceeds that of the *Québécois*.<sup>342</sup>

The importance of English in Quebec is more than a conse-

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338. See *supra* note 41. Puerto Rico is as monolingual in Spanish as the United States is in English. The 98.2% of Spanish-speakers in Puerto Rico, see *supra* note 41, mirrors the 97% of English-speakers in the United States. See BARON, *supra* note 59, at 177.

339. See LEMCO, *supra* note 324, at 10, 18. The latest statistics available show the following linguistic breakdown among residents of Quebec:

Language	Population	Percentage
Only English	358,505	5.09
Only French	3,951,715	56.09
Bilingual	2,660,590	37.77
Neither English nor French	74,270	1.05
Total	7,045,080	100.00

RECENSEMENT DE 1996 – STATISTIQUE CANADA, provided to the author by Bureau de la statistique du Quebec, Centre d'information et de documentation, <CID@bsq.gouv.qc.ca>.

According to another set of statistics, in 1981 French was the mother tongue of 82.4% of the population of Quebec, while English was that of 11%; the mother tongue of the remaining 6.6% was another. See SHEILA MCLEOD ARNOPOULOS & DOMINIQUE CLIFT, *THE ENGLISH FACT IN QUEBEC* 230 (2d ed. 1984).

340. See WEBBER, *supra* note 324, at 218. Statistics for 1981 break down as follows: 41.5% unilingually Francophone, 45.0% bilingual, 12.0% unilingually Anglophone, and 1.5% neither. See ARNOPOULOS & CLIFT, *supra* note 339, at 233.

341. See CENSUS, *supra* note 41, at 71. Of that population, 98.2% is able to speak Spanish, 28.3% is fluent in English and 1.3% is not fluent in either. See *id.*

342. *Accord* Rodríguez Orellana, *supra* note 322, at 1092. In 1990, a poll revealed that 55% of the inhabitants of Quebec consider themselves first as citizens of that province. See Lowrey, *supra* note 167, at 260 n.198. Meanwhile, the 1993 Ateneo Study revealed that the comparable figure in Puerto Rico is 91%. See *Ateneo Study*, *supra* note 45, at 84-85.

quence of that province's political relation to its Anglophone sisters. It is also—perhaps principally—a by-product of a demographic reality: the presence within its borders of 800,000 persons whose home language is English, and who hold a major share of the means of production.<sup>343</sup> That important segment of Quebec's population migrated from the rest of Canada and from other parts of the world.<sup>344</sup> In that sense, Quebec has been "colonized" by Anglophone Canada in much the same fashion, although certainly not as extensively, as the United States colonized those of its territories where a substantial number of non-English speakers originally lived, such as Louisiana,<sup>345</sup> Hawaii,<sup>346</sup> New Mexico<sup>347</sup> and,

343. The home language figure, dating from 1981, is found in ARNOPOULOS & CLIFT, *supra* note 339, at 230. Although the situation has changed significantly as a consequence of the "Quiet Revolution," in the 1960s Quebec's Francophones owned a mere 22% of manufacturing businesses and only 26% of its financial institutions. See LEMCO, *supra* note 324, at 4. Another set of statistics, from 1978, show that while 30.6% of all non-Francophones were situated in the two highest earning brackets, the corresponding percentage for Francophones was 20.0%. See ARNOPOULOS & CLIFT, *supra* note 339, at 238.

344. The pro-independence *Parti Québécois* blamed the Canadian federal government for its hair-splitting 50.6% to 49.4% loss in the October, 1995 referendum on separation from Canada. It argued that an abnormally large number of Anglophone aliens residing in Quebec were granted Canadian citizenship shortly before that referendum to influence the result. See Rodríguez Orellana, *supra* note 322, at 1094.

345. The purchaser of the Louisiana territory—Thomas Jefferson—proposed a mass settlement of Anglophones in that territory, to alter the legal and linguistic status of French. See BARON, *supra* note 59, at 2.

Louisiana was the first and only state admitted into the Union with a majority population of non-English speakers. See *id.* at xv-xvi, 83. Yet, only some 50 years after statehood, all state constitutional protection of the French language was eliminated, and Louisiana became in fact an English-only state. See *id.* at 83-87. The weak recognition of "historic linguistic and cultural origins" in the Constitution of 1974, LA. CONST. art. 12, § 4, has not changed that condition.

346. The impact of the English language and of United States values and customs in Hawaii had already begun early in the nineteenth century with the arrival of New England missionaries, who instructed most Hawaiians in their native language and in English. See NANCY FAIRES CONKLIN & MARGARET A. LOURIE, *A HOST OF TONGUES: LANGUAGE COMMUNITIES IN THE UNITED STATES* 215 (1983). According to these authors, "[a]s the century wore on, however, English became increasingly predominant as the language of instruction and public life." *Id.*; see also SYLVESTER K. STEVENS, *AMERICAN EXPANSION IN HAWAII, 1842-1898*, at 8-9, 25, 32-33 (1945). By the middle of that century, moreover, the influx of population into California and the Pacific Coast due to the gold rush also contributed to an expanded Anglophone population in Hawaii. See *id.* at 32-33.

During the first five decades of this century, while the population of the United States as a whole doubled, Hawaii's tripled. This fact can be attributed to immigration basically from two main sources: foreign immigrants and immigrants from the mainland United States. Of the total population increase experienced by Hawaii between 1960 and 1970, net immigration represented about 40%. During that period, mainland United States immigrants constituted over three-quarters of the total number of immigrants. See generally DAVID HOOD & BELLA Z. BELL, IN-

generally, all of the Southwestern states.<sup>348</sup>

For geographic reasons—its condition as an island of only 3,600 square miles—as well as for demographic reasons—its world record population density—Puerto Rico has never been open to such colonization, and most probably never will.<sup>349</sup> Anglophones in Puerto Rico have always composed a tiny, mostly self-contained, and largely un-assimilated group. Most of them have learned barely enough Spanish to get by. Their lack of numbers makes it impossible for them to play the role that other United States citizens played in settling and eventually controlling the economic

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MIGRATION AS A COMPONENT OF HAWAII POPULATION GROWTH: ITS LEGAL IMPLICATIONS 2-15 (1973).

As for foreign immigrants, in the last quarter of the nineteenth century the Hawaiian government fomented the importation of large numbers of contract laborers from China, Japan and the Philippines. This was in response to the insufficiency of the Hawaiian population to meet the labor demands of sugar plantations. See ELIZABETH BUCK, *THE POLITICS OF CULTURE AND HISTORY IN HAWAII* 74 (1993). As a result, the percentage of the Hawaiian population born elsewhere shifted from 9,530 (16.4%) in 1878 to 34,306 (42.6%) in 1884. See ROBERT SCHMITH, *DEMOGRAPHIC STATISTICS OF HAWAII, 1778-1965* 182 (1968).

Although the Hawaiian language is protected by the Constitution of that state, HAW. CONST. § 4, this is merely a symbolic gesture, since most residents of Hawaii do not speak it. See BARON, *supra* note 59, at 10. Moreover, section four of the Hawaii Constitution goes on to state that Hawaiian “shall be required for public acts and transactions only as required by law,” thus conferring upon that language subsidiary or second-class status. To compare Hawaii’s dual language protection with Puerto Rico’s is untenable, unless it is to show the very subsidiary nature of *English* in Puerto Rico.

347. The early territorial legislature of New Mexico conducted its business in Spanish, but that situation had changed by 1889. See BARON, *supra* note 59, at 95. On the sixty-year drive for statehood in New Mexico, which met with strong Congressional opposition, principally due to the question of language, see *id.* at 95-104; see also KLOSS, *supra* note 188, at 128 (relating how Congress acquiesced to New Mexico statehood only after there was a majority of Anglophones in that territory).

348. See BARON, *supra* note 59, at 187:

The American Southwest did not become the “Québec” of the United States because from the outset it was sparsely populated by its Hispanic settlers, and because Hispanic immigration was largely cut off after the Mexican War. Although the original Hispanic families of the Southwest showed a high degree of language retention, particularly in the rural areas where they remained, they were quickly outnumbered by Anglos once the latter began entering the area in force after annexation in 1848. (Mexican immigration did not resume in great numbers until the labor shortages of the two world wars, by which time English had gained an unerodable advantage.) Quebec, on the other hand, retained a majority French population who could be expected to react negatively, and with vigor, to the repression of their language in the national and the provincial arena.

*Id.*

349. See BREAKTHROUGH, *supra* note 171, at 1475-76. According to Triás Monge, “only if all the people in the rest of the world moved to America, would the United States have a population density similar to that of Puerto Rico.” TRIÁS MONGE, *COLONY*, *supra* note 18, at 2.

and political life of the above-mentioned territories, or even the role that Anglophone Canadians have played in Quebec.<sup>350</sup>

## 2. Bilingualism in the United States

There remains the issue of bilingualism throughout the United States. Some have claimed that the existence and persistence of minority languages in the United States prove that statehood for Puerto Rico would not present a different problem.<sup>351</sup> That is a very serious misconception. What statehood leaders claim is not that Puerto Ricans will be able to continue speaking Spanish at home and have regular Spanish classes at school, but that the principal language of government, instruction and common understanding in a State of Puerto Rico will be Spanish.<sup>352</sup> Currently, no linguistic community in the United States is making such a claim; and of all those which did make it in the past, none even came close to succeeding.<sup>353</sup>

Bilingual education programs in the United States are transitional; their aim is to permit students to master English as soon as possible, so that they can enter the regular curriculum in English.<sup>354</sup> No federal program exists to permit students to maintain their native tongue<sup>355</sup> and no court decision has ever held that

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350. See Rodríguez Orellana, *supra* note 322, at 1080 n.2, 1088.

351. See *supra* note 323.

352. That this posture may not be popular even in some "liberal" circles in the United States is illustrated in BARON, *supra* note 59, at 22. This author recounts the opposition of some members or former members of the American Civil Liberties Union (ACLU) to that organization's stand against official English proposals; one of them expressed that "millions of aliens have forced their way into our country, and as they gain majorities in various areas they will change the law to force Spanish in the same way the French have done in Quebec." *Id.* Of course, French *Québécois* have always been there, and always in the majority. So have Spanish-speaking Puerto Ricans in Puerto Rico.

353. See *id.* at 64-132 (discussing historical attempts to preserve German in Pennsylvania and other states, French in Louisiana and Spanish in the Southwest).

354. See *id.* at 11-12, 173, 192; Richardson, *supra* note 113, at 532 n.74. That was also the main thrust of the most important Supreme Court decision on the subject, *Lau v. Nichols*, 414 U.S. 563 (1974), which held that to force non-English speaking children into the regular curriculum violates section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1994), barring discrimination on account of national origin. The *Lau* holding was later reaffirmed in specific legislation. See 20 U.S.C. § 1703(f) (1994); see also the Bilingual Education Act, 20 U.S.C. §§ 3281-3386 (1988). And federal courts have refused to approve bilingual education programs which do not comply with the transitional requirement. See, e.g., *Cintrón v. Brentwood Union Free Sch. Dist.*, 455 F. Supp. 57, 64 (E.D.N.Y. 1978).

355. Except for Puerto Rican *diaspora* students, upon their return to the Island. See *supra* note 64, discussing 20 U.S.C. § 7432 (1994). That statute permits Puerto Rico to operate a maintenance system in Spanish, while denying such ulti-

there is a constitutional right to such a program.<sup>356</sup> That is worlds apart from the situation of French in Quebec and of Spanish in Puerto Rico.<sup>357</sup>

Statehood leaders do not just claim that future generations of Puerto Rican children will continue eating *bacalaítos* (cod fritters), but that they and their descendants will be able to read and write the recipe in fluent Spanish, in a homogeneous Hispanic society. Hispanic communities in the United States have not accomplished that objective. Those communities lack political and cultural cohesion, and the rate of anglicization of their newer generations parallels that of other minorities.<sup>358</sup> If statehood leaders can marshal enough political muscle after statehood to make their claim a reality, it could pose a serious challenge to the vision of *e pluribus*

mate objective to Native Americans:

Programs authorized under this part that serve Native American children, Native Pacific Island children, and children in the Commonwealth of Puerto Rico, notwithstanding any other provision of this part, may include programs of instruction, teacher training, curriculum development, evaluation, and testing designed for Native American children and youth learning and studying Native American languages and children and youth of limited-Spanish proficiency, except that one outcome of such programs serving Native American children shall be increased English proficiency among such children.

*Id.*

356. See BARON, *supra* note 59, at 10-11. Attempts to maintain native languages through private supplementary schools have not been successful:

While such supplementary minority-language schools are an important symbol of ethnic and cultural identity, they have not been particularly effective. Their mother-tongue instruction is more likely to resemble the foreign language instruction found in the public schools than the maintenance of a non-English first language. In general, sociolinguists have concluded that despite maintenance efforts on the part of ethnic communities, minority languages tend to survive in the United States more as cultural artifacts—like ethnic restaurants—than as living languages transmitted across generations.

*Id.* at 12 (citation omitted).

357. A student commentator perceptively states:

[T]wo crucial differences . . . invalidate the comparison between Canada and the United States: first, both French and English have been guaranteed equal status in Canada since its inception, while the United States has never officially guaranteed the language rights of any immigrant class; and second, Quebec's separatist movement involves a cohesive French culture, while English language legislation in the United States targets Spanish-speaking immigrants who lack the cultural cohesion to pose a serious secessionist threat.

Richardson, *supra* note 113, at 522. Ms. Richardson, however, fails to take into account the case of Puerto Rico and its similarity to that of Quebec.

358. See BARON, *supra* note 59, at 188, citing CALVIN VELTMAN, LANGUAGE SHIFT IN THE UNITED STATES 214 (1983); see also Karst, *supra* note 234, at 352 ("These incentives [to integrate into the mainstream society] are powerful; in the past they have inexorably led to the adoption of English and, for the most part, to the exclusive use of English by the third or fourth generation.").



*unum* of the United States.<sup>359</sup> However, if political realities after statehood turn out to be less rosy, then Puerto Rico as we know it might be doomed after statehood.

I do not assume that law will overpower culture, but neither can I assume the opposite. The relationship between law and culture is one of reciprocal influence.<sup>360</sup> From that standpoint, I am concerned that the influence of a federal language law over Spanish in Puerto Rico would be sufficiently substantial in the long run, as to present a separate and independent reason to reject the road to statehood. Even if such a federal law did not signify the demise of Spanish as the primary vehicle of communication in private affairs, it would have sufficient influence over Puerto Rican culture and identity, so as to change it in ways that are unacceptable to the overwhelming majority of Puerto Ricans. Such a law would certainly make English truly an official language of government in Puerto Rico and would legitimate Anglophones to demand that government functions be conducted in that language.<sup>361</sup> That is more than enough.

Additionally, one cannot view the impact of law over culture in isolation. There are other events, besides a mere statute, that may have a profound effect on the preservation of Spanish in Puerto Rico. Some of these events are already taking place, and statehood would only accelerate them. Extensive cable-TV penetration, education of the children of the elite in English-language private schools and return migration of mainland Puerto Ricans,

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359. See MOYNIHAN, *supra* note 189, at 73-74. It has been suggested that three factors are necessary preconditions for an ethnically based movement for political autonomy: 1) a core territory in which the ethnic minority enjoys substantial or majority presence; 2) a strong basis of community identity; and, 3) the presence of the national majority in the core territory occupying a privileged economic position. See Lowrey, *supra* note 167, at 303, citing Colin Williams, *More Than Tongue Can Tell: Linguistic Factors in Ethnic Separatism*, in LINGUISTIC MINORITIES, POLICIES AND PLURALISM 179, 184-85 (John Edwards, ed. 1984). Puerto Rico clearly meets all three criteria today, and will continue to meet them in the foreseeable future, while Lowrey must engage in a prediction that Hispanics in certain sectors of the United States might meet all three sometime in the future. See Lowrey, *supra* note 167, at 309.

360. That insight is shared by writers who otherwise profess diverging views on the nature of law. See, e.g., LABOUR, LAW AND CRIME: AN HISTORICAL PERSPECTIVE 10-11 (Francis Snyder & Douglas Hay eds., 1987); Martha Minow, *Rights and Cultural Difference*, in IDENTITIES, POLITICS, AND RIGHTS 347-65 (Austin Sarat & Thomas R. Kearns eds., 1995); Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 L. & SOC. REV. 165, 173 (1987-88); James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684 (1985). For an excellent analysis of the reciprocal influence of law and social reality, with particular emphasis on the case of Puerto Rico, see Rivera Ramos, *supra* note 320.

361. See Serrano Geyls & Gorrin Peralta, *supra* note 57, at 74.

whose children mostly speak only English, are some of these factors.<sup>362</sup> As long as Puerto Rico has some control over the language of government and public instruction, these factors by themselves may not prove decisive, even in the long run. Without such control, however, the prospect may be quite different.

The pervasive worldwide influence of English, as the language of economics, diplomacy and communications is undeniable. However, that influence has not induced other societies to adopt English as their main vehicle of government communication, to the detriment of their vernacular. While no one contests that Puerto Ricans should have the opportunity to learn English, it is an entirely different proposition to level the road for a future displacement of one language over another.

The failure of the United States in its attempt to impose English in Puerto Rico during the first fifty years of this century does not prove that it is an impossible task.<sup>363</sup> It is a matter of record that statehooders were, in general, supportive of such plans.<sup>364</sup> But they were clearly not in the majority. Thus, for the majority of Puerto Ricans the issue was one of *them*—the Americans—against *us* Puerto Ricans.<sup>365</sup> If statehooders become a majority, their historical quest for Puerto Ricans to become Americans will present a completely changed scenario, one more conducive toward the imposition of English.<sup>366</sup> It would not be the first time that a majority discriminated against itself for self-deprecatory reasons, as the Supreme Court suggested in *Cas-*

362. See Muñiz Argüelles, *supra* note 40, at 74, 76. On the latter of these factors, see also Serrano Geysls & Gorrín Peralta, *supra* note 57, at 44.

363. That is the traditional argument of pro-statehood ideologues. See, e.g., 4 BOTHWELL GONZALEZ, *supra* note 99, at 474-75.

364. See TRÍAS MONGE, COLONY, *supra* note 18, at 60; Serrano Geysls & Gorrín Peralta, *supra* note 57, at 34-36. And some of them still may be, as shown by the statements of Mr. Romero Barceló in 1989 before the Senate Committee on Energy and Natural Resources:

Before 1940, Senator, we had in Puerto Rico about 500 exchange teachers who came from the mainland. Just about everyone that graduated from high school in the 30s and 20s had a teacher who was Mrs. Brown, Mrs. Smith, something or other. When the Popular Party came into office and control, they did away with that program. By the time Luis Ferré, the first statehood governor, came into office in 1969, there were less than a dozen or two dozen of those teachers left in Puerto Rico. . . .

1989 Hearings, *supra* note 89, at 187.

365. Cf. JOHN HART ELY, DEMOCRACY AND DISTRUST 158-59 (1980) (arguing that impermissible stereotypes are those of the "we/they" type, where those who make the classification have no reason to feel empathy with those against which that classification operates).

366. Indeed, that may be a reasonable explanation for recent changes in educational policies adopted by the current pro-statehood administration. See *supra* note 65 and accompanying text.

*tañeda v. Partida*,<sup>367</sup> and as Justice Marshall more fully explained in his concurrence in that case.<sup>368</sup> It is not at all surprising that one of the principal statehood leaders felt the urge to protest in the 1989 Senate hearings against the use in Puerto Rico's public schools of first grade books that start by telling their young readers that they are Puerto Ricans.<sup>369</sup>

Even before statehood, the current pro-statehood government is showing signs of what could be in store if that movement ultimately succeeds. The English immersion laboratories in public schools<sup>370</sup> are just one of many measures which raise doubts as to the sincerity of the statehooders' nonnegotiability claim. For ex-

367. 430 U.S. 482, 496-500 (1977) (holding that a prima facie case of intentional discrimination against Hispanics in the selection of grand juries was not rebutted by the fact that such ethnic group was a governing majority in the county in question).

368. See *id.* at 501 ("Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority.") (Marshall, J., concurring). As Dean Ely has expressed it: "A sufficiently pervasive prejudice can block its own correction not simply by keeping its victims 'in the closet' but also by convincing even them of its correctness." ELY, *supra* note 365, at 165.

369. Mr. Romero then testified:

So, right now, for instance, in the public schools of Puerto Rico, under this [Popular Party] administration, they have a book for first graders, written by Ricardo Alegría which [*sic*] is the Cultural Advisor to the Governor, where it talks about Puerto Rico. And when it refers to the nation, it says our friendly nation, the U.S.

It talks about Puerto Rico as my country and it makes no reference whatsoever to the fact that Puerto Ricans are U.S. citizens. Nowhere in that book. And that is used for the students in the first few grades.

1989 Hearings, *supra* note 89, at 187-88. The next day, Mr. Romero introduced for the record an excerpt of the first page of the book in question, entitled MY FIRST BOOK OF PUERTO RICO. The passage to which Mr. Romero alluded, as he himself translated it, reads:

Who am I?

I am a Puerto Rican.

My family is Puerto Rican.

Puerto Rico is my fatherland, my country.

Puerto Rico is a country of the Caribbean.

Other countries like Puerto Rico in the Caribbean are the Dominican Republic, Haiti, Cuba, Jamaica, Trinidad, Venezuela, and Colombia.

Puerto Rico, my country, also has symbols. The symbols of Puerto Rico are the flag, the seal and the hymn.

Puerto Rico, as every other country, has its flag.

In Puerto Rico, my fatherland, also flies the flag of the United States of America because Puerto Rico is associated with the United States.

We must respect both flags because they are the national symbols of two countries, ours, Puerto Rico, and the friendly country, the United States, with whom we are associated.

*Id.* at 297.

370. See *supra* note 65 and accompanying text.

ample, in 1994 the Supreme Court of Puerto Rico held unconstitutional under the Constitution of Puerto Rico, a measure that created a voucher program to promote the transfer of public school students to private schools.<sup>371</sup> Attempts to privatize education in Puerto Rico, particularly in view of the growing number of English-language private schools,<sup>372</sup> are viewed with suspicion in many quarters. The government, moreover, has not relented on such plans. After a failed initial attempt to create a private foundation to pursue the same goal,<sup>373</sup> the government has just legislated to divert some forty million dollars annually from the University of Puerto Rico to create a scholarship fund that will promote the transfer of students from public elementary, secondary and higher learning institutions to those of the private sector.<sup>374</sup> Another constitutional confrontation is looming on the horizon.<sup>375</sup>

## V. Self-Determination for Puerto Rico and for the United States: Some Indispensable Steps

The decision to admit a state whose culture, language and way of life are distinct and very different from the first fifty may be as momentous for the United States as it would be for Puerto Rico. It calls for an ample and vigorous debate throughout the United States—in and out of Congress—of an even larger dimension than that of 1898.<sup>376</sup> It is truly perplexing that the prospect of

371. See *Asociación de Maestros v. Torres*, 94 J.T.S. 145 (1994) (applying P.R. CONST. art. II, § 5: "No public property or public funds shall be used for the support of schools or educational institutions other than those of the state."). For a favorable review of this decision, see José Julián Álvarez González & Ana Isabel García Saúl, *Derecho Constitucional, in Análisis del Término 1994-95 del Tribunal Supremo de Puerto Rico*, 65 REV. JUR. U.P.R. 799, 834-43 (1996).

372. See *supra* note 362 and accompanying text.

373. See Álvarez González & García Saúl, *supra* note 371, at 843 & n.193.

374. See *Designan Candidatos al Consejo de Becas*, EL NUEVO DÍA, June 27, 1998, at 26.

375. The Teachers' Association filed suit challenging the constitutionality of this new law. See *Teacher's Group Challenges Rosselló 'Opportunities' Law*, SAN JUAN STAR, July 16, 1998, at 8. The Teachers' Federation and a coalition of university students have also expressed their willingness to do likewise. See Carmen Millán, *Alborota el Avispero la Nueva Ley*, EL NUEVO DÍA, June 28, 1998, at 28; Luis R. Varela, *Prometen Retar la ley Educativa*, EL NUEVO DÍA, June 27, 1998, at 36. For the view that any such program violates the precise Puerto Rican constitutional prohibition of government support of private education, see Álvarez González & García Saúl, *supra* note 371, at 843.

376. On the nature of the robust debate of 1898, see *supra* note 320, as well as the books of TRIAS MONGE, *supra* notes 8, 18. On the need for a debate on statehood for Puerto Rico, see Editorial, *Go Slow on 51st State*, BOSTON HERALD, Mar. 7, 1998, at 12 ("Americans everywhere need to debate whether a culture so differ-

Puerto Rican statehood is almost completely ignored in the current intense debate over language policy in the United States, even though such an event could radically alter the very terms of that debate.<sup>377</sup>

The people of the United States and their political leaders must openly address a myriad of questions, such as the following: Do culture and language matter in structuring a political organization?<sup>378</sup> Are modern federations whose components have diverse cultural and linguistic traits truly similar to the brand of federalism practiced in the United States?<sup>379</sup> If not, is the difference related to those divergent cultural and linguistic traits? If it is, does that mean that a federation whose components exhibit such contrasting traits *must* be looser and less centralized than that of the

ent from the mainland culture can fit into the union, and whether it should be admitted if a substantial minority doesn't want in—likely true for Puerto Rico”).

377. Even those few who mention Puerto Rico fail to make the necessary connection:

The eighty to one hundred thousand people who chanted “Inglés No!” to express opposition to a law making both Spanish and English the official languages of Puerto Rico may be seen by the American public as a minor nuisance in a faraway place. For the issue to hit home, the public will have to be exposed to a situation akin to what provoked the Anglos in Dade County in 1980—frequent uses of non-English in public forums.

TATALOVICH, *supra* note 6, at 257. The author seems to ignore the fact that the “faraway place” is knocking at the door of his “home.” Another author who mentions the 1993 march for Spanish at the very end of a 100-page article, without making any other reference to Puerto Rico, is Meyerhoff, *supra* note 326, at 1012 n.521.

378. See, e.g., BARON, *supra* note 59, at 6 (“So central is language to political organization that in many societies defining the language has become tantamount to defining nationality.”).

379. For an argument that the United States is no longer a federal but a unitary state, with a modest degree of decentralization, see Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009 (1997). According to Professor Rubin:

[F]ederalism was once an important principle for regulating relations between the states and the national government, but that it has now become irrelevant in that arena. It remains relevant, however, in regulating relations between the national government and the Native American tribes that continue to possess reservation land, and between the national government and America's territorial possessions, such as American Samoa, Guam, Puerto Rico, and the U.S. Virgin Islands. . . . These cultural and political forces have rendered federalism irrelevant in contemporary America. Federalism is a political expedient to achieve partial unity when people are divided into territorial groups, with identifiable differences between them and a sense of loyalty to their particular group. In the United States, there are no longer any such territorial groupings; everyone lives in the same place, and that place is a vast, interacting, homogenized national culture. Thus, no compromise is required and no expedient is necessary. Americans have diverse views, and belong to various interest groups, but the conflicts among those interest groups are national ones, played out in a national arena.

*Id.* at 1041, 1056.

United States?<sup>380</sup> Is the United States ready and committed to re-define its notion of federalism?<sup>381</sup> Would admission of Puerto Rico as a state only be a small step in a much larger political reorganization in the huge continent that the rest of the world calls America? Is the United States contemplating this?

Or is it that the United States believes the answers to be otherwise? Does it predict that modern multilingual and multicultural federations will eventually assume a form of integration more closely resembling that of the United States? Does it believe that the relationship between Scotland, Lombardy, Flanders and Catalonia will in time resemble that of California, Mississippi, Iowa and Vermont? Does it, therefore, predict that cultural and

380. *See id.* This is, for example, the case of Canada, where linguistic and cultural differences may provide an important explanation. This critical difference between the United States and Canada has been developed elsewhere:

Another distinction arises from the loose nature of Canada's federation, which has fostered more provincial than national allegiance. Canadians, particularly Quebeckers, tend to identify with their provinces more strongly than with Canada as a nation. In contrast, the fifty states have come together as a more tightly knit nation than its northern neighbor and the regional identity is not found in the United States as it is in Canada. Americans possess a national sense of community, tending to consider their status as Americans more significant than their status as "Tennesseans" or "Californians."

Richardson, *supra* note 113, at 532 (footnotes omitted). As shown in the *Ateneo Study*, *supra* note 45, at 9, 91% of the inhabitants of the potential 51st state consider themselves Puerto Ricans first.

And in spite of the relative looseness of the Canadian federation, Quebec separatists envision an even looser economic confederation based on the European Union model. *See* Massa, *supra* note 324, at 217, citing MAUREEN COVELL, THINKING ABOUT THE REST OF CANADA: OPTIONS FOR CANADA WITHOUT QUEBEC 29 (York University Constitutional Reform Project Study No. 6, 1991).

381. For the argument that it should not, see Rubin, *supra* note 379, at 1064:

Federalism is a bit like abdominal surgery. It can save the political life of a nation under certain circumstances, but it is not benign and should not be resorted to without a reason. It can be divisive, exaggerating political differences that might otherwise have dissipated over time, and exacerbating conflicts that might otherwise have been resolved. Moreover, because it grants political sub-units definitive rights against the central government, it means that some residents of those sub-units are likely to be treated in a way that the majority of the nation regards as wrong, and even immoral. Perhaps the reason why people are talking about federalism more these days is that we have managed so well without it that we have forgotten its dangers. It held our sharply-divided nation together for seventy years, but only by allowing millions of Americans to be held in slavery long after the majority of whites had recognized the horrors of that institution, and only by preserving sectional differences that sent the [nation] spiraling into civil war. We have done a lot better—not perfectly, but better—in the past seventy years, during which federalism has quickly declined into irrelevance. We are unlikely to revive federalism—certainly, a few Supreme Court cases will not do so—but we would be ill-advised even to try.

*Id.*

linguistic differences between the fifty states and Puerto Rico will wane after statehood,<sup>382</sup> or will prove to have no political significance? Do Puerto Ricans share that belief? Is it important whether they do share it? What would be the consequence of an erroneous prediction, "[a] false step,"<sup>383</sup> either on the part of the United States or on that of Puerto Rico?<sup>384</sup>

However it answers these and other such questions,<sup>385</sup> the United States *must* spell out, much more clearly than it has until now, its expectation concerning language in Puerto Rico.<sup>386</sup> If it expects and welcomes the idea that a State of Puerto Rico may continue communicating with its residents in Spanish and that no

382. Would that view be predicated on a version of Social Darwinism? Or would the federal government aid in the promotion of such end, as it invariably has in the past?:

The federal government actively used minority languages to recruit settlers for its sparsely populated territories in the Midwest and West, then withheld statehood from territories that lacked English-speaking majorities. In addition, both economic pressure and consciously articulated policy encourage minority language speakers to adopt English at the expense of their native tongue.

BARON, *supra* note 59, at 14. Is that the meaning of sections three and four of the Young Bill? See H.R. 856, 105th Cong. §§ 3(c), 4(b)(1) (1998), *discussed in supra* notes 148-150 and accompanying text.

On active—and eventually successful—federal attempts at eradication of Native American languages, see BARON, *supra* note 59, at 3, 36, 165-66. Those attempts took place at about the same time when similar—then unsuccessful—attempts were taking place in Puerto Rico. See *id.* at 166-70; *supra* note 57.

383. *Downes v. Bidwell*, 182 U.S. 244, 286 (1901) (Brown, J.) ("A false step at this time might be fatal to the development of what Chief Justice Marshall called the American Empire.")

384. The concluding paragraph in Lowrey, *supra* note 167, at 319, is illustrative of what is at stake:

A rational language policy must find some acceptable alternative between a dictatorial (and probably ineffective) restriction of minority languages and an unabated linguistic pluralism which could shatter a cohesive national identity. American language policy must confront the question of whether such a compromise is even possible. The lesson of the Canadian experience may be that language differences can be irreconcilable *despite* a policy of official bilingualism. The legacy of over two centuries of Canadian bilingualism raises concerns that a system of personal bilingualism, in which citizens may function by choice in either language, is not feasible within a federal society. Can American language policy create a society in which multiple languages and their speakers coexist? Or is the question after all, which is to be master?

*Id.*

385. The last time such questions were seriously posed, and some preliminary answers offered, was during Senate consideration in 1991 of a plebiscite process for Puerto Rico. See *supra* notes 321, 323; see also Hernández Colón, *supra* note 138. The outcome of that discussion was that the process was aborted.

386. See TRIAS MONGE, COLONY, *supra* note 18, at 192; see also *id.* at 185 ("Fairness both to the people of the United States and to that of Puerto Rico requires that there be no equivocation about this.")

one will have a right to *force* that government to function in English, aside from translations in the penal and other appropriate contexts, the plebiscite ballot should so state.<sup>387</sup> However, if the expectation is otherwise, which seems to be the convoluted message of the Young Bill,<sup>388</sup> that also should be spelled out on the face of the ballot in much clearer terms. Only then will there be a true process of self-determination for both parties.<sup>389</sup>

These issues have not been addressed adequately by United States policymakers. Particularly unenlightening was President Clinton's October 16, 1997 televised "town hall" response from Argentina to a Puerto Rican university student in Miami:

If Puerto Rico were accepted as the 51st state, what assurance could you give the Puerto Rican community that we would be able to keep our traditions, our culture, our language and not lose your Puerto Rican identity?

THE PRESIDENT: Well, first, let me state what my position is. My position is that the status of Puerto Rico should be for the Puerto Rican people themselves to decide. Whether a commonwealth, independence or statehood—it should be totally up to the people of Puerto Rico.

If Puerto Rico were to become a State, among other things, under our laws the educational system of Puerto Rico would be primarily the constitutional responsibility of the State of Puerto Rico, so that to whatever extent the state wanted to have a cultural support for the native culture, the native customs and the native language would be a decision for the state to pursue that the federal government should not try to undermine.

So that's my position. I don't think you'd have to worry about that. There are complicating questions on both sides of that issue. But I think the preservation of the unique and wonderful culture of Puerto Rico would not be a problem probably in

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387. If that promise were to hold true, it would be a first in United States history. That is a history of eventual domination of all other languages by English, irrespective of original understandings and promises. It happened with German in Pennsylvania, *see* BARON, *supra* note 59, at 65-83, French in Louisiana, *see id.* at 83-87, and Spanish in California, *see id.* at 17-18, 23, and in New Mexico, *see id.* at 94-106. In all of these states "minority-language speakers typically strove to preserve their language rights while fighting a losing battle against language shift among the young and in the face of opposition from English speakers." *Id.* at 106.

388. *See supra* notes 140-162 and accompanying text.

389. It has been persuasively argued that the tension between Quebec and the rest of Canada traces its roots to ambiguities in the British North America Act of 1867, which historically have been interpreted differently by both parties. *See* GEORGE RAMSAY COOK, *PROVINCIAL AUTONOMY, MINORITY RIGHTS AND THE COMPACT THEORY, 1867-1921* 53 (1969), *cited in* Rodríguez Orellana, *supra* note 322, at 1086-87. Professor Rodríguez Orellana points out the parallelism between that legal debate and the one that surrounds Puerto Rico's Commonwealth status. *See id.* at 1087 n.23.



either way. But there may be some specific problems I'm unaware of. But I would say that people should make their decisions about commonwealth and statehood probably based on what they think is best economically, rather than that. I believe that we'll be able to preserve the culture no matter what.

As a matter of fact, if you look at what's happening in Miami, what's happening in Los Angeles, what's happening in Chicago, what's happening in the Fairfax County school district across the river from Washington, D.C., where there are people from 180 different national groups in one school district—we're going to do a lot of cultural preservation in the years ahead.<sup>390</sup>

The President's answer to this specific, serious question relied on some traditional clichés that have surrounded the issue of statehood for Puerto Rico: the fallacious claim that the decision on statehood rests exclusively in Puerto Rico's hands; the questionable argument of exclusive state sovereignty over educational matters; the disturbing suggestion that economic factors should inform the statehood decision, to the exclusion of issues of culture and national identity; and, the misleading comparison of Puerto Ricans on the Island with ethnic communities on the mainland.

The President's response underscores a common misunderstanding concerning cultural notions, which historically has plagued United States-Puerto Rico relations. The President uses the term "culture" to refer to ethnic traditions, while Puerto Ricans give that term a much deeper meaning than colorful traditions and folklore. For Puerto Ricans, "culture" means their sense of self-identity, forged through five hundred years of common history, and which is different from and independent of that of the United States. A governmental Institute of Californian Culture is unimaginable, except as a stand-up joke. A government agency called the Institute of Puerto Rican Culture has existed in Puerto Rico since 1955, and has always been taken very seriously, even by pro-statehood governments.<sup>391</sup>

A common response to all of these queries is that the United States need not confront the issue of Puerto Rican statehood until Puerto Ricans ask for it. Such a strategy would not be particularly rational.<sup>392</sup> The United States has an undeniable colonial problem

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390. President's Remarks in the Univision Town Meeting in Buenos Aires, 33 WEEKLY COMP. PRES. DOC. 1601 (Oct. 16, 1997).

391. See P.R. LAWS ANN. tit. 18, §§ 1195-1201 (1989). The general purpose of this "official, corporate and autonomous entity . . . is to preserve, promote, enrich and diffuse the cultural values of the Puerto Rican people, and achieve a broader and fuller awareness thereof." *Id.* § 1195.

392. See Berríos Martínez, *supra* note 117, at 113:

in Puerto Rico with which it must affirmatively deal, since it is an international embarrassment. To face that problem, the United States must announce whether any of the internationally recognized solutions to a colonial situation is unacceptable to it. Statehood is one of those solutions. If that solution is unavailable to Puerto Ricans, common decency requires that they be so informed. To postpone that announcement will only make matters worse. Pro-statehood support in Puerto Rico has been growing steadily since 1967,<sup>393</sup> fueled by the belief that such a status is attainable and that it would not signify a radical change in the Puerto Rican way of life. If either of those beliefs is unsound, the United States would be ill-advised to postpone announcing it until a supermajoritarian demand for statehood arrives from Puerto Rico. That would only lead to either an even greater international embarrassment for the United States, if it then refuses to grant statehood to Puerto Rico, or to a half-hearted admission to statehood, in order to avoid such an embarrassment. Inattention and neglect concerning the case of Puerto Rico is no longer in the best interests of the United States.

For one hundred years, the United States has not acted neutrally toward Puerto Rico's right to self-determination.<sup>394</sup> Instead, it has taken many affirmative steps to steer the Island away from

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While those in Congress who oppose statehood may be tempted to derail the Young Bill, such a strategy would be counterproductive. With every passing day there is a great danger that the irrational statehood bandwagon in Puerto Rico will be joined in the United States by an equally irrational bandwagon of pluralism. As Hispanic voters become a larger percentage of the American electorate, in the desire not to appear to oppose multiculturalism, many voters and politicians will in fact be promoting multinationalism. This can only lead to Balkanization and a backlash against multiculturalism and minorities. Members of American minorities will not constitute a mathematical majority until the middle of the next century, but their increasing electoral weight will soon become a politically determinant factor in the complex and heterogeneous American society. If the Senate succumbs to the Walpolian temptation of inaction, it will merely be postponing an issue that will come back to haunt Congress in ever more menacing ways.

*Id.*

393. The results of two plebiscites conducted by the government of Puerto Rico in 1967 and 1993 demonstrate an erosion of support for Commonwealth status, the current arrangement, and a concomitant increase in support for statehood. In the 1967 plebiscite, which was boycotted by all major pro-independence forces, Commonwealth garnered 60.4% of the vote, compared to 39.0% for statehood and 0.6% for independence. See 1 Alvarez González, *Puerto Rico*, *supra* note 7, at 12. In the 1993 plebiscite, the results were: Commonwealth, 48.6%; statehood, 46.3%; and independence, 4.4%. See H.R. 856, 105th Cong. § 2(10) (1998).

394. See TRIAS MONGE, COLONY, *supra* note 18, at 183-84 (the United States has actively disfavored independence and is "unwittingly responsible for the existence in Puerto Rico of a strong statehood movement . . .").

its rightful place within the family of nations.<sup>395</sup> If Puerto Rico's complete integration into the Union would not conform with the best interests of the United States, it is time for the United States to atone for past wrongs. An altogether different affirmative action program is in order.

### Conclusion: Language, Statehood and the Specter of Secession

A defective process of self-determination which led to statehood would be a recipe for certain trouble in the future. But even an adequate process does not guarantee everlasting tranquility. Although it has been disputed, I subscribe to the view that the right to self-determination is not extinguished, once exercised.<sup>396</sup> Many writers—perhaps already a majority—argue that secession may be a valid exercise of self-determination in appropriate circumstances.<sup>397</sup> The following is one of the most complete and rep-

395. The definitive account of United States actions to disfavor pro-independence sentiment in Puerto Rico has not been written yet. For a brief summary of such measures see Berríos Martínez, *supra* note 117, at 103-07. Mr. Berríos identifies the following: the unilateral collective grant of citizenship in 1917, at a time when the principal political party in Puerto Rico had proclaimed independence as its final aspiration; several actions to repress the Nationalist Party of Puerto Rico, including imprisoning its leaders and massacring a peaceful assembly of its followers, killing 22 and injuring 97; the rejection of independence in the 1940s by the ruling Popular Democratic Party as a negotiated *quid pro quo* for federal concessions of a larger measure of local self-government; blacklisting of independence supporters, with the active backing of federal intelligence agencies; extension to Puerto Rico of a myriad of federal welfare and other programs, which increased exponentially Puerto Rico's dependence on federal largesse. See *id.*; see also TRIAS MONGE, *COLONY*, *supra* note 18, at 65, 88-94, 119, 183 (arguing that the grant of citizenship was designed to deter independence and citing examples of repression of the independence movement).

396. See, e.g., HÉCTOR GROS ESPIEL, *THE RIGHT OF SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS 8*, U.N. Doc. E/CN.4/Sub2/405/Rev. 1 (1980); Lung-Chu Chen, *Self-Determination and World Public Order*, 66 *NOTRE DAME L. REV.* 1287, 1292 (1991) ("Self-determination is not a one-shot affair."); Efrén Rivera Ramos, *Self-Determination and Decolonisation in the Society of the Modern Colonial Welfare State*, in *ISSUES OF SELF-DETERMINATION* 115, 124 (William Twining ed. 1991) ("self-determination must be understood . . . as an inexhaustible right"). And although Professor Gros Espiel denies that this right extends to secession from a United Nations member, see GROS ESPIEL, *supra*, at 13, there is no logical or compelling reason to support this claim.

397. See, e.g., SURYA P. SHARMA, *TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW* 248 (1997) (arguing that when group rights are not accepted and the group has a convincing historical claim to territory, territorial secession may be legitimate); Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 *YALE J. INT'L L.* 177, 192 (1991) (stating that a normatively sound claim to territory might buttress a self-determination claim to secession); Hercules Booyens, *South Africa: In Need of a Federal Constitution For Its Minority*

representative statements on the subject:

[F]rom about 1970 on, there could be a right of "peoples"—still not well defined—to secede from an established state that does not have a fully representative form of government, or at least to secede from a state whose government excludes people of any race, creed or color from political representation when those people are the ones asserting the right and they have a claim to a defined territory. By 1993, the right had arguably expanded to be assertable against a government that is unrepresentative of people who are defined by characteristics not limited to race, creed or color.<sup>398</sup>

The principal leader of the Puerto Rican independence movement has specifically advanced the claim to a right to secession after statehood.<sup>399</sup> If statehood for Puerto Rico does not prove to be the panacea that its supporters preach, or if their linguistic and cultural claims prove to be unjustified, other sectors of the Puerto Rican society may demand another exercise of self-determination. Even under some of the more restrictive views on the international right to secession, such as Professor Brilmayer's,<sup>400</sup> the people of Puerto Rico have a much better normative claim to the territory that comprises their small island archipelago than the descendants of those who, by invading it in 1898, "tainted [the situation] with the 'original sin' of colonialism."<sup>401</sup> Would the

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*Peoples*, 19 LOY. L.A. INT'L & COMP. L.J. 789, 804 (1997) (arguing that the right to secession is conditional; the community seeking secession "must have been subjected to economical and political discrimination [and] the central government controlling the community must have rejected reasonable proposals for autonomy and minority rights"); see also ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC 143-46 (1991); Chen, *supra* note 396, James E. Falkowski, *Secessionary Self-Determination: A Jeffersonian Perspective*, 9 B.U. INT'L L.J. 209, 210-11 (1991); Minasse Haile, *Legality of Secessions: The Case of Eritrea*, 8 EMORY INT'L L. REV. 479, 509 (1994); *The Logic of Secession*, 89 YALE L.J. 802, 804-05 (1980); at 1293; Dietrich Murswick, *The Issue of a Right of Secession-Reconsidered*, in MODERN LAW OF SELF-DETERMINATION 26-27 (Christian Tomuschat ed., 1993); Ved P. Nanda, *Self-Determination Under International Law: Validity of Claims to Secede*, 13 CASE W. RES. J. INT'L L. 257 (1981).

For views against the recognition of a right to secession, see, for example, LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978); Cass R. Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633 (1991).

398. Frederic L. Kirgis, Jr., *The Degrees of Self-Determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 306 (1994).

399. See Berrios Martínez, *supra* note 117, at 110 ("Independentistas have vowed to continue the struggle for independence—indeed for secession—under statehood.")

400. See Brilmayer, *supra* note 397, at 192-202.

401. *Id.* at 194, citing MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 27 (1982). According to Professor Brilmayer, four factors help determine whether the territorial claim is sound: (1) the immediacy or remoteness of the territorial grievance; (2) the extent to which the separatist group has kept the claim alive; (3) the extent to which the original population composition has been changed

United States refuse to recognize that claim? Would the great-grandson of Admiral Sampson bombard San Juan in the 21st Century, while the great-grandson of General Miles burns Ponce?

Statehood for Puerto Rico could mark the demise of the Puerto Rican nationality or, rather, its hibernation. The Puerto Rican people should not be led down the plank of national suicide, deceived into believing that hemlock is simply Coca-Cola. And the United States must ascertain and clearly label which beverage it means to serve to Puerto Rico and to itself.

The issue of language in Puerto Rico—under statehood or under any form of relationship with the United States—is very serious, as serious as the issue of Puerto Rican statehood itself. It simply will not go away through inattention or neglect. After one hundred years of United States neglect over Puerto Rico—benign or not—that should be abundantly clear.

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by settlements by members of the dominant group; and, (4) the nature and wrongfulness of the original grievance. See Brilmayer, *supra* note 397, at 199-201. The case of Puerto Rico, even after statehood, and particularly if statehood were granted without overwhelming supermajoritarian support, would satisfy comfortably all of Professor Brilmayer's factors.

