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NEW YORK STATE
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MARGARITA ROSA
Commissioner

MANUEL del VALLE
CHIEF ADMINISTRATIVE LAW JUDGE

June 3, 1994

Hon. Alexis Herman
Director of Public Liaison
The White House
1600 Pennsylvania Avenue - West Wing
Washington, D.C. 20500

Dear Ms. Herman:

It was wonderful meeting with you last week.

I am enclosing a copy of my chapter on National Origin and Alienage Discrimination along with other materials, which I thought might be of interest to you.

I would appreciate receiving any comments you may have on the article. I remain,

With warmest regards,

Manuel del Valle

MdV:hah

JUN - 7

PUERTO RICAN BAR ASSOCIATION

FELIPE NERI TORRES AWARD FOR ACHIEVEMENT IN THE LAW

MANUEL del VALLE

April 7, 1994

New York, New York

I thank you President Otero for your kind words. Let me thank at the outset almighty God, who has always been present my life, Manuel del Valle Roman and Providencia Colon de del Valle, my mother and father, Cruz Sanchez-del Valle, my wife, Manuel Francisco del Valle, my son, for their ceaseless support on my behalf, all the members of the Board of Directors of the Puerto Rican Bar Association and the members of the Puerto Rican Bar Association.

Many of you have known me as a teacher and I am so proud to see so many of my former students here tonight, may I share with you the truth which I have learned from you, namely, that, you were the teachers and that I was the student and that my life would never have been so rich and fulfilled if I had never met you.

For this reason, I dedicate this award to my students at Fordham, Princeton, Rutgers, Yale, New York Law School and Phillips Andover.

Today we honor the young men and women who will be the recipients of scholarships from the Puerto Rican Bar Association; we also honor the late Honorable Felipe N. Torres.

On Sunday, April 3, 1994, the Honorable Felipe N. Torres passed away at the age of 96. Judge Torres was born in Salinas, Puerto Rico on May 26, 1897, coincident with the events which led to the Spanish-American war and which resulted in the transfer of Puerto Rico from Spain to the United States. In 1917, through the provisions of Second Organic Act promulgated by Congress and known as the "Jones Act," he along with most other Puerto Ricans resident in the Island automatically became United States citizens.

Judge Torres graduated from high school in Ponce, Puerto Rico. He served in the United States Army as a second lieutenant in Puerto Rico late in World War I. With ten dollars in his pocket, Judge Torres, the son of a shoemaker, was among the first Puerto Ricans to settle in New York after the War, having emigrated to New York in 1919, came to live first in Brooklyn and eventually settled in the Bronx.

Judge Torres washed dishes at the Biltmore and Commodore Hotels. The Commodore Hotel was the predecessor to the Grand Hyatt, the place where we honor him today. He was a dish washer while he studied for a degree from Fordham Law School, which he received in 1926.

He was admitted to the Bar of the State of New York on July 7, 1927. While running an office and raising his family, Judge Torres studied nights at City College of the City of New York leading to a B.S.S. degree which was awarded in 1940. On June 19, 1982, he was granted an honorary degree of Doctor of Laws by the University of the City of New York, City College Division.

Judge Torres closed his original midtown office and relocated his practice uptown to 116th Street in Harlem,, an area later to be known as Spanish Harlem. While there he was elected president of the Harlem Lawyers Association, since reorganized into the Metropolitan Black Bar Association.

Subsequently, Judge Torres moved his office to the South Bronx, the community that he later represented from 1952 to 1961 as the Borough's first Puerto Rican Assemblyman. He was the sole Puerto Rican member of the New York State Assembly until 1963, when there were three Puerto Rican assembly members.

In 1957, with the handful of Puerto Rican lawyers then in New York, he helped found the Puerto Rican Bar Association. During 1957-1958, Judge Torres was the President of the Fiesta de San Juan, the patron saint of Puerto Rico. In 1960, to address the lack of mortgage funding available to the aspiring and growing Puerto Rican community, Judge Torres, then an Assemblyman, helped to found the Ponce de Leon Federal Savings Bank.

In the years prior to the federal Voting Rights Act of 1965, Judge Torres campaigned for legislation to eliminate the English-only literacy test which had served to deprived Puerto Ricans and others of their right to the franchise. He supported raising the minimum wage for hourly workers and supported the City's Rent Control Law in order to assure citizens affordable housing.

In 1962, former Mayor Robert F. Wagner named Judge Torres to the Family Court where he remained until 1967, having reached the mandatory retirement age of 70. After retiring from the bench, Judge Torres served as a hearing officer for the Board of Education, a member of the Committee on Character and Fitness of the Appellate Division, First Department, a Judicial Hearing Officer of the Supreme Court, a Director of the Ponce de Leon Federal Savings Bank, and for over 20 years continued an active and busy legal brace in the Bronx with his son, Austin Torres. Last year, in 1993, Fordham Law School honored Judge Torres by awarding him the Dean's Medal of Recognition.

Judge Torres' life and achievements in the law reflect a singular commitment to excellence, to compassion for all those with whom he dealt, and to an unswerving commitment to community, especially our own Puerto Rican community. All of this translated into a commitment not only to do justice, but to reflect justice in his treatment of all people.

After a review of such achievements, it is indeed humbling to think that I would receive an award bearing Judge Torres' name, a name that can only signify an awareness of the responsibility that we all have to do right by people, regardless of background, to do right by the law, regardless of complexity.

I grew up in the East Harlem, where Judge Torres once had his offices, and as a child I would look at the overpass which carried a train that said New Haven Railroad on it, and I said that one day I would like to go where that train goes. I did. I went to Yale.

I have been privileged beyond my wildest dreams to study, to write, to litigate, and to now to adjudicate on behalf of our people and many others as well. And yet as I walk to work in Harlem, within blocks of where I grew up, I cannot fail to see that ours is a community under siege from forces that would cripple the lives of our children and of their parents. Guns, drugs, and random violence are indicia of the turmoil which absorbs and affects so many in our community that it almost leads to one commentator has called a "statistical paralysis," an inability of us to contemplate actions to change these conditions in light of the overwhelming nature of the problem.

Yet, Judge Torres demonstrated by his life that the time for crying that we are "powerless" to effect our destiny is past, indeed, it is itself an obstacle to contemplating effective change. If you look around this ballroom you will see the infrastructure of Puerto Rican social change; here present are the hands of the legal technicians that have it within their power to effect outcomes, bring about awareness, redistribute resources, and, most importantly, insure justice. Antonia Pantoja, the founder of Aspira, the student leadership movement of which so many here were members would be proud of all of us here, of our achievements, of our understanding of our past, and of our dreams for the future.

What is that understanding of the past? It is that we have five centuries of history and achievement by Puerto Rican men and women, that we accept our history of racial mixing, of our Taino, Spanish, and African roots, that we are the sons and daughters of a vibrant culture, and that whenever that culture is under attack, the culture will raise up both heros and heroines who will assert our interests, advance our needs, and secure for us respect and understanding. Indeed, when the local interpretation of Puerto Rican law was put under severe pressure by the First Circuit Court of Appeals (which until 1962 had the power to review the decisions of Puerto Rico's Supreme Court), it was Justice Oliver Wendell Holmes who came to the defense of the Island's legal and cultural autonomy.

To assert our identity is to set out a context, what Professor Celina Romany has called the position from which we can understand our historical reality and the partiality of our truth. It has been my experience that the more we understand who we are the more that understand what there is in common with people from all kinds of backgrounds. In the particularity of our definition as a Puerto Rican people, we find the universality of our human condition, and, so I am privileged once to have taught courses on the legal history and politics of Puerto Rico and presently to teach courses on international human rights.

For those who continue to insist that we as Puerto Ricans have no history, no culture, and no identity, let them understand that they are wrong, and let us all understand that the greatest weakness we can have as a people is a failure to believe in our own abilities and strengths. There are those who would give up before the seemingly intractable problem of poverty, of crime, of limited resources; theirs is the language of despair, a language quite familiar to many of us. But, there is within the Puerto Rican people, la raza del "ay bendito," a language of hope and possibility, an ability to laugh at ourselves and our problems, which is universal, and which will one day lead to the change we so much seek and desire.

May I close by summing up the challenge and the legacy which the Honorable Felipe N. Torres has left for all us in the following words: "Never forget the value of struggle, and always struggle for values."

Employment Discrimination

Law and Litigation

Volume 2

by Merrick T. Rossein



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MANUEL del VALLE (Chapter 29—National Origin and Alienage Discrimination) is Chief Administrative Law Judge, New York State Division of Human Rights. He previously served as a trial attorney for the Office of the Solicitor, U.S. Department of Labor (1975-1986) and received the Department's Meritorious Achievement Award. He also was a staff attorney for the Puerto Rican Legal Defense and Education Fund, Inc. He is a graduate of Princeton University and Yale Law School, and received his LL.M. from the London School of Economics and Political Science. He was a recipient of a Rockefeller Foundation Fellowship and a Ford Foundation Research grant. He has taught as an adjunct professor at Fordham University Law School, the Woodrow Wilson School of Public and International Affairs, Princeton University, Rutgers University, Yale College and New York Law School. He has published a treatise on national origin discrimination in addition to law review articles.

Chapter 29

National Origin and Alienage Discrimination

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§29.1 / Employment Discrimination

§29.1. National Origin Discrimination—Introduction. The diversity of the United States population has captured the imagination of the world. Some assert that the United States is a microcosm of the world, and this is reflected in its jurisprudence. The Supreme Court has stated that the United States Constitution “was made for an undefined and expanding future, and for a people gathered and to be gathered from many nations and of many tongues.”¹

The national origin paradigm has come to play a special role in the protections afforded those persons who came to the United States from different countries speaking their native languages. The basic civil rights laws of the United States have impacted upon the rights of national origin groups; an examination of the relevant case law helps define the elements that characterize employment discrimination based on national origin.

Title VII of the Civil Rights Act of 1964 proscribes national origin discrimination. “National origin” is not defined by Title VII.² In the case law under Title VII and other civil rights statutes, such as 42 U.S.C. §1981, the component parts or characteristics of the national origin paradigm consist of an individual’s surname, height, language, accent, race and color, and alienage. National origin discrimination further encompasses the artificial barriers of high school diplomas and examinations as well as the intentional discrimination reflected in racial/national origin slurs, stereotypes and harassment.

Most of the litigation involves “Hispanics”—people who migrated to this country from Latin America, and increasingly the largest minority group in the United States. This group reflects diverse cultures from different countries, although its members share a common language (Spanish). Asian-Americans also reflect diverse cultures with different languages and roots. These immigrants are increasingly utilizing employment discrimination statutes to challenge adverse employment decisions.

¹ *Hurtado v. People of California*, 110 U.S. 516 (1884).

² National origin discrimination is also prohibited by the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986). See Chapter 25 for a full discussion of this Act.

National Origin Discrimination / §29.2

§29.2. Surname. One of the identifying characteristics by which Hispanics¹ and other national origin groups have been identified in the general population is their surname. In *Hernandez v. Texas*,² the first U.S. Supreme Court case to recognize that Mexican-Americans were protected by the equal protection clause of the Fourteenth Amendment, plaintiffs relied upon 1950 Census data to show that 14 percent of the population of Jackson County, Texas, had "Mexican or Latin American surnames."³ The State of Texas stipulated that for twenty-five years it had no record of any persons with a Mexican or Latin American name having served on a Jackson County jury commission, petit jury or grand jury.⁴

In order to rebut the inference of national origin discrimination resulting from the absence of Hispanics from its jury lists, Texas argued that the Court could not rely on names to show the descent of persons in the county. The Supreme Court held that "just as persons of a different race are distinguished by color, these Spanish names provide ready identification of the members of this class."⁵ The Court found Texas had failed to

¹ The U.S. Bureau of the Census utilizes the term "Hispanic." However, some commentators argue that the term "Latino" is a more appropriate description of different groups of people whose primary place of origin is Latin America. See Shorris, *Latino Si, Hispanic No*, New York Times, §A, p. 21, col. 2 (Oct. 28, 1992). *Contra Velez Guadalupe, Latino ? Hispanic ? Quecha ? No, American*, New York Times, §A, p. 26, col. 4 (Nov. 18, 1992) (argues that both the Latino and Hispanic terms are externally imposed and that bickering over the terms fails to advance the cause of the people so labeled). A recent study by the Latino National Political Survey, directed at people of Mexican, Puerto Rican and Cuban origin, indicated that "Latinos" prefer to identify themselves by their national origin—as Puerto Ricans, Mexicans or Cuban-Americans, rather than a pan-ethnic label. These three groups comprise 80 percent of all Latinos in the United States. See Suro, *Hispanic Pragmatism Seen in Survey*, New York Times, §A, p. 20, col. 4, (Dec. 15, 1992). See also Falcon, *A Mirror of Many Images*, New York Newsday, p. 30, col. 1 (Jan. 4, 1993) ("These results strongly point to the absence, at present, of an overarching pan-ethnic consciousness among Latinos, giving such umbrella terms a limited political and cultural meaning."). However, people who discriminate against these national origin groups may lump them together based on their own biases and stereotypes.

² *Hernandez v. Texas*, 347 U.S. 475 (1954).

³ *Id.* at 480 n.12.

⁴ *Id.* at 481.

⁵ *Id.* 480 n.12.

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rebut the prima facie case established by the use of Spanish surnames, to establish the long-continued exclusion of Mexican or Latin Americans from the county's juries.⁶ The Court denominated the discrimination against the class of Mexican persons before it as based on national origin or descent.⁷ It is therefore not surprising that the nomenclature initially used by the United States Census to identify persons of "Spanish origin" had been used by plaintiff's attorneys in denominating Hispanics as either Spanish-surnamed Americans or Spanish surnamed.⁸

Under Title VII, some federal courts have used the allegations of Spanish-surnamed national origin to exclude the claims of persons who are not Hispanic. For example, a federal court in New Mexico held that a lawsuit brought by the Equal Employment Opportunity Commission (EEOC) on behalf of Spanish-surnamed employees did not encompass a French Canadian.⁹ This reflects the tendency of some courts to treat the allegations of discrimination on the basis of surname literally.

A federal district court in California held that an American-born of Portuguese-German ancestry with the surname "Rodrigues" could not be considered "Spanish-surnamed." He was therefore precluded from representing a class defined in terms of "all other Spanish-surnamed first and second level management employees."¹⁰ The court determined that the plaintiff was himself not a member of the class he sought to represent.¹¹ Further support for the court's ruling came from its conclusion

⁶ *Id.* at 481.

⁷ *Id.* at 482.

⁸ See, e.g., *Lebron v. Hotel, Restaurant & Club Employees and Bartenders Union Local 6*, 540 F. Supp. 1389 (S.D.N.Y. 1982) (Spanish-surnamed); *United States v. Navajo Freight Lines, Inc.*, 6 FEP Cas 274 (C.D. Cal. 1973), *aff'd in part and rev'd in part*, 525 F.2d 1318 (9th Cir. 1975) (Spanish-surnamed American).

⁹ *EEOC v. Zia Co.*, 16 FEP Cas 1717 (D.N.M. 1976), *aff'd on national origin finding, but remanded on other grounds*, 582 F.2d 527 (10th Cir. 1978).

¹⁰ *Rodrigues v. Pacific T & T Co.*, 70 F.R.D. 414, 16 FEP Cas 1220 (N.D. Cal. 1976).

¹¹ In its analysis, the court examined how the plaintiff had characterized himself and identified the difference between "Rodrigues" and "Rodriguez." *Id.* at 1221.

National Origin Discrimination / §29.2

that EEOC had defined the category of Spanish-surnamed American to be limited to Mexicans, Puerto Ricans, Cubans, or persons of Spanish origin.¹² In disposing of the plaintiff's claim, the court found the absence of linguistic and physical characteristics which give rise to discrimination against Mexicans and Spanish-Americans, particularly in the use of the Spanish language.¹³

The difficulty generated by the use of the ethnic category "Spanish-surnamed American" confronted a federal district court in Massachusetts. Six blacks and two Puerto Ricans, who had unsuccessfully sought appointment as Boston policemen, sued on behalf of other blacks and a group of Spanish-surnamed persons.

The court acknowledged that the term "Spanish-surnamed persons" accorded with the terminology of the U.S. Bureau of the Census, but may have been overinclusive in its application to native Americans with Spanish ancestry who had been in the United States for generations, or someone born in Spain and educated there, or to others not members of the plaintiffs' class.¹⁴

The court defined the Spanish surname classification to encompass what it presumed to be the intended group of plaintiffs as: "[P]ersons who were born or whose parents were born in Puerto Rico, Cuba, or other Caribbean countries, whose primary language is Spanish, and who have not had education and training comparable to that received by most mainstream Americans."¹⁵ The common attributes of members of this class involved first or second generation status, distinctive language, and an inequality of education and training as compared to other Americans.

The court refused to apply a literal definition of Spanish-surnamed and employment characteristics in its definition

¹² *Id.* at 1221-22. The EEOC's 1985 EEO-1 instructions used the term "Hispanic" (and not Spanish-surnamed American), which is defined as "[a]ll persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race."

¹³ *Id.* at 1222 (citations omitted).

¹⁴ *Castro v. Beecher*, 334 F. Supp. 930, 4 FEP Cas 37, 39 n.2 (D. Mass. 1971), *aff'd in part and rev'd in part*, 459 F.2d 725 (1st Cir. 1972).

¹⁵ *Id.*

§29.3 / Employment Discrimination

which it associated with discrimination against Hispanics. The court's definition excluded bilingual or English-speaking Hispanics who had been mainstreamed on a theory that somehow these persons would not be the subject of discrimination.

Indeed, a Spanish-surnamed plaintiff, who claims national origin discrimination but exhibits none of the stereotypical characteristics associated with Hispanics, must overcome the defense's argument that the purported discrimination is not rooted in national origin. One court observed in this regard that it was not apparent that the plaintiff was Hispanic in terms of his pronunciation, speech patterns, or mannerisms.¹⁶ Interestingly enough, the Spanish-surnamed plaintiff in this case spoke no Spanish.¹⁷

§29.3. Height. A salient physical characteristic of Hispanics and other national origin groups, such as Asians, is their height, and this has been the subject of claims of discrimination on the basis of national origin.¹ For example, the city of Buffalo imposed a minimum height requirement of 5'9" for police patrolmen and 5'7" for firefighters and police cadets. Spanish-surnamed Americans brought suit and argued that these requirements discriminated against them.²

¹⁶ *Nieves v. Metropolitan Dade County*, 598 F. Supp. 955, 36 FEP Cas 1851 (S.D. Fla. 1984). The Court observed: "Plaintiff had no Spanish accent, spoke no Spanish, and according to Jakobsche [his supervisor] never mentioned his national origin. Nieves pronounces his name Neeves (rhymes with leaves) although the name is traditionally pronounced by Spanish speakers, Ne-ev-ace. In addition, at the time Plaintiff applied for the promotion, his personnel file still indicated that he was Caucasian, and made no mention of his Spanish-American nationality." *Id.* at 36 FEP Cas 1854-55.

¹⁷ *Id.* at 36 FEP Cas 1855.

¹ EEOC Dec. No. 71-1418, 3 FEP Cas 580 (1971); *Davis v. County of Los Angeles*, 8 FEP Cases 239 (C.D. Cal. 1973) and 8 FEP Cas 244 (C.D. Cal. 1974), *aff'd in part and rev'd in part*, 566 F.2d 1334 (9th Cir. 1977); *LULAC v. City of Santa Ana*, 410 F. Supp. 873, 12 FEP Cas 651, *modified*, 13 FEP Cas 1019 (C.D. Cal. 1976); EEOC Dec. No. 73-0319, 16 FEP 1788 (1972); *United States v. City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978); *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918 (10th Cir. 1979); *Officers for Justice v. Civil Service Comm'n of the City and County of San Francisco*, 473 F. Supp. 801 (N.D. Cal. 1979), *aff'd*, 688 F.2d 615 (9th Cir. 1982), *cert. denied*, 450 U.S. 1217 (1983).

² *United States v. City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978).

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Statistics for New York State and New Jersey were introduced which showed that 80.6 percent of Spanish-surnamed American males between the ages of 17 to 26 were eliminated from consideration by the 5'9" requirement in contrast to 48.5 percent of non-Spanish surnamed American males.³ The 5'7" requirement eliminated 54.7 percent of Spanish-surnamed American males aged 17 to 26 in contrast to 21.3 percent of non-Spanish-surnamed American males.⁴ The court held that both the Spanish-surnamed American males and the female plaintiffs established a prima facie case of discrimination with respect to the height requirements. The city was unable to justify the use of these standards, and they were consequently held to be illegal.⁵

In San Francisco, the court struck down a 5'6" pre-selection minimum requirement that was used by the city for the position of patrol officer.⁶ The court found that this requirement adversely affected Hispanics, Asians and women, and the city did not rebut the plaintiff's prima facie case.⁷ In another case, the Tenth Circuit Court of Appeals ordered the district court to review a trucking firm's requirement that its drivers be 5'7" tall.⁸ The United States brought this case and argued that the height requirement had a disparate impact on Spanish-surnamed Americans.

The employer argued that a certain height minimum was necessary to operate the truck cab and to apply the brakes during an emergency; another concern was the need to reach all of the pedals including the brakes. This notwithstanding, the employer hired sixteen white men who did not meet the height requirement. Furthermore, the employer failed to relate the height requirement to records of safe driving or strength. The case was remanded to the district court to make findings on

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Officers for Justice v. Civil Service Comm'n*, at 22 FEP Cas 1707; see also 371 F. Supp. 1328, 6 FEP Cas 1285, 395 F. Supp. 378, 11 FEP Cas 815, 818 (N.D. Cal. 1975); 20 FEP 1304 (N.D. Cal. 1977).

⁷ *Id.* at 22 FEP Cas 1707.

⁸ *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 20 FEP Cas 1345, 1363 (10th Cir. 1979).

§29.4 / Employment Discrimination

business necessity, and thus to reassess its holding that the height requirement was valid.⁹

The EEOC issued a number of rulings concerning the relationship of height requirements and its impact on Hispanics.¹⁰

§29.4. Language—A Historical Overview. The most common characteristic of national origin groups is their foreign language. It is not only an indicator of national origin, but has historically been a basis upon which they have been discriminated. The language-based national origin discrimination is reflected in the employment discrimination claims of various national origin groups, particularly those from Latino and Asian backgrounds.

The Supreme Court acknowledged the language-based national origin treatment of Mexican-Americans in *Hernandez v. Texas*,¹ in a case alleging a denial of equal protection under the Fourteenth Amendment to the U.S. Constitution. The Court in this case examined whether the plaintiff established his charge of group discrimination against persons of Mexican descent in Jackson County, Texas.² It found that one method of establishing group discrimination was through evidence of the community's attitude, which included (1) the segregation of children of Mexican descent in public schools on the basis of their language;³ the purported reasons for this was that these

⁹ *Id.* at 20 FEP Cas 1362-63. See also *LULAC v. City of Santa Ana*, 12 FEP Cas (BNA) 651, 656, 669-70; *Davis v. County of Los Angeles*, 8 FEP Cas (BNA) 240 (C.D. Ca. 1973).

¹⁰ EEOC Dec. No. 71-1418, 3 FEP Cas (BNA) 580, 582; EEOC Dec. No. 73-0319, 16 FEP Cas 1788, 1790; see also EEOC Dec. No. 71-1529, 3 FEP Cas 952 (1971) (Mexican-Americans and females); EEOC Dec. Para. 74-25, 10 FEP Cas 260 (1970) (fire department).

¹ *Hernandez v. Texas*, 347 U.S. 475 (1954).

² *Id.* at 479.

³ In *Lau v. Nichols*, 414 U.S. 563 (1974), a group of 1800 non-English speaking Chinese children, who were receiving no special language assistance in San Francisco's public schools, challenged the school's failure to provide a bilingual education. Justice Douglas, writing for a unanimous Supreme Court, stated:

Under these state-imposed standards [that children master English] there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.

National Origin Discrimination / §29.4

children needed special assistance in learning English; the Court found that in most cases each teacher taught only one class in the regular school, but in the Mexican school each teacher taught two grades; (2) at one restaurant in town there was a sign announcing "No Mexicans Served"; and (3) there were two toilets on the courthouse grounds, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here").⁴ This evidence was used by the Court to hold that Mexicans constituted a class entitled to the protection of the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.⁵

The class of Mexicans involved in this case had been the victims of discrimination on the basis of their language and national origin. Public school districts had learned how to use the Spanish language of Mexican children as a proxy for discrimination. When these segregative policies were scrutinized by the courts, they were declared illegal and unjustified on any pedagogical ground. These challenges to the segregation of Mexican children in public schools were successfully brought in the federal courts prior to the Supreme Court's historic decision in *Brown v. Board of Education*.⁶

Id. at 566. The Court held that some bilingual instruction was mandated by Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d-1 (non-discrimination by recipient of federal financial assistance). A number of court decisions addressed whether bilingual assistance in obtaining various public benefits was required. *See, e.g., Carmona v. Sheffield*, 325 F. Supp. 1341 (N.D. Cal. 1971), *aff'd*, 475 F.2d 738 (9th Cir. 1973). The court in *Carmona* held that bilingual assistance in obtaining unemployment insurance benefits is not required because it is reasonable for state government to conduct all its business in only one language, especially in light of the finite resources of a state. This and other courts relied in part, on 8 U.S.C. §1423(1), which requires at least an elementary understanding of the English language as a condition to naturalization. However, this provision does not apply to Puerto Ricans, and arguably Mexican-Americans, who trace their origins to the Treaty of Guadalupe-Hidalgo. *See discussion infra* in text in §29.4(1). *Contra Pabon v. Levine*, 70 F.R.D. 674 (S.D.N.Y. 1976).

⁴ 347 U.S. at 479 & n.10, 480.

⁵ *Id.* at 480.

⁶ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *see Salvatiera v. Ind. Sch. Dist.*, 33 S.W.2d 790 (1930), *cert. denied*, 284 U.S. 580 (1931) (segregation sustained); *Mendez v. Westminster Sch. Dist.*, 64 F. Supp. 544 (S.D. Cal. 1946), *aff'd*, 161 F.2d 774 (9th Cir. 1947) (segregation struck down); *Gonzalez v. Sheely*, 96 F. Supp. 1004 (D. Ariz. 1951) (segregation struck

§29.4(1) / Employment Discrimination

§29.4(1). The Treaty of Guadalupe-Hidalgo and the Treaty of Paris of 1898. The Mexican-American and the Puerto Rican became part of the United States of America by acts of war, conquest, and cession which resulted in their inclusion in the American body politic in the nineteenth century. The Treaty of Guadalupe-Hidalgo of 1848 made the Mexicans residing in the newly acquired territories American citizens, unless they took steps within a year to preserve their Mexican citizenship.⁷

Article VIII of the Treaty of Guadalupe-Hidalgo mandated that all Mexicans who had not declared their intention to become United States citizens within a year of the ratification of the treaty were to be considered to have elected to become citizens.⁸ Of significance in this respect was the absence of any requirement that these new citizens show any ability to read, write or speak the English language. They and their descendants became United States citizens whether or not they spoke English.

The Mexicans who had remained in the newly acquired territories were to be afforded the equality granted the inhabitants of other territories equal to that given the residents of Louisiana and Florida. Those inhabitants were also made United States citizens, without English language requirements.

The Treaty of Guadalupe-Hidalgo demonstrated that the federal government can and has refused to impose English literacy requirements for United States citizenship. A similar policy was applied in 1918 in the admission of Mexican nationals for the purpose of temporary work in the United States. In 1918, the Commissioner General of Immigration issued a Departmental Order which waived the literacy requirements for Mexican laborers; this policy was continued long after the end of the labor shortage.⁹ Mexicans became the

down); *cf. Cisneros v. Corpus Christi Ind. Sch. Dist.*, 324 F. Supp. 599 (S.D. Tex. 1970), *aff'd in part, modified in part*, 467 F.2d 142 (5th Cir. 1972) (segregation struck down); *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex. 1971) (segregation struck down); *Morales v. Shannon*, 516 F.2d 411, 413 (5th Cir. 1975) (segregation struck down).

⁷ Peace, Friendship, Limits and Settlement (Treaty of Guadalupe-Hidalgo), Feb. 2, 1848, United States-Mexico, art. VIII, 9 Stat. 222., T.S. No. 207.

⁸ *Id.*

⁹ Congressional Research Service, *Illegal Aliens: Analysis and Background*, House Committee on the Judiciary, 95th Cong., 1st Sess., 50-55, 48-

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largest contingent of Spanish-speaking United States citizens to be joined by Puerto Rico's Spanish-speaking inhabitants in 1917.

As a result of the Spanish-American war, the United States had acquired Puerto Rico in 1898. The Treaty of Paris, ratified on April 11, 1899, provided that Congress would determine the political and civil rights of the inhabitants of Puerto Rico.¹⁰ Puerto Ricans were made United States citizens through the Second Organic Act of 1917, commonly referred to as the Jones Act.¹¹

Like the Mexican-Americans before them, Puerto Ricans were not required to demonstrate any English-language knowledge or proficiency. Unlike the Mexican-Americans in the Southwest, Puerto Ricans were to continue to use Spanish as the dominant language on the Island. Its public schools were to receive federal funds and the language of instruction was to be in Spanish.

49 (Comm. Print 1977) reprinted in Aleinikoff and Martin in *Immigration: Process and Policy* at 746 (1985).

¹⁰ United States-Spain, 30 Stat. 1754, T.S. No. 343, reprinted in Commonwealth of Puerto Rico, Documents on the Constitutional History of Puerto Rico 51 (1964).

¹¹ Section 5 of the Jones Act provided:

That all citizens of Puerto Rico, as defined by section seven of the Act of April twelfth, nineteen hundred, "temporarily to provide revenues and a civil government for Puerto Rico, and for other purposes," and all natives of Puerto Rico who were temporarily absent from that island on April eleventh, eighteen hundred and ninety-nine, and are not citizens of any foreign country, are hereby declared, and shall be deemed and held to be, citizens of the United States; Provided, That any person hereinbefore described may retain his present political status by making a declaration, under oath, of his decision to do so within six months of the taking effect of this Act before the district court in the district in which he resides, the declaration to be in form as follows:

"I, _____, being duly sworn, hereby declare my intention not to become a citizen of the United States as provided in the Act of Congress conferring United States citizenship upon citizens of Puerto Rico and certain natives permanently residing in said Island."

39 Stat. 951 (1917), reprinted in Office of the Commonwealth of Puerto Rico, Documents on the Constitutional History of Puerto Rico 84-85 (1964). *But see Balzac v. People of Porto Rico*, 258 U.S. 298 (1922) (held that right to a jury trial not applicable to people in Puerto Rico).

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The historical treatment accorded Spanish-speaking groups by federal public policy extended United States citizenship without language requirements. The use by courts of the Immigration and Naturalization Act¹² to somehow indicate otherwise is erroneous as a matter of history and law. This statute did not and does not apply to Mexican-Americans and Puerto Ricans and their descendants; the federal government has never sought to condition the right of Mexican-Americans and Puerto Ricans to citizenship on the basis of English-language facility.

§29.4(2). The Legal Principles. Hispanics are not the only group to have pressed language-based claims of discrimination; they are today in the U.S. the largest such group. The legal principles for a standardized approach against national origin language-based discrimination lies in the concepts of disparate impact and disparate treatment. The Supreme Court set the standard in *Yick Wo v. Hopkins*¹³ where it held that facially neutral procedures which were unevenly applied to a protected group constituted a violation of the equal protection clause of the Fourteenth Amendment. The Court held that the equal

¹² 8 U.S.C. §1423(1) requires at least an elementary understanding of the English language as a condition of naturalization. However, in the area of voting rights, Congress was vigilant in protecting the rights of Puerto Ricans in response to a provision in the New York State Constitution, reprinted in *Katzenbach v. Morgan*, 384 U.S. 641, 644 n.2 (1966), which required eligible voters to read and write English. In 1965, Congress passed §4(e) of the Voting Rights Act, 79 Stat. 439, 42 U.S.C. §1973b(2) (1964 ed., Supp. I), reprinted at 384 U.S. at 643. This section mandated that persons educated in American-flag schools, where the language of instruction was other than English, and who had completed the sixth grade, not be denied the right to vote. The Court in *Katzenbach* upheld §4(e), passed under section 5 of the Fourteenth Amendment to prohibit New York from denying the right to vote to large segments of the Puerto Rican community, and thus nullified New York State's English-literacy requirement. 384 U.S. at 652.

¹³ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). The Supreme Court held: Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.

Id.

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protection clause was a pledge of the protection of equal laws and was applicable to all persons regardless of their race, color, or nationality.¹⁴

§29.4(3). English Literacy: Vehicle for Discrimination and Stigma. For Hispanics and other national origin groups, it has been the actions of states against the languages of such groups that has made them turn to the federal courts for protection. World War I produced a xenophobic reaction which resulted in state laws prohibiting the instruction of English to elementary or junior high school students; state statutes adopting English as the official language of the state were also passed.¹⁵

Such statutes were justified as an attempt to promote civic development and American ideals, which would be inhibited if a child was trained or educated in a foreign language. States reacted to large foreign-born communities typified by a common use of foreign words, foreign leaders, and foreign atmosphere. This was viewed as a hindrance to the children of the foreign born and as a peril to public safety.

In *Meyer v. Nebraska*,¹⁶ the U.S. Supreme Court scrutinized a state statute which made it a criminal offense for a teacher to instruct children below the eighth-grade level in specified foreign languages. In this case a parochial school teacher was convicted for teaching the subject of reading in the German language.¹⁷

The Court's perspective on language-based discrimination is as applicable today as it was in 1923:

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which

¹⁴ *Id.*

¹⁵ See generally, B. Platt, Only English? Law and Language Policy in the United States (1990).

¹⁶ *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁷ *Id.* at 401.

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conflict with the Constitution—a desirable end cannot be promoted by prohibited means.¹⁸

The Supreme Court found that the Nebraska English-only statute deprived persons of the liberty guaranteed by the Fourteenth Amendment. The definition given by the Court to the concept of liberty is well-known throughout civil rights jurisprudence and worthy of repetition.¹⁹

The Court found that the teacher in this case taught German in the school as part of his occupation; he had a right to teach and parents had a right to have their children instructed. These rights were within the liberty protected by the Fourteenth Amendment. The Court saw no emergency which could serve as a basis for rendering foreign language instruction to children harmful and acknowledged that such languages are best learnt at an early age. The statute was declared unconstitutional as was a similar statute in Iowa.²⁰

These state statutes were sophisticated enough not to target their prohibitions at the particular national origin groups who spoke the prohibited foreign language, rather the legislatures drew classifications based solely on language. The supporters of these state statutes saw themselves as pro-English and believed

¹⁸ *Id.* at 401.

¹⁹

While this court has not attempted to define with exactness the liberty thus guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts. [citations omitted].

Id. at 399-40.

²⁰ *Bartels v. State of Iowa*, 262 U.S. 404 (1923).

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them to be a proper response to the purported threat of foreign language groups; they even attacked the loyalty of foreign language speakers. The Supreme Court intervened to arbitrate the controversy and to come down on the side of the foreign language teachers and learners.

The Nebraska and Iowa cases were soon followed by cases in the Philippines and Hawaii, where territorial governments had legislated foreign language prohibitions. In *Yu Cong Eng v. Trinidad*,²¹ the Filipino legislature passed a statute which required merchants to keep their account books in English, Spanish or one of the forty-three local dialects. This statute prohibited 12,000 Chinese merchants from keeping their books in Chinese. The failure to comply would result in criminal sanctions being imposed.

The Supreme Court found that the statute was aimed at the Chinese merchant community in the Philippines, that it prohibited these merchants who spoke no other language from the details essential for the conduct of their business. The statute was deemed unconstitutional as a deprivation of the liberty of these merchants to conduct their affairs in a language they understood and thus of their property without due process of law. The Supreme Court ruled the statute unconstitutional as a violation of the due process of law and the denial of the equal protection of the laws.²²

More recently, various groups have pressed for English-only laws in Florida, California, New York and in a few other areas. This history is an important foundation for understanding language-based national origin discrimination in the workplace.²³

§29.5. Language-Based National Origin Discrimination Claims in the Workplace. Language-based national origin discrimination claims arise in different contexts. Some employers require

²¹ *Yu Cong Eng v. Trinidad*, 271 U.S. 500 (1926). See also *Farrington v. Tokushige*, 11 F.2d 710 (9th Cir. 1926) (involved Hawaiian statute limiting admission of children to private schools taught in Japanese unless they completed the first and second grades in an American public school).

²² 271 U.S. at 524-25.

²³ See Note, *English-Only Laws and Direct Legislation: The Battle in the States Over Language Minority Rights*, 7 J. of Law and Politics 325 (1991).

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employees to speak English only, and when a violation of this policy results in an adverse employment decision, the rule may be challenged as a form of national origin discrimination. Other courts have addressed the issue of requiring job applicants to speak and/or read English. Where a discriminatory impact is demonstrated, courts must determine whether the requirement was job-related. Finally, allegations of discrimination because of an accent associated with a primary language other than English has been the subject of intense litigation.

The EEOC addressed many of these issues in the early 1970s through Commission decisions and issued expansive Guidelines concerning English-only rules and national origin discrimination. However, some judicial interpretations of the boundaries of national origin linguistic discrimination have taken a more narrow view. These agency decisions, Guidelines and court interpretations are set out below.

§29.5(1). EEOC Interpretations. The EEOC in the early 1970s aggressively pursued claims of language-based national origin discrimination and adopted Guidelines concerning "English only" Rules. In one case, for example, the EEOC found reasonable cause to believe that Title VII¹ had been violated where an employer's foreman and "lead girl" prohibited Spanish-surnamed Americans from speaking Spanish at their work locations, during lunch, and during other non-working times.²

The agency agreed with the opinion of the Attorney General of New Mexico that a rule requiring employees to speak only English during work hours was a violation of New Mexico's Human Rights Act.³ It adopted the National Labor Relations Board (NLRB) rule that conversation was a term, condition, or privilege of employment.⁴ The EEOC held that "it is a term, condition, or privilege of employment for Spanish-surnamed Americans to speak Spanish at work."⁵ The EEOC found that

¹ Hereinafter, reasonable cause will be used to mean "reasonable cause to believe that a violation of Title VII exists."

² EEOC Dec. 71-446, 2 FEP Cas (BNA) 1127 (1970).

³ *Id.* at 1128 n.3.

⁴ *Id.* at 1127.

⁵ *Id.* The agency stated:

It is now well settled that conversation, including social conversation, at work both during working and non-working time, is a term or

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the employer's English-only rule violated Title VII regardless of whether it was seen as specifically aimed at Spanish-surnamed American employees or a rule against speaking languages which the employer's supervisors did not understand. Such a rule had to be justified by business necessity, and the employer made no such showing in this case.⁶ The EEOC agreed that there may be occasions when an employer's business necessity will require it to forbid its employees at their work locations from speaking languages which its supervisors do not understand; however, it could not conceive of a situation that would require a prohibition on the use of languages during non-working time.⁷ In this decision, the EEOC applied its National Origin Guidelines,⁸ which set forth the required showing of business necessity needed to justify a speak English-only rule.

condition of employment, within the meaning of section 8(a)(3), 8(d), and 9(a) of the National Labor Relations Act. It also is clear that "terms, conditions, or privileges of employment" as used in Title VII has a scope no less wide—it is in our view wider—than "term or conditions of employment" as used in the National Labor Relations Act. Here the employees were speaking in a tongue which was, for all or some of them, their native tongue and/or the tongue in which they were most comfortable. (footnotes omitted)

Id.

⁶ *Id.* at 1128.

⁷ *Id.*

⁸ The National Origin Guidelines concerning "Speak-English-only rules," provide at 29 C.F.R. §1606.7 (1992):

(a) When applied at all times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.

(b) When applied only at certain times. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) Notice of the rule. It is common for individuals whose primary

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The EEOC has closely examined various claims of poor work due to a "language problem"; in one instance where a Spanish-surnamed American typesetter was fired for an inability to speak, read and understand English well, the EEOC found that the Hispanic typesetter had sixteen years of experience in typesetting English text.⁹ It concluded that there was reasonable cause against the employer.

In 1972, the EEOC investigated a set of charges against an employer engaged in cultivating and processing agricultural products.¹⁰ The EEOC found that the company required that employees read, write, and speak English to perform certain jobs. Spanish-surnamed American employees comprised a majority of the company's employees, and a significant number were unable to speak, read, or write English.¹¹ The employer provided no business justification for the requirement; absent such a justification, the EEOC concluded that there was reasonable cause against the firm.¹²

The EEOC also concluded that there was reasonable cause against the union at the same establishment for posting notices about union elections only in English.¹³ In another matter involving an employer engaged in the food processing industry, the EEOC found reasonable cause against a union for prohibiting its Spanish-surnamed American employees and members from speaking Spanish during work hours and at union

language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin.

Id. (footnotes omitted).

⁹ EEOC Dec. Case No. YAU 9-048, 2 FEP Cas (BNA) 78 (1969).

¹⁰ EEOC Dec. No. 73-0377, 19 FEP Cas (BNA) 1776, 1782 (1972).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 1781. See also Gregory, *Union Leadership and Workers' Voices: Meeting the Needs of Linguistical Heterogeneous Union Members*, 58 Cinc. L. Rev. 115 (1989).

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meetings.¹⁴ The union offered no business necessity justification for the rule. It also found that the union's constitution, by-laws, rules and procedures, and its collective bargaining agreement were printed solely in English. Prior to 1972, its nomination, election and polling information for union elections were printed and disseminated in English only.¹⁵ After receiving pressure from its members, the union distributed this information in Spanish on the company bulletin boards, but this information was inaccurately translated. The union's Spanish version of its membership application was rarely used since the union's office personnel were unfamiliar with Spanish.¹⁶

The EEOC found that under these circumstances the union had an obligation to publish its collective bargaining agreement and other relevant information in both Spanish and English. It found the employment rights of the union's Spanish-speaking members to be adversely affected by the failure to provide them with accurate information concerning their union rights and privileges. Spanish-speaking members were simply not provided with access to all relevant information.¹⁷ This served as the basis for the EEOC's conclusion that the union had discriminated against Spanish-surnamed Americans as a class on the basis of their national origin.¹⁸

The EEOC's findings of reasonable cause do not control the action of the district court in the same case.¹⁹ On the other hand, EEOC guidelines are entitled to great weight, unless they diverge from what the court finds to be Congress' legislative intent.²⁰ The EEOC's work in the area of national origin has

¹⁴ EEOC Dec. No. 73-0479, 19 FEP Cas (BNA) 1788, 1790, 1804 (1973); see also EEOC Dec. No. 71-2029, CCH EEOC Dec. ¶6243 (1971) (where the EEOC found the union's failure to publish the collective bargaining agreement and other relevant information constituted reasonable cause).

¹⁵ *Id.* at 1803.

¹⁶ *Id.*

¹⁷ *Id.* at 1803-04.

¹⁸ *Id.* at 1803.

¹⁹ Before a lawsuit may be filed under Title VII, it must be conciliated by either a State Fair Employment Practices Agency and/or the EEOC. Prior to filing a lawsuit, the charging party generally receives a right to sue letter, which requires filing within ninety days.

²⁰ *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

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had a variety of results in the case law. Basic to EEOC's approach is its concept of national origin discrimination defined to include:

[T]he denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.²¹

The ability to relate the characteristics of a national origin group to discrimination against it sets this definition apart from the case-by-case approach used by district courts, especially those confronting the issues involved in language-based national origin discrimination. In essence, the EEOC identifies both the immutable characteristic of national origin groups—place of origin—with mutable characteristics such as language; many courts limit their analysis only to the first aspect.

§29.5(2). The *Garcia v. Gloor* Modality²²—Employers May Require Bilingual Employees to Speak English only. In *Garcia*

²¹ 29 C.F.R. §1606.1 (1992) (original published at 45 Fed. Reg. 85635 (1980)). The complete definition provides:

The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group. The Commission will examine with particular concern charges alleging that individuals within the jurisdiction of the Commission have been denied equal employment opportunity for reasons which are grounded in national origin considerations, such as (a) marriage to or association with persons of a national origin group; (b) membership in, or association with an organization identified with or seeking to promote the interests of national origin groups; (c) attendance or participation in schools, churches, temples or mosques, generally used by persons of a national origin group; and (d) because an individual's name or spouse's name is associated with a national origin group. In examining these charges for unlawful national origin discrimination, the Commission will apply general Title VII principles, such as disparate treatment and adverse impact.

²² *Garcia v. Gloor*, 609 F.2d 156 (5th Cir. 1980), *withdrawn and substituted*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). See generally, Platt, *Toward Domestic Recognition of a Human Right to Language*, 23 Hous. L. Rev. 885 (1986).

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v. *Gloor*, the Fifth Circuit Court of Appeals established a modality that differentiates between monolingual²³ and bilingual Hispanics. The effect of this norm is to divide language-based national origin discrimination into separate and exclusive categories of language and national origin, thus, differentiating the protections afforded persons of Hispanic and other national origins.

The essence of the modality is that fully bilingual employees must comply with speak English-only rules, since as to them the rule does not impose a discriminatory condition of employment:

[I]f the employer engages a bilingual person, that person is granted neither right nor privilege by the statute [Title VII] to use the language of his personal preference.²⁴

The underlying rationale for this modality was that the rules of the workplace were to be made by collective bargaining, or, in its absence, the employer.²⁵

The *Garcia v. Gloor* modality rests on the theory that Title VII prohibits national origin discrimination, but holds that "[n]either the statute nor common understanding equates national origin with the language that one chooses to speak."²⁶ The appellate court, which originated this modality, conceded that language may be applied as a covert basis for national origin discrimination, but found that it had not been applied to *Garcia* with this end or result in mind.²⁷

The Fifth Circuit Court of Appeals observed that Title VII does not equate "the language an employee prefers to use with his national origin."²⁸ Language-based national origin discrimination was limited to those instances where a person spoke only one language or has difficulty in the use of a language other than the one spoken at home. The court found that bilingual persons have a choice, and this choice divorces

²³ Throughout this study the word "monolingual" will be used to refer to Spanish-speaking Hispanics, unless otherwise indicated.

²⁴ *Garcia v. Gloor*, at 618 F.2d at 269.

²⁵ *Id.* at 268-69.

²⁶ *Id.* at 268.

²⁷ *Id.*

²⁸ *Id.* at 270.

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language from national origin discrimination. In this case the English-only rule was interpreted to merely require that an individual who could speak English do so at the workplace and during work hours.²⁹

The appellate court took pains to distinguish the case of the bilingual employee from that of the monolingual for whom language might be equated to immutable characteristics like sex, race, or place of birth.³⁰ The law is more protective of such characteristics and less so of mutable characteristics over which an individual has a measure of control and may change, such as hair length, or in the case of a bilingual employee, the language they choose to speak. The court further differentiated this case from rules based on the language used in the employee's home, the language the employee speaks when not at work, or the language spoken by his or her parents and grandparents.³¹ Nor was its rule to apply in a case where the employee inadvertently slipped into a more familiar language.³²

By analogy the appellate court had transformed an allegation of language-based national discrimination into one of insubordination, that is, the refusal of an employee to obey a rule of the workplace. It therefore explicitly held that Garcia "was discharged because, having the ability to comply with his employer's rule, he did not do so."³³

The *Garcia v. Gloor* modality neither comports with social science, nor with the facts of this case. The court itself made plain that Title VII does not prohibit an employer from arbitrary practices; it does not forbid an employer from hiring "only persons born under a certain sign of the zodiac or persons having long hair or short hair or no hair at all."³⁴

In this case, Hector Garcia, a born American of Mexican descent, had been hired as a salesman by Gloor Lumber and Supply, Inc. in Brownsville, Texas. In 1975, seven of Gloor's eight salesmen (including Garcia) were Hispanic, a direct result

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* at 272.

³⁴ *Id.* at 269 (footnote omitted).

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of business necessity since 75 percent of the population in its business area were Hispanic; many of Gloor's customers desired to be waited upon by a salesman who spoke Spanish. Garcia was expected to communicate with Spanish-speaking customers in Spanish; he had been hired in part because of this ability.³⁵

Gloor's speak English-only rule therefore did not apply when communicating on the job with Spanish-speaking customers. However, with two exceptions, it prohibited employees from speaking Spanish in all other situations. The rule did not apply to work breaks, nor did it apply to non-English-speaking employees who worked in the lumber yard.³⁶ The incident which triggered Garcia's discharge occurred when he was asked by a fellow Mexican-American employee about an item that had been requested by a customer; Garcia responded in Spanish that the article was not available. Alton Gloor, a company shareholder and officer, overheard this conversation. Garcia was subsequently discharged.³⁷

The purported business reasons for the speak English-only rule included: (1) customer satisfaction insofar as English-speaking customers objected to conversations between employees which they could not understand; (2) the need for English fluency in order to understand trade literature and pamphlets published only in English; (3) improving the English ability of employees who spoke Spanish off the job; and (4) monolingual English-speaking supervisors could better oversee their subordinate's work.³⁸ The district court found these to be valid business reasons. None of these reasons comport with EEOC's interpretation of language-based national origin discrimination as reflected in its decisions or in its National Origin Guidelines at 29 C.F.R. §1606.7(b) (adopted in response to the *Garcia v. Gloor* modality). The sole exception EEOC makes for salespersons concerns their relationship with English-speaking customers—an issue which was not involved in this case.³⁹

³⁵ *Id.* at 266-68.

³⁶ *Id.* at 266.

³⁷ *Id.*

³⁸ *Id.* at 267.

³⁹ EEOC Dec. No. 73-0377, 19 FEP Cas (BNA) 1776.

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In short, Garcia was fired for answering a fellow employee's job-related question in Spanish. It is not clear from the decision whether the question was posed in Spanish; if it had been, Alton Gloor presumably would have taken action against Garcia's fellow employee and no such action was noted. The court of appeals did not believe that Garcia had inadvertently slipped into using his Spanish since Garcia had violated the speak English-only rule previously and at every opportunity.⁴⁰ Yet, it is not unusual for bilinguals to respond in Spanish to a question posed by a fellow bilingual even when the question is in English.

The appellate court's approach is not surprising in light of its remarkable candor that ethnic or sociocultural traits or an unrelated status must not be confused with national origin.⁴¹ Language becomes a characteristic which is within the victim's power to alter, unlike the individual's place of birth or the place of birth of their forebears, their race, or their sex. The latter become immutable characteristics subject to protection under the law, while mutable characteristics, with the exception of religion (a result of personal choice which is protected) are not to be afforded this protection.⁴² The appellate court believed that an employer's hiring policy on mutable characteristics relates to the employer's conduct of business, and not to equal employment opportunity.⁴³

The court refused to find that the rule had a discriminatory impact on Hispanics, since this was a rule that each affected employee could follow and the failure to do so was a function of personal choice. It analogized the situation to that of a rule forbidding smoking which affected more members of one race than another.

To trivialize the most important characteristic of all Hispanics—a characteristic which has been the basis for the segregation of their children, the denial of their right to exercise the franchise,⁴⁴ and their ability to sit on petit and grand juries,⁴⁵

⁴⁰ *Garcia v. Gloor*, 618 F.2d at 267, 270. *Id.* at 269.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Castro v. State of California*, 2 Cal. 3d 223, 466 P.2d 244, 85 Cal. Rptr. 20 (1970); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

⁴⁵ *Hernandez v. Texas*, 347 U.S. 475 (1954).

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or their right to understand a court proceeding⁴⁶—is to misapprehend the fundamentals of language-based national discrimination. This modality sanctions discrimination against those Hispanics who have taken the first tentative steps to master English and with this proficiency achieve a modicum of employment opportunity.

The implications of the *Garcia v. Gloor* modality must have startled its authors for they took pains to point out that they did not seek to denigrate a person's racial, ethnic, or national self-identification, including language preference; nor were differences in language and other cultural attributes to serve as a basis for discrimination.⁴⁷ It did not find that the speak English-only rule in this company created an atmosphere of racial or ethnic oppression.⁴⁸ The bilingual is compelled by this thinking to separate his or her linguistic behaviors into English and Spanish compartments in order to secure equal treatment from his or her employer; such separate but equal taxonomies serve only to intimidate the bilingual and stigmatize the bilingual's salient national characteristic: language.

The *Garcia v. Gloor* modality allows the employer to forbid employees from speaking the language they prefer; it sanctions language-based national origin discrimination against bilinguals. The decision establishes a legal distinction between monolinguals and bilinguals, which is not supported by Title VII or by EEOC's own decisions.

The consequence of this decision was to dilute the protection afforded monolinguals and bilinguals by EEOC decisional authority, while giving the employer a free hand to discriminate against bilinguals. The appellate court was aware of the EEOC decisional authorities in this area, but it disregarded EEOC's decisions and approached the matter on the basis of the statute and the case law. The court observed that despite EEOC's decisions, the agency had not promulgated a regulation, standard, or general policy for language rules. The EEOC National Origin Guidelines were not adopted until December

⁴⁶ *United States ex rel. Negron v. State of New York*, 434 F.2d 386 (2d Cir. 1970).

⁴⁷ *Garcia v. Gloor*, 618 F.2d at 270.

⁴⁸ *Id.*

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29, 1980, and were promulgated in response to the *Garcia v. Gloor* modality.⁴⁹ Nevertheless a number of courts continue to apply the *Garcia v. Gloor* modality despite EEOC's guidelines to the contrary.⁵⁰

§29.5(3). English-only and English Proficiency Rules.⁵¹

Many courts addressed employer rules to speak English-only or job criteria that mandated proficiency in English. In *Mejia v. N.Y. Sheraton Hotel*,⁵² the plaintiff alleged that she was fired from her position as a chambermaid because of her Spanish surname and the fact that Spanish was her primary language. She alleged that for these reasons she also was denied a promotion to a front office cashier position.⁵³ The employer admitted that the plaintiff's language was a factor in its employment action, but argued that since she would be in contact and interact with the hotel guests, her language proficiency was an obstacle to her selection.⁵⁴ Her evaluation stated that she would have to learn to speak better English than what she possessed.⁵⁵ The defendant argued that the plaintiff was discharged for violation of a hotel rule which prohibited employees from entering occupied rooms while not on duty and that plaintiff was denied a promotion because of her lack of English proficiency.⁵⁶

The court found "a serious past and current inability on the plaintiff's part to articulate clearly or coherently and to make herself adequately understood in the English language."⁵⁷ This was further confirmed from an instructor's report card ren-

⁴⁹ 29 C.F.R. §1606.7(a), 45 Fed. Reg. 85635 (Dec. 29, 1980).

⁵⁰ See, e.g., *Jurado v. Eleven Fifty Corp.*, 630 F. Supp. 569, 39 FEP Cas (BNA) 1459 (D.C. Cal. 1985).

⁵¹ See generally, Perea, *English Only Rules and the Right to Speak One's Primary Language in the Workplace*, 23 U. Mich. J.L. Ref. 265 (1990).

⁵² *Mejia v. N.Y. Sheraton Hotel*, 459 F. Supp. 375, 18 FEP Cas 602 (S.D.N.Y. 1978).

⁵³ *Id.* at 603.

⁵⁴ *Id.* at 603-04.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 604.

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dered in summer programs she had taken to improve her English.⁵⁸

In short, the court concluded that English proficiency was a requirement that was significantly related to successful job performance, and it had no adverse impact on minority applicants. It found that the hotel employed Hispanics, including in the front cashier department, and plaintiff's Hispanic origin or employment as a chambermaid did not play a role in the hotel's refusal to promote her.⁵⁹ She had been denied the position because of her English language deficiency; she had been terminated because of her violation of the hotel rule.⁶⁰

In applying the business necessity test, the court found that even if the English proficiency requirement set forth in the employer's hotel rule had a disparate impact upon Hispanics, the employer proved that such requirements were reasonably necessary to the normal operation of their particular business.⁶¹

The district court in *Flores v. Hartford Police Dept.*⁶² faced the issue of language-based discrimination with respect to the requirements of the Hartford Police Department's cadet training program.

The training program had only two Puerto Rican recruits, who were not permitted to speak Spanish in the training academy, even when classes were not in session. The plaintiffs claimed this prevented them from improving their course performance since they were prevented from discussing their course work in Spanish. They also alleged that they were reprimanded in their classes for speaking Spanish, which the defendant denied.⁶³

The court analyzed these claims in terms of (1) the *Garcia v. Gloor* modality,⁶⁴ that is, that a bilingual employee had no protected right to speak Spanish on the job, and (2) EEOC's

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 603.

⁶¹ *Id.* at 605.

⁶² *Flores v. Hartford Police Dept.*, 25 FEP Cas 180 (D. Conn. 1981).

⁶³ *Id.* at 185.

⁶⁴ *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980); this case is discussed in detail *supra* §29.5(2).

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ruling that an absolute prohibition on speaking Spanish violated a privilege and condition of employment.⁶⁵ The district court found that there was no evidence that the speak English-only rule had been applied to the plaintiffs because of their Puerto Rican origin, or, only to Puerto Rican recruits.⁶⁶

The court found that even if the absolute prohibition on speaking Spanish was not job-related, it was not an irrational response to the need to obtain proficiency in English from the recruits.⁶⁷ In short, it removed language from its connection to national origin, and held that unless the discrimination was against national origin, not language, there was no violation of Title VII.⁶⁸ This holding rejects the EEOC guidelines⁶⁹ and does not recognize a connection between language and national origin discrimination.

The *Flores v. Hartford Police Dept.* holding reflects a failure on the part of some courts to recognize the linkage between language and national origin. The failure to recognize this link stands juxtaposed to tenets of sociology and cultural anthropology where language differences are inextricably entwined with and inseparable from their moorings in national origin. Consequently, the failure to treat language as a salient characteristic of national origin arguably denies the protection that inheres in the national origin concept to the very groups most in need of the same.

Puerto Ricans and Mexican-Americans have been historically discriminated against on the basis of their language.⁷⁰ In

⁶⁵ 25 FEP Cas at 186.

⁶⁶ *Id.* at 186.

⁶⁷ *Id.*

⁶⁸ *Id.* The court said:

Even if the rule could not be shown to be job-related, it is an understandable and not irrational response to a problematical situation the training officers were required to handle. Proficiency in English was a necessary goal, if only to facilitate communication between officers. I do not find that a no-Spanish rule was enforced with intent to discriminate on the basis of national origin.

⁶⁹ 29 C.F.R. §1606.7.

⁷⁰ Charles M. Wollenberg, *All Deliberate Speed: Segregation and Exclusion in California Schools, 1855-1975*, 108-118 (1978); Mario T. Garcia, *Desert Immigrants: The Mexicans of El Paso, 1880-1920*, 110-126; Manuel del Valle, *Language Rights and Due Process—Hispanics in the United States*, 17 *Revista Juridica de la Universidad Interamericana de Puerto Rico* 91

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March 1983, workers at a New York restaurant were informed that a new policy would require that only English be spoken in the office. The basis for the rule was the belief by the supervisor that employees believed that they or the supervisor were the subject of all conversations by the foreign-language-speaking figure clerk employees.⁷¹

The restaurant employed Indian figure clerks who discussed and completed their work assignments by speaking Hindi and Hispanic clerks who did the same in Spanish. The speak English-only rule made no mention of the consequences associated with its violation. An Hispanic clerk inadvertently spoke to another clerk in Spanish and was terminated. The clerk complained that the clerks speaking Hindi during this time had not been fired; she believed she had been replaced by an Indian.⁷² The Hispanic clerk had worked at the restaurants' Check Control Department for four and one-half years; she and the other Hispanic clerks had always spoken Spanish and had done their jobs satisfactorily.

Another Hispanic employee, who had worked there for two and one-half years, inadvertently asked the first employee a question in Spanish and was consequently terminated. She also believed that she was replaced by an Indian. Finally, a third employee, who had been employed for one and one-half years, was terminated on the same day even though she was not speaking in Spanish.⁷³ She also believed she had been replaced by a person of Indian national origin.

The three Hispanic employees claimed language-based national origin discrimination as a result of the application of the speak English-only rule. The parties ultimately entered into a negotiated settlement agreement, which reinstated each of the three Hispanic figure clerks, provided them with backpay, and rescinded the rule prohibiting persons from speaking in languages other than English.⁷⁴ There was no business necessi-

(1982); Pastora San Juan Cafferty and William C. McCready (eds.), *Hispanics in the United States* 87-111 (1985).

⁷¹ EEOC Charge Nos. 021-83-2062, 021-83-2063, 021-83-2064, EEOC N.Y. Dist. Off. (April 12, 1983).

⁷² *Id.*

⁷³ *Id.*

⁷⁴ EEOC, Negotiated Settlement Agreement, Charges 021-83-2062, 021- (Release #5, 6/93)

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ty associated with the rule, and the parties apparently conceded the impact of the rule discriminated in theory and in fact on Hispanics.

In *Saucedo v. Brothers Well Service, Inc.*,⁷⁵ John Saucedo, a person of Mexican descent, was terminated for violating a supervisor's rule that did not permit any "Mesican" (sic) talk. The plaintiff's immediate supervisor told him that while he believed anyone could speak any language on the job, his own superior, "Doc" Holliday, did not tolerate any "Mesican" talk.⁷⁶

The incident that gave rise to plaintiff's discharge involved an order to bring a large metal part to be straightened to another Mexican-American employee. Saucedo brought over the part and asked his co-worker, in two Spanish words, where he wanted the part placed. Holliday overheard the request and told the plaintiff that he had just resigned. The co-worker argued with Holliday that a man could not be discharged for speaking Spanish on the job, called the rule a "chicken *****" rule, and called Holliday "chicken *****" for enforcing it. Holliday then assaulted the co-worker, hitting him a number of times around the face with his fist.⁷⁷

Holliday was not discharged, although the court saw this as much more likely to cause a safety problem in this drilling well operation than the plaintiff's casual use of Spanish. The court found that the rule had a disparate impact on Mexican-American employees, was an absolute prohibition rather than a rule prohibiting the use of foreign languages in some situations, and was not justified by business necessity.⁷⁸

83-2063, 021-83-2064 EEOC N.Y. Dist. Off. (May 10/11, 1983). The matter was handled by the Puerto Rican Legal Defense & Education Fund, Inc.

⁷⁵ *Saucedo v. Brothers Well Service, Inc.*, 19 FEP Cas 91 (S.D. Tex. 1979).

⁷⁶ *Id.* at 93.

⁷⁷ *Id.*

⁷⁸ *Id.* at 93-94, 91-92. The court said that it was not holding that an employer, or this specific defendant, could never institute a rule prohibiting its employees from using a foreign language in some situations, but rather that in this case the plaintiff had been terminated for "racial animus." *Id.* at 91-92. In terms of the rule used in this case, it observed:

A rule that Spanish cannot be spoken on the job obviously has a disparate impact upon Mexican-American employees. Most Anglo-Americans obviously have no desire and no ability to speak foreign languages on or off the job. The question in a case of this nature

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hospital. It further said that a random introduction of such employees would not help patients who were not fluent in English. Since the English language qualification also affected all other foreign language users, the appellate court found it was well within the discretion of the hospital to utilize it. The rule was found to be a bona fide occupational qualification, which under Title VII is a complete defense to any claims of

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The case provides a well-reasoned approach to the claim of language-based national origin discrimination; the facts of the case inextricably relates language to national origin. Saucedo was not prohibited from speaking Spanish, he was forbidden to speak "Mesican." In the popular mind, to speak Spanish is to evidence the chief characteristic of Hispanics. In New York, employers have instructed employees to stop speaking "Puerto Rican," meaning to cease speaking Spanish.

In *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*,⁷⁹ Magdalena Garcia, a Mexican-American, brought suit under Title VII and 42 U.S.C. §1981; she alleged discriminatory practices against Latino employees (defined as any Spanish-surnamed person or individual of Hispanic ancestry residing in the City of Chicago). One such practice included the requirement that employees in nearly all job classifications speak and read English in some fashion.⁸⁰ The plaintiffs produced no evidence of the alleged discriminatory impact of this requirement: they did not show that as a consequence of this or other related rules Latinos were excluded at a higher rate than persons of other national origin.⁸¹

The district court found that the Latinos were not adversely affected by the language rule, nor were they treated differently than others with regard to the requirement. The court concluded that in a highly sophisticated medical care institution, the ability to speak and read some English was a necessary, job-related requirement.⁸² The Seventh Circuit Court of Appeals affirmed this decision finding that a deficiency in the English language would not serve the majority of patients at the

therefore becomes whether or not the employer can prove by a preponderance of the evidence that his "rule" requiring only English to be spoken on the job is the result of business necessity. Brothers here has not proved by credible evidence that it actually had and uniformly enforced such a rule and has not shown there was any business necessity for a rule which would result in automatic termination in a situation like that which existed in the case at bar.

Id. at 94.

⁷⁹ *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 23 FEP Cas 177 (N.D. Ill. 1980), *aff'd*, 660 F.2d 1217 (7th Cir. 1981).

⁸⁰ *Id.* at 23 FEP Cas 186.

⁸¹ *Id.*

⁸² *Id.*

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the percentage of Mexican Americans in its work force had been affected by the rule.⁸⁶

The district court disregarded the fact that the plaintiff had been hired by the defendant as a seasonable truck driver, apparently without any complaints about his work performance. The court of appeals found that the employer's English-only policy (in effect since 1977) was supported by its reasons of business advantage resulting from employing truck drivers who (1) could communicate with both English and Spanish-speaking customers, and (2) could understand the owner's instructions in English.⁸⁷

The employer's rationale was upheld as a legitimate, non-discriminatory reason for its denial of the full-time employment of the plaintiff, this despite the fact that the plaintiff had been periodically hired to do this same job notwithstanding his inability to speak English. The monolingual Hispanic in this case was subjected to a legal test which was aimed at the sole issue of language without any analysis that related his linguistic trait to his national origin. No effort was made to assess whether he could perform the job, evidence of which existed from his prior employment with the same firm.

In *Jurado v. Eleven Fifty Corp.*,⁸⁸ the district court turned its attention to a bilingual Hispanic, who refused his radio station's direction to broadcast his program entirely in English, without the use of any Spanish words or phrases. The decision by the radio station to have the plaintiff stop speaking Spanish was found by the court to be a programming decision and not motivated by racial or national origin animus. The court applied the *Garcia v. Gloor* modality,⁸⁹ that is, that bilingual employees could not establish a claim of disparate impact under an English-only rule since they can comply with the rule and thereby be unaffected by it.⁹⁰ The court reasoned that

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Jurado v. Eleven Fifty Corp.*, 630 F. Supp. 569, 39 FEP Cas 1459 (C.D. Cal. 1985), *aff'd*, 813 F.2d 1406 (9th Cir. 1987).

⁸⁹ *Garcia v. Gloor*, 609 F.2d 156 (5th Cir. 1980), *withdrawn and substituted*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981). See §29.5(2).

⁹⁰ 39 FEP Cas at 1468-69.

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there was no English-only rule since programming changes constantly occurred at the station; and on the other hand, if the broadcaster's direction be deemed a rule, it did not apply to the plaintiff.⁹¹ The court neither mentioned, nor applied the EEOC National Origin Guidelines; the bilingual employee was left to the discrimination sanctioned by the *Garcia v. Gloor*⁹² modality.

In *Gutierrez v. County of Los Angeles*,⁹³ employees of the Municipal Court of the Southeast Judicial District of Los Angeles County were required to communicate only in the English language during working hours. The court enjoined the application of the rule pending its final decision on the case, provided that the defendants could apply the English-only rule for those circumstances dictated by valid business and public relations concerns. If such concerns existed, they were to be communicated to employees in writing.⁹⁴ In this case, the court's ruling mirrored the EEOC National Origin Guidelines without citing them. In short, the English-only rule would be allowed where business necessity dictated it. Language-based national origin discrimination was otherwise proscribed.

In *Frontera v. Sindell*,⁹⁵ a Puerto Rican plaintiff faced a situation similar to that of the Mexican-American seasonal truck driver in *Vasquez v. McAllen Bag and Supply, supra*, that is, plaintiff was able to perform a job but was not otherwise "qualified." Frontera had been employed as a carpenter at the Cleveland Hopkins Airport under temporary appointment. In order for this appointment to be made permanent, he was required to take a civil service carpenter examination in English.⁹⁶

Frontera had sought to have the examination translated, and the Civil Service Commission had voted to have it translated,

⁹¹ *Id.*

⁹² *Garcia v. Gloor*, 609 F.2d 156 (5th Cir. 1980), *withdrawn and substituted*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

⁹³ *Gutierrez v. County of Los Angeles*, 41 FEP Cas 1464 (C.D. Cal. 1985), *aff'd*, 838 F.2d 1031 (9th Cir. 1988), *vacated*, 109 S. Ct. 1786 (1989). See Oliva, *English-Only Rules in the Workplace: The Ninth Circuit Attempts to Redefine the Parameters*, 3 J. Human Rts. 99 (1990).

⁹⁴ *Id.*

⁹⁵ *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975).

⁹⁶ *Id.* at 1216.

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if possible. However, for lack of a trade dictionary and time it was unable to translate the exam. Frontera then proceeded to take and fail the exam administered in English.⁹⁷

The district court found that there was a compelling state interest to have the examination in English; the court of appeals affirmed, yet disagreed that a state had to show more than a rational basis for its action. It noted that there was no evidence to prove that plaintiff was discriminated on account of or against his nationality and that plaintiff did not raise a suspect class or race issue. This notwithstanding, it found English to be the common language of the United States as exemplified in the Immigration and Naturalization Act, 8 U.S.C. §1423. The court relied on the *Carmona v. Sheffield* modality, which had denied Spanish-speaking claimants a right to bilingual assistance and notices with regard to unemployment benefits.⁹⁸

§29.6. Accent. Language-based national origin discrimination also takes the form of discrimination because of an accent¹ that is associated with a primary language other than English. The published case law deals with a diversity of national origin groups, although the majority appear to be Asian (Chinese, Filipino, Indian, and Vietnamese) rather than European (Polish).²

⁹⁷ *Id.* at 1215-16.

⁹⁸ *Id.* at 1219-20. See *Carmona v. Sheffield*, 475 F.2d 738 (9th Cir. 1973). *Contra Pabon v. Levine*, 70 F.R.D. 674 (S.D.N.Y. 1976).

¹ See Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L.J. 1329 (1991).

² See EEOC Dec. Case No. YAU 9-048, 2 FEP Cas 78 (1969); EEOC Dec. No. 71-446, 2 FEP Cas 1127 (1970); EEOC Dec. No. 71-2029, CCH EEOC Decisions ¶6243 (1971); cf. *Fekete v. U.S. Steel Corp.*, 353 F. Supp. 1177, 5 FEP Cas 639 (W.D. Pa. 1973) (Hungarian); *Marcano v. H.J. Heinz Co.*, 9 FEP Cas 26 (W.D. Mich. 1974); *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975); *Mejia v. N.Y. Sheraton Hotel*, 450 F. Supp. 375 (S.D.N.Y. 1978); EEOC Dec. No. 73-0133, 19 FEP Cas 1765 (1972); EEOC Dec. 73-0377, 19 FEP Cas 1776 (1972); EEOC Dec. No. 73-0479, 19 FEP Cas 1788 (1973); cf. *Berke v. Ohio Dept. of Public Welfare*, 30 FEP 387 (S.D. Ohio 1978), *aff'd*, 628 F.2d 980 (6th Cir. 1980) (Polish, accent); *Garcia v. Gloor*, 609 F.2d 156 (5th Cir. 1980), *withdrawn and substituted*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *Morales v. Dain, Kalman & Quail*, 467 F. Supp. 1031 (D. Minn. 1979); *Flores v. Hartford Police Dept.*, 25 FEP Cas 180 (D. Conn. 1981); cf. *Carino v. Univ. of Oklahoma*, 25 FEP 1332 (W.D. Okla.

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In *Berke v. Ohio Dept. of Public Welfare*,³ the court found that the plaintiff of Polish national origin spoke with a pronounced accent, but could be readily understood; her command of the language was above average. The district court reasoned that the plaintiff's accent was not so familiar as to identify her as an Eastern European, but would allow the inference that her national origin was other than the United States.⁴

On this basis the court found that although the employer was not aware of the plaintiff's national origin, it should have been aware from her accent that she was not from the United States, and hence a person protected by Title VII.⁵

The district court held that the employer had failed to promote the plaintiff because of her non-United States origin.⁶ The protection afforded this plaintiff stands in marked contrast to discrimination against Hispanics on the basis of their primary language, as opposed to an aspect such as accent. The district court's decision was affirmed by the same Sixth Circuit Court of Appeals⁷ that had applied the *Carmona v. Sheffield*⁸

1981), *aff'd*, 750 F.2d 815 (10th Cir. 1984) (Filipino, accent); *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 660 F.2d 686 (7th Cir. 1981); *Vasquez v. McAllen Bag and Supply Co.*, 660 F.2d 686 (5th Cir. 1981); EEOC Dec. No. 81-25, 27 FEP Cas 1820 (1981); EEOC Dec. No. 83-7, 31 FEP Cas 1861 (1983); *Hou v. Commonwealth of Pennsylvania*, 573 F. Supp. 1539 (W.D. Pa. 1983) (Chinese, accent); *Duong Nhat Tran v. City of Houston*, 35 FEP Cas 471 (S.D. Tex. 1983) (Vietnamese, accent); *Bell v. Home Life Ins. Co.*, 596 F. Supp. 1549 (M.D.N.C. 1984) (New Zealander, accent); *Mandhare v. LaFargue Elementary School*, 605 F. Supp. 238, 37 FEP Cas 1611 (E.D. La. 1985), *rev'd without op.*, 788 F.2d 1563 (5th Cir. 1986) (Indian, accent); *Jurado v. Eleven Fifty Corp.*, 630 F. Supp. 569 (C.D. Cal. 1985), *aff'd*, 813 F.2d 1406 (9th Cir. 1987); *Gutierrez v. County of Los Angeles*, 41 FEP Cas 1464 (C.D. Cal. 1985), *aff'd in part and rev'd in part*, 838 F.2d 1031 (9th Cir. 1988), *reh'g denied, en banc*, 861 F.2d 1187 (9th Cir. 1988), *vacated*, 490 U.S. 1016 (1989), *on remand*, 873 F.2d 1342 (9th Cir. 1989).

³ *Berke v. Ohio Dept. of Public Welfare*, 30 FEP 387 (S.D. Ohio 1978), *aff'd*, 628 F.2d 980 (6th Cir. 1980).

⁴ *Id.* at 391-392.

⁵ *Id.* at 393.

⁶ *Id.* at 394.

⁷ 522 F.2d 1215 (6th Cir. 1980).

⁸ *Carmona v. Sheffield*, 325 F. Supp. 1341 (N.D. Cal. 1971), *aff'd*, 475 F.2d 738 (9th Cir. 1973) (unemployment insurance benefit notices need not be provided in Spanish).

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modality in *Frontera v. Sindell*;⁹ here accent-based national origin discrimination was actionable under Title VII, but language-based national origin discrimination was not protected under the U.S. Constitution.

In *Carino v. Univ. of Oklahoma*,¹⁰ a Filipino plaintiff was demoted from a supervisory position in a laboratory to a non-supervisory position. The district court applied the *Garcia v. Gloor*¹¹ modality in finding that accent (unlike language) was an immutable characteristic, although not as permanent as race or color; it was not easily changed for the person who had resided in a foreign country for an extended period of time.¹² The court reiterated the *Garcia v. Gloor* imperative that discrimination on the basis of national origin did not include discrimination on the basis of bilingual ability.¹³ This was said even though the EEOC had already promulgated its National Origin Guidelines in part in response to the *Garcia v. Gloor* modality and had rejected the license granted to employers to issue absolute prohibitions to monolingual or bilingual employees.

The district court held that an employer could not make an adverse employment decision simply because an individual possessed an accent, which resulted from birth and life in a foreign country.¹⁴ The court found plaintiff's demotion to have been made on the basis of his national origin related to accent, a violation of Title VII.

The Ohio and Oklahoma courts, as well as the Ninth Circuit in *Frangante v. Honolulu*¹⁵ concluded that accent-based national origin discrimination was actionable under Title VII, and, if proved, constituted a violation of the act. They also distinguished their decisions from that of the bilingual employee that is the focus of the *Garcia v. Gloor* modality. One

⁹ *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975) (civil service exams need not be conducted in a foreign language).

¹⁰ *Carino v. Univ. of Oklahoma*, 25 FEP Cas (BNA) 1332 (W.D. Okla. 1981), *aff'd*, 750 F.2d 686 (10th Cir. 1984).

¹¹ See §29.5(2).

¹² 25 FEP Cas at 1336-37.

¹³ *Id.* at 1336.

¹⁴ *Id.* at 1337.

¹⁵ *Frangante v. Honolulu*, 888 F.2d 591 (9th Cir. 1989).

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obvious difference between the bilingual Hispanic and the Polish or Filipino employees was that the latter sought to speak English, but could not do so without revealing a national origin trait—their accent—which served as the basis for discrimination. The decisions did not promote foreign language usage, but rather sought to arrest stereotypical discrimination based on a national origin characteristic.

In *Mandhare v. LaFargue Elementary School*,¹⁶ a female of Asian (India) national origin alleged she had been denied reappointment for the 1981-82 school year because of her national origin. The school board defended by arguing that plaintiff was terminated or not re-employed because her “heavy-accent and speech patterns and grammar problems” prevented effective communication with primary school students.¹⁷ The district court found this rationale to be a mere pretext for discrimination, since the librarian position for which the plaintiff was being considered did not require such communication. It ordered the plaintiff reinstated.¹⁸

The situation is different where an accent is considered by a court to affect teaching effectiveness. In *Hou v. Commonwealth of Pennsylvania*,¹⁹ a plaintiff of Chinese national origin was denied a promotion from associate professor to full professor of mathematics. He argued, in part, that criticisms of his teaching ability were a pretext for discrimination, and pointed to evaluations which commented upon his accent.²⁰

The court agreed that accent-based discrimination was a delicate subject; however, it found that the comments about plaintiff's accent were directed toward the legitimate issue of teaching effectiveness. Although a definition of teaching effectiveness was described as elusive, the court found that it did include the ability to communicate a discipline's content, a quality which could be carefully assessed by a college. In this case, the court found that the comments on accent were

¹⁶ *Mandhare v. LaFargue Elementary School*, 605 F. Supp. 238, 37 FEP Cas 1611 (E.D. La. 1985), *rev'd without op.*, 788 F.2d 1563 (5th Cir. 1986).

¹⁷ *Id.* at 1612.

¹⁸ *Id.* at 1613.

¹⁹ *Hou v. Commonwealth of Pennsylvania*, 573 F. Supp. 1539, 33 FEP Cas 513 (W.D. Pa. 1983).

²⁰ *Id.* at 519.

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directed toward a legitimate issue, and held that the plaintiff had failed to show that the college's reasons for its action were pretextual.²¹

Courts distinguish instances of accent-based national origin discrimination from those where a plaintiff's English proficiency is inadequate for a particular job. The latter obtain no protection from Title VII. In *Duong Nhat Tran v. City of Houston*,²² a Vietnamese plaintiff alleged that he was denied an interdepartmental transfer from his position as a stationary engineer (in control of air conditioning and heating equipment) to an inspector position in the energy conservation section of Houston's Public Works Department.

The district court found that the plaintiff's spoken English was readily understood only with great difficulty and at times not at all. The job for which he had applied required constant communication on a daily basis with different persons described as unfamiliar with the "peculiarities" of his speech. In short, plaintiff's spoken English was found inadequate for the position; his claim of discrimination was rejected.²³

In *Bell v. Home Life Ins. Co.*,²⁴ the New Zealander plaintiff argued that his supervisor ridiculed him because of his accent. The court concluded that if the plaintiff could show that he had been discriminated against because of his accent, he would establish a prima facie case of national origin discrimination.²⁵ The court declared that a foreign accent was a linguistic characteristic of a national origin group within the meaning of the EEOC National Origin Guidelines.²⁶

However, the court found that plaintiff had not proven any specific discriminatory conduct associated with remarks about his accent. The court held that the plaintiff was terminated for

²¹ *Id.* It should be noted that the court made its determination under Section 1981 and not under Title VII, but used Title VII standards. The Title VII claim was deemed untimely by the Court.

²² *Duong Nhat Tran v. City of Houston*, 35 FEP Cas (BNA) 471 (S.D. Tex. 1983).

²³ *Id.* at 472.

²⁴ *Bell v. Home Life Ins. Co.*, 596 F. Supp. 1549, 36 FEP Cas 440 (M.D.N.C. 1984).

²⁵ *Id.* at 444.

²⁶ *Id.*, 29 C.F.R. §1606.1 (1984).

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business reasons and would have been terminated even if he were from New Jersey.²⁷ Claims of accent-based national origin discrimination would therefore have to be proven by specific acts on the part of the employer before a finding of liability under Title VII could be established. Where such acts were shown or where the reasons raised by employers were shown to be pretextual, the plaintiffs prevailed. Absent such a showing, there was no entitlement to protection. The courts treated accent as almost an immutable characteristic of national origin, unlike language which was seen as mutable and therefore not afforded the same status or protection.

In sum, the protection accorded claims of accent-based national origin discrimination should be extended to the claims of language-based national origin discrimination so that they are also scrutinized by the courts; to do any less is to protect the part (accent) without regard to or protection for the whole (the language). There is a need for a reassessment of this entire area of the law and for legal approaches that better fit the socio-linguistic reality of the Hispanic and other national origin groups in the workplace.

An alternative to prohibitions against the use of languages other than English is, of course, to make use of these as an asset. Indeed, employers with federal contracts are required to make a reasonable accommodation to the needs of handicapped workers;²⁸ the standard should be no less for Spanish-speaking Hispanics with due regard to their levels of English fluency and the business requirements of specific jobs.

In one instance knowledge of a foreign language was used to facilitate assimilation into the workplace. That instance involved an employee of Hungarian national origin; to this end a general machine shop foreman (of Czechoslovakian origin)

²⁷ *Id.* at 36 FEP Cas 445.

²⁸ See §§503 and 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§753, 754 and §102(b)(5)(A) of the Americans with Disabilities Act. See also Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 Yale L.J. 1329, 1379-82 (argues for reasonable accommodation); Karst, *Paths to Belonging: The Constitutional and Cultural Identity*, 64 N.C.L. Rev. 303 (1986); Note, *Language Discrimination Under Title VII: The Silent Right of National Origin Discrimination*, 15 J. Marshall L. Rev. 667 (1982).

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requested a second-generation Hungarian employee (who spoke Hungarian) to speak to the worker in Hungarian. This was ended later at the foreman's request, but was ultimately used by the employer to defeat the worker's claim of national origin discrimination.²⁹ The case law does not reflect such efforts on behalf of Hispanics, which is not to say that such practices do not or should not exist. Employers can and should make use of the diverse cultural and linguistic characteristics of their employees. A national employment policy of language accommodation based on the EEOC National Origin Guidelines would be responsive to the needs of Hispanics and other national origin groups.

§29.7. Race and Color as a Component of National Origin Discrimination. Puerto Ricans,¹ Mexican-Americans,² and other Hispanic³ national origin groups, Asian national origin

²⁹ *Fekete v. U.S. Steel Corp.*, 353 F. Supp. 1117, 5 FEP Cas. 639, 644.

¹ See, e.g., *Rios v. Steamfitters Local 638*, 326 F. Supp. 198, 3 FEP Cas 349 (S.D.N.Y. 1971), *aff'd and remanded*, 501 F.2d 622 (2d Cir. 1974) (race and national origin); *Colon-Sanchez v. Marsh*, 733 F.2d 78 (10th Cir. 1984) (race); *Gonzalez v. Dept. of the Army*, 718 F.2d 926 (9th Cir. 1983) (Section 1981 claim dismissed, sovereign immunity); *Perrin v. Florida Power & Light Co.*, 35 FEP 117 (S.D. Fla. 1984) ("dark complected"); *Garcia v. Gardner's Nurseries*, 585 F. Supp. 369 (D. Conn. 1984) (Section 1981, race); *Rodriguez v. Chandler*, 641 F. Supp. 1292 (S.D.N.Y. 1986) (race), *aff'd*, 841 F.2d 1117 (2d Cir. 1988); *Torres-Valentin v. County of Lehigh*, 42 FEP Cas 175 (E.D. Pa. 1986) (Hispanic race).

² See, e.g., *Western Addition Community Org. v. Alioto*, 330 F. Supp. 536 (N.D. Cal. 1971), 340 F. Supp. 1351 (N.D. Cal. 1972), 5 FEP Cas 221, 223 (N.D. Cal. 1972), *appeal moot*, 514 F.2d 542 (9th Cir. 1975) (Section 1981), *cert. denied*, 423 U.S. 1014 (1975); *United States v. Longshoremen*, 334 F. Supp. 976 (S.D. Tex. 1971) (race and national origin); *Revis v. Laird*, 627 F.2d 982 (9th Cir. 1980); *Pacheco v. Advertiser Lithographing, Inc.*, 657 F.2d 191 (8th Cir. 1981) (Section 1981); *Vasquez v. McAllen Bag and Supply Co.*, 21 FEP 1123 (S.D. Tex. 1979), *aff'd*, 660 F.2d 686 (5th Cir. 1981) (Section 1981, claim accepted); *Whatley v. Skaggs Companies, Inc.*, 707 F.2d 1129 (10th Cir. 1983) (Section 1981); *Page v. U.S. Industries, Inc.*, 726 F.2d 1038 (5th Cir. 1984) (Section 1981); *Erebia v. Chrysler Plastics Products*, 772 F.2d 1250 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986) (Section 1981); *Martinez v. UAW, Local 1373*, 772 F.2d 348 (7th Cir. 1985) (race); *Gomez v. Great Lakes Steel Div., Nat'l Steel Corp.*, 803 F.2d 250 (6th Cir. 1986) (Section 1981).

³ See, e.g., *Blanco v. Willis Drilling Co.*, 40 FEP Cas 1317 (S.D. Tex. 1986) (residents of the state of Texas and of Hispanic origin); *O'Loughlin v. Procon*, (Release #5, 6/93)

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groups and other national origin groups⁴ have brought suit under the Civil Rights Act of 1866,⁵ which courts have universally held requires a racial component. Courts have therefore had to address the multiracial characteristics of Hispanics—an aspect which sets them apart from most other national origin groups.⁶ The Supreme Court clarified this area

Inc., 627 F. Supp. 675 (E.D. Tex. 1986) (Black Cuban); *Davis v. Boyle-Midway, Inc.*, 615 F. Supp. 560 (N.D. Ga. 1985) (Section 1981 claim of person of Hispanic descent dismissed as not cognizable); *Alston v. Blue Cross*, 37 FEP Cas 1792 (E.D.N.Y. 1985) (Panamanian stated and proved a violation of Section 1981 and Title VII); *Acosta v. Univ. of the Dist. of Columbia*, 528 F. Supp. 1215 (D.D.C. 1981) (Hispanic); *Mouriz v. Avondale Shipyards*, 428 F. Supp. 1025 (E.D. La. 1977) (Cuban Caucasian failed to state claim).

⁴ See, e.g., *Nanavati v. Burdette Tomlin Memorial Hospital*, 42 FEP Cas (BNA) 197 (D.N.J. 1986); *Torres v. County of Oakland*, 758 F.2d 147 (6th Cir. 1985); *Duong Nhat Tran v. City of Houston*, 35 FEP Cas (BNA) 471 (S.D. Tex. 1983).

⁵ 42 U.S.C. §1981. It is common for this statute to be used by persons alleging employment discrimination. Unlike Title VII, it does not require a filing of a charge of discrimination within six months of the event, nor does it require conciliation by a State Fair Employment Practices agency or the EEOC prior to filing, nor does it require a right to sue letter from the EEOC. All of these procedural steps can be avoided by invoking Section 1981. However, the statute has been viewed by the courts to require an allegation of racial discrimination, does not cover claims of sex or religious discrimination, and requires that the relevant state statute of limitations (generally longer than the six months of Title VII) be observed. See Chapter 26, §26.3. *Runyon v. McCrary*, 427 U.S. 160, 167-168 (1976); *McDonald v. Santa Fe Transp. Co.*, 427 U.S. 273 (1973); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 15, 12 FEP Cas 344, 353 (E.D. Pa. 1975); *Wilson v. Garcia*, 471 U.S. 261 (1985).

⁶ Courts have examined the claims of all other national origin groups to determine if there is a racial component to the claims of these groups. Asians, particularly persons from India, have been more successful than other groups in this respect. Cf. *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987) (American of Iranian descent could state claim); *Nanavati v. Burdette Tomlin Memorial Hospital*, 42 FEP Cas 197 (D.N.J. 1986) (dark-skinned Indian); *Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731 (5th Cir. 1986) (American national origin fails to state claim); *Shah v. General Electric Co.*, 40 FEP Cas 1295 (W.D. Ky. 1986), *aff'd in part and rev'd in part*, 816 F.2d 264 (6th Cir. 1987) (dark-skinned Indian); *Abdulrahim v. Gene B. Glick Co.*, 612 F. Supp. 256, 262-64 (N.D. Ind. 1985) (Palestinian, Section 1981 claim dismissed); *Ibrahim v. N.Y. State Dept. of Health*, 581 F. Supp. 228 (E.D.N.Y. 1984), *rev'd*, 904 F.2d 161 (2d Cir. 1990) (Egyptian national origin

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of law in 1987 in *St. Francis College v. Al-Khazraji*⁷ and *Shaare Tefila Congregation v. Cobb*⁸ when it held that the term "race" encompassed ethnic or ancestry characteristics.⁹

§29.7(1). Constitutional Foundation. Mexican-Americans have traditionally had to face the argument that there are but two racial groups in American society, namely, black and white. It was for this reason that the State of Texas argued

fails to state a claim); *Banker v. Time Chemical, Inc.*, 579 F. Supp. 1183 (N.D. Ill. 1983) (East Indian stated claim); *Torres v. County of Oakland*, 758 F.2d 147 (6th Cir. 1985) (Filipino); *Said v. Institute of Int'l Education, Inc.*, 36 FEP Cas 1790 (S.D.N.Y. 1981) (Egyptian); *Duong Nhat Tran v. City of Houston*, 35 FEP Cas 471 (S.D. Tex. 1983) (Vietnamese); *Anooya v. Hilton Hotels Corp.*, 733 F.2d 48 (7th Cir. 1984) (Iraqi failed to state claim); *Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669 (N.D. Ill. 1984) (American race failed to state a claim); *Manabat v. Columbus Medical Center*, 34 FEP Cas 254 (N.D. Ill. 1984) (Pacific Islander Race); *Temengil v. Trust Territory of the Pacific Islands*, 33 FEP Cas 1027 (D.N. Mar. I. 1983) (Micronesian), *aff'd in part and rev'd in part*, 881 F.2d 647 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990); *Hou v. Commonwealth of Pennsylvania*, 573 F. Supp. 1539 (W.D. Pa. 1983) (Chinese); *Ashagre v. Southland Corp.*, 546 F. Supp. 1214 (S.D. Tex. 1982); *Kumar v. Board of Trustees of the Univ. of Mass.*, 566 F. Supp. 1299 (D. Mass. 1983), *rev'd*, 774 F.2d 1 (1st Cir. 1985), *cert. denied*, 475 U.S. 1097 (1986) (Indian); *Casas v. First American Bank*, 31 FEP Cas 1478 (D.D.C. 1983) (Filipino); *Kureshy v. City University of New York*, 561 F. Supp. 1098 (E.D.N.Y. 1983), *aff'd*, 742 F.2d 1431 (2d Cir. 1984) (dark-skinned Indian); *Lartius v. Iowa Dept. of Transp.*, 705 F.2d 1018 (8th Cir. 1983) (Indian); *Stiessberger v. Rockwell Int'l Corp.*, 29 FEP Cas 1273 (E.D. Wash. 1982) (German origin fails to state claim); *Ben-Yakir v. Gaylinn Associates, Inc.*, 535 F. Supp. 543 (S.D.N.Y. 1982) (Israeli); *Petrone v. City of Reading*, 541 F. Supp. 735, 738 (E.D. Pa. 1982) (Italian); *Mattison v. Canon, U.S.A., Inc.*, 28 FEP Cas 1685 (N.D. Ill. 1981) (American white); *Porto v. Canon, U.S.A., Inc.*, 28 FEP Cas 1679 (N.D. Ill. 1981) (non-Japanese national origin fails to state claim); *Shah v. Mt. Zion Hospital*, 642 F.2d 268 (9th Cir. 1981) (East Indian failed to state claim, denominated as Caucasian); *Okonko v. Union Oil Co.*, 519 F. Supp. 372 (C.D. Cal. 1981) (Nigerian); *Banerjee v. Bd. of Trustees of Smith College*, 648 F.2d 61 (1st Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981) (Bengali Indian); *Ragheb v. Blue Cross and Blue Shield of Michigan*, 24 FEP Cas 1504 (E.D. Mich. 1979).

⁷ *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); see Chapter 26 §26.3.

⁸ *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); see Chapter 26 §26.3.

⁹ 481 U.S. at 612-613.

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before the U.S. Supreme Court in *Hernandez v. Texas*¹⁰ that they could not have discriminated against Mexicans since there were only two classes—white and Negro—within the contemplation of the Fourteenth Amendment. The Court reminded Texas that its courts had held that the systematic exclusion of Roman Catholics from juries violated the Fourteenth Amendment; that restrictive covenants forbidding the sale of land to persons of Mexican descent were unenforceable; and that it also had taken a restrictive view with regard to the exclusion of persons of Mexican descent from juries.¹¹

The Court expressly found that the Fourteenth Amendment was not directed solely against discrimination based upon differences between white and Negro.¹² It set out a factual test to determine whether persons of Mexican descent were protected by the Fourteenth Amendment; it found that the plaintiff had established the existence of group discrimination sufficient to prove that persons of Mexican origin or descent constituted a separate class in Jackson County, Texas, distinct from whites.¹³

¹⁰ *Hernandez v. Texas*, 347 U.S. 475, 477 (1954).

¹¹ *Id.* at 478 nn. 5-6.

¹² *Id.* at 478.

¹³ The Supreme Court's test provided:

Throughout our history differences in race and color have defined easily identifiable groups which have at times required the aid of the courts in securing equal treatment under the laws. But community prejudices are not static, and from time to time other differences from the community norm may define other groups which need the same protection. Whether such a group exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. The Fourteenth Amendment is not solely directed against discrimination due to a "two-class theory"—that is, based upon differences between "white" and Negro.

Id. at 478.

The Court found an identifiable group in this case by examining the attitude of the community, including the distinction made by residents of Jackson County between "white" and "Mexican," the slight participation of persons of Mexican descent in community and business groups, the segregation of Mexican school children for the first four grades, the refusal of a restaurant to serve Mexicans, and the segregated toilet facilities on the

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The Court held that the State of Texas had no right to systematically exclude persons of Mexican descent.¹⁴ This case stands for the proposition that Mexican-Americans are a national origin group cognizable under the Fourteenth Amendment because of their physical, cultural, and linguistic characteristics.

The question of legal protection for Hispanics arose again when Mexican-Americans began to file desegregation cases. Some school districts in Texas had classified Mexican-American children as Anglo, while taking actions which perpetuated the segregation of Mexican-American school children.¹⁵ Unlike blacks in Texas, which had been segregated pursuant to state law, there was no such statute for Mexican-Americans. The Fifth Circuit Court of Appeals had to decide whether the segregation of Mexican-American public school students was unconstitutional.¹⁶ The Fifth Circuit held that such segregation was impermissible and accepted the lower court's finding that Mexican-Americans were an identifiable, ethnic-minority class entitled to the protections of the Fourteenth Amendment.¹⁷

The lower court found that Mexican-Americans were identified by their physical characteristics, language, predominant religion, culture and Spanish surnames.¹⁸ They were distinct

courthouse grounds. *Id.* at 479-80. The Court further concluded that Spanish surnames provided an easy identification of the members of this class, and accepted Spanish-surnamed statistics to conclude that persons of Mexican descent had been denied the right to sit on juries for twenty-five years.

¹⁴ *Id.* at 482.

¹⁵ *Cisneros v. Corpus Christi Ind. Sch. Dist.*, 467 F.2d 142, 146 (5th Cir. 1972).

¹⁶ *Id.* at 144.

¹⁷ *Id.* at 149.

¹⁸ *Cisneros v. Corpus Christi Ind. Sch. Dist.*, 324 F. Supp. 559, 607-08 (S.D. Tex. 1970). The district court held:

[I]t is clear to this court that these people for whom we have used the word Mexican-Americans to describe their class, group, or segment of our population, are an identifiable ethnic-minority in the United States, and especially so in the Southwest [and] in Texas.... This is not surprising; we can notice and identify their physical characteristics, their language, their predominant religion, their distinct culture, and, of course, their Spanish surname. And if there were any doubt in this court's mind, this court could take notice, which it does, of the

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from other groups, particularly Anglos and blacks. While this disposition ultimately led to a finding of unconstitutional segregation in the Corpus Christi School District, other school districts in the west had to come to terms with the novel concept of tri-ethnic segregation.

The district court involved in the desegregation of the San Felipe Del Rio School District in Texas also found Mexican-American students to be a cognizable ethnic or national origin group and ordered desegregation.¹⁹ The racial isolation which Mexican-American children experienced in identifiable Mexican schools throughout the Southwest²⁰ led the Supreme Court to pass on the question of whether a school populated by blacks and Mexican-Americans in Denver, Colorado, was segregated for the purposes of the Fourteenth Amendment.²¹

congressional enactments, governmental studies and commissions on this problem. (footnotes omitted)

Id. at 607-08.

¹⁹ *United States v. Texas*, 342 F. Supp. 24 (E.D. Tex. 1971). In this case, Judge Justice found the testimony before him to demonstrate that:

[M]exican-American students exhibit numerous characteristics which have a causal connection with their general inability to benefit from an educational program designed primarily to meet the needs of so-called Anglo-Americans. These characteristics include "cultural incompatibilities" and English language deficiencies—two traits which immediately identify those students sharing them as members of a definite group whose performance norm habitually will fall below that of Anglo-American students who do not exhibit these traits.... [I]t is largely these ethnically-linked traits—albeit combined with other factors such as poverty, malnutrition and the effects of past educational deprivation—which account for the identifiability of Mexican-American students as a group and which have, as a consequence, elicited from many school boards throughout Texas and, indeed, throughout the southwestern United States, the different and often discriminatory treatment shown on the record in this case.

Id. at 26.

²⁰ See *Alvarado v. El Paso Ind. Sch. Dist.*, 593 F.2d 577 (5th Cir. 1979); *Morales v. Shannon*, 516 F.2d 411 (5th Cir. 1975), *cert. denied*, 423 U.S. 1034 (1975); *Arvizu v. Waco Ind. Sch. Dist.*, 495 F.2d 499 (5th Cir. 1974); *Soria v. Oxnard Sch. Dist.*, 488 F.2d 579 (9th Cir. 1973), *cert. denied*, 416 U.S. 951 (1974).

²¹ *Keyes v. Sch. Dist. No. 1, Denver, Colo.*, 413 U.S. 189 (1973).

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The Supreme Court held in *Keyes v. Sch. Dist. No. 1*²² that Hispanos suffered from the same inequities in education as blacks; schools which were majority black and Hispano were to be treated as segregated schools.²³ The district court had merely held that schools with either black or Hispano students were segregated. The Supreme Court's ruling added a new category, based on the identical treatment of discrimination obtained by blacks and Hispanos when contrasted with the treatment obtained by Anglos.²⁴

²² *Id.*

²³ *Id.* at 197-98. The Court used the terms of the parties "Anglo," "Negro" and "Hispano," and Hispano was the term used by the Colorado Dept. of Education, to include a person of Spanish, Mexican, or Cuban heritage. The Court added that in the Southwest, the "Hispanos" were usually referred to as "Chicanos" or "Mexican Americans."

²⁴ *Id.* The Court cited the United States studies by the United States Comm'n on Civil Rights, Mexican American Education Study, Report 1, Ethnic Isolation of Mexican Americans in the Public Schools of the Southwest (Apr. 1971) and Report 2, The Unfinished Education (October 1971), specifically its finding that "minority students in the Southwest—Mexican Americans, blacks, American Indians—do not obtain the benefits of public education at a rate equal to that of their Anglo classmates." *Id.* at 197 nn. 7-8. The Court itself held in this regard:

We conclude, however, that the District Court erred in separating Negroes and Hispanos for purposes of defining a "segregated" school. We have held that Hispanos constitute an identifiable class for purposes of the Fourteenth Amendment. Indeed the District Court recognized this in classifying predominantly Hispano schools as "segregated" schools in their own right. But there is also much evidence that in the Southwest Hispanos and Negroes have a great many things in common. The United States Commission on Civil Rights has recently published two Reports on Hispano education in the Southwest. Focusing on students in the States of Arizona, California, Colorado, New Mexico, and Texas, the Commission concluded that Hispanos suffer from the same educational inequities as Negroes and American Indians. In fact, the District Court itself recognized that "[o]ne of the things which the Hispano has in common with the Negro is economic and cultural deprivation and discrimination." This is agreement that, though of different origins, Negroes and Hispanos in Denver suffer identical discrimination in treatment when compared with the treatment afforded Anglo students. In that circumstance, we think petitioners are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of "segregated schools." (citations omitted)

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§29.7(2). **Racial Component of National Origin Claims Under 42 U.S.C. §1981.** The history of discrimination discussed above led Mexican-American plaintiffs to allege racial discrimination in Section 1981 lawsuits and to persuade courts that allegations of national origin discrimination include a racial component. On the other hand, some Mexican-Americans have rested their entire claim on the basis of discrimination because of their Mexican or Mexican-American race,²⁵ while some Puerto Ricans have alleged discrimination because of their Puerto Rican race.²⁶ Other claims have been made on the basis of Hispanic race.²⁷

A detailed examination of the debate generated by the multiracial identity of Hispanic groups will reveal how courts perceive the identity of Hispanics and whether they should be afforded the protections of the Civil Rights Act of 1866.²⁸ The controversy is usually generated when a Hispanic alleges national origin or race discrimination under Section 1981, and the employer moves to dismiss this aspect of the case for failure to state a claim.

Id. at 197-98.

²⁵ See *Griffin v. Pacific Maritime Ass'n*, 478 F.2d 1118 (9th Cir. 1973), cert. denied, 414 U.S. 859 (1973); *LaFore v. Emblem Tape & Label Co.*, 448 F. Supp. 824 (D. Colo. 1978) (race); *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254 (N.D. Ill. 1978), *aff'd*, 660 F.2d 1217 (7th Cir. 1981) (race); *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173, 36 FEP Cas 571 (Wash. Sup. Ct. 1977) (racial slurs); *Martinez v. UAW, Local 1373*, 772 F.2d 348 (7th Cir. 1985) (race); *Vargas v. Salvation Army*, 649 F. Supp. 763 (N.D. Ill. 1986) (race).

²⁶ See *Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610 (M.D. Pa. 1978) (race); *Martinez v. Bethlehem Steel Corp.*, 496 F. Supp. 1002 (E.D. Pa. 1979), *aff'd without op.*, 633 F.2d 210 (3d Cir. 1980) (dark-skinned Puerto Rican); *United Third Bridge, Inc. v. Local #3, Int'l Bhd. of Electrical Workers*, 512 F. Supp. 298 (S.D.N.Y. 1981) (race); *Bolden v. Pennsylvania State Police*, 371 F. Supp. 1096 (E.D. Pa. 1979), *aff'd*, 601 F.2d 573 (3d Cir. 1979) (Black Puerto Rican); *Perin v. Florida Power & Light Co.*, 35 FEP Cas 117 (S.D. Fla. 1984) ("dark complected"); *Garcia v. Gardner's Nurseries*, 585 F. Supp. 369 (D. Conn. 1984) (race); *Rodriguez v. Chandler*, 641 F. Supp. 1292 (S.D.N.Y. 1986) (race).

²⁷ See, e.g., *Torres-Valentin v. County of Lehigh*, 42 FEP Cas 175 (E.D. Pa. 1986), *aff'd*, 841 F.2d 1117 (2d Cir. 1988) (Hispanic race).

²⁸ 42 U.S.C. §1981.

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The case law reflects the manner in which different courts have sought to square the claims of Hispanics with what they perceived were the requirements of Section 1981.

In one of the most detailed case law discussions of Section 1981, the district court in *Ortiz v. Bank of America*²⁹ distinguished between that group which enjoyed the broadest rights and those groups that are perceived and can be measured as distinct by comparison.

In this case, a Puerto Rican plaintiff alleged that she was denied a promotion to the position of bank teller solely because of her Puerto Rican descent; that she was terminated because of her national origin; and that she had been the subject of harassment due to her national origin and accent. The district court held that plaintiff had alleged she was a member of a distinct race [whether viewed as membership in a discrete unit (Puerto Rican) or in a broader group (Hispanic)] which has been the subject of discrimination.³⁰ The court held that given her allegation of discrimination on the basis of her descent and accent, she could prove a set of facts in support of her claim to relief under Section 1981.³¹ In effect, the court applied the *Hernandez v. Texas* modality of group distinction and granted legal protection to the Puerto Rican claimant.

The district court analyzed the Section 1981 case law by identifying three approaches used by the courts: (1) those cases where the courts hold that Section 1981 is not available to "national origin" claims, which it criticized for failing to define the term "race"³² and to draw a rational distinction between

²⁹ *Ortiz v. Bank of America*, 547 F. Supp. 550, 29 FEP Cas 1494, 1508 (E.D. Cal. 1982), *aff'd*, 824 F.2d 692 (9th Cir. 1987).

³⁰ *Id.* at 29 FEP Cas (BNA) 1508.

³¹ *Id.* at 1508.

³² The district court found that Latinos had been classified as a race: The unexpressed supposition of these courts that there is a meaning for the word "race" which distinguishes that notion from national origin classifications is both common and plainly false. "Through overuse and vague application the term race has become ... encumbered with contradictory and imprecise meanings.... Many people take for granted that they know what 'race' means and assume that scientific investigation has long ago proved the existence of significant human racial differences—yet, each time the term is applied, a definition must be provided so that the reader will know what concept it represents." S. Molnar, *Races, Types & Ethnic Groups* 12 (1975) (hereinafter,

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national origin and race; the conclusion that Section 1981 extends only to race discrimination was seen as based on faulty and unexpressed premises which were insupportable;³³ (2) those cases which allow Hispanic plaintiffs and other ethnic groups to state a Section 1981 claim by amending their complaints to allege racial discrimination and/or prove that the discrimination was racial rather than based on national origin;³⁴ these courts were criticized for not defining the term

Molnar). Nor is the assumption limited to courts. As has been said "Geneticists believe that anthropologists have decided what race is. Ethnologists assume that their classifications embody principles which genetic science has proved to be correct." L. Hogben, *Genetic Principles in Medicine and Social Science*, 122-44 (1931). As will be discussed infra, they are wrong. Indeed, even the suppressed predicate that "scientists" would not classify Hispanics as a "racial" type (whatever definition is used) is factually wrong. The most respectable scientists who persist in attempting a taxonomy of human types published a racial classification of thirty types, number twenty-eight of which was "Ladino" (defined as what has commonly come to be known as "Hispanics"). C.S. Coon, S. Garn & J. Bidsell, *Races: A Study of the Problem of Race Formation in Man*, 138 (1950). See also Massey, *Hispanic Residential Segregation*, *Sociology and Social Research*, 311-22 (April 3, 1981) (wherein Hispanics are referred to as "ethnic/racial groups").

Id. at 1502 n.18.

The court cited as examples of this approach *Hiduchenko v. Minneapolis Medical & Diagnostic Center*, 475 F. Supp. 1175 (D. Minn. 1979) (holding that a Ukrainian plaintiff was not of a race other than caucasian and hence could not state a racial discrimination claim against other caucasians); *Vera v. Bethlehem Steel Corp.*, 448 F. Supp. 610 (M.D. Pa. 1978) (holding that although Puerto Ricans may have undergone a discrimination similar to racial discrimination they could not state a claim of racial discrimination); *Jones v. United Gas Improvement Corp.*, 68 F.R.D. 1, 10-15, 12 FEP Cas (BNA) 344 (E.D. Pa. 1975) (where a claim of discrimination against Spanish-surnamed persons was characterized as a claim based on national origin not cognizable under Section 1981).

³³ 29 FEP Cas at 1502.

³⁴ *Id.* at 1502-03. The court gave as examples: *Bullard v. OMI Georgia, Inc.*, 640 F.2d 632, 634 (5th Cir. 1981) (noting that the distinction between national origin and racial discrimination was a difficult one to identify and holding that plaintiff's racial discrimination allegations sufficed to defeat a motion to dismiss); *Khawaja v. Wyatt*, 494 F. Supp. 302, 304-05 (W.D.N.Y. 1980) (Pakistani plaintiff defeated a motion for summary judgment on ground that there was a disputed fact issue on whether the alleged discrimination was racial); *Saad v. Burns Int'l Security Services, Inc.*, 456 F.

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"racial" or distinguishing it from "national origin," and considered like the first group to be based on ipse dixit, that is, a bare assertion resting on the authority of an individual judge; (3) those cases which find that Section 1981 cannot be limited by the strict notion of "race"; these courts seek to determine whether the group is distinguishable from the reference group set out in the statute: "white persons"; some courts in this group examined the discrimination to see if it is based on racial animus; but regardless of whether the claims are based on national origin, race, alienage, or ethnicity, these are held to be valid claims under Section 1981.³⁵

Supp. 33 (D.D.C. 1978) (plaintiff of Arabian descent allowed to amend complaint to plead race or color basis for discrimination); *Apodaca v. General Electric Co.*, 445 F. Supp. 821 (D.N.M. 1978) (Hispanic plaintiff allowed to amend complaint to allege racial perception and animus as basis for discrimination); *Martinez v. Hazelton Research Animals, Inc.*, 430 F. Supp. 186, 188 (D. Md. 1977) (Hispanic granted leave to amend to allege racial background); *Gomez v. Pima County*, 426 F. Supp. 816 (D. Ariz. 1976) (Mexican American plaintiffs stated a claim on race and color basis); and *Cubas v. Rapid American Corp.*, 420 F. Supp. 663 (E.D. Pa. 1976) (Cuban-American plaintiff survived motion to dismiss on ground that court could not determine that the alleged discrimination did not contain racial discrimination elements).

³⁵ The court cited at 1503-04 in support of this approach: *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979) (Mexican-American descent discrimination claim validly stated); *Madrigal v. Certaineed Corp.*, 508 F. Supp. 310 (W.D. Mo. 1981) (perception by prejudiced persons of a group as non-white valid basis for claim, even where classification debatable); *Whatley v. Skaggs Companies, Inc.*, 502 F. Supp. 370, 376, 27 FEP Cas 452 (D. Colo. 1980) (Mexican-American descent allegation stated claim); *Aponte v. Nat'l Steel Service Center*, 500 F. Supp. 198, 202-03, 24 FEP Cas 609 (N.D. Ill. 1980) (Hispanic plaintiff stated claim because Hispanics identified as non-whites); *Tayyari v. New Mexico State University*, 495 F. Supp. 1365, 1369-70 (D.N.M. 1980) (Iranian citizen stated claim since he was member of group perceived as different from whites); *Garcia v. Rush-Presbyterian-St. Luke's Medical Center*, 660 F.2d 1217 (7th Cir. 1981) (race, national origin and ethnicity indistinguishable in claim by Mexican and Mexican-American plaintiffs); *Ortega v. Merit Insurance Co.*, 433 F. Supp. 135, 139 (N.D. Ill. 1977) (Hispanics protected); *Enriquez v. Honeywell, Inc.*, 431 F. Supp. 901, 904-06, 16 FEP Cas 374 (W.D. Okla. 1977) (distinction between race and national origin discrimination indiscernible); *Budinsky v. Corning Glass Works*, 425 F. Supp. 786 (W.D. Pa. 1977) (whites, blacks, Hispanics and Indians commonly accepted as separate races); *Puerto Rican Media Action & Education Council v. Metromedia, Inc.*, 10 FEP Cas 1009

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The district court in this case accepted this third approach in allowing the Puerto Rican plaintiff to proceed with her suit. It had reasoned that race was a "taxonomic" device and concluded that while human differences exist, the matter of "which differences we select to use as a basis for classification is only valid in terms of the reason for classification." The focus of the court's inquiry is that of the *Hernandez v. Texas* modality, that is, to determine whether a person is a member of a group which has been the object of discrimination.³⁶

The multi-component character of race and national origin is discussed in various other cases.³⁷

(S.D.N.Y. 1975) (Puerto Ricans stated claim); *Maldonado v. Broadcast Plaza, Inc.*, 10 FEP Cas 839 (D. Conn. 1974) (Puerto Ricans stated claim); *Miranda v. Clothing Workers Local 208*, 10 FEP Cas 557 (D.N.J. 1974) (Puerto Ricans stated claim). See also Comment, *Developments in the Law—Section 1981*, 15 Harv. C.R.-C.L.L. Rev. 29 (1980); Greenfield & Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Cal. Rev. 662 (1975). *Id.* at 1505.

³⁶ 29 FEP Cas at 1506. For this court, race was a dynamic; and in the legal context answers to race questions could only be supplied "in terms of the reason for asking the question." *Id.* at 1507. In short, "[t]he idea of race as an element of the history of ideas in this country has frequently been no more than a vehicle for racism, i.e., a presumed inherited defect in those who are not of the racist's kind, however he defines his kind." *Id.* As the court noted this flexible approach continues to be rejected by some district courts.

³⁷ *Vargas v. Salvation Army*, 649 F. Supp. 763 (N.D. Ill. 1986) (in holding that Section 1981 covered the plaintiff, the district court focused on the multiracial character of Mexican-Americans); *Rodriguez v. Chandler*, 641 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 841 F.2d 117 (2d Cir. 1988) (court found "that a Spanish-surnamed person of Puerto origin who champions minority rights may well be perceived as 'non-white'").

A more rigid position was taken by the district court in *Hampson v. Bd. of Ed. of Thornton Fractional Township High School Dist. No. 15*, 41 FEP Cas (BNA) 606, 610 (N.D. Ill. 1986) (court found that the Puerto Rican plaintiff had failed to claim that the alleged discrimination was due to her skin color; the court did not find any indication in the complaint that her skin color was not white); *Blanco v. Willis Drilling Co.*, 40 FEP Cas (BNA) 1317, 1319 (S.D. Tex. 1986) (court reviewed the holdings of the Fifth Circuit Court of Appeals, finding that the appellate court had held that a complaint by Mexican-Americans, which alleged racial and ethnic discrimination, stated a claim under Section 1981, citing *Alvarado v. El Paso Ind. Sch. Dist.*, 445 F.2d 1011 (5th Cir. 1971); *O'Loughlin v. Procon, Inc.*, 627 F. Supp. 675 (E.D. Tex. 1986), *aff'd without op.*, 808 F.2d 54 (5th Cir. 1986) (where a black Cuban plaintiff alleged a race and national origin claim under Section 1981, the

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In *Garcia v. Gardner's Nurseries*,³⁸ the court analyzed Section 1981 in terms of affording protections to whites and non-whites; it found that while many Puerto Ricans were "white" in terms of skin color, they were perceived as "non-whites" by Americans regardless of skin color. The district court found that it was generally accepted that Hispanics of Puerto Rican descent were the subject of discrimination in the United States and may have been denied the rights afforded white persons. The court relied, in part, for its conclusion that Puerto Ricans are perceived as non-white on Jose A. Cabranes, *Citizenship and the American Empire*.³⁹

district court raised no question about the applicability of the statute). On the other hand, where a Mexican-American radio announcer alleged that he was discharged for willfully refusing to obey his radio manager's instruction to cease broadcasting in Spanish, the court found this failed to state a Section 1981 claim. *See Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1410-11 (9th Cir. 1987).

The question of the skin color of the plaintiff becomes a basis for some courts to readily identify them as non-white and hence to conclude that Section 1981 is applicable. *See Saldivar v. Cadena*, 622 F. Supp. 949 (W.D. Wis. 1985) (the district court held that this claim failed to allege that plaintiff was a member of the Brown race, and hence dismissed her Section 1981 claim; her national origin claim was not sufficient to support her Section 1981 contention); *Ramos v. Flagship Int'l, Inc.*, 612 F. Supp. 148 (E.D.N.Y. 1985) (district court held that it was up to the jury to determine whether Hispanics constitute a group readily distinguishable from whites); *Davis v. Boyle-Midway, Inc.*, 615 F. Supp. 560 (N.D. Ga. 1985) (focus on skin color).

Where a Mexican-American inspection supervisor reported statements that referred to him as Mexican and to the speaker as white, that a white person could be doing his job, instead of a Mexican, that he was a "wet bag" (sic), the Sixth Circuit Court of Appeals found that a Section 1981 claim had been stated. *See Erebia v. Chrysler Plastics Products*, 772 F.2d 1250 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986).

³⁸ *Garcia v. Gardner's Nurseries*, 585 F. Supp. 369 (D. Conn. 1984); *cf.* 43 A.L.R. Fed. 103 §§2-3.

³⁹ Whatever else it may be, Puerto Rico is not a society that is preponderantly "white" under conventional North American definitions of race. *See generally* G. Lewis, *Puerto Rico: Freedom and Power in the Caribbean*, ch. 13 (1963). The statistics on race collected by the United States Department of War and later by the United States Census Bureau, based as they were upon North American notions of race, were invariably meaningless. As a 1940 guide on the island noted "[t]he remark has often been made that on the mainland a drop of Negro blood makes a white man a Negro; while in Puerto Rico a drop of white blood makes a Negro a white man."

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The failure of courts to adopt the pragmatic approach that undergirds the *Hernandez v. Texas* modality results in courts dismissing the Section 1981 claims of Hispanic employees for failure to make an allegation of racial discrimination⁴⁰ or with

Puerto Rico Reconstruction Administration in Cooperation with the Writers' Program of the Works Progress Administration, *Puerto Rico: A Guide to the Island of Boriquen* 110 (1940). *See also* G. Lewis, *supra*, at 283 ("[I]n Latin America and the Caribbean one drop of 'white' blood can launch an individual on the road to social acceptance as white."). The accelerated "amalgamative process between the races" described by Professor Lewis, G. Lewis, *supra*, at 282, and others, is effectively revealed in the United States census reports between 1899 and 1950 that suggested that blacks and racially mixed persons were simply vanishing in Puerto Rico. J. Cabranes, *Citizenship and the American Empire*, 98 n.475.

The observations on the relation between races in Puerto Rico made by Jose A. Cabranes [Chief Judge, United States District Court, District of Connecticut] and Professor Gordon K. Lewis were traced back to the eighteenth century by Juan Rodriguez Cruz and were used by the Puerto Rican anthropologist Eduardo Seda Bonilla in *Requiem Por Una Cultura* at 52 (1970). This process of adaptive self-identification was called "blanqueamiento" ["whitening"] by Prof. Seda Bonilla to emphasize racial mixture. He finds this phenomenon throughout Latin America and pinpoints its origins in the Iberian peninsula using H. Hoeting's observation in *Race and Colonial Psychology*, *J. Economic History* 640 (1952). This process of intermixture produced a group in-between black and white, which is referred to throughout the Caribbean as "mulatto" but which is commonly described in Puerto Rico as "triguero" (a word which means the color of wheat). *See, e.g.*, E. Fernandez Mendez, *Portrait of a Society* 52 (1972); Joseph P. Fitzpatrick, *Puerto Rican Americans* 102 (1971); Melvin M. Tumin and Arnold S. Feldman, *Social Class and Social Change in Puerto Rico* 228 (1971). For an historical examination of race in Latin America and in Puerto Rico, *see* Frank Tanenbaum, *Slave & Citizen* (1946); Stanley M. Elkins, *Slavery* (1968); Laura Foner and Eugene D. Genovese, *Slavery in the New World* (1969); Robin Wins (ed.), *Slavery: A Comparative Perspective* (1972); Arthur F. Corwin, *Spain and the Abolition of Slavery in Cuba, 1817-1886* (1967); H. Hoetink, *Slavery and Race Relations in the Americas* (1973); Luis M. Diaz Soler, *Historia de la Esclavitud Negra en Puerto Rico* (1965); Cayetano Coll y Toste, *Historia de la Esclavitud en Puerto Rico* (1969); Arturo Morales Carrion, *Auge y decadencia de la trata negrera en Puerto Rico (1820-1860)* (1978).

⁴⁰ *See, e.g., National Ass'n of Gov't Employees v. Rumsfeld*, 413 F. Supp. 1224 (D.D.C. 1976), *aff'd without op.*, 556 F.2d 76 (1977) (realignment of military base led to dismissal of employees including allegedly one-half of the Spanish-American warehouse employees; failure to allege racial discrimination led to dismissal of Section 1981 claim).

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attempts to recreate its teaching by making ad hoc determinations of a group's racial characteristics.⁴¹

The point of departure for an effective analysis of Section 1981 is that it is not available solely to African-Americans.⁴²

⁴¹ See, e.g., *Cubas v. Rapid American Corp.*, 420 F. Supp. 633, 13 FEP Cas 794, 795 (E.D. Pa. 1976) (where the Cuban plaintiff alleged that Cuban-Americans may be considered a non-white racial group and the court held that it could not find, as a matter of law, that discrimination against Cuban-Americans did not contain racial element). The court cited *Hernandez v. Texas* and said:

Unfortunately, judicial decisions offer little guidance about the methods for proving that a group has common racial characteristics. In cases interpreting the 14th Amendment, it has been held that the question whether there exists within a community a distinct class of persons who, as class, are entitled to equal treatment, is a factual issue. *Hernandez v. Texas*, 347 U.S. 475 (1954) (Discrimination against Mexican Americans in selecting jury panels). Equal Protection Clause cases analyzing the class of hispanic American groups have not focused on racial characteristics because classless could be proved on the basis of cultural and ethnic commonalities, and of the discriminatory social practices directed at the class by majority groups. In *Cisneros v. Corpus Christi Independent School District*, 324 F. Supp. 599, 606 n.30 (S.D. Tex. 1970), the court quoted from the testimony of an expert witness who said Mexican Americans were a minority from the social science, legal, cultural, and racial points of view. In *Van Hoomissen v. Xerox Corporation*, 368 F. Supp. 829, 840 n.7, 6 FEP Cas 1231, 1240 (N.D. Cal. 1973), the court explicitly avoided deciding the question whether Mexican Americans should be considered non-white for the purposes of [Section] 1981. We are not aware of any authoritative and judicially manageable method for distinguishing between national origin discrimination and racial discrimination when both may be present at the same time. On the one hand, courts might attempt on a case by case basis to separate out the elements of racial and national origin discrimination. Another approach would be to consider sociological and historical evidence relevant to the experience of a particular national origin group in the community in which discrimination is alleged, together with anthropological evidence about the racial characteristics of the national origin group, and determine whether it should be rebuttably presumed that discrimination against that group is infected with racial discrimination.

Id. at 795 n.2.

⁴² *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); see also *Fernandez v. Avco Corp.*, 12 FEP Cas 1054, 1055-56 (D. Conn. 1976) (where plaintiff's allegation of discrimination against him as black and Hispanic (Release #5, 6/93)

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that courts should be wary of grounding their decisions on various classifications used by Hispanics and other national origin groups to describe their background,⁴³ which means that courts will reject the facile use of national origin/race taxonomies.⁴⁴ The claims that Hispanics or other national origin groups such as Asians are neatly contained within racial classifications such as Caucasian or Negroid fails to under-

likened to "race or color" and not clearly distinguishable from racial and national origin bias).

⁴³ Noted in the introduction to this chapter is the variety of classifications used by Hispanics which range from Spanish-surnamed American to Mexican-Pakistani. Courts which merely rely on the superficial label generally selected by a Hispanic plaintiff's attorney for use in the complaint will be led down a path of narrow, and at times absurd, construction. For example, in *Zubero v. Memorex, Inc.*, 12 FEP Cas 604 (N.D. Cal. 1976), the court refused to accept plaintiff's self-classification as "Spanish-speaking, Spanish-surname" to describe a group protected by Section 1981:

Plaintiff in the instant case would have this court broaden the meaning of "race" for the purposes of [Section] 1981 further still to include all "Spanish-speaking, Spanish-surname females." We think that the group denoted as "Spanish-speaking, Spanish-surname" cannot be construed as a racial group nor even as a group with a specific national origin. For example, any Caucasian female who speaks Spanish and is married to a Mexican-American would be a member of the group plaintiff seeks to have protected under [Section] 1981 on the basis of race. "Spanish-speaking, Spanish-surname" does not, therefore, describe a group that might be subject to discrimination on the basis of race under [Section] 1981.

Id. at 606. This court had acknowledged that Puerto Ricans, Mexican-Americans, and native Americans had been granted a right to sue on the basis of Section 1981, but refused to equate the plaintiff's allegation to any of these groups. Such a superficial reliance on taxonomies is both misleading and misdirected; the heart of the inquiry was set out in the *Hernandez v. Texas* modality and is typified by the efforts of the Tenth Circuit Court of Appeals in *Manzanares v. Safeway Stores, Inc.*, 593 F.2d 968 (10th Cir. 1979).

⁴⁴ See, e.g., *Gradillas v. Hughes Aircraft Co.*, 407 F. Supp. 865, 12 FEP Cas 414, 415 (D. Ariz. 1975) (where the plaintiff alleged discriminatory discharge because of his Mexican-American national origin, and the court held that discrimination on the basis of national origin is not within the scope or confines of Section 1981); *Jones v. United Gas Improvement Corp.*, 12 FEP Cas 344, 352-53 (E.D. Pa. 1975) (where the court held that Spanish-surnamed individuals were not covered by Section 1981, since it viewed the act's proscription to apply only on grounds of race or alienage; the failure of plaintiffs to plead they were aliens; transformed their claim into a national origin claim, and therefore without a basis in the statute).

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stand, let alone address, their multiracial characteristics.⁴⁵ The color discrimination faced by Mexican-Americans was found by one student of the phenomenon as affecting light and dark-skinned Mexicans.⁴⁶ The reference point for courts should be the history of invidious discrimination faced by national origin groups on the basis of their ethnic heritage.⁴⁷ The court's acceptance of jurisdiction does not mean that a court will find in favor of the plaintiff, but it does mean that the plaintiff will be afforded an opportunity to make a claim under Section 1981. Courts have been and continue to be inconsistent in their approaches to Hispanics and other national origin groups; the overwhelming weight of authority, however, is that Section 1981 claims by Hispanics should be accepted and adjudicated on the merits. The Supreme Court's holdings in *St. Francis*

⁴⁵ See *Maldonado v. Broadcast Plaza, Inc.*, 10 FEP Cas 839 (D.D.C. 1974) (where defendant viewed the Puerto Rican plaintiff as "white," and the district court held that plaintiff's allegation that she was "a citizen of the United States" of Puerto Rican descent stated a Section 1981 claim); *Miranda v. Clothing Workers, Local 208*, 10 FEP Cas 557 (D.N.J. 1974) (where defendants urged that since Puerto Ricans and other Hispanic persons were members of the Caucasian or "white race," plaintiffs, who were Puerto Rican and other Hispanic persons, lacked standing to sue under Section 1981; in support of their argument, defendants submitted an anthropological abstract on the classification of "races"; the court characterized this argument as creative, but devoid of merit).

⁴⁶ See Dr. Manuel Gamio's observations in Greenfield and Kates, *Mexican Americans, Racial Discrimination, and the Civil Rights Act of 1866*, 63 Cal. L. Rev. 662, 707 (1975):

The darkest-skinned Mexican experiences almost the same restriction as the Negro, while a person of medium-dark skin can enter a second-class lunchroom frequented also by Americans of the poorer class, but will not be admitted to a high class restaurant...

As an extension or reflection of this racial prejudice, individuals of Mexican origin but of white skin are also socially discriminated against. The stigma of indigenous blood is so deep that the word Mexicans ... has acquired in the South a derogatory character....

See also Comment, *Mexican Americans: Are They Protected by the Civil Rights Act of 1866?*, 20 Santa Clara L. Rev. 889 (1980).

⁴⁷ See, e.g., *Sabala v. Western Gillette, Inc.*, 362 F. Supp. 1142, 6 FEP Cas 120 (S.D. Tex. 1973) (where the court held that Section 1981 applied to Mexican-Americans who are discriminated against because of their ethnic heritage).

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*College v. Al-Khazraji*⁴⁸ and *Shaare Tefila Congregation v. Cobb*⁴⁹ are consistent with this principle and courts ruling under 42 U.S.C. §1981 should rule accordingly.

§29.8. Alienage. Discussed above is how some courts have divided Hispanics into monolingual and bilingual linguistic groups, individual race or color groups. This section examines how the courts further divide groups such as Mexican-Americans into citizens and aliens for Title VII and Section 1981 purposes.

§29.8(1). The *Espinoza v. Farah Mfg. Co.* Modality¹—Allowing Discrimination by Private Employers on the Basis of Citizenship. Title VII prohibits discrimination on the basis of national origin. However, national origin is not defined.² The subcommittee proposal for Title VII (in defining the proscribed bases for discrimination) used the words “to discriminate against any individual because of his race, color, religion, national origin, or ancestry.”³ The final bill and Title VII itself omits any expressed reference to “ancestry.”⁴ This omission was not a material change, and the terms “national origin” and “ancestry” are synonymous.⁵

The legislative history on the meaning of “national origin” is limited. Congressman Roosevelt, Chairman of the House Subcommittee which reported the bill, defined it on the House floor:⁶ “May I just make very clear that ‘national origin’ means national. It means the country from which you or your forebears came from. You may come from Poland, Czechoslovakia, England, France, or any other country.” The Supreme

⁴⁸ *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987); see Chapter 26, §26.3.

⁴⁹ *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987); see Chapter 26, §26.3.

¹ *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

² 42 U.S.C. §2000e (1981).

³ See *Minority Report Upon Proposed Civil Rights Act of 1963*, Committee on Judiciary Substitute for H.R. 7152, reprinted in 1964 U.S. Code Cong. & Ad. News 2455.

⁴ *Id.*; 42 U.S.C. §2000e (1981).

⁵ 414 U.S. at 89.

⁶ 110 Cong. Rec. 2548-49 (1964), set out at 4 FEP Cas 931, 932-33 (5th Cir. 1972).

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Court decided whether the term embraced citizenship requirements.⁷

In *Espinoza v. Farah Mfg. Co.*,⁸ Cecilia Espinoza, a lawfully admitted resident alien from Mexico living in San Antonio, Texas with her husband, an American citizen, was refused employment as a seamstress at the Farah Manufacturing Company because she was not a United States citizen. The company had a long-standing policy (established by its founder for security reasons) of hiring only United States citizens.⁹ Espinoza filed a charge with the EEOC in which she alleged discrimination on the basis of her Mexican national origin. The EEOC Regional Director found that Espinoza was not denied employment because of her Spanish-surname. The trial court found that persons of Mexican ancestry made up 92 percent of the company's total employees, 96 percent of its employees in San Antonio, and 97 percent of the persons employed in the work for which Espinoza applied.

The trial judge held that in this case there was no discrimination on the basis of ethnic background or ancestry.¹⁰ The Court also held that the refusal by the defendant to hire Espinoza because of her lack of citizenship was discrimination on the basis of national origin.¹¹

The district court relied for its holding on 29 C.F.R. §1606.1(d) (1972) which provided:

Because discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship....¹²

The Supreme Court accepted the validity of this guideline; however, it limited it to cases where citizenship-based discrimination was a proxy for national origin discrimination. It identified two instances where that might occur: (1) where it

⁷ 414 U.S. at 89.

⁸ *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86 (1973).

⁹ 414 U.S. at 87.

¹⁰ *Id.*

¹¹ 414 U.S. at 87-88.

¹² *Id.* at 92.

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was part of a wider scheme of national origin discrimination; and (2) where it was used as a pretext to disguise national origin discrimination. The Court declared that Title VII forbids discrimination on the basis of citizenship where the purpose or effect of discrimination is based on national origin.¹³

The Court found none of these principles applicable to this case; here the record failed to disclose that the company's policy forbidding the employment of aliens had the purpose or effect of discrimination on the basis of a person's Mexican national origin. This situation was contrasted with a policy where aliens of other national origins were hired, while Mexican or Spanish-speaking aliens were not. The company made no inquiry of the national origin of employees, only of their citizenship status.¹⁴

The Court referred to the discrepancy between EEOC's guideline and its position when first confronted with the issue, where its General Counsel defined national origin to refer to place of origin and not citizenship status.¹⁵ The Court refused to defer to the EEOC guideline, which it found inconsistent with congressional intent. It read congressional intent to make "national origin" and "ancestry" synonymous, and, more importantly, to be in harmony with Federal Civil Service Commission rules which prohibited aliens from taking competitive examinations for federal employment. This requirement was never vitiated by the various Executive Orders since 1943 which prohibited national origin discrimination in the federal government.¹⁶

The Court examined Section 701(b) of Title VII which prohibited national origin discrimination against Federal em-

¹³ *Id.* at 92-93.

¹⁴ *Id.* at 91-92.

¹⁵ *Id.* at 93-95. The General Counsel's Opinion Letter said: "'National origin' refers to the country from which the individual or his forebears came..., not to whether or not he is a United States citizen." *Id.* at 94. The Opinion Letter focused on whether it was lawful for an employer to favor citizens and resident aliens over nonresident aliens. It reserved decision on the issue whether employers could favor United States citizens against resident aliens. The Court found the definition of national origin to be at odds with that sought by Espinoza.

¹⁶ *Id.* at 89.

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ployees. It also examined federal statutes passed in 1964 which barred aliens from federal employment. It concluded that Title VII's prohibition against national origin did not include a citizenship requirement; it reasoned that such an interpretation was inconsistent with congressional policy requiring U.S. citizenship for federal employment.¹⁷

The Court further asserted that since Congress permitted discrimination against aliens in federal employment, it was inconsistent to prohibit private employers from similar conduct. An affirmative ruling on behalf of the plaintiff would have prohibited the company in this case from requiring U.S. citizenship, while the EEOC itself would be required to hire only U.S. citizens. The Court refused to condone such a "bizarre" result. Accordingly, the Court found that the term "national origin" denotes "the country where a person was born, or, more broadly, the country from which his or her ancestors came."¹⁸ It held that the company had not engaged in unlawful discrimination against Espinoza on the basis of her national origin. It also refused to rule on the question of whether a U.S. citizenship-only policy violated Section 1981.¹⁹

Justice Douglas dissented on the ground that alienage resulted from a sole condition, namely, birth outside the United States; the company's de facto policy here was a

¹⁷ *Id.* at 90-91.

¹⁸ *Id.* at 88; *cf. Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731 (5th Cir. 1986) (discrimination against American can never be equated with discrimination on the basis of alienage, therefore relief under Title VII was available, but not under Section 1981 since based on American national origin); *Bilka v. Pepe's, Inc.*, 601 F. Supp. 1254 (N.D. Ill. 1985) (claim of discrimination because of American national origin stated claim under Title VII); *Vicedomini v. Alitalia Airlines*, 37 FEP Cas 1381, 1383 (S.D.N.Y. 1983) (American national origin failed to state a valid claim under Title VII); *Thomas v. Rohner-Gehrig & Co.*, 582 F. Supp. 669 (N.D. Ill. 1984) (employment discrimination against American citizens sufficient to state a Title VII claim); *Dowling v. U.S.*, 476 F. Supp. 1018 (D. Mass. 1979) (United States citizen precluded from stating valid claim under Title VII against hockey leagues that hire only Canadian referees; citizenship or alienage discrimination was not barred by Title VII); *Novak v. World Bank*, 20 FEP Cas 1166 (D.D.C. 1979) (reverse *Espinoza* situation—discrimination against United States citizens, not aliens, failed to state a valid claim under Title VII). *Id.* at 95-96.

¹⁹ 414 U.S. at 95-96.

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preference for those born in the United States, and hence based upon national origin. The result of the Court's policy was to sanction discrimination against a permanent resident alien, which would be prohibited against her husband or children, all of whom were or would be American citizens.²⁰

The Court refused to be drawn into the debate that a person born in the United States did not have to meet the naturalization requirements which an alien would have to meet, and hence a refusal to hire the alien is a result of the person's country of birth. The Court succinctly said that it was the federal government which imposed naturalization requirements and not private employers.²¹

The Court's result with respect to aliens is anomalous when compared to the strictures placed on citizenship requirements by state employers or state bar associations. Thus, a state cannot require an employee to be a United States citizen unless the positions in question are "state elective or important nonelective executive, legislative, [or] judicial positions" since such persons "participate directly in the formulation, execution, or review of broad public policy."²² The Court has also

²⁰ *Id.* at 96-98.

²¹ *Id.* at 93 n.6.

²² *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (New York State competitive civil service U.S. citizenship requirement found unconstitutional). *Cf. Truax v. Raich*, 239 U.S. 33 (1915) (where the Supreme Court struck down an Arizona State requirement that 80 percent of its employees of employers with five or more employees employ qualified electors or native-born citizens of the United States or its sub-divisions). The Court said in this case:

It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure. ...The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal government. The assertion of an authority to deny to aliens the opportunity of earning a livelihood when lawfully admitted to the state would be tantamount to the assertion of the right to deny them entrance and abode, for in ordinary cases they cannot live where they cannot work. And if such a policy were permissible, the practical result would be that those lawfully admitted to the country under the authority of the acts of Congress, instead of enjoying in a substantial sense and in their full scope the privileges conferred by the admission,

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held that states may not set U.S. citizenship requirements for aliens who seek to take the state's bar examination.²³ No state could prohibit Mrs. Espinoza from its competitive civil service, nor could a state deny her, if she met all other requirements, to sit for a bar examination and should she pass, to practice law. But, a private employer could deny her a seamstress' job simply because she was born in Mexico, or, if she were a lawyer, deny her a job for the same reason without any protection afforded to her by Title VII.

The *Espinoza v. Farah Mfg. Co.* modality therefore stands for the principle that a private employer can promulgate U.S. citizenship-only employee requirements, which will stand unless used as a pretext for national origin discrimination. In essence, the law makes a demarcation between those persons of Mexican descent with United States citizenship and those without; even where this may prevent a resident alien from securing a livelihood through work in the common occupations. A private employer is thus free to do what a state is proscribed from doing; the result is anomalous.

§29.8(2). EEOC's Guideline on Citizenship Requirements. On March 18, 1974 EEOC formally rescinded the guideline²⁴ in issue at 29 C.F.R. 1606.1(d) (1972) and substituted it with 29 C.F.R. 1606.5 (1992), which provides:

- (a) In those circumstances, where citizenship requirements have the purpose or effect of discriminating against an individual on the basis of national origin, they are prohibited by Title VII.²⁵
- (b) Some state laws prohibit the employment of non-citizens. Where these laws are in conflict with Title VII they are superseded under Section 708 of the Title.²⁶

would be segregated in such of the states as chose to offer hospitality.
(citations omitted)

Id. at 41-42.

²³ *In re Griffiths*, 413 U.S. 717 (1973).

²⁴ See 45 Fed. Reg. 85635 (Dec. 19, 1980).

²⁵ See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92 (1973). See also EO 11395; 5 C.F.R. Part 7.4; and 31 U.S.C. §669(b), for citizenship requirements in certain Federal employment.

²⁶ See CD 71-1529 (1971), CCH EEOC Decisions [Para.] 6223, 3 FEP Cas 580; CD 74-25 (1973), CCH EEOC Decisions [Para.] 6400, 10 FEP Cas 260. *Davis v. County of Los Angeles*, 566 F.2d 1334, 1341-42 (9th Cir. 1977),

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This new guideline rejected the proscription of the old 29 C.F.R. 1606.1(d) guideline of discrimination on the basis of citizenship in conformance with *Espinoza v. Farah Mfg. Co.* Private employers are free to discriminate against aliens on the basis of their lack of U.S. citizenship, but are proscribed from using such discrimination as a pretext for national origin discrimination.

In the promulgation of the new guideline, the EEOC asserted that it was based on Section 1606.1(d) and (e) of the preceding Guidelines.²⁷

The EEOC's second provision would appear to be in line with Supreme Court jurisprudence on the subject; however, in order to afford Hispanics a protection comparable to that in *Sugarman v. Dougall*²⁸ it would have to adopt the rationale in *Sugarman* and its narrow policy-making exceptions. EEOC mentioned in its comments on the promulgation of the rule that where state law permitted discrimination against non-citizens, it would base its decision on such a charge on the state law provisions involved and the employer's application of the state law to its employment practices.²⁹

Given the Immigration and Reform Control Act of 1986,³⁰ it is plain that discrimination by private employers against undocumented aliens would be read by the Court to be in harmony with and not violative of Title VII. The basic thrust of the *Espinoza v. Farah Mfg. Co.* modality is to further assert that discrimination by private employers against documented aliens is also permissible.

§29.8(3). Defining "Country" One Is from for National Origin Purposes Is Broader than Principles of Sovereignty. In defining national origin for Title VII purposes, the Supreme Court has focused on the country where someone was born, or, the country from which their ancestors came.³¹ The question

vacated and remanded as moot on other grounds, 440 U.S. 625 (1979). See also *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

²⁷ *Id.* The guideline was amended in 1974 to conform to the *Espinoza v. Farah Mfg. Co.* modality. See §29.5(2).

²⁸ *Sugarman v. Dougall*, 413 U.S. 634 (1973).

²⁹ 45 Fed. Reg. 85633 (Dec. 19, 1980).

³⁰ 99th Cong., 2d Sess. (1986).

³¹ 414 U.S. at 88.

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which arises from such a definition is whether plaintiffs have to show that their place of origin was in fact "a country," that is, an independent nation-state, or whether it sufficed that the place of origin was an identifiable land inhabited by people of the same race, dialect, or culture.

In *Roach v. Dresser Industries*,³² the Louisiana district court was faced with a plaintiff, who was a native-born American of Arcadian descent. The plaintiff alleged that he had been terminated because of his national origin (Arcadian or "Cajun") and association with fellow employees of the same national origin. The employer contended that since Arcadia was not and had never been a country, the plaintiff did not have standing to sue under Title VII; it insisted that since Arcadia had never been an independent nation it could not be the plaintiff's national origin.³³

The district court found that: (1) a "Cajun" is properly defined as an Arcadian; (2) that Arcadians had been the subject of oversimplified characterizations, stereotypes, and controversy; (3) that the plaintiff was an Arcadian; and (4) that historically Arcadians had colonized an area of the new world known at various times as the French colony of "Arcadia," the British Massachusetts colony of "Nova Scotia," and ultimately (after separation from the Massachusetts colony) as "Nova Scotia"; (5) that French-speaking residents who remained in Arcadia and who refused to sign an unconditional oath of allegiance to English had their property confiscated, their families scattered, and found themselves exiled; (6) that between 1764 and 1767 and later in 1787 many of them came to live in Louisiana.³⁴

The district court's analysis may be considered a specific application of the *Hernandez v. Texas*³⁵ modality in order to determine whether statutory protection on the basis of national origin would be afforded Arcadians in Louisiana. The court focused on the odious distinctions faced by citizens solely because of their ancestors; it found these to offend a free people

³² *Roach v. Dresser Indus.*, 23 FEP Cas (BNA) 1073, 1074 (W.D. La. 1980).

³³ *Id.* at 1074-75.

³⁴ *Id.*

³⁵ *Hernandez v. Texas*, 347 U.S. 475 (1954).

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with institutions grounded on the doctrine of equality; and it refused to be governed in its decision by principles of sovereignty.³⁶

The district court found that the Louisiana Arcadian was alive and well, that he or she would be afforded the same protection granted persons with English, Spanish, French, Italian, Czechoslovakian, Portuguese, Polish, Mexican, Italian and Irish ancestry. It held that the Arcadian plaintiff was protected by Title VII's proscription on national origin discrimination.³⁷

The principles of this case were so persuasive that the EEOC defined "national origin" at 29 C.F.R. §1607.1 (1984) as "place of origin." It cited the district court's decision in *Roach v. Dresser Industries*³⁸ and explained that since the phrase "country of origin" might imply a reference to sovereign nation, it had substituted it with "place of origin."³⁹ The EEOC went further and added that plaintiffs need not show that an alleged discriminator knew the particular national origin group to which they belonged, but rather it was sufficient to show different treatment from others because of their foreign accent, appearance, or physical characteristics.⁴⁰

The principle of *Roach v. Dresser Industries* applies by extension in the case of Puerto Rico, which has also never been an independent nation or country.⁴¹ When the United States acquired Puerto Rico in 1898 it was a province of Spain; thereafter, it became an unincorporated territory of the United States.⁴² Persons born in Puerto Rico subsequent to its acquisition by the United States technically were American

³⁶ 23 FEP Cas at 1075.

³⁷ *Id.*

³⁸ *Roach v. Dresser Indus.*, 23 FEP Cas (BNA) 1073 (W.D. La 1980).

³⁹ 45 Fed. Reg. at 85633 (1980).

⁴⁰ *Id.*

⁴¹ *Cf. Temengil v. Trust Territory of the Pacific Islands*, 33 FEP Cas 1027 (D. N. Mar. 1. 1985), *aff'd in part and rev'd in part*, 881 F.2d 647 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990).

⁴² *See, e.g.,* Reglamento Para la Eleccion de Diputados a Cortes Constituyentes en la Provincia de Puerto Rico, reprinted in Reece B. Bothwell Gonzalez, Puerto Rico: Cien Anos de Lucha Politica 125 (1979); Manuel del Valle, *Puerto Rico Before the United States Supreme Court*, 19 Revista Juridica de la Universidad Interamericana de Puerto Rico 13 (1984).

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nationals (later United States citizens), with forebears of Spanish national origin.⁴³ The district court in *Roach* demonstrated that in Title VII cases courts should not be governed by sovereignty principles; the EEOC has responded to the district court's concern in its definition of national origin as place of origin, and the cases brought by Puerto Ricans demonstrate that this has never been an issue and continues not to be an issue for them.⁴⁴

§29.8(4). The *Guerra v. Manchester Terminal Corp.* Modality—Section 1981 and Citizenship. The issue left open by the Supreme Court was whether aliens were protected against discrimination under Section 1981 in spite of their lack of U.S. citizenship. The Fifth Circuit Court of Appeals addressed this question in *Guerra v. Manchester Terminal Corp.*⁴⁵ where the plaintiff, a resident alien from Mexico living in Houston,

⁴³ Cf. *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922).

⁴⁴ See 45 Fed. Reg. 85633.

⁴⁵ *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 8 FEP Cas (BNA) 423 (5th Cir. 1974), overruled by *Bhandari v. First Nat. Bank of Commerce*, 829 F.2d 1345 (5th Cir. 1987) (court of appeals restricted the reach of the protections of 42 U.S.C. § 1981 from the private alienage discrimination embraced in *Guerra* to the public alienage discrimination endorsed by the United States Supreme Court in *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948). However, the Civil Rights Act of 1991, Pub. L. 102-166, Nov. 21, 1991, 105 Stat. 1074, amended 42 U.S.C. § 1981 by adding a section (c) which provides that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law," which restores the statute's reach to the private sector, thus undermining one of *Bhandari*'s doctrinal bases. Congress' further amendment to Section 1981 to define that "the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship," abrogated the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 160 (1976). In *Patterson*, the Court held that the right to make a contract referred to in Section 1981 did not include conduct occurring after the establishment of the contract. Both of these amendments have recast the reach of Section 1981 and when combined with the Supreme Court's precedent in *St. Francis College v. Al Khazraji*, 481 U.S. 604 (1987) and *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), which enlarged the scope of "race" discrimination, may do much to restore what is referred here as the *Guerra v. Manchester Terminal* modality. For the legislative history of the Civil Rights Act of 1991, see 1991 U.S. Code Cong. & Adm. News, 549.

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Texas, worked at the defendant employer's Dock and Commodity Department (the "Dock"). He had begun his employment in the Cotton Compress and Warehouse Department (the "Compress"). The defendant Local 1581, Int'l Longshoremen's Association (the "Local") had a collective bargaining agreement which provided for higher rates of pay at all eleven job classifications at the Dock in contrast to the forty job classifications at the Compress.⁴⁶

In 1965, the employer agreed to hire its employees through the union hiring hall with preference to be given to United States citizens. The collective bargaining agreement negotiated in 1965 provided for extended hospitalization benefits for workers and their families employed in the Dock, but limited these benefits to workers and not their families for those in the Compress. The union further voted to begin a hiring hall system through which the more desirable jobs in the Dock went first to United States citizens, then to Mexican citizens who had their families in the United States. If there were jobs still available, Mexican citizens who like the plaintiff had their families in Mexico would be referred.⁴⁷

The plaintiff was informed in September 1965 that he was to be transferred from the Dock to the Compress. He was told that he could not hold permanent employment in the Dock until he either became a United States citizen or moved his family to the United States. His place in the Dock was taken by a Mexican-American. Plaintiff Guerra filed an unfair labor practice on which he ultimately prevailed and a suit under Title VII and Section 1981.⁴⁸

On the authority of *Espinoza v. Farah Mfg. Co.*, the Fifth Circuit Court of Appeals affirmed the district court's dismissal of the plaintiff's Title VII complaint which was based solely on lack of citizenship. On the other hand, the appellate court held that Section 1981 protected aliens as well as citizens.⁴⁹ The

⁴⁶ 8 FEP Cas 423.

⁴⁷ *Id.* at 434-35.

⁴⁸ *Id.* at 434.

⁴⁹ See *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410 (1948) (where a state statute's prohibition on issuance of commercial fishing licenses to aliens ineligible for citizenship was held unconstitutional; the Supreme Court explicitly said that aliens were protected by Section 1981); *Graham v. Richardson*, 403 U.S. 365 (1971) (state restrictions on welfare benefits to only

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defendants argued that even if Section 1981 protected aliens, the referral system was based on family residence not citizenship. The appellate court characterized this argument as a "semantic Maginot line," and responded that the plaintiff would not have been transferred if he were a United States citizen.⁵⁰

The obstacle that Mr. Guerra faced was a consequence of the residence of his family in Mexico and that barrier was erected because of his Mexican citizenship. Only non-United States citizens had to deal with this obstacle; the difference in treatment was due to his alienage—a practice prohibited by Section 1981. The Fifth Circuit held Mr. Guerra's transfer to be illegal and affirmed the award of backpay to be made by the Local and its International parent jointly and severally.⁵¹

Guerra v. Manchester Terminal Corp. therefore provided a Section 1981 remedy to private discrimination on the basis of alienage; this stands in contrast with *Espinoza v. Farah Mfg. Co.*, which allows private employers to discriminate based on the absence of United States citizenship, except where this is a pretext for national origin discrimination.⁵²

The inconsistency of approaches reflected in *Espinoza v. Farah Mfg.* and *Guerra v. Manchester Terminal* typifies the uneven handling of claims brought by persons of Mexican descent and the availability of statutory protections to them. There is a need to rethink the issue, especially in light of the Supreme Court's decisions on discrimination against aliens in contravention of the equal protection clause of the Fourteenth Amendment. In short, private employers should not be allowed to do what state government employers are proscribed from doing, that is, discriminate on the basis of citizenship. Persons

those who were United States citizens or a resident alien for a specified number of years was unconstitutional; the Supreme Court said Section 1981 had been held to protect aliens as well as citizens).

⁵⁰ 8 FEP Cas at 442.

⁵¹ *Id.* at 442-43.

⁵² *Cf. Chaffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731 (5th Cir. 1986) (American national origin claim not protected by Section 1981, but sufficient to state a claim under Title VII); *Thomas v. Rohner-Gehrig Co.*, 582 F. Supp. 669 (N.D. Ill. 1984) (claim by United States citizen deemed a national origin claim rather than a claim of alienage, therefore not covered by Section 1981, but instead covered by Title VII).

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should be judged on the basis of their merits and if this had been the case, the plaintiff, Mr. Guerra, would never have been transferred to the Compress, while Mrs. Espinoza would at least have been considered for the seamstress job.

§29.9. Racial/National Origin Slurs, Stereotypes and Harassment. Hispanics, like other national origin groups, have been the object of racial slurs, racially charged working conditions, and/or harassment. This stereotype-based conduct has been condoned by some employers, participated in by some employer supervisors, and unknown still to others. National origin groups have used the law to attack this conduct, and courts have invoked a series of approaches that determine whether a plaintiff will succeed or not.¹ For a detailed discussion of racial harassment, see Chapter 6, §6.10.

¹ See *Bohen v. City of East Chicago*, 799 F.2d 1180 (7th Cir. 1986) (sexual harassment against Hispanic women violative of equal protection clause, not fired because of national origin); *Toth v. American Greetings Corp.*, 40 FEP Cas 1768 (N.D. Ohio 1985) (ethnic jokes and slurs not limited to persons of plaintiff's Italian national origin); *O'Loughlin v. Procon, Inc.*, 627 F. Supp. 675 (E.D. Tex. 1986), *aff'd without op.*, 808 F.2d 54 (5th Cir. 1986) (racially defamatory statements against black Cuban, no violation); *Saldivar v. Cadena*, 622 F. Supp. 949 (W.D. Wis. 1985) (verbal abuse and harassment alleged by Hispanic woman for advocacy of equal protection for members of the Brown race); *Ramos v. Flagship Int'l, Inc.*, 612 F. Supp. 148 (E.D.N.Y. 1985) (harassment against Hispanics); *Erebia v. Chrysler Plastics Products*, 772 F.2d 1250 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986) (ethnic slurs against Mexican-American); *Snell v. Suffolk County*, 611 F. Supp. 521 (E.D.N.Y. 1985), *aff'd*, 782 F.2d 1094 (2d Cir. 1986) (virulent slurs against blacks and Hispanics); *Torres v. County of Oakland*, 758 F.2d 147 (6th Cir. 1985) (single incident of derogatory language against Filipino did not constitute violation); *Dominguez v. Stone*, 97 N.M. 211, 638 P.2d 423 (N.M. Ct. App. 1981) (Mexican national called "Mexican," actionable conduct); *Contreras v. Crown Zellerbach Corp.*, 88 Wash. 2d 735, 565 P.2d 1173 (Wash. Sup. Ct. 1977) (racial jokes, slurs and comments against Mexican-American was actionable); *Bell v. Home Life Ins. Co.*, 596 F. Supp. 1549 (M.D.N.C. 1984) (ridicule of New Zealander's accent was not discriminatory harassment); *Obradovich v. Federal Reserve Bank of New York*, 569 F. Supp. 785 (S.D.N.Y. 1983) (Yugoslavian claimed harassment); *Carillo v. Illinois Bell Telephone Co.*, 538 F. Supp. 793 (N.D. Ill. 1982) (Hispanic female claimed harassment); *Perez v. Dana Corp.*, 545 F. Supp. 950 (E.D. Pa. 1982), *aff'd*, 718 F.2d 581 (3d Cir. 1983) (Puerto Rican alleged derogatory and insulting remarks by co-worker, claim time-barred); *Schulz v. Veterans Administration*, 30 FEP Cas 209 (D.D.C. 1982) (Hispanic female claimed harassment; disparate treatment found); *Robino v. Norton*, 682 F.2d 192 (8th

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§29.10. High School Diplomas and Examinations. In March 1985, the United States Bureau of the Census reported that the median school years completed for the total United States population was 12.6 years; it was 12.7 years for total non-Latinos, and for Latinos it was 10.2 years for Mexicans, 11.2 years for Puerto Ricans, 12.0 years for Cubans, and 12.4 for other Latinos.¹ More than one half of all persons of Mexican descent and Puerto Ricans do not have the minimum 12.0 years necessary for a regular high school diploma. The existence of high school requirements for public and private employment in the United States may therefore serve as an obstacle to consideration and hiring.

The Supreme Court first passed on the issue of high school diplomas in its landmark decision in *Griggs v. Duke Power Co.*² In 1955, the Duke Power Company, located in North Carolina, instituted a policy of requiring a high school diploma for initial assignment to any of its departments except its Labor Department and for transfer from its Coal Handling Department to any of its inside departments. In 1960, census statistics showed that only 12 percent of black males had completed high school in comparison to 34 percent of white males. The effect

Cir. 1982) (derogatory comments about Italian national origin, no violation); *Gonzalez v. Lumbermen's Mutual and Federal Kemper Ins. Co.*, 27 FEP Cas 1765 (D. Md. 1980), *aff'd without op.*, 32 FEP Cas 1544 (4th Cir. 1981) (ethnic comment made about Puerto Ricans ambiguous, no violation); *St. J. Enriquez v. Transit Mixed Concrete Co.*, 492 F. Supp. 390 (C.D. Cal. 1980) (Mexican-American alleged co-workers annoyed, vexed, or harassed him because of his Mexican-American race, no violation); *Morales v. Dain, Kalman & Quail*, 467 F. Supp. 1031 (D. Minn. 1979) (person of Cuban origin alleged comment about "fast thinking Latin Americans" was verbal abuse, not excessive, no violation); *Kidd v. American Filter Co.*, 23 FEP Cas 381 (W.D. Ky. 1980) (German origin plaintiff alleged harassment by fellow employees, no violation).

¹ U.S. Bureau of the Census, *Persons of Spanish Origin in the United States: March 1985 (Advance Report)*, Current Population Survey (March 1985), reprinted in Institute for Puerto Rican Policy, *Datanote on the Puerto Rican Community* (March 1986), 401 U.S. 424 (1971).

² *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). For a full discussion of the disparate impact theory developed by this case and its progeny, see Chapter 2, §§2.3-2.11.

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of the high school diploma requirement would disproportionately exclude blacks.³

The Supreme Court held that the high school completion requirement did not have a demonstrable relationship to successful performance of the jobs for which it was required. The Court did so on the basis of two propositions: (1) that Title VII did not only prohibit overt discrimination, it also prohibited "practices that are fair in form, but discriminatory in operation";⁴ and (2) the test for such practices was business necessity, so that if the employment practice which operated to exclude blacks could not be shown to be related to job performance, it was prohibited.⁵ This case sanctioned litigation not merely on selection procedures used by employers with the intent to exclude Hispanics and other protected groups but with procedures which had that effect, although the employer had no such intent.

Courts were therefore allowed to scrutinize what would appear to be facially neutral selection procedures, that is, a single or a number of job requirements applied to every applicant in the same fashion. Where such a procedure had a disproportionate or adverse impact on a protected group, the employer would now have to produce evidence that it was job-related or required by business necessity. The failure to do so would lead to the elimination of the purported requirement as an artificial obstacle to equal employment opportunity.

Hispanics have used this type of analysis to challenge the high school diploma requirements of public and private employers.⁶ In many cases, Hispanics have demonstrated that

³ *Id.* at 427, 430 n.6.

⁴ *Id.* at 431.

⁵ *Id.*

⁶ *Aguilera v. Cook County Police and Corrections Merit Board*, 760 F.2d 844 (7th Cir. 1985), *cert. denied*, 474 U.S. 907 (1985) (Hispanics challenged high school diploma requirement for correction officer positions, summary judgment for defendant affirmed, no violation); *Vulcan Society of Westchester County, Inc. v. Fire Dept. of the City of White Plains*, 505 F. Supp. 955 (S.D.N.Y. 1981) (Hispanics, high school diploma requirement modified to include equivalent experience); *United States v. City of Buffalo*, 457 F. Supp. 612 (W.D.N.Y. 1978) (Spanish-surnamed persons challenged high school diploma requirement for police and fire departments; requirement upheld for police, struck down for fire department, violation); EEOC Decision No. 73-0128, 16 FEP Cas 1783 (1972) (Spanish-surnamed Americans challenged

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such requirements have a disproportionate impact upon them, which has shifted the burden to employers to show that the high school or G.E.D. equivalency requirements are either job-related or required by business necessity. The failure of an employer to meet this burden leads to an injunction against the use of the requirement.

Another area of major litigation for Hispanics has involved the examinations administered by employers for hiring and promotion of employees. The watershed case in this area remains *Griggs v. Duke Power Co.* and the principles outlined by the Supreme Court in that case dictate the methodology used in these suits. On the date that Title VII became effective, the Duke Power Co. added an examination requirement for new employees. For placement in any department except the Labor Department, applicants were required to pass the Wonderlich Personnel Test (which purported to test general intelligence) and the Bennet Mechanical Comprehension Test. Incumbent employees who sought to transfer from Labor or

high school diploma or G.E.D. equivalent for admission to apprenticeship programs, reasonable cause found where no business necessity shown); *Padilla v. Stringer and City of Albuquerque*, 395 F. Supp. 495 (D.N.M. 1974) (Spanish-origin persons challenged high school diploma requirement for zookeeper job, requirement struck down, violation); *Vulcan Society v. New York City Civil Service Comm'n.*, 490 F.2d 387 (2d Cir. 1973) (Hispanics attacked high school requirement, remanded to district court which refused to pass on issue); *United States v. Sheet Metal Workers, Local 10*, 6 FEP Cas 1036 (D.N.J. 1973) (high school diploma for joint apprenticeship program was not job-related); *United States v. Inspiration Consolidated Copper Co.*, 6 FEP Cas 939, 948-49, 955-56 (D. Ariz. 1973) (Mexican-Americans challenged high school requirement for transfer into jobs within the jurisdiction of craft and railroad unions, requirement struck down, violation); *United States v. Steamfitters, Local 638*, 360 F. Supp. 979 (S.D.N.Y. 1973), remanded, 501 F.2d 622 (2d Cir. 1974) (high school diploma continued pending recommendation from administrator of apprenticeship program); *United States v. Ironworkers, Local 10*, 6 FEP Cas 59 (W.D. Mo. 1973) (high school diploma not job-related); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972) (Spanish-surnamed individuals challenged high school requirement for police, requirement sustained, violation on other grounds); EEOC Decision No. 71-623, 3 FEP Cas 261 (Spanish-surnamed Americans challenged high school diploma or G.E.D. equivalency requirements by utility, reasonable cause found); *Roman v. Reynolds Metals Co.*, 3 FEP Cas 228 (S.D. Tex. 1970) (Mexican-Americans challenged high school or equivalent requirement for hiring, motion to dismiss denied, class certification granted).

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Coal Handling to an "inside job" and who did not possess a high school education could do so only by passing the two tests. The Supreme Court found that neither examination was directed or intended to measure the ability to learn to perform a specific job or category of jobs.⁷

The basic principle of the *Griggs v. Duke Power Co.* modality is that diplomas and tests (although useful) not become the masters of reality. Where a selection procedure has a disproportionate or adverse impact upon a protected group, Title VII has placed the burden on the employer to show that the specific requirement or procedure is job-related.⁸ In this regard, the Supreme Court gave great deference to the EEOC employee selection guidelines.⁹ These guidelines required that employers which used tests possess data that demonstrate that the test was predictive or significantly correlated with important work behavior elements which comprised or are relevant to the job or jobs for which the candidate was evaluated.

No area of employment discrimination law has yielded as much success as the challenge by Hispanics that tests (especially civil service examinations by state and local governments) which have a disproportionate impact on them, be shown to be job-related. If the tests fail to meet the burden of proof they must not be used.¹⁰

⁷ 401 U.S. at 428.

⁸ *Id.* at 432.

⁹ See 29 C.F.R. §1607 (1984), now known as the Uniform Guidelines on Employee Selection Procedures. For a full discussion of these procedures, see Chapter 17.

¹⁰ See, e.g., *Hispanic Society v. New York City Police Dept.*, 42 FEP Cas 905 (S.D.N.Y. 1986), *aff'd*, *Marino v. Ortiz*, 866 F.2d 1144 (2d Cir. 1986), *aff'd*, 484 U.S. 301 (1988) (Hispanics, hiring examination, proposed settlement approved); *Clady v. County of Los Angeles*, 770 F.2d 1421 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986) (Mexican-Americans, firefighters exam, exam found job-related, judgment for defendant, affirmed); *Cuesta v. The State of New York Office of Court Administration*, 571 F. Supp. 392 (S.D.N.Y. 1983) (Hispanics, court officer examination, plaintiff's request for preliminary injunction denied); *Hammon v. Barry*, 606 F. Supp. 1082 (D.D.C. 1985) (Spanish-speaking Americans, fire department promotions, affirmative action plan implemented, violation); *Vulcan Pioneers, Inc. v. New Jersey Dept. of Civil Service*, 588 F. Supp. 727 (D.N.J. 1984) (layoffs), 35 FEP Cas 341 (D.N.J. 1984) (Hispanics, firefighter exam, remedy); *Vanguards v. City of Cleveland*, 753 F.2d 479 (6th Cir. 1985), *reh'g denied, en banc*, 36 Empl. Prac. Dec. (CCH) ¶ 35,190 (6th Cir. 1985), *aff'd*, 478 U.S. 501 (1986) (Hispanics, firefighters, consent decree affirmed); *Alvarez v. City of Philadelphia*, 98 F.R.D. 286, 35 FEP Cas 1255 (E.D. Pa. 1983) (Mexican, Puerto Rican, Cuban, Latin American, Spanish descent, police examination, hiring,

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This has proven to be an invaluable tool in meeting the employer's argument that all it has done is to treat all applicants or incumbent employees equally under a uniform standard or selection procedure. The standard must now be tested on the basis of the job and not of general assertions of employee qualities and qualifications.

limited class certified, motion to dismiss granted as to claims of 1972 test takers and 1975 test failers); *Boston Chapter v. Beecher*, 371 F. Supp. 507 (D. Mass. 1974), *aff'd*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975) (Spanish-surnamed, firefighter and police examinations, tests not properly validated), *cert. denied*, 421 U.S. 910 (1975), *case vacated as moot*, 716 F.2d 931 (1st Cir. 1983), *vacated*, 468 U.S. 1206 (1984). *Guardians Ass'n of the New York City Police Dept. v. Civil Service Comm'n of the City of New York*, 6 FEP Cas 1205 (S.D.N.Y. 1973) (Hispanics, police officers examination), *aff'd*, 490 F.2d 400 (2d Cir. 1973), 466 F. Supp. 1273 (S.D.N.Y. 1979) (compensatory seniority awarded), *aff'd in part and rev'd in part*, 633 F.2d 232 (2d Cir. 1980) (district court rejection of Section 1981 claim affirmed), *aff'd*, 463 U.S. 582 (1983); also, 527 F. Supp. 751 (S.D.N.Y. 1981) (Hispanics, police entry-level and police sergeant examination, settlement approved); 539 F. Supp. 627 (S.D.N.Y. 1982) (Hispanics, police rank ordered-examination, backpay and retroactive seniority); *Kirkland v. New York State Dept. of Correctional Services*, 11 FEP Cas 36 (S.D.N.Y. 1974) (Hispanics correction sergeants, promotional examination ruled unconstitutional), *aff'd*, 520 F.2d 420 (2d Cir. 1975), *cert. denied*, 429 U.S. 823 (1976); also, 21 FEP Cas 1264 (S.D.N.Y. 1976), 628 F.2d 796 (2d Cir. 1980), *cert. denied*, 450 U.S. 980 (1981), 524 F. Supp. 1214 (S.D.N.Y. 1981), 552 F. Supp. 667 (S.D.N.Y. 1982) (Hispanic correction sergeants, promotional examination, class action settlement approved), *aff'd*, 711 F.2d 1117, 32 FEP Cas 509 (2d Cir. 1983), *cert. denied*, *Altihiser v. New York State Dept. of Correctional Services*, 465 U.S. 1005 (1984) (district court approved settlement affirmed); *Association Against Discrimination v. City of Bridgeport*, 454 F. Supp. 751 (D. Conn. 1977), *vacated*, 594 F.2d 306 (2d Cir. 1979), *aff'd in part and vacated in part*, 647 F.2d 256 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); also, 710 F.2d 69 (2d Cir. 1983) (Hispanics, fire department, remedy modified, violation); *Ramirez v. City of Omaha*, 538 F. Supp. 7 (D. Neb. 1981), *aff'd*, 678 F.2d 751 (8th Cir. 1982) (Mexican-Americans, firefighter polygraph examinations, district court judgment for defendant affirmed, no violation); *United States v. City of Buffalo*, 28 FEP Cas 1195 (W.D.N.Y. 1981) (Native Americans motion to intervene denied); *Underwood v. State of New York, Office of Court Administration*, 28 FEP Cas 922 (S.D.N.Y. 1980) (Hispanics, uniformed court officer civil service examination, consent decree approved); *Vulcan Society of Westchester County, Inc. v. Fire Dept. of the City of White Plains*, 505 F. Supp. 955, 28 FEP Cas 893 (S.D.N.Y. 1981) (Hispanics, fire department entry examinations, consent judgment approved).

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JOURNAL OF HISPANIC POLICY



Published by The Hispanic Student Caucus
at the John F. Kennedy School of Government,
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DEVELOPING A LANGUAGE-BASED NATIONAL ORIGIN DISCRIMINATION MODALITY

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INTRODUCTION

For Hispanics, historically, their use of the Spanish language has been a basic determinant of whether or not they will face discrimination in the workplace. The public policy which has been developed on the legal protection to be afforded foreign language speakers or linguistic minorities in the United States is worthy of review and presents a sobering picture for Hispanics. Public policy in the United States has too often used the fact that Hispanics speak Spanish "as a ground of inferiority in law or an obstacle in fact to the exercise of" their rights.¹ Such treatment differs from the protection afforded language under international law.²

United States courts have approached issues of language-based discrimination by bifurcating national origin, which is a classification that affords members of ethnic communities protection against discrimination, from language, which is seen as a mutable characteristic of ethnicity and hence unprotected by the law. Thus, courts may take cognizance of discrimination claims which have been based strictly on their traditional almost one dimensional conception of a person's national origin, while failing to accept a lawsuit based on an Hispanic's claim of language-based discrimination. The effect of this approach has been to allow courts to sanction language-based discrimi-

nation against Mexican Americans and Puerto Ricans, while striking down discrimination based on other so-called immutable characteristics such as color or race. The result has been a history of employment discrimination litigation which fails to accept and protect the rights of Hispanics as a linguistic minority of the United States.

This article examines the need for a reassessment of public policy in the United States in order to make it consistent with the concept of "effective equality" found in international law and afforded linguistic minorities in the world. This approach would enlarge national origin claims to legally encompass the language-based claims of Hispanics and other groups so as to afford them protection against discrimination. For this reason a review of the applicable international precedent, of applicable civil rights law and the applicable national origin employment discrimination case law would be useful in order to provide a background and context to the recommendations made by the author. It is the author's position that the discrimination faced by Hispanics in employment calls for a language-based national origin discrimination modality which has its logic in history, pragmatism, and the law.

INTERNATIONAL PRECEDENT

The United States is not the only country in the world with linguistically identifiable minorities. At the end of the first World War, the major Allies sought to secure treaty protections for such minorities. A model treaty was signed with Poland; the League of Nations undertook similar guarantees from Albania, Estonia, Iraq, Latvia, and Lithuania.³

Towards a Theory of Genuine and Effective Equality

The Permanent Court of International Justice passed on the significance of these minorities treaties in 1935 in its *Advisory Opinion on Minority Schools in Albania* decision.⁴ The Albanian Declaration before the Council of the League of Nations in 1921 provided the same treatment in law and fact for its nationals who belonged to "racial, religious or linguistic minorities" as that granted other Albanian nationals. The declaration specifically allowed these minorities among other things to establish schools at their own expense and to conduct these in their own language.

In 1933, Albania decided to close all private schools and reserved to itself the right to offer education in its own schools; compulsory attendance was required for primary instruction which was provided free of charge. Before the Permanent Court, Albania argued that it had not discriminated against students in the minority language schools since it did no more than pass a general measure applicable to the majority as well as the minority.

The definition for community elaborated by the Permanent Court in its *Advisory Opinion on the Greco-Bulgarian Communities* was applied; a community was

A group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidar-

ity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.⁵

This definition would work equally well as a delineation of what the legal classification of "national origin" should mean in the United States. This definition of community also is consistent with the sociology of ethnic communities and explicitly makes language one of the chief characteristics of ethnicity. More importantly, this definition can serve as a point of departure for our analysis and as the legal basis for protecting the rights of linguistic minorities against the public policy of a linguistic majority—a situation extant for diverse groups throughout the world.

Albania argued that it had merely promised to its racial, religious, or linguistic minorities a right equal to that possessed by other Albanians.⁶ Albania contended that when the majority ceased to have the right to establish and conduct their own private schools, the minorities also lost that right. Albania insisted that it was treating the minority no different than the majority. For the Permanent Court to rule otherwise, Albania asserted, would be to accord these minorities a special privilege not available to the majority.

On the other hand, the Greek Government argued that the equal treatment of the minority and the majority would result in an "apparent" or "formal equality" inconsistent with the "genuine and effective equality" required by the Albanian Declaration of 1921. In passing on these claims, the Permanent Court described the essence of the principles that governed the international protection of minorities.

The essential characteristics of protections to be accorded a minority included (i) a concept that no person shall be placed in a position of inferiority because of language, race or religion and (ii) that there were certain minimum rights which were granted to minorities without regard to birth, nationality, language, race or religion. These rights were defined with the objective of preventing differences in race, language, or religion "from becoming a ground of inferiority in law or an obstacle in fact to the exercise of the rights in question." The Permanent Court made a distinction between equality in law and in fact. It cited its Advisory Opinion concerning the case of the German settlers in Poland to the effect that minorities must be accorded equality in fact as well "as ostensible legal equality in the absence of discrimination in the words of the law." The concept of equality in law forbade discrimination of any kind, which differed from equality in fact that required "different treatment in order to obtain a result which establishes an equilibrium between different situations."

In essence the Permanent Court arrived at the same position the U.S. Supreme Court had reached in *Yick Wo v. Hopkins*⁷ nearly a half-century before: that there are cases where the equal treatment of majority and minorities can result in inequality in fact.⁸ This of course is applicable to any situation which requires conformity of a linguistic minority to the majority language, while subordinating and making inferior the language of the minority in question. Equality in fact requires more than affording majority and minority similar disabilities.

The Permanent Court in the Albania case concluded that the abolition of the private language schools and their replacement by state schools would destroy the equality of treatment to which these minorities were entitled. The

Court found that the effect of such an action would be to deprive the minority of their institutions, while perpetuating the institutions of the majority. This conclusion is similar to that of the U.S. Supreme Court in *Meyer v. Nebraska*⁹ and *Bartels v. Iowa*,¹⁰ where the prohibition of foreign language instruction in private schools to children below the eighth grade was deemed a deprivation of liberty and unconstitutional. Although Nebraska and Iowa did not abolish foreign language private schools as Albania sought to do, these states desired to exercise control over foreign language instruction to children belonging to a linguistic minority under the police powers of the state and on the ground of an alleged need for linguistic conformity.

For the Permanent Court the value of "equal rights" is questionable where the government has the power to abolish or curtail the right in question, with the result that the right becomes illusory. For the right to be meaningful, it must always be enjoyed by the minorities in question; to do otherwise would be to make the right and those who assert it inferior to the majority.¹¹

The Permanent Court found that State education was something afforded all persons in Albania; it was something in addition to private education, and as such could not take the place of private schooling. The Permanent Court found that the Albanian Minorities Declaration guaranteed to its racial, linguistic or religious minorities the right to maintain, manage, and control at their own expense or to establish in the future charitable, religious, and social institutions along with schools and other educational establishments; within these institutions they had the right to use their own language and exercise their freedom of religion.¹²

The rationale and outcome of this case reflects the considered global jurisprudence that finds language discrimination actionable as a violation of declared minority treaty rights or in the case of the United States violated the ordered concept of liberty in the due process clauses of the United States Constitution.¹³ As we will demonstrate below, the equal protection clause to the Fourteenth Amendment of the United States has been a vehicle to afford equality in law and in fact to Hispanics, a process we believe consistent with American constitutional jurisprudence and with international concepts of equality.

The Belgian Linguistic Cases

Like many major international instruments, the European Convention on Human Rights provides that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."¹⁴

In the Belgian Linguistic Cases, the European Court of Human Rights found that a Belgian statute which prevented certain children, solely on the basis of their parents' residence, from having access to the French-language schools existing in the six communes on the periphery of Brussels (which had a special language status) violated Articles 2 and 14 of the Convention.¹⁵

Belgium had established zones where Dutch and French would be used exclusively as the language of instruction, and a child whose parent resident in one zone would not be entitled to instruction in the other language. These zones were based on the historic national origin groups (French and Dutch) that came to constitute the Belgian nation-state. The European Court on Hu-

man Rights concluded that these language-based distinctions were deemed discriminatory. Such discrimination is similar to that faced by Mexican American children in publicly segregated schools simply because they spoke Spanish.

The Right of Hispanics and others to Self-Identification of their Protected Status

Any concept of equality in fact for Hispanics requires a way of allowing Hispanics to identify themselves as members of a protected classification or group. In this regard, American courts have taken what amounts to an intrusive role unlike the international precedent noted below which provides for an unobtrusive role for the state in this regard. Thus, courts and public agencies in America continue to pass upon the question of self-identification of minority group members, that is, whether or not they are a part of a specific national group, or, until quite recently in the context of lawsuits under the Civil Rights Act of 1866, 42 U.S.C. Section 1981, whether or not they are a part of a race. For example, a State Supreme Court justice in New York ordered the Office of Equal Employment Opportunity of the New York Police Department to explain why it refused to permit an officer, seeking to benefit from an affirmative action promotion program for sergeants, to reclassify himself from white to Hispanic.¹⁶

The Permanent Court of International Justice addressed this issue of classification in its Advisory Opinion on Minority Schools in Upper Silesia.¹⁷ Confronted with the issue of self-classification, the Permanent Court held that the German-Polish Convention of 1922 bestowed upon every national the right freely to declare (according to their conscience and personal responsibility) that they did or did not belong to a racial, linguistic, or religious minority and to declare the language.¹⁸

The treaty had prohibited a verification of the minority status of an individual. The aim of the provision was to avoid the disadvantages which arise if the authorities had to determine an individual's minority background. Although the Permanent Court noted that this could lead to the treatment of certain persons who were not in fact minority members as such, this was a consequence accepted by the parties in light of the greater disadvantages that would otherwise result.

The courts in America, however, have traditionally examined the factual basis for the assertion of protection. In this connection, it should be recalled that the case of *Plessy v. Ferguson* involved the arrest of a passenger who claimed to be white, but was perceived as and held to be non-white, and who was traveling in a train car exclusively available only to whites.¹⁹ This case refused to accept the passenger's self-identification and enunciated the doctrine of "separate but equal," which was the United States equivalent to the argument for apparent equality made by Albania and rejected by the Permanent Court.

In *Hernandez v. Texas*,²⁰ the first U.S. Supreme Court case to explicitly recognize that Mexican Americans were protected by the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, the Court focused on the factual basis of the group's treatment to identify whether Chicanos were protected by the clause. The Supreme Court held that "just as persons of a different race are distinguished by color," the Spanish-surnames of the Mexican claimants provided "ready identification for members of this class."²¹

For our purposes *Hernandez v. Texas* is a fundamental decision for Mexican Americans and other Hispanics since the Court acknowledged the language-based national origin treatment of Chicanos. The Court found that one method of establishing group discrimination against persons of Mexican descent was evidence of the community's attitude, which included:

- (i) the segregation of children of Mexican descent in public schools on the basis of their language; the purported reason for this was that these children needed special assistance in learning English; the Court found that in most cases each teacher taught only one class in the regular school, but in the Mexican school each teacher taught two grades; the purported reason for additional language instruction was no more than subterfuge for the unlawful segregation of Mexican children;²²
- (ii) at one restaurant in town there was a sign announcing "No Mexicans served"; and
- (iii) there were two toilets on the courthouse grounds, one unmarked, and the other marked "Colored Men" and "Hombres Aqui" ("Men Here").²³

Strikingly, the separate toilet for Chicanos was designated in Spanish. This evidence was used by the Supreme Court to hold that Mexicans constituted a class entitled to the protection of the equal protection clause. It also evidenced how language had been used in public schools²⁴ and public accommodations to discriminate against Hispanics in the United States.²⁵

Rather than accept the self-identification choices or classifications as was the case pursuant to the German-Polish Convention, American courts and public policy makers have involved themselves in a factual analysis which is unnecessary, inappropriate, and intrusive. Instead, we believe that American public policy makers should accept the self-identification choices made by or group characteristics associated with minority groups for the purposes of affording them protection. This could be accomplished by a per se rule that would treat Hispanic claims as national origin claims which encompass discrimination on the basis of their group characteristics such as language, accent, race, height, and Spanish-surname.

For public policy makers involved in the national debate on bilingual education in the public schools, it should be noted that the Permanent Court went on to conclude in its Advisory Opinion that in this Polish case there was an obligation to establish public primary schools where the medium of instruction would be in the minority language and that the authorities were free to limit these facilities to the children whose language was the minority language.²⁶

The consequence of the Permanent Court's opinion was to insure that self-classification would be the norm for minorities without verification, dispute, pressure or hindrance of the authorities and that the minority language schools would be available to the minority language child as prescribed in the Convention.

These treaty interpretations are of some value in the treatment of Mexican Americans and Puerto Ricans, two groups who were made part of the American polity through conquest and treaty. In this regard they are unlike the foreign immigrants who came to America without treaty guarantees or the status of United States citizenship.²⁷ These two Spanish-speaking minorities were established communities within the meaning of the Minority Schools

in Albania Advisory Opinion, that is, they lived in prescribed localities, had their own race, religion, and traditions and were united by them.

The treaties in question guaranteed them Mexican Americans and Puerto Ricans the rights of other United States citizens in law and in fact. Puerto Ricans were allowed to elaborate their own pedagogy in the Spanish language. Puerto Rican public schools are conducted in the vernacular language of the Island, which is Spanish. They are the only American-flag schools which do this,²⁸ but historically public schools in the United States were at different time conducted in such languages as French and German. In the case of the Mexican American, language has always been a substitute for national origin and race discrimination. Many Mexican schools were created in the Southwest and publicly segregated purportedly on the basis of student language needs.²⁹ The xenophobia that resulted from the first World War impelled state authorities to employ public policy to restrict foreign language use, to use such regulations as a proxy for national origin discrimination in the name of linguistic conformity. The current English-only Movements in the United States are contemporary examples of this xenophobia and are inconsonant with international precedent and United States jurisprudence protecting the rights of linguistic minorities such as Mexican Americans and Puerto Ricans.

LANGUAGE-BASED NATIONAL ORIGIN DISCRIMINATION IN THE U.S.

The Treaty of Guadalupe-Hidalgo of 1848 and the Treaty of Paris of 1898

An historical review of the Treaties of Guadalupe-Hidalgo of 1848, the Treaty of Paris of 1898 and the Second Organic Act of 1917, which made Mexican Americans and Puerto Ricans citizens of the United States, is appropriate to rebut the rationale of the *Carmona v. Sheffield* modality discussed below that citizenship in the United States is exclusively conditioned on English or that the Immigration and Nationality Act applied to the inhabitants of these territories absorbed by the United States or to their descendants.

The Mexican American and the Puerto Rican became part of the United States of America by acts of war, conquest, and cession which resulted in their inclusion in the American body politic in the nineteenth century. The Treaty of Guadalupe-Hidalgo of 1848 made the Mexican residents in the newly acquired territories American citizens unless they took steps within a year to preserve their Mexican citizenship.³⁰

Specifically, it was article VIII of the Treaty of Guadalupe-Hidalgo which mandated that all Mexicans who had not declared their intention to become United States citizens within a year of the ratification of the treaty were to be considered to have elected to become citizens.³¹

Of significance in this respect was the absence of any requirement that these new citizens show any ability to read, write or speak the English language. They and their descendants became United Citizens whether or not they spoke English. A victorious America had no need and showed no desire to impose an English language requirement for the exercise of citizenship.

The Mexicans who had remained in the newly acquired territories were

to be afforded the equality granted the inhabitants of other territories equal to that given the residents of Louisiana and Florida. Those inhabitants were also made United States citizens, without English language requirements.³²

The Treaty of Guadalupe-Hidalgo demonstrated that the Federal government can and has refused to impose English literacy requirements for United States citizenship. A similar policy was applied in 1918 in the admission of Mexican nationals for the purpose of temporary work in the United States. In 1918, the Commissioner General of Immigration issued a Departmental Order which waived the literacy requirements for Mexican laborers; this policy was continued long after the end of the labor shortage. English literacy has not been a condition precedent for the exercise of rights by Mexican Americans, nor is it for Puerto Ricans.

Mexicans became the largest contingent of Spanish-speaking United States citizens to be joined by Puerto Rico's Spanish-speaking inhabitants in 1917. As a result of the Spanish-American war, the United States had acquired Puerto Rico in 1898. The Treaty of Paris of 1898, which ceded Puerto Rico to the United States, provided that the U.S. Congress would determine the political and civil rights of the inhabitants of Puerto Rico.³³

Puerto Ricans were made United States citizens through the Second Organic Act of 1917, commonly referred to as the Jones Act.³⁴ Like the Mexican Americans before them, Puerto Ricans were not required to demonstrate any English language knowledge or proficiency. Unlike the Mexican Americans in the Southwest, Puerto Ricans were to continue to use Spanish as the dominant language on the Island. Its public schools were to receive federal funds and the language of instruction was to be in Spanish.

The historical treatment accorded Spanish-speaking groups by federal public policy has been to extend to them United States citizenship without an English language requirement. The use by courts of the Immigration and Naturalization Act to somehow hold otherwise is erroneous as a matter of history and law. This statute did not and does not apply to the Mexican American and Puerto Ricans and their descendants; the federal government has never sought to condition the right of Mexican Americans and Puerto Ricans to citizenship on the basis of English language facility.

EMPLOYMENT DISCRIMINATION AND THE *Carmona v. Sheffield* AND *Garcia v. Gloor* MODALITIES

Two contemporary modalities have been developed by courts to handle the language-based national origin employment discrimination claims of Hispanics. The *Carmona v. Sheffield*³⁵ modality rests on its operational outcome (leading to a dismissal of claims by Spanish-speakers for bilingual assistance or notice) on the dual bases of English as the language of the United States and the alleged and unproved administrative costs associated with providing bilingual services. The *Carmona v. Sheffield* modality provides that it is reasonable for state government in the United States to conduct all of its business only in one language, especially in the light of what is perceived to be the finite resources of a state.

The *Carmona* modality thus posits its public policy prescription on an argument that no special efforts are required to affording Spanish-speakers who

do not read English an understanding of the notices sent to them by the state unemployment insurance and that protection afforded them would lead to claims by all other similar groups for special treatment. The Court dismissed the claims of the Spanish-speaking Plaintiffs without ever holding a trial on the merits of their claims.

While English is the de facto language of the United States, the court sought to make it the de jure language by citing the naturalization statute which requires an understanding of English for United States citizenship. That statute is, of course, entirely inapplicable to Puerto Ricans, who are Spanish-speaking American citizens from birth. Interestingly enough, a federal district court facing the identical claims raised by the Mexican Americans in *Carmona* refused to dismiss the lawsuit and that suit was ultimately resolved by settlement in favor of the Spanish-speaking Puerto Rican class.³⁶

The *Garcia v. Gloor*³⁷ case established a modality that differentiates between monolingual Spanish-speaking Hispanics, who were protected from national origin discrimination, from bilingual (that is, English and Spanish-speaking) Hispanics, whose use of the Spanish language at the workplace was not protected from discrimination. The Court found that Title VII of the Civil Rights Act of 1964, as amended, which prohibits discrimination in employment on the basis of national origin did not prohibit discrimination on the basis of "the language the one chooses to speak."³⁸

Consequently, a bilingual Mexican American salesman who had been hired in order to speak Spanish with the majority Spanish-speaking clientele was properly dismissed for answering in Spanish a fellow salesman's inquiry which had been in Spanish. Such action on the part of the dismissed employee had violated the employer's requirement that conversations between salesmen on the job be in English. This result could only rationally be obtained from a public policy analysis that artificially divided language from national origin, protecting what is perceived to fall within the national origin classification and excluding from national origin what in international precedent is fundamental, namely, the language of the member of the linguistic minority.

The *Carmona v. Sheffield* and *Garcia v. Gloor* modalities are mere extensions of the distinction sanctioned by the courts against Hispanics on the basis of language. They stand in contradistinction to the *Hernandez v. Texas* and *Katzbach v. Morgan* modalities which seek to guarantee Hispanics the equality in fact which are implicit in the Treaty of Guadalupe-Hidalgo and Treaty of Paris. Such guarantees are made more explicit for Puerto Ricans who are encouraged through federal funds for their public school system in Puerto Rico to retain their Spanish language which is a salient national origin trait.³⁹

THE EEOC NATIONAL ORIGIN GUIDELINES

In summary, there is an international recognition of discrimination on the basis of language which is actionable and deemed illegal where not otherwise justified by some legitimate reason. The norm is analogous to that reflected in the National Origin guidelines of the United States Equal Employment Opportunity Commission (EEOC), the difference lies that language is subsumed within the classification of national origin in EEOC's view and is a sep-

arate actionable classification in the world view.⁴⁰

The EEOC view seeks to make use of the "national origin" classification used in American jurisprudence and to the extent that it includes and protects language would be consistent with the protection and status afforded language in international instruments and under international law.

In both the EEOC view and international jurisprudence, language-based discrimination is inextricably tied to the national origin of the minorities claiming the discrimination. Congress has been aware of this link in the case of Mexican Americans and Puerto Ricans⁴¹ — it is time that the courts of the United States also concur. Failing a judicial acceptance of the concept of language-based national origin discrimination, Congressional action is needed in order to protect Hispanics in the United States.

The historic and international arguments for this are also associated with the promises made to Hispanics for the preservation of their rights and culture best exemplified in the case of Puerto Ricans. Otherwise discrimination meaning (1) a distinction, exclusion, restriction or preference, (2) based on the salient trait of national origin minorities, and (3) as a result of intentional or inadvertent (adverse impact) actions of employers will be allowed to nullify or impair the equality of treatment obtained by Hispanics in the United States.⁴²

Elaborating an Approach Toward Language-Based National Origin Discrimination

Hispanics are not the only groups to have pressed language-based claims of discrimination; they are today the largest such group. The legal principles for a standardized approach against language-based national origin discrimination lies in the concepts of disparate impact and disparate treatment. The Supreme Court set the standard in *Yick Wo v. Hopkins*⁴³ where it held that facially neutral procedures which were unevenly applied to a protected group constituted a violation of the equal protection clause of the Fourteenth Amendment. The Court held the equal protection clause was a pledge of the protection of equal laws and was applicable to all persons regardless of their race, color, or nationality.⁴⁴

1. English Literacy: Vehicle for Discrimination

For Hispanics and other national origin groups it has been the actions of states against the languages of such groups that has made them turn to the federal courts for protection. As already noted, the First World War led to a xenophobic reaction which produced state laws prohibiting the instruction of English to elementary or junior high school students; state statutes adopting English as the official language of the state were also passed. Such statutes were justified as an attempt to promote civic development and American ideals, which would be inhibited if a child was trained or educated in a foreign language.

States reacted to large foreign born communities typified by a common use of foreign words, foreign leaders, and foreign atmosphere. This was viewed as a hindrance to the children of the foreign born and as a peril to public safety. In *Meyer v. Nebraska*,⁴⁵ the U.S. Supreme Court was called upon to scrutinize a state statute which made it a criminal offense for a teacher to

instruct children below the eighth grade level in specified foreign languages. In this case a parochial school teacher was convicted for teaching the subject of reading in the German language.

The Court's perspective on language based discrimination is as applicable today as it was in 1923: the Constitution protects all persons, whether they were born speaking English or not. The Supreme Court found that the Nebraska English-only statute deprived persons of the liberty guaranteed by the Fourteenth Amendment.

The Court found that the teacher in this case taught German in the school as part of his occupation; he had a right to teach and parents had a right to have their children instructed. These rights were within the liberty protected by the Fourteenth Amendment. The Court saw no emergency which could serve as a basis for rendering foreign language instruction to children harmful and acknowledged that such languages are best learnt at an early age. The statute was declared unconstitutional as was a similar statute in Iowa.⁴⁶

These state statutes were sophisticated enough not to target their prohibitions at the particular national origin groups who spoke the prohibited foreign language, rather the legislatures learned to draw classifications based solely on language. The supporters of these state statutes saw themselves as pro-English and believed them to be a proper response to the purported threat of foreign language groups; they even attacked the loyalty of foreign language speakers.

The English-only statutes currently proposed throughout the United States is but another example of the xenophobic trend that seeks to impose linguistic conformity on linguistic minorities. The motivation is no longer against French or German speakers but principally against Hispanics who constitute one of the largest foreign language communities in the United States.

As in the Albania case, the U.S. Supreme Court intervened to arbitrate the controversy and to protect the rights of the foreign language teachers, students and their parents. The Nebraska and Iowa cases were soon followed by cases in the Philippines and Hawaii, where United States territorial governments had legislated foreign language prohibitions. The willingness and ability of a dominant linguistic group to make use of the instruments of public policy to enforce their dominance against linguistic minorities should make such actions suspect and require that they be subjected to the strict scrutiny referred for other classifications used in the past to discriminate against groups such as race.

In *Yu Cong Eng v. Trinidad*,⁴⁷ the Philippines legislature passed a statute which required that merchants keep their account books in English, Spanish or one of the 43 Philippine local dialects. This statute prohibited some 12,000 Chinese merchants from keeping their books in Chinese, and the failure to do so was to result in criminal sanctions. The U.S. Supreme Court found that the statute was aimed at the Chinese merchant community in the Philippines, that it prohibited these merchants who spoke no other language from the details essential for the conduct of their business.

The U.S. Supreme Court held the statute unconstitutional as a deprivation of the liberty of these merchants to conduct their affairs in a language they understood and thus of their property without due process of law. The Supreme Court ruled the statute unconstitutional as a violation of the due process of law and the denial of the equal protection of the laws.⁴⁸

In 1926, the Hawaii legislature focused its concern on private schools where children were taught in Japanese; it sought to progressively prohibit the admission of children to such schools unless they had completed the first and second grades in an American public school. It further sought to regulate what could be taught in such schools, assess a fee per pupil, license instructors for knowledge of American values and the English language, and require English equivalents to be published in new textbooks for foreign words and idioms. The Japanese private schools were prohibited from conducting sessions during the mornings or while the public schools were in session. Violation of the rules constituted a criminal misdemeanor and subjected the defendant to a fine.⁴⁹

These regulations were aimed at controlling the personnel, student admission requirements, curriculum, materials and hours of instruction of the 163 foreign language schools in Hawaii. Nine of these schools were conducted in Korean, seven in Chinese, and 143 in Japanese. The Ninth Circuit Court of Appeals found that the right to impart instruction, whether viewed as a property right or as part of one's liberty, was implicated in this case, and the legislature's action against these private schools violated the privileges and immunities of United States citizens and the due process of law clause.

It said that were the regulations involved here to be imposed by a state against a college in which foreign languages were taught it would "shock the conscience of mankind." The state statutes examined so far were aimed at the prohibition or regulation of foreign language usage by striking at its use in private schools created for this purpose. The goal was to curtail foreign language usage in the United States.

Another way to accomplish this was through the imposition of literacy requirements on the exercise of the franchise. The states of California and New York passed English literacy statutes with the intent of discriminating against the foreign language speaker. In 1891, A.J. Bledsoe (known as a member of the vigilante Committee of Fifteen which expelled from Humboldt County every person of Chinese heritage) introduced the English literacy requirement as a proposed constitutional amendment in the California State Assembly. In his introduction, he quoted from the political platform of one of the major political parties which sought to deny the franchise to the foreign born until they had been acculturated.

The English-literacy constitutional amendment was approved in 1894 and required an ability to read the California state constitution in English and to write their name.⁵⁰ Rather than prohibit the use of the language of the national origin group, the stratagem was to require English competence at a high enough level to insure exclusion of immigrant groups. The California amendment required an ability to read a legal document, complex in nature, and unfamiliar to most voters; there was room here for discrimination and that was what the amendment's sponsors sought. The discrimination could now be defended with the argument that the right to vote was not denied because of the individual's race, color, creed, or national origin, but because of their illiteracy in the English language. This is but another version of the *Garcia v. Gloor* modality with its tenet that language-based discrimination is allowed whereas national origin discrimination is prohibited. As we discuss below, the California Supreme Court was finally called upon to strike down the English literacy requirement in the case of Chicanos in 1970 holding that Spanish literacy would suffice to make the state requirement.

In New York the object of exclusion of immigrants and the protection of those already on the voter's rolls was achieved through an English literacy statute and a grandfather clause waiving such requirements for those who were already voters. The only other exception to the constitutional requirement was physical disability.³¹ This provision was successful in keeping Puerto Ricans from exercising their right to vote.³² Yet, its genesis lies in the reaction of its sponsors to the foreign born who through naturalization were eligible to vote. One such sponsor spoke of the need to check the danger stemming from the infusion of Southern and European races into the United States.³³

The supporters of the English literacy requirement argued before the Supreme Court that its intent was to provide an incentive for non-English speaking immigrants to learn English and to guarantee the intelligent exercise of the right to vote. The Supreme Court responded that Congress was free to question this in light of the prejudice that played such an important role in its passage.³⁴

2. The Promise in *Balzac v. People of Porto Rico*³⁵

The Jones Act made Puerto Ricans United States citizens; what it did not do was make applicable to Puerto Rico all rights guaranteed fellow citizens on the mainland under the bill of the U.S. Constitution. In the landmark case of *Balzac v. People of Porto Rico*, the Supreme Court held that the right to trial by jury was deemed a mere made of procedure and not applicable to Puerto Rico even though its people were United States citizens. The reason for this was that Puerto Rico was an unincorporated territory of the United States to which the United States Constitution did not apply in all of its respects.³⁶

The Supreme Court saw the grant of United States citizenship as a signal to Puerto Ricans to obtain full equality with fellow citizens by migrating to the continental United States. The Supreme Court noted the goal of Congress was to insure local autonomy for Puerto Rico and complete equality of Puerto Ricans in its promise to them.

Whatever might occur in Puerto Rico, Puerto Ricans who moved to the continental United States were promised an "exact" equality which was denied many of them because of the English-literacy requirements imposed by states such as New York.

3. The Congressional Response to the Puerto Rican Claim for Bilinguality

In 1965, the United States Congress passed section 4(e) of the Voting Rights Act³⁷ of that year, which allowed that persons educated in American-flag schools where the language of instruction was other than English and who had completed the sixth-grade were not to be denied the right to vote. This was a direct response to the New York statute which had been amended to allow persons with at first eighth grade educations and then sixth grade educations in Puerto Rico to vote; the difference was that the Puerto Rican schools had to have been conducted in English.³⁸

The Supreme Court held in *Katzenbach v. Morgan* that section 4(e) was an enactment passed under section 5 of the Fourteenth Amendment to enforce the equal protection clause; it also held that Puerto Ricans were entitled to the protection of the amendment; the Court viewed section 4(e) as a statute designed

"For the Puerto Rican community residing in New York nondiscriminatory treatment by government—both in the imposition of voting qualifications and the provision or administration of governmental services, such as public schools, public housing and law enforcement."⁵⁹

The effect of the statute was "to prohibit New York from denying the right to vote to large segments of the Puerto Rican community"; this in turn was to enhance the political power of Puerto Ricans deemed helpful in order to obtain nondiscriminatory treatment in services. The Court cited the promise in *Balzac* for the proposition that Section 4(e) would enable the Puerto Rican minority to obtain the "perfect equality of civil rights and the equal protection of the laws."

Under section 5 of the Fourteenth Amendment, it was for Congress to determine whether the needs of the Puerto Rican community required federal intervention on the state interests that were served by the English-literacy requirement. The Supreme Court held that Congress had the power to evaluate and weigh the conflicting considerations involved in the nullification of the New York state English-literacy requirement. Congress was free to consider an equivalence between an ability to read or understand Spanish and English literacy based upon the Spanish-language newspapers, radio and television programs to which Puerto Ricans had access.⁶⁰

The statute was challenged by New York state voters who alleged that their right to vote would be diluted if Puerto Ricans were allowed to vote; they also asserted that the statute limited itself to Puerto Ricans and did not include those educated abroad who also spoke foreign languages. The Supreme Court rejected the assertion that Congress had to extend relief to those educated in non-American flag schools.

It considered that the Congress' choice may have been a result of four factors: (i) Congressional familiarity with the quality of teaching in American-flag schools (found by the Court to apply only to Puerto Rico's schools); (ii) the unique and historic relationship between Congress and Puerto Rico; (iii) Congressional awareness, acceptance and funding of Puerto Rico's public schools where Spanish was the language of instruction, and (iv) congressionally enacted policies which fostered migration from Puerto Rico to the continental United States.

The Supreme Court thus answered the 'floodgates' argument, that is, that if affirmative relief is awarded to a specific national origin group it must be accorded to all. This is not the case where Congress has a basis for a distinction; in short, Congress need not treat all evils at the same time. Congress' power to forge piecemeal reform directly contradicts one of the tenets of the *Carmona* modality which stipulates that language-based relief could not be afforded Spanish-speaking claimants since it would have to be granted to all foreign language claimants.

Most importantly, the Congress responded to the promise detailed in *Balzac* to insure by its own affirmative action that Puerto Ricans be accorded full political and civil rights in the continental United States. Congress created a basis for a doctrine of effective equality⁶¹ which did not accept the appearance of equal treatment, for example, that all persons must show literacy in English, but rather insists on the substance of equality, that is, that assistance designed to attain equality may be required. The implication is that Puerto Ricans were entitled upon reaching the United States not merely to equality in form or apparent equality but rather to equality in fact, which was ultimately

to encompass a bilingual election apparatus in cities throughout the United States.

4. The Voting Rights Cases

Mexican Americans began the quest for effective equality by defining what the right to vote meant for Hispanics who were illiterate and yet entitled to vote under Texas law. In *Garza v. Smith*,⁶² three illiterate Mexican American voters brought a class action to challenge the Texas Election Code's prohibition against voter assistance at the polls; assistance was only allowed for voters who could not prepare ballots because of a physical infirmity that rendered them unable to see or write.

The district court held that the right to vote included the right to know which mark on a ballot or which voting machine lever would effectuate the choice of the voter. The court refused to accept the notion that an illiterate voter had the right to vote, but not the right to know for whom or what he pulled the lever. Accordingly, the Texas code provisions which prohibited voter assistance to illiterates were found violative of the equal protection clause of the Fourteenth Amendment. The argument of an illiterate voter's right to know which was successfully made in *Garza* was used by Puerto Ricans to make their argument that they were entitled to know in their own Spanish language the consequence of their marking a ballot or pulling a voting machine lever. The Mexican Americans had established a principle of effective equality similar to the concept of equality of fact found in international jurisprudence; the Puerto Ricans would now use this concept to make their case for a bilingual election apparatus.

Puerto Ricans made use of a concept of the right to an effective vote in *Puerto Rican Organization for Political Action v. Kusper*.⁶³ Puerto Ricans argued that in order to make their right to vote effective they required assistance in the Spanish language. The court reviewed the Voting Rights Act of 1965, as amended in 1970. It relied on Congress' declaration of policy that it was "necessary to prohibit the States from conditioning the right to vote of Puerto Ricans on ability to read, write, understand, or interpret any matter in the English language"⁶⁴ in concluding that Chicago's election commissioners were required to provide voter assistance in Spanish for the 1972 general election.

The defendants had argued that such an order would violate an Illinois statute which made English the official language of the state; the court found that the existence of the statute had not precluded the states from the publication of materials in other languages. This rationale may be equally applicable to those Hispanics working in jurisdictions with English-only statutes or in states which have declared English to be the official state language.

The English as the official state language argument did not preclude the federal district court from ordering that defendants prepare in Spanish and distribute: (i) directions for voting on voting machines to be affixed to Specimen General Election Ballots; (ii) posters that advised who was entitled to voter assistance, (iii) instruction cards to be affixed to the model voting machines. These materials were to be used and displayed in the polling places; reasonable efforts were also to be made to appoint bilingual elections in the polling places.⁶⁵ The Seventh Circuit Court of Appeals affirmed the decision of the district court by affording Spanish-speaking Puerto Ricans assistance in a language they could understand.⁶⁶

The precedent set in Illinois was immediately transferred to New York where the federal district court in *Torres v. Sachs*,⁶⁷ ordered the most comprehensive bilingual relief obtained in a voting rights case. The Board of Elections in New York City was ordered with respect to all future elections to:

- (i) provide all written materials sent to voters or prospective voters in connection with the election process in Spanish and English;
- (ii) provide ballots in both Spanish and English;
- (iii) provide a sufficient number of election officials who speak, read, write and understand Spanish and English;
- (iv) provide conspicuous signs in Spanish at all polling and registration places that indicated that election officials were available to assist Spanish-speaking voters or registrants and that bilingual printed materials were available; and
- (v) publicize elections in all media in a way that reflected the Spanish language characteristics of the Puerto Rican plaintiffs.

In arriving at its determination, the district court found Puerto Ricans protected by the Voting Rights Act of 1965 as amended, that they were United States citizens, and, unlike persons seeking to become naturalized, United States citizens were not required to learn English. The promise of political equality inherent in *Balzac* and extended by Congress to Puerto Ricans through section 4(e) of the Voting Rights Act had now remade the electoral apparatus of American politics adding to it a component of bilinguality. A federal district court in Philadelphia joined these other courts in ordering bilingual voter assistance for Puerto Ricans.⁶⁸

By contrast, the full measure of relief obtained by Puerto Ricans was denied Mexican Americans in *Castro v. State of California*.⁶⁹ In this lawsuit Section 1 of Article II of the California constitution, which conditioned the right to vote on the ability to read the state constitution in English, was challenged by plaintiffs who were literate in Spanish but not in English. The California Supreme Court held that the provision as applied to persons otherwise qualified who were literate in Spanish but not in English violated the equal protection clause of the Fourteenth Amendment.

In reaching its conclusion, the California Supreme Court pointed to the availability of Spanish language periodicals, newspapers, and other communication media adequate to inform the Spanish-speaking plaintiffs about local, state, and national issues and candidates.

The defendants were unable to show that the Spanish media did not provide the necessary political information. The California Supreme Court's holding was made applicable to any otherwise qualified voters, literate in a language other than English, who could show comparable access to sources of political information.

The court, however, denied the Spanish-speaking plaintiffs a right to a bilingual election apparatus. It assumed that these voters could prepare themselves through study on their own with the assistance of others who could translate sample ballots and materials for them. The Spanish news media was also counted on to communicate the relevant information. The basic rationale for this holding was that California had a substantial interest in a single language system and bilingual materials were unnecessary for intelligent exercise of the franchise.

Mexican Americans, who were the chief beneficiaries of the court's ruling, were denied the bilingual election apparatus that Puerto Ricans had obtained in Illinois, New York, and Pennsylvania. This also contrasted with New Mexico which authorized ballots and instructions to be printed in Spanish and English. In terms of the English literacy requirements, 30 states in 1966 had no such requirements, Hawaii accepted literacy in English or Hawaiian, and New Mexico provided personal assistance.⁷⁰ California maintained a literacy requirement but could no longer limit it to literacy in English.

The decision in *Castro v. State of California* placed the burden of equality, that is, of understanding the significance of an English-only electoral apparatus, on the Spanish-speaking Hispanic. This is in line with the *Carmona* modality which excuses governments from assuming the administrative burden associated with bilingual services or materials. Rather than mark a departure from such tenets the California's response confirms a judicial refusal to effectuate genuine equality of treatment by requiring special assistance to monolinguals.

The fuller protection afforded by Congress and the courts to Puerto Ricans were denied Hispanics in California. In 1975 this situation was addressed by Congress through the amendments to the Voting Rights Act. Congress required a bilingual election apparatus where more than 5 percent of the citizens of voting age of a state or political subdivision were from a single language minority and the illiteracy rate was higher than the national illiteracy rate; illiteracy meant failure to complete the fifth primary grade.⁷¹ Language minorities meant persons who were of American Indian, Asian American, Alaskan Natives, or Spanish heritage. Congress was called upon to intervene and prohibit state governments from conducting an English-only electoral apparatus, which did not accord Hispanics and others genuine and effective equality in comprehension of and participation in the process.

These federal bilingual election requirements were passed once again in 1982 and extended for ten years.⁷² The statute sought to cure the discrimination and stigma which came with English illiteracy. The disability that comes with English illiteracy marks children for their entire lives, denies them equality of civic and political participation, and limits employment opportunities. It results in personal and economic costs which are inestimable.⁷³

For Hispanics the cost involves a life of discrimination based exclusively on their inability to speak English; such discrimination has been the focus of federal involvement in the area of the franchise. It has not, however, been addressed with a uniform approach in the area of language-based national origin discrimination in employment.

The essential lesson from the Hispanic quest for equal civil rights is that historically they have been discriminated against on the basis of their language. The passage of English literacy requirements against the Chinese in the Philippines, against the foreign-born language-speaking European in California or New York had at its roots an attempt to curtail the civil rights of these national origin groups. The history of the Mexican American in the Southwest discloses the intentional segregation of their children on the basis of their Spanish language. Such segregation was alleged to be for remedial purposes, when in fact the courts found it to be because of the race and national origin of the Mexican American child. It comes as no surprise that for Hispanics and other national origin groups that measures that are alleged to promote the English language have in fact turned out to be vehicles for national origin discrimination.

This was true in the 1920's in Nebraska and Iowa, and it is true today in California, the latest state to declare English as its official language. The attempts by New York to condition the right to vote for Puerto Ricans on English literacy requirements necessitated the intervention of the Federal government, and the current attempt to turn back the clock to the xenophobia of World War I and its aftermath may also require congressional action. Certainly, Congress has the power to prohibit states from using the declaration of English as the official language to deny Hispanics effective equality in treatment and services.

Public policy makers are compelled by the increasing demographic presence of Hispanics in the United States to understand the special needs of Hispanics as a linguistic minority facing discrimination in employment, education and voting. There is a need to protect Hispanics against language-based national origin discrimination and that the concept of national origin as interpreted by the courts encompass language. An effort by policy makers in this regard would bring American jurisprudence in light with international precedent and would serve as a basis for the equality in fact to which Hispanics are entitled. More specific, detailed policy recommendations follow, but none is more important than insuring the protection of Hispanics as a linguistic minority entitled to full and effective participation in the American polity.

POLICY RECOMMENDATIONS

Hispanics constitute the second largest minority group in the United States; it is predicted that in the twenty-first century they will be the largest minority group in America. Hispanics compose communities throughout the United States which are tied together by race, color, language, national origin, and culture. The indicia of Hispanic race/national origin in American society has been their surname, height, language, accent, race and color, racial and national origin stereotypes, physical appearance, alienage, socio-economic and socio-educational status.

Courts have failed to appreciate the physical, cultural, and linguistic characteristics of Hispanics as a matrix of factors which define their national origin. Attempts to separate these characteristics from Hispanics so that race or national origin must be individually proven along with attempts to separate language from national origin has resulted in uneven treatment of their claims and legally sanctioned discrimination against them.

1. Language-Based National Origin Claims Should be Deemed by Courts to State a Claim upon which Relief can be Granted.

In order to afford Hispanics equality in law and in fact, courts should allow claims of language-based national origin discrimination to go forward to trial. An allegation of adverse impact or disparate treatment should suffice to defeat a motion to dismiss or for summary judgment. An employer that could not support its language-based discrimination on the basis of job-relatedness or necessity should not be allowed to prevail.

In short, where Hispanics and other language-based minority groups can

demonstrate that classifications constructed by public or private employers fall more harshly on them than on the majority group, courts should find that they have made out a *prima facie* case of national origin discrimination. The burden of going forward should then shift to the defendant that its classification is designed and administered to meet the needs of Hispanics and others and that less drastic or alternative approaches either would not produce a better result or would not be feasible.

Where the defendant cannot show that its policies and practices meets the needs of Hispanics, but instead perpetuates the discriminatory effect already demonstrated by plaintiff, such practices should be enjoined. On the other hand, if the defendant meets its burden of proof, the plaintiff should then be free to show that the defendant's reasons are mere pretext and if the plaintiff succeeds in doing so the court should grant appropriate relief.

2. The Burden of Proof Should Fall on the Employer to Show that Its Employment Decisions and Actions Against Hispanics and other National Origin are Based on Just Cause.

The Congress should consider amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. with the purpose of explicitly stating and allocating the burdens of proof between plaintiffs and employers. The Congress should adopt the same standard that obtains in private arbitration discipline cases, that is, that an employer's actions were based on just cause. The burden of proof would be explicitly placed on the defendant which is the party most knowledgeable about the facts that surround its employment decisions. State laws should also be amended to reflect this basic arbitral principle.

3. The Statute of Limitations in Employment Discrimination Cases Should Be Extended From 180 Days to 365 Days so that a Complaint Filed Within 365 Days of the Act of Discrimination would be Timely.

Many of the cases brought by Hispanics and other national origin groups have been dismissed because they were untimely. While in personal actions under many state and federal statutes (including those that adopt state statute of limitations) plaintiffs have a year or more to file their claims, Title VII plaintiffs must file within 180 days. Federal employees must take action within 30 days. The distinction between federal and non-federal employees should be eliminated, and the statute of limitations should be lengthened to at least one full calendar year. The time would start to run from the date of the discriminatory act, and in the case of tenure decisions, which generally occur one year before a professor is terminated, would not begin to run until the date of actual termination. In the case of a professor, this would obviate the present necessity of commencing litigation against colleges and universities while also working for them.

4. The Distinction Between Monolinguals and Bilinguals Must Be Abolished in Treating Language-Based National Origin Claims

The distinction between monolinguals and bilinguals must be abolished in treating language-based national origin claims of employment discrimination.

Courts should make use of EEOC's National Guidelines at 29 CFR 1606. To the extent that they do not (which has been the case with respect to language-based national origin claims), Title VII of the Civil Rights Act of 1964 should be amended at 42 U.S.C. Section 2000e by defining the term "national origin" as in a new section (l) as follows:

(l) The term "national origin" is defined broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.

This definition merely adopts the well-reasoned approach used by EEOC at 29 CFR 1606.1. On the other hand, Title VII itself could be amended at 42 U.S.C. 2000-e et seq. by adding language as a prohibited classification.

For example, Title VII would be amended to read at 42 U.S.C. Section 2000e-2(a)(1):

(a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, language, or national origin. (2) to limit, segregate, or classify his employees or applicants for employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, language, or national origin.

The balance of Title VII would also be amended to include the additional "language" provision as another protected classification.

5. Private Employers Should Not Be Given A Right Prohibited to State Employers; They Should Not be Allowed to Discriminate on the Basis of Alienage.

Under Title VII, private employers currently have the right to deny employment to persons on the basis of their alienage. This is a right forbidden to state employers, except where such positions are state, executive, legislative or judicial positions involving persons that participate directly in the formulation, execution, or review of broad public policy. The private employer should be held to the same standard and therefore be forbidden to refuse to hire persons because of their alienage. Such an amendment could be undertaken by defining national origin at 42 U.S.C. Section 2000e(l) to include alienage:

(l) The term "national origin" is defined broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's, alienage and/or place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group.

This definition would protect aliens in private employment in the same fashion that they are protected by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution against employment discrimination by the states. An alternative to the definitional amendment would be added as a separate Title VII protected category.

6. State Constitutions and Laws that Make English the Official Language Should Be Amended or Nullified in Order to Protect Hispanics.

In light of the current movement to make English the official language of the states of the union, it will be critical that state fair employment practices statutes also be amended either to define national origin consistent with the EEOC definition set out above, or, by protecting the "language" classification. To fail to do this will be to insure that discrimination on the basis of language will continue unabated.

It cannot be said that English-only statutes have historically been used against Hispanics and others as a proxy for national origin discrimination. The Congress has responded to this in the case of Puerto Ricans by specifically nullifying the English-only literacy requirements of the State of New York; it has also responded by passing the bilingual election requirements provision of the Voting Rights Act of 1965, as amended. Under Section 5 of the Fourteenth Amendment, Congress has the power to nullify the English-only statewide provisions currently being enacted and should consider doing so with respect to Hispanics. A Congressional statute which exempts Hispanics from such English-only statutes will restore the equilibrium between majority and minority interest that is at the heart of equality of treatment in law and in fact.

Congress has in effect done this in the case of Puerto Rico by permitting Spanish to be used in the Island's federally funded school system and thereby fulfilling the promise made to Puerto Ricans that their language and culture will be preserved within the American constitutional structure. To do less is to disavow the historical guarantees that emerge for Mexican Americans from the Treaty of Guadalupe-Hidalgo and for Puerto Ricans from the Treaty of Paris.

7. A Right to a Jury Trial Should Exist in all Title VII Actions Involving Colleges and Universities.

The almost universal failure of plaintiffs to successfully press claims of employment discrimination that touch upon the issue of tenure denial by colleges and universities is in part a refusal of the judiciary to intervene in what is deemed a highly subjective process. Almost any basis for a tenure denial will be sustained by the courts. In cases where tenure denial is the issue, Title VII should be amended to allow the plaintiff to request a jury trial on the tenure denial claim. This will make the jury the trier of fact and its determination on the tenure denial claim would be binding on the court.

8. The Civil Rights Act of 1866, 42 U.S.C. Section 1981 Should Be Amended to Explicitly Allow Claims of Disparate Impact.

The Supreme Court has determined that only acts of intentional discrimination are covered by the Civil Rights Act of 1866, 42 U.S.C. Section 1981 and, most recently, that contrary to prior precedent the statute does not cover all terms and conditions of employment. The burden of proof should be allocated to the employer which is in line with arbitral authority. Congress should amend the statute as follows:

All persons of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evi-

dence, and to the full benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other. Claims of disparate impact are cognizable under this statute as is every claim involving a term, condition or privilege of employment. The burden of proof in an employment claim shall be on the employer.

This amendment to 42 U.S.C Section 1981 would allow claims of disparate impact thus making it easier to allege and prove a claim of discrimination. This would return the statute to the use made by civil rights litigants prior to the Supreme Court's 1982 ruling in *General Building Contractors Association, Inc. v. Pennsylvania*,⁷⁴ where the Court held that proof of intentional discrimination was necessary for Section 1981 liability. It would reverse several recent Supreme Court rulings.

CONCLUSION

The process of employment discrimination involves the distinctions made by employers with respect to employment decisions that concern compensation, terms, conditions, or privileges accorded employees in the workplace; one consequence of the distinctions which are allowed in law to be used against Hispanics has been discrimination on the basis of their language. This is a far cry from the perfect equality in fact necessary for genuine and effective equality. The movement to make English the official language of each of the states and of the United States belies the genius of the American polity; the adoption of a federal English-only policy would be to impose English as the official language of all business and schools in Puerto Rico and in the territories still under American supervision.

This counters the tide of international precedent in which American Supreme Court jurisprudence has been a leader. This is a challenge to all American institutions, including employers, and yet America has met such challenges before. The Hispanic in America deserves neither more nor less than equality in law and in fact; the dream to be realized is the quest for genuine and effective equality. The outcome of this quest will shape the quality of life and opportunity for all Americans.

ENDNOTES

1. Cf. Advisory Opinion on Minority Schools in Albania, PCIJ (A./B. 64) 4 (1935) at 17-18.
2. International jurisprudence has long acknowledged the existence of language as a basis upon which minorities have been discriminated against. The treaty response has been universal and that is to prohibit discrimination on the basis on language. The United Nations Charter

provides that its members will take joint and separate action to achieve the purposes set forth in Article 55 which include the promotion of "universal respect for, and observance of, human rights and fundamental freedom for all without distinction as to race, sex, language or religion." United Nations Charter, Articles 55 and 56 reprinted in Brownlie, *Basic Documents on Human Rights* 5-6 (1981). One of the purposes of the United Nations as an organization is to achieve respect for human rights and for fundamental freedoms without distinction as to race, sex, language, or religion. See Article 1, United Nations Charter reprinted in *id.* at 4.

The Universal Declaration of Human Rights promulgated by the General Assembly of the United States in 1948 proclaims that everyone is entitled to all the rights and freedoms set out in the Declaration "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." See Article 2, Universal Declaration of Human Rights reprinted in *id.* at 22.

The position of international bodies on language discrimination has been unequivocal. The United Nations General Assembly Resolution 1514 (XV) constituting a Declaration of the Granting of Independence to Colonial Countries and Peoples sought respect for and observance of human rights without distinction as to race, sex, language or religion. *Id.* at 29. The American Declaration of the Rights and Duties of Man issued by the Ninth International Conference of American States also proscribed language distinction by providing that "all persons are equal before (sic) the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." See Article II of the American Declaration of the Rights and Duties of Man (1948) reprinted in *Id.* at 382.

That such a norm means a prohibition on language-based discrimination one need only look to Article 1 of the American Convention on Human Rights, which proscribes "discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." See Article 1 of the American Convention on Human Rights (1969) reprinted in *Id.* at 392.

3. J.W. Bruegel, "A Neglected Field: The Protection of Minorities," *Journal of Human Rights* 413, 414-15 (1971); see also Dinstein, "Collective Human Rights of Peoples and Minorities," 25 *International Comparative Law Quarterly* 113-114 (1976).

4. (A./B. 64) 4 (1935).

5. *Id.* at 11.

6. This argument is similar to that of the San Francisco School District in *Lau v. Nichols*, 414 U.S. 563 (1974), which argued that by providing non-English speaking Chinese students with the same teachers, textbooks and materials in the same schools as English-speaking students it had afforded these students equal treatment. A unanimous Supreme Court disagreed and found failure to provide for the specific needs of non-English speaking students to conduct a denial of effective participation in the educational program offered by the district.

7. 118 U.S. 356 (1886).

8. *Id.* at 19; cf. 118 U.S. 355 (1866).

9. 262 U.S. 390 (1923).

10. 262 U.S. 404 (1923).

11. 1935 P.C.I.J., serv. A/B 64 at 20.

12. *Id.* at 22.

13. *Meyer v. Nebraska*, *supra*.

14. Article 14 of the European Convention on Human Rights (1950) reprinted in *id.* at 247. Cf. Article 2(2) of the International Covenant on Economic, Social, and Cultural Rights (1966) which provides that "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," reprinted in *id.* at 119; see also Article 2(1) International Covenant on Civil and Political Rights (1966) which provides "[e]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," reprinted in *id.* at 129.

15. *Id.* at 87.

16. 613. *Parolulek v. Ward*, 197 New York Law Journal 13, col. 1 (February 24, 1987).

17. 1928 P.C.I.J., Judgment No. 12, Series A., No. 15, 4-88 (April 26, 1928).

18. *Id.*

19. 163 U.S. 537 (1896).

20. 347 U.S. 475 (1954).

21. *Id.* 480 n.12.

22. Mexican Americans have historically been the victims of unlawful segregation of their children in public schools on the basis of language. This is yet another example of the language-based national origin discrimination sustained by Hispanics in the United States. See, e.g. *Alvarado v. El Paso Ind. School District*, 426 F. Supp. 575 (1976), *aff'd* 593 F.2d 277 (5th Cir. 1979) (Mexican School founded in 1887, Mexican District, 1922); *Soria v. Oxnard School District Board of Trustees*, 386 F. Supp. 539 (C.D.Cal. 1974) (Mexican children segregated by schools and classrooms for more than forty years, with the exception of the "brightest" and "cleanest" Mexican children who were placed in white classes when these white classes were too small in pupil size); *Morales v. Shannon*, 516 F.2d 411 (5th Cir. 1975) (Mexican School founded as early as 1907 as result of the "language problem"; *Mendez v. Westminster School District*, 64 F. Supp. 544 (S.D.Cal. 1946), *aff'd* 161 F.2d 774 (9th Cir. 1947) (Mexican children segregated on the basis of language without bona fide basis); *Gonzalez v.*

Sheely, 96 F. Supp. 1004 (D.Ariz. 1951)(Mexican children segregated on the basis of language without bona fide basis).

23. *Hernandez v. Texas*, *supra*, at 479 & n.10, 480.

24. *Id.*

25. See *Katzbach v. Morgan*, 384 U.S. 641 (1966).

26. 1928 P.C.I.J., Judgment No. 12, Series A, No. 15, 4-88 (April 26, 1928).

27. See Treaty of Guadalupe Hidalgo of 1848, *infra* note 45; Treaty of Paris of 1898, *infra* note 49; Second Organic Act ("Jones Act") of 1917, *infra* note 50.

28. See *Katzbach v. Morgan*, *supra*.

29. See note 27.

30. Peace, Friendship, Limits and Settlement (Treaty of Guadalupe-Hidalgo), February 2, 1848, United States-Mexico, art. VIII, 9 Stat. 222., T.S. No. 207.

31. *Id.*

32. *Id.*, Article IX.

33. Article IX of the Treaty of Paris provided in relevant part:

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress. United States-Spain, 30 Stat. 1754, T.S. No. 343 reprinted in Commonwealth of Puerto Rico, Documents on the Constitutional History of Puerto Rico 51 (1964). The treaty was concluded at Paris, December 10, 1898; ratification advised by the Senate February 6, 1899; ratified by the President, February 6, 1899; ratifications exchanged and treaty proclaimed on April 11, 1899.

34. Section 5 of the Jones Act, 39 Stat. 951 (1917).

35. 325 F. Supp. 1341 (N.D.Ca. 1971), affirmed 475 F.2d 738 (1973); *accord*, *Guerrero v. Carlson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal.Rpt. 201 (1973), *cert. denied* 414 U.S. 1137 (1974)(the failure to provide welfare notices in Spanish did not violate the due process clause).

36. See *Pabon v. Levine*, 70 F.R.D. 674 (S.D.N.Y. 1976)(where the Court refused to dismiss the claims of non-English speaking Puerto Rican claimants seeking bilingual services and materials from the unemployment insurance division of the State of New York).

37. 609 F.2d 156 (5th Cir. 1980), withdrawn and substituted 618 F.2d 264 (5th Cir. 1980), *cert. denied* 449 U.S. 113 (1981).

38. *Id.* 618 F.2d at 270.

39. See *Katzbach v. Morgan*, *supra*.

40. The National Origin Guidelines concerning "Speak-English-only-rules" provide at 29 CFR Section 1606.7 (1984):

(a) When applied at all times. A rule requiring employees to speak only English at all times in the workplace is a burdensome term and condition of employment. The primary language of an individual is often an essential national origin characteristic. Prohibiting employees at all times, in the workplace, from speaking their primary language or the language they speak most comfortably, disadvantages an individual's employment opportunities on the basis of national origin. It may also create an atmosphere of inferiority, isolation and intimidation based on national origin which could result in a discriminatory working environment. Therefore, the Commission will presume that such a rule violates Title VII and will closely scrutinize it.

(b) When applied only at certain times. An employer may have a rule requiring that employees speak only in English at certain times where the employer can show that the rule is justified by business necessity.

(c) Notice of the rule. It is common for individuals whose primary language is not English to inadvertently change from speaking English to speaking their primary language. Therefore, if an employer believes it has a business necessity for a speak-English-only rule at certain times, the employer should inform its employees of the general circumstances when speaking only in English is required and of the consequences of violating the rule. If an employer fails to effectively notify its employees of the rule and makes an adverse employment decision against an individual based on a violation of the rule, the Commission will consider the employer's application of the rule as evidence of discrimination on the basis of national origin. *Id.* (footnotes omitted).

41. See Voting Rights Act of 1970 as amended, 42 U.S.C. Section 1973 *et seq.*, which provides for a bilingual election apparatus for linguistic minorities obtaining a certain threshold percentage in the relevant population. Spanish-speaking Hispanics have made use of this legislation to effectively make use of their franchise throughout the United States.

42. See generally McKean, "The Meaning of Discrimination in International and Municipal Law," 44 B.Y.I.L. 183 (1970); McKean, *Equality and Discrimination under International Law* (1983).

43. 118 U.S. 355 (1866). The Supreme Court held:

Though the law itself be fair on its face, and impartial in appliance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. *Id.*

44. *Id.*

45. 263 U.S. 390 (1923).

46. *Bartels v. State of Iowa*, 262 U.S. 404 (1923).

47. 271 U.S. 500 (1926).

48. *Id.* at 524-25.

49. *Farrington v. Tokushige*, 11 F.2d 710 (9th Cir. 1926).

50. Id. at 225; article II, section 1 of the California state constitution provided:
No person who shall not be able to read the Constitution in the English language and write his or her name shall ever exercise the privileges of an elector in this State; . . . Id.
51. See *Katzenbach v. Morgan*, *supra*, at 644 n.2.
52. See, e.g. *Camacho v. Rogers*, 199 F. Supp. 155 (S.D.N.Y. 1961).
53. 384 U.S. 654 & n.14.
54. Id. at 654.
55. 258 U.S. 298 (1922).
56. Id.; see also Manuel del Valle, "Puerto Rico Before the United States Supreme Court," 19 Rev.Jur.Inter.P.R. 13 (1984). However, despite the U.S. Supreme Court's consistent view that Puerto Rico is an unincorporated territory, that is, a colony of the United States, the author is in agreement with the thesis of Justice Harlan's dissent in *Downes v. Bidwell*, 182 U.S. 244, 379-380 (1901):
- "The idea that this country may acquire territories anywhere upon the earth, by conquest treaty, and hold them as mere colonies or provinces - the people inhabiting them to enjoy only such rights as Congress chooses to accord them - is wholly inconsistent with the spirit and genius as well as with the words of the Constitution."
57. 79 Stat. 439, 42 U.S.C. Section 1937b(e)(1964 ed., Supp. I) reprinted at 384 U.S. at 643.
58. 384 U.S. at 644 n.2.
59. Id. at 652.
60. Id. at 654-55.
61. *Aspira of New York, Inc. v. Board of Education of the City of New York*, 58 F.R.D. 62 (S.D.N.Y. 1973).
62. 329 F.Supp. 131 (W.D.Tex. 1970).
63. 350 F.Supp. 606 (N.D.Ill. 1972), *aff'd* 490 F.2d 575 (7th Cir. 1973).
64. 490 F.2d at 580.
65. 350 F.Supp. at 611-12.
66. 490 F.2d at 580.
67. 381 F.Supp. 309 (S.D.N.Y. 1974).
68. *Arroyo v. Tucker*, 372 F.Supp. 764 (E.D.Pa. 1974); see also *Lopez v. Dinkins*, 73 Civ. 695 (S.D.N.Y. Feb. 14, 1973) (district court required bilingual ballots and assistance in community school board elections in New York City).
69. 2 C.3d 223 (1970).
70. *Katzenbach v. Morgan*, *supra*, note 562, at 654 n.15.
71. 42 U.S.C. Section 1973aa-1a (1981).
72. Pub.L. 97-205, 96 Stat. 134 (1982). Sections (b) and (c) of the Bilingual Election requirements were amended in 1982.
73. The Supreme Court refused to sustain a Texas statute which denied a public education to the children of persons not "legally admitted" into the United States in *Plyler v. Doe*, 457 U.S. 202, 222 (1982).
74. 458 U.S. 375 (1982).

**Revista
Jurídica
de la
Universidad
Interamericana
de Puerto Rico**



Facultad de Derecho

Vol. XIX

Septiembre-Diciembre, 1984

Núm. 1

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en el mundo académico: *La Reválida*. Podría afirmarse que la reválida de leyes significa hoy el "terrible" examen general de los estudios de leyes. Para muchos "terrible" no expresa adecuadamente la carga emocional de estos exámenes.

Es urgente que se estudien seriamente las implicaciones de la reválida sin apasionamiento y con franqueza.⁵ Es necesario entender la complejidad del problema ya que envuelve tres grupos conflictivos: El profesorado, el estudiante, y el examinador. Envuelve la responsabilidad intelectual de cada una de las tres áreas. Añadiría una más: la filosofía de cada institución encargada de ofrecer estudios jurídicos. Por eso, debemos cuidarnos de fijar responsabilidad sin previo estudio y evaluación. Debemos comprender que para todos es una tarea difícil. Volvamos a darle a la palabra su verdadero significado: "Dar de nuevo validez a una cosa". Es imprescindible que la reválida sea, pues, un instrumento de medición de los conocimientos y las destrezas básicas que debe tener un aspirante a la abogacía. Lograr este fin será obra coordinada de los diferentes elementos mencionados.

Repito que estamos frente a un problema complejo pero no imposible de solucionar. Se necesita el trabajo conjunto de todas las partes comprometidas en la educación jurídica; se necesita la consideración ponderada de los problemas que caracterizan una reválida; se necesita reconocer los límites de responsabilidad de cada esfera incluyendo las facultades de derecho. Pero los cambios curriculares se deben originar y desarrollar en las facultades de Derecho.

La creación del Comité Especial para el estudio del examen de reválida nombrado este verano por la Junta Examinadora es un buen foro para analizar todo lo relacionado con el examen de reválida.

Acabo de expresar unas preocupaciones y recomendaciones sobre la educación jurídica. Asumo la posición de Decano de la Facultad de Derecho de la Universidad Interamericana con la esperanza y el entusiasmo de poder contribuir a la solución de estos problemas.

A todos ustedes que me han honrado con su compañía esta tarde, muchas gracias.

PUERTO RICO BEFORE THE UNITED STATES SUPREME COURT*

Manuel Del Valle**

*Dedicated to my students
at Fordham, Princeton, and Yale*

ABSTRACT

The purpose of this work is to examine the legal status of Puerto Rico within the American constitutional framework considering relevant international law principles. This is the first comprehensive treatment of all of the case law of the United States Supreme Court on Puerto Rico, and the work introduces the doctrines developed by the author of "judicial autonomy" and "nullification and implied approval" while also considering the doctrines of "territorial incorporation," "legislative autonomy," and "sovereign immunity." The conclusion arrived at is that the United States Supreme Court has developed a doctrine of judicial autonomy (which it has implemented through a rule of local deference) by which tribunals reviewing the decisions coming from Puerto Rico are to defer to the interpretations of the insular courts on matters of local law and practice and not to substitute their own view even if equally plausible.

The doctrines of judicial autonomy sought to protect the prerogative of the insular courts to hold their own view on matters of local law, unless these

- This work would not have been possible without the support provided by a variety of sources. This project was funded by the Rockefeller Foundation Fellowship Program for Minority-Group Scholars through my selection as a 1983-84 Fellow. It required an official leave of absence which was approved by the U.S. Department of Labor, Office of the Solicitor, and it involved the support of the Puerto Rican Institute, Fordham University, the Dean of the Liberal Arts College of Fordham's Lincoln Center Campus, and the administration of grant funds by Fordham. Further support and encouragement was provided by the Puerto Rican Studies Center of the City University of New York. Additional support was provided during the course of my research in London by the London School of Economics and Political Science and the University of London, Institute of Political Science and the University of London, Institute for Advanced Legal Studies; support was also forthcoming during my stay in Madrid from the Biblioteca Nacional.

A special expression of gratitude goes to all of those at each of these institutions who have made this research effort possible. It should be noted that the opinions expressed in work are those of the author and not necessarily those of any of the aforementioned institutions.

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5. Véase "Informe de la Comisión para el Estudio de la Reválida y la Educación Legal en Puerto Rico", sometido al Tribunal Supremo de Puerto Rico al 16 de enero de 1980 en Virtud de su Resolución del 15 de mayo de 1978.

were inconsistent with federal preemptory norms. To the extent that the Supreme Court succeeded in this regard it provided a means through which the people of Puerto Rico could continue to advance their freedom, further their development, maintain their territorial integrity, and exercise their sovereignty—all indicia of the international norm of self-determination. Finally, the legal status of Puerto Rico today (as it was when it was formally ceded to the United States in 1899) is that of an unincorporated territory of the United States. This means that the United States Constitution did not initially, nor does it presently apply in Puerto Rico with respect to all of its provisions. The ultimate arbiter of which provisions apply is the United States Supreme Court and its decisions in this regard are treated in this work in detail.

INTRODUCTION

The sovereign state is the primary subject of international law, owing its factual existence to its territory, which can be enlarged or diminished by occupation, prescription, cession, conquest or accretion.¹ A state is free to define the status of its territory within such limitations as may be imposed by its constitutive instruments, international law, and specific treaty obligations.² In the case of Puerto Rico, the United States Supreme Court³ has evolved a doctrine of incorporation to define the Island's legal position within the American constitutional framework.⁴ Essentially, this doctrine differentiates an incorporated territory of the United States (where all of the provisions of the U.S. Constitution apply) from an unincorporated territory" such as Puerto Rico (where the American Constitution does not apply in all

respects).⁵ It is ultimately for the U.S. Supreme Court to determine which portions of that organic instrument are applicable.⁶ Thus it was not until 1979 that the U.S. Supreme Court formally applied to the Island the constitutional prohibition against unreasonable searches and seizures.⁷

In order to appreciate the nature and extent of the territorial rights of Puerto Rico and its residents within the American constitutional order, a detailed examination of the U.S. Supreme Court's jurisprudence is invaluable.⁸ International law may also help clarify some aspects of this study, while providing an appropriate frame of reference in areas such as self-determination.⁹ In addition to the judge-made doctrine of territorial incorporation, this work will examine and introduce the doctrines of judicial autonomy, legislative autonomy, nullification and implied approval. The doctrine of judicial autonomy is our own way of conceptualizing the rule of local deference applied by the U.S. Supreme Court in reviewing and sustaining the interpretations of the Island's courts on matters of local law.¹⁰ This rule provided that federal tribunals (whether the First Circuit Court of Appeals or the local District Court of Puerto Rico) were to apply local law where appropriate and to defer to local interpretations of such law or practice unless these were plainly inconsistent with federal law. The federal tribunal was not to substitute its own equally plausible interpretation for that of the insular tribunal.

By providing a basis whereby the local decisions and interpretations of Puerto Rico's tribunals were to prevail over that of federal tribunals (reviewing such interpretations), the U.S. Supreme Court sustained the institutional prerogatives and importance of the insular courts. In this sphere of interpretation of local law the Island's courts were thus autonomous; the doctrine of judicial autonomy is a recognition of this power of auto-interpretation. The local norms of the Island were to be defined and protected by the insular tribunals and were to stand as against conflicting interpretations by the

1. See Akehurst, *A Modern Introduction to International Law* 1 (4th ed. 1982); Brierly, *The Law of Nations* 163 (6th ed. 1963).

2. See generally Crawford, *The Creation of States in International Law* (1979); see, e.g., *de Luna v. Bidwell*, 182 U.S. 1 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); and *Dooley v. United States*, 183 U.S. 151 (1901), which are known as the Insular Tariff cases and discussed the general status of Puerto Rico at that date.

3. Throughout this text, except where citing case names or quoting from Supreme Court decisions, we will make use of the historically proper name of the Island, viz., Puerto Rico, although until 1932, the United States government spelled the Island's name as "Porto Rico." The origin of this usage may be traced to the Agreement Concerning Commercial Relations between Spain and the United States, concluded on January 2, 1884, in which the Island is referred to as "Porto Rico" and its use in the Treaty of Peace between Spain and the United States, concluded on December 10, 1898 at Paris (hereinafter, the "Treaty of Paris"). See II *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776-1909, 1680-81, 1690-95* (Malloy ed. 1910). Hereinafter, the United States Supreme Court will be referred to as "U.S. Supreme Court," and the United States Constitution as "U.S. Constitution."

4. See *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922).

5. *Id.*

6. See *Examining Board v. Flores de Otero*, 426 U.S. 572, 590 (1976).

7. See *Torres v. Puerto Rico*, 422 U.S. 465 (1979) (which applied the Fourth Amendment to Puerto Rico). It should be noted that where available the paternal and maternal surnames of a Spanish-surnamed litigant have been provided in the case name to avoid the confusion in some of the case reporters which, e.g., provide the maternal name in lieu of the paternal surname. It should also be noted that the first of the two surnames is the paternal surname and the second the maternal surname. This is the customary usage on the Island and in Hispanic countries.

8. Between 1899 and 1983, the U.S. Supreme Court issued 139 written decisions on Puerto Rico subject matter. This number does not include cases where the Court did not issue a written decision.

9. See 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); see also Crawford, *supra* note 2, at 356.

10. See, e.g., *Sancho Bonet v. Texas Co.*, 308 U.S. 463, 471 (1940).

federal preemptory norms. The common law precepts known to federal judges were to be subordinated in their review of the Spanish civil law norms in Puerto Rico cases.

The doctrine of legislative autonomy supported the competence of the local legislature of Puerto Rico in passing laws and sought to give effect to such norms. The doctrines of nullification and implied approval constitute a new approach to the debate over Congress' power to require that all legislative enactments of the Island be reported to it and its power to annul any Puerto Rico statute of which it disapproved. The doctrines essentially state that while Congress (and later the President as well) had the power to veto Puerto Rico statutes, the federal courts used this possibility of veto to create a doctrine of implied approval. Consequently any statute not nullified by Congress was presumed to be approved by that body. The possibility of Congressional or Presidential nullification of the Island's statutes was used to affirm the power and prerogatives of the Puerto Rico legislature. Moreover, it is argued that Puerto Rico enactments were more often subject to judicial nullification than they were, for example, to Presidential veto.

Each of these doctrines when applied by the U.S. Supreme Court resulted in the affirmation of the right of the people of Puerto Rico to determine their legal rights and obligations through their own legislative enactments and judicial pronouncements. The people of Puerto Rico were therefore free to dispense with the right of jury trial in certain misdemeanor cases or to define their property relationships in terms of Spanish civil law precepts. This ability to derogate from common law concepts was deliberately supported by the U.S. Supreme Court and acted to further guarantee the right of Puerto Rico to preserve its Spanish heritage in its own separate legal and jurisprudential system.

The right of Puerto Rico to its own independent legislative and judicial views in areas of local concern presaged certain aspects of the international norm of self-determination embodied in United Nations General Assembly Resolution 1514 (XV) of 14 December 1960. That resolution declared that "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."^{10a} This norm was grounded in the conviction that all peoples have an inalienable right to (i) complete freedom; (ii) the exercise of their sovereignty; and (iii) the integrity of their national territory.^{10b}

In the case of Puerto Rico, its economic, social and cultural development has been intimately associated with its legal development and ability to

10a. See G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960).

10b. *Id.*

exercise insular sovereignty over matters of local concern. To the extent that the U.S. Supreme Court has fostered the exercise of these prerogatives it has thereby insured an indicia of self-determination. Its doctrines have provided a means through which the people of Puerto Rico could continue to advance their freedom, further their development, maintain their territorial integrity, and exercise their sovereignty. Yet, it must be stressed that insular norms are ultimately subordinate to countervailing federal norms. Autonomy as a vital component of the self-government which exists in Puerto Rico is not to be confused with national or complete independence; it is not some form of associated statehood, nor identical with the international norm of self-determination. It has been and is, however, a necessary adjunct to the Island's legal development and in this regard the U.S. Supreme Court has played a critical role.

I. THE CONQUEST AND CESSION OF PUERTO RICO

On April 19, 1898, the United States Congress passed a resolution recognizing the independence of Cuba (then a province of Spain) and suggesting that Spain evacuate its soil. Spain responded to this resolution on April 21, 1898 by breaking diplomatic relations and declaring war against the United States.¹¹ On April 25, 1898, the Congress declared war on Spain, with the result that by June 27, 1898, the United States had proclaimed a naval blockade of specified Spanish ports including the capital of Puerto Rico, San Juan.¹² Puerto Rico was invaded by United States military forces under General Nelson A. Miles on July 25, 1898 when American troops landed in Guánica, on the southern coast of the Island.¹³

The material dates that follow resulted in the transition of Puerto Rico from Spanish province to American territory: (i) August 12, 1898, a protocol was entered into by the U.S. Secretary of State and the French Ambassador, acting on behalf of Spain, for a suspension of hostilities, the cession of Puerto Rico, and the conclusion of a treaty of peace; (ii) October 18, 1898, the forces of Spain were evacuated from Puerto Rico; (iii) December 10, 1898, the

11. See note 14.

12. See *The Olinda Rodríguez*, 174 U.S. 519 (1899), which was the first decision rendered by the U.S. Supreme Court on a Puerto Rico subject, namely, the effectiveness of the blockade of Puerto Rico as a matter of international law. The case is generally unknown in the contemporary literature of commentators although a subject of some interest at the turn of the century. See Wheeler, *The Law of Prize as Affected by Decisions Upon Captures Made During the Late War Between Spain and the United States*, 1 Colum. L. Rev. 141, 146 (1901); Hoyt, *Recent Development and Tendency of the Law of Prize*, 12 Yale L. J. 306, 311 (1903); Gregory, *The Law of Blockade*, 12 Yale L.J. 339, 341 (1903); Binney, *The Latest Chapter of the American Law of Prize and Capture*, 54 U. Pa. L. Rev. 537, 546 n. 29 (1906); and *et. al.*, *Trías Monge*, 1 *Historia Constitucional de Puerto Rico* (1980).

13. See note 14.

Treaty of Paris was signed which, *inter alia*, ceded the Island of Puerto Rico to the United States; (iv) February 6, 1899, the Treaty of Paris was approved by the Senate and ratified by the United States President; (v) March 2, 1899, a Congressional act was passed appropriating funds to carry out the treaty obligations; (vi) March 19, 1899, the Queen Regent of Spain ratified the treaty; (vii) April 11, 1899, the ratifications of the treaty were exchanged and the treaty was proclaimed in effect; and (viii) April 12, 1900, the Congress passed the Island's First Organic Act (commonly known as the "Foraker Act" to provide temporary revenues and a civil government for Puerto Rico). This act was in effect from March 1, 1900 until March 2, 1917.¹⁴

A. The Cession of Puerto Rico

International law acknowledges that a state may acquire territory by conquest or cession. Conquest has been described as the acquisition of an enemy's territory by its complete and final subjugation coupled with a declaration by the conquering state of its intention to annex it.¹⁵ This can be contrasted with cession which is merely a way of transferring the title to territory from one state to another.¹⁶ It has been observed that title by conquest is rare, that territorial annexation after a war is usually implemented by treaty of cession, and that the treaty confirms only a title which the conquering state has already obtained through conquest.¹⁷

Some commentators point out that a treaty of cession is the clearest form by which one state can express its willingness to transfer territory to another international person.¹⁸ Under customary international law states are free to dispose of any part or all of their territory. The basic predicate for such a transfer is the consent of the parties; the treaty of cession provides the basis in law for the exercise of sovereignty by the annexing state.¹⁹ The power to acquire territory either by conquest or cession is vested by the U.S. Constitution in the United States through the powers of making war and making treaties.

The power to acquire territory by treaty has been held to imply not only the power to govern, but to prescribe on what terms the United States will

receive its inhabitants, and what their status shall be.²¹ Much controversy ensued surrounding the cession of Puerto Rico and other Spanish insular possessions of Spain to the United States.²² While commentators generally agreed that the United States had the power to acquire territory; they were in disagreement as to the extent to which the U.S. Constitution applied.²³

In Puerto Rico, there developed at least one line of opinion which expressed the belief that since neither the people of Puerto Rico, nor their representatives had consented to the transfer of sovereignty that the Treaty of

stated regarding the President and Congress:

Power to acquire territory either by conquest or treaty is vested by the Constitution in the United States. Conquered territory, however, is usually held as a mere military occupation until the fate of the nation is entirely subdued, or in case it be destroyed and ceases to exist, the right of occupation becomes permanent, and the title vests absolutely in the conqueror.

See also U.S. Const. art. I, sec. 8, cl. 11; art. II, sec. 2, cl. 2.

21. See *Downes v. Bidwell*, *supra*, at 21 S. Ct. 784.

22. See Langdell, *The Status of Our New Territories*, 12 Harv. L. Rev. 365 (1898); Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 Harv. L. Rev. 393 (1898); Thayer, *Our New Possessions*, 12 Harv. L. Rev. 464 (1898); Randolph, *Constitutional Aspects of Annexation*, 13 Harv. L. Rev. 38 (1899); Lowell, *The Status of Our New Possessions—A Third View*, 13 Harv. L. Rev. 155 (1899); Falliey, *The Growth of the Idea of Annexation, and Its Breaking Upon Constitutional Law*, 13 Harv. L. Rev. 371 (1899); Adams, *The Causes and Results of Our War With Spain From a Legal Standpoint*, 8 Yale L. J. 119 (1899); Beach, *Constitutional Expansion*, 8 Yale L. J. 225 (1899); Morse, *The Civil and Political Status of Inhabitants of Ceded Territories*, 14 Harv. L. Rev. 262 (1900); Costigan, *The Third View of the Status of Our Possessions*, 9 Yale L. J. 124 (1900); Bacon, *Territory and the Constitution*, 9 Yale L. J. 99 (1900); Shipman, *Webster on the Territories*, 9 Yale L. J. 185 (1900); Loomis, *Extension of the Constitution to Porto Rico, by Discovery, Purchase, Cession, or Conquest, According to the Usage of the United States*, 48 U. Pa. L. Rev. 332 (1900); Walton, *Change of Sovereignty of a People and the United States Constitution*, 48 U. Pa. L. Rev. 510 (1900); Parker, *The Constitution in Porto Rico*, 10 Yale L. J. 136 (1901); Smith, *The Constitution and Inequality of Rights*, 10 Yale L. J. 146 (1901); Note, *The Constitutional Power of Congress over the Territory of the United States*, 49 U. Pa. L. Rev. S. 11 (1901); Fuller, *Some Constitutional Questions Suggested by Recent Acquisitions*, 1 Colum. L. Rev. 108 (1901).

23. See e.g., Lowell, *supra* note 22, at 175, who said:

The theory, therefore, which best interprets the Constitution in the light of history, and which accords most completely with the authorities, would seem to be that territory may be so annexed as to make it part of the United States, and that if so all the general restrictions in the Constitution apply to it, save those on the organization of the judiciary; but that possessions may also be so acquired as not to form part of the United States, and in that case constitutional limitations, such as those requiring uniformity of taxation and tried by jury, do not apply.

For a critique of this view see Costigan, *supra* note 22.

14. See *de Lima v. Bidwell*, *supra*, at 21 S. Ct. 744; Ribes Tovar, *A Chronological History of Puerto Rico* 372-95 (1973); Berbusse, *The United States in Puerto Rico, 1898-1900* (1966).

15. See 1 Schwarzenberger, *International Law* 297 (3rd ed. 1957); 2 Whiteman, *Digest of International Law* 1111 (1963); Brierly, *supra* note 1, at 171.

16. *Id.*

17. *Id.*

18. See Schwarzenberger and Brown, *A Manual of International Law* 96-97 (6th ed. 1976).

19. *Id.*

20. See *United States v. Huckabee*, 68 U.S. (1 Wall.) 414, 434 (1872), where the Supreme Court

Paris was null and void.²⁴ This position assumed that Puerto Rico had obtained sovereignty from Spain through the Autonomist Charter of 1897.²⁵ A review of the Autonomist Charter, however, reveals that while self-government in some large measure was granted to the Island, the charter did not transfer sovereignty.²⁶

The immediate impact of the Island's cession on its legal status within the American constitutional framework was that as of April 11, 1899, it ceased to be a foreign country with respect to the United States and became a territory appurtenant and belonging to it.²⁷ This meant that from July 25, 1898 through April 11, 1899, Puerto Rico was a foreign country with respect to the United States. The duties imposed by General Miles on July 26, 1898 on imports into Puerto Rico, and the tariffs imposed by the President as Commander in Chief on August 19, 1898 and February 1, 1899 met the necessity

24. See Pedro Albizu Campos, *La Conciencia Nacional Puertorriqueña* 82-83 (4th ed. 1979), where the President of the Puerto Rican Nationalist Party in the 1930's explained:

La supuesta autoridad del Congreso de Estados Unidos para regular la vida de Puerto Rico emana de un acto de fuerza: la intervención militar norteamericana; y de un tratado, el de París, hecho y firmado por Estados Unidos y España en contravención con principios fundamentales del derecho internacional.

Reconocida la soberanía de Puerto Rico por la Corona española en virtud del Acta Autonómica de 1897, no podía España ceder nuestra patria a Estados Unidos sin consultar la opinión nacional puertorriqueña a través de sus legítimos representantes. Ausentes los plenipotenciarios de Puerto Rico de las discusiones que culminaron en el Tratado de París, no consultada la opinión puertorriqueña sobre las partes dispositivas de dicho tratado que le afectaban, la cesión de Puerto Rico a Estados Unidos se hizo ilegalmente. Es por esto que todos los actos del Congreso de Estados Unidos en cuanto afectan a Puerto Rico son nulos, carentes de toda efectividad jurídica.

For a critique of this view under international law principles see López Baralt, *Is the Paris Treaty Null "Ab Initio" as to the Cession of Puerto Rico?*, 7 Rev. Jur. U.P.R. (1937).

25. See Albizu Campos, *supra* note 24, at 82-83.

26. See the Autonomist Charter of 1897 in Office of the Commonwealth of Puerto Rico (hereinafter, "Commonwealth Office"), *Documents on the Constitutional History of Puerto Rico* 24 (2d ed. 1964), which provided, *inter alia*,

To these three orders of idea correspond the fundamental provisions of the project submitted to the approval of Your Majesty. To the first—that is, to the metropolitan aspect—belongs the question of sovereignty, intrusted to the highest bodies of the Spanish.... Nothing of what is essential has been forgotten, and in no degree is the authority of the central power diminished or lessened.

See *Documentos Presentados a las Cortes en la legislatura de 1898 por el Ministro de Estado* (1899); Eugenio Montero Ríos, *El Tratado de París* (1904); López Baralt, *supra* note 24, at 113 & 82; Trías Monge, *La Carta Autonómica de 1897*, 43 Rev. Jur. U.P.R. 179 (1974).

27. See *Downes v. Bidwell*, *supra*, at 21 S. Ct. 787.

for government revenue during this time.²⁸ Such actions were sustained by the U.S. Supreme Court with respect to duties and tariffs on goods shipped from New York to Puerto Rico during this period as a valid exercise of the prerogatives afforded the military under the rules of war.²⁹

With the proclamation of the Treaty of Paris on April 11, 1899, Puerto Rico became territory of the United States, although not an organized territory (that is, with a local civil government) in the technical sense of the term.³⁰ At this point the imposition of tariffs or duties on goods shipped from New York were deemed improper until such time as Congress should legislate on the subject, which it did by passing the Foraker Act of April 12, 1900.³¹ The period from July 25, 1898 through May 1900 was one in which Puerto Rico was subject to the rule of American military authorities, and, as already noted, for most of this period was deemed to be a foreign country with respect to the United States.

B. Military Rule in Puerto Rico and the Rule of Local Deference

The relevant international law at the time of the Spanish-American War recognized that the belligerent had a right to occupy and govern enemy territory while in military possession. This was one of the consequences of war which followed from what was termed the right to conquer. The local law of the conquered territory and those laws governing private rights remained in force during military occupation except where suspended by the military authorities. The belligerent was considered to have the powers of a *de facto* government, with the power to change existing laws or promulgate new ones.³²

On July 13, 1898, the United States President issued General Order No. 101, with reference to Cuba, to the Secretary of War. This order was in turn communicated by the Secretary of War to the military commanders:

Though the powers of the military occupants are absolute and supreme and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, so far as they are compatible with the new order of things, until they are suspended or superseded by the occupying belligerent,

28. See *Dooley v. United States*, *supra*, at 21 S. Ct. 765-66.

29. *Id.*

30. See *de Lima v. Bidwell*, *supra*, at 21 S. Ct. 752.

31. See *Dooley v. United States*, *supra*, at 21 S. Ct. 767.

32. *Id.* at 765-66.

and in practice they are not usually abrogated, but are always to remain in force and to be administered by the ordinary tribunals, substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion.³³

The order further provided that the private property of individuals and corporations was not to be confiscated, except for cause, and private property taken by the Army was subject to compensation. It made plain that the first effect of military occupation was to sever the former political relations of the inhabitants and to establish a new political power. This, however, did not diminish the entitlement of the inhabitants to security in their person and property as well as their private rights and relations.³⁴

General Order No. 101 constituted an instruction to General Miles, who was the first commander of the United States Army in Puerto Rico. He was second in authority only to the President with respect to Puerto Rico, which meant that as the President's representative he exercised full control over the Island. By pronouncement on July 28, 1898 to the people of Puerto Rico, he rearticulated the principles of General Order No. 101, including the protection of property.³⁵ He had this order published *mutatis mutandis* on July 29, 1898, making it binding on the Island's military government.³⁶ From August 12, 1898, the date of the protocol ceasing hostilities between the United States and Spain, to April 11, 1899, General Miles' subordinates were governed by this order and the instructions of July 29, 1898 as the sole authority for the Island's governance.³⁷

In construing General Order No. 101 in *Ochoa v. Hernández Morales*, the Supreme Court held that the military governor of Puerto Rico had no authority from the President to issue any order, judicial in nature that had the effect of depriving any person of their property without due process of law. In

33. See *Ochoa v. Hernández Morales*, 230 U.S. 139 (1913), 33 S. Ct. at 1039-40.

34. *Id.*

35. See Commonwealth Office, *supra* note 26, at 55.

36. *Id.* at 56; the July 29, 1898 order state in part:

The municipal laws, in so far as they affect the private rights of persons and property and provide for the punishment of crime, should be continued in force as far as they are compatible with the new order of things, and should not be suspended unless absolutely necessary to accomplish the objects of the present military occupation. These law should be administered by the ordinary tribunals substantially as they were before the occupation. Should it, however, become necessary to the maintenance of law and order, you have the power to replace or expel the present officials, in part or altogether, and to substitute others, and to create such new and supplementary tribunals as may be necessary....

37. See *Ochoa v. Hernández Morales*, *supra* at 33 S. Ct. 1040-41.

this case a judicial order of the military governor issued on April 4, 1899 purported to reduce the time period under Puerto Rico law during which real estate must be held in order to permit the conversion of a *posesorio* title to a *dominio* title. It reduced the relevant statute of limitations from twenty to six years thus depriving the plaintiffs of their title to land. The Court held that the purchaser of the land in question took title subject to the risk that the judicial order was *ultra vires* and subjected the firm to the notoriety of the principles proclaimed by General Miles which were found to be principles of international law and fundamental to American jurisprudence. The local law was thus sustained and the military judicial order set aside.³⁸

1. United States Provisional Court for the Department of Puerto Rico

On the 27th of June 1899, the new commander of the military department of Puerto Rico, Brigadier General George W. Davis issued General Order No. 88 which established a United States Provisional Court for the Island. This court's jurisdiction was to be equivalent to that cognizable in the federal district and circuit courts. It was composed by three judges, of which one was designated as a law judge, who was responsible for determining all technical questions of law. The questions of fact would be determined by a majority of three judges. The provisional court was free to introduce or dispense with the system of jury trial. Any party aggrieved by the actions of the provisional court was allowed to make an application to the U.S. Supreme Court for a writ of certiorari or other applicable process to review any judgment or decree.³⁹

The importance of the provisional court was that it established the precedent of a bifurcated court system on the Island. The establishment of two separate systems of courts, one local and the other federal, was to sanction a model different from that found in the other United States territories, where the jurisdiction of the United States courts was vested in local district courts and a supreme court.⁴⁰ On the first occasion the U.S. Supreme Court had to review a petition for leave to file a writ of habeas corpus and certiorari, it denied leave to file on the ground that the matter would become moot (*i.e.*, deprived of practical significance) before it could act on the case;⁴¹ on the second opportunity it held that it was not empowered to review the proceedings of military tribunals by certiorari.⁴²

38. *Id.* at 1035, 1042-43.

39. See *Ex Parte Báez*, 177 U.S. 378, 381-83 (1900).

40. See *Examining Board v. Flores de Otero*, *supra*, at 587 7 n. 7.

41. See *Ex Parte Báez*, *supra* (the case was moot because the relevant 30 day jail sentence in issue would have expired before the Court could act).

42. See *In the Matter of José Juan Vidal*, 179 U.S. 126 (1900).

2. Municipal Election Cases

The two cases which the Supreme Court declined to review arose from the municipal elections held in Guayama, Puerto Rico on October 31, 1899. In *Ex Parte Báez*⁴³ the petitioner had been sentenced to and imprisoned for 30 days at hard labor in the municipal jail of Humacao for allegedly illegally voting in the municipal elections. He alleged that there were some thirty other persons similarly arrested. However, the fact that he would have served out the full term before the high court could act made his case moot. The case *In the Matter of José Juan Vidal*⁴⁴ concerned the propriety of a *quo warranto* proceeding brought against José Juan Vidal by the military authorities to oust him and others from the municipal offices of the town of Guayama. The Supreme Court found that the military tribunals on the Island were neither courts of law or equity, which meant that it could not assume jurisdiction over cases arising from them.⁴⁵

3. Validity of Judgment of the Provisional Court

The Supreme Court's view of its jurisdiction over the military tribunals did not prevent it from giving efficacy to the judgments of the United States provisional court for the department of Puerto Rico. In *Santiago v. Pons Noguerras*,⁴⁶ the Court held that the judgment of the provisional court in question was not a nullity and rejected plaintiff's attack on the authority of that court. Plaintiffs, who owned parcels of land sold as a result of an execution on a judgment issued against them by the provisional court, attacked that court as having no lawful existence; alternatively, they argued that if the court was properly constituted it was without power to render the judgment in question.⁴⁷ The Court found that the provisional court had been lawfully created by the power of the President acting as Commander in Chief and that the authority to govern ceded territory derived from the international law applicable to conquest and cession.⁴⁸

The Court explained that the President's military power included the power to establish courts of justice, which it considered an essential part of any government. The provisional court had been created by General Order No. 88 which gave it jurisdiction over cases cognizable in the district and circuit courts of the United States. Most importantly, this jurisdiction extended to cases involving diversity of citizenship; the order provided that

43. 177 U.S. 378.

44. 179 U.S. 126.

45. *Id.*

46. 214 U.S. 260 (1909).

47. *Id.* at 29 S. Ct. 608.

48. *Id.* at 29 S. Ct. 609.

where the case involved Puerto Rican parties or arose from Spanish or Puerto Rican laws, the court was to apply Spanish and similar precedents determined in territories acquired from Spain or Mexico. One of the purposes for the creation of the court was to allow Spaniards to obtain redress against Puerto Ricans at a time when controversies between the two groups were still ripe. The case in point involved a Spanish subject as plaintiff and a citizen and resident of Puerto Rico as defendant.⁴⁹

Two other observations made by the Court concerned the extent of military authority on the Island and the application of local law. The Supreme Court held that the authority of the military government on the Island during the interim period prior to Congressional action was large but not unlimited. It cited the case of *Dooley I*⁵⁰ for the proposition that there were certain limits on this power, while it concluded that given the situation, the military commander on the Island had the right to administer the Puerto Rico government, after the ratification of the Treaty of Paris, until Congress should act.⁵¹ The Court assumed that the local law had been properly applied and held that the defendants had obtained good title by way of the sale on execution.⁵² This case reflects the fact that the provisional court was required by General Order No. 88 to apply Spanish law and principles in diversity cases, thus incorporating the local norms into the federal forum.

These cases underscore the interplay of federal and local norms in the federal forum. The military authorities were without authority to issue a judicial order that had the effect of reducing the applicable statute of limitations in real property cases thereby depriving persons of property rights without due process of law.⁵³ The local norm was sustained over the purported change. Similarly, while the military authorities had the right to impose and collect duties and tariffs on goods imported to Puerto Rico from the United States (and elsewhere), such rights terminated on April 11, 1899, when Puerto Rico ceased to be a foreign country with respect to United States imports.⁵⁴ It was then for Congress to determine the nature and extent of Puerto Rico's custom duties and tariffs.

The military authorities were free to enforce federal peremptory norms in the provisional court against those alleged to have violated its laws concerning voter qualifications or holding office.⁵⁵ Such actions were not reviewable in

49. *Id.* at 29 S. Ct. 608-09.

50. 182 U.S. 222.

51. 29 S. Ct. at 609.

52. *Id.*

53. See *Ochoa v. Hernández Morales*, *supra*.

54. See *Dooley I*, 182 U.S. 222.

55. See *Ex parte Báez*, *supra*; *In the Matter of José Juan Vidal*, *supra*.

the U.S. Supreme Court,⁵⁶ and the authority of the provisional court and its judgments were sustained against attack.⁵⁷ The successor to the provisional court, the District Court of Puerto Rico (which was created by Congress in the Foraker Act) had the right to take possession of all of the records of the provisional court and to give effect to its judgments.⁵⁸ The provisional court further provided the basis for the bifurcated model of federal and local forums which has become a permanent feature of Puerto Rico. The phenomenon of independent local tribunals applying the Spanish civil law and local law while a federal tribunal applied local law, the common law and national norms was to become a salient characteristic of the Island's judicial development. The dual nature of the federal forum required it to apply federal norms in one category of cases and to interpret and apply local norms in cases invoking its diversity jurisdiction.⁵⁹

This convergence in diversity cases of local norms and federal forum raised questions as to how much deference would be given to the interpretations of the insular tribunals and in the case of equally plausible interpretations which would prevail in the federal forum. This situation was mirrored in the jurisprudence of the District Court of Puerto Rico, but also in the appellate review function of the First Circuit Court of Appeals in cases arising from the District Court and from the Puerto Rico Supreme Court. The resulting tensions between the differing norms and forums gave rise to the doctrine of judicial autonomy.

II. THE TRANSITION FROM SPANISH TO AMERICAN RULE

The Treaty of Paris protected the rights of private and public persons, and ecclesiastical and civic bodies to peaceful possession of property of all kinds.⁶⁰

56. See *In the Matter of Juan Vidal*, *supra*.

57. See *Santiago v. Pons Noguera*, *supra*.

58. *Id.* at 29 S. Ct. 609.

59. For a discussion of diversity jurisdiction in the District Court of Puerto Rico and for a proposal to eliminate it see Asseo Guerra and Fuster, *The Development of Federalism in the Commonwealth of Puerto Rico: A Proposal to Annul the Special Diversity Jurisdiction of the U.S. District Court in Puerto Rico*, 26 Rev. Jur. U.P.R. 321 (1957); see also, Note, *Federal District Court in Puerto Rico: A Brief Look at the Court and Federal Handling of Commonwealth Civil Law in Diversity Cases*, 13 Case W. Res. J. Int'l L. 231 (1981).

60. Article VIII of the Treaty of Paris provided in relevant part:

And it is hereby declared that the relinquishment or cession, as the case may be, to which the preceding paragraph refers, cannot in any respect impair the property rights which by law belong to the peaceful possession of property of all kinds, of provinces, municipalities, public or private establishments, ecclesiastical or civic bodies, or any other associations having legal capacity to acquire and possess property in the aforesaid territories renounced or ceded, or of private individuals, of whatsoever nationality such individuals may be.

See 187 *The Consolidated Treaties Series* 103 (C. Parry ed. 1979).

This provision did not prevent the local municipalities from seeking to record their ownership in the public registry to the property of the Roman Catholic Church on the Island.⁶¹ In *Municipality of Ponce v. Roman Catholic Apostolic Church in Puerto Rico*,⁶² Mr. Chief Justice Fuller rejected the assertion that the Church did not possess a legal personality and held that the Treaty of Paris as well as international law protected the Church's right to possess the two temples involved in the suit. In so doing, he said that the Court would take judicial notice of the Spanish law insofar as it affected the insular possessions of the United States since such law was "*pro tanto* no longer foreign law."⁶³ The history of Puerto Rico and its legal and political institutions prior to annexation were held to be recognized by the high court in the same way as the ancient laws and institutions of the states within its jurisdiction.⁶⁴

The status of a charitable corporation which had been organized under the laws of Spain, with its activities limited to Puerto Rico, was that it was no longer a citizen of Spain.⁶⁵ With the cession of Puerto Rico Spain lost its power or duty over its subjects, and the duty to protect property rights in Puerto Rico rested with the United States.⁶⁶ Under the American form of government the creation and control of a corporation was strictly a legislative function; the effect of the Foraker Act⁶⁷ on the corporation was to entrust the matter of its status to the government of Puerto Rico.⁶⁸ The Supreme Court refused to decide whether such a corporation in *Martínez v. La Asociación de Señoras Damas, etc.* had no more than a *de facto* existence, subject to future action by the Puerto Rico legislature, since the fact that it was a Puerto Rico citizen

61. See *Municipality of Ponce v. Roman Catholic Apostolic Church in Puerto Rico*, 210 U.S. 296 (1908).

62. *Id.*

63. 28 S. Ct. at 379.

64. *Id.*

65. See *Martínez v. La Asociación de Señoras Damas*, 213 U.S. 20 (1909).

66. *Id.* at 29 S. Ct. 329.

67. The Court characterized the legal status of the insular government created by the Foraker Act in *Martínez v. La Asociación de Señoras Damas*, *supra*, as follows:

That act created a form of government for Porto Rico and its adjacent islands, in which there was exhibited, with some modifications, the characteristic American separation of the legislative, executive, and judicial powers. The United States has never granted to any territory organized by act of Congress complete self-government and Porto Rico is no exception to the rule. Indeed, though the act confers a considerable measure of self-government, for reasons deemed sufficient by Congress, it stops short of the power usually conferred upon territories within the continent. This organic act has the provision common to most, if not all our territories, whether fully incorporated into the United States or not, that Congress may, if it deem advisable, annul all laws enacted by the local legislative assembly.

68. *Id.*

defeated the Court's diversity jurisdiction.⁶⁹ This case was distinguished from a Spanish trading corporation with a place of business in Spain and which as a result of comity was permitted to do business on the Island.⁷⁰

The provision of the Treaty of Paris on the protection of property rights was invoked to recover the value of the office of solicitor of courts of the capital of Puerto Rico which was abolished on August 31, 1899.⁷¹ The Court held in *Alvarez y Sánchez v. United States* that this was a quasi-public office and that it was inconceivable that the United States had agreed not to abolish a system of sale of public office which was foreign to American conceptions and inconsistent with its institutions.⁷² The abolition of the office which the incumbent had held since 1878 was held not to contravene any provision of the U.S. Constitution, nor did it infringe any property right which could be asserted against the United States.⁷³

The Supreme Court affirmed the power of Congress in the Foraker Act to fix the exchange rate between Puerto Rican and American currency in *Serrales v. Esbrí*.⁷⁴ Section 11 of the Foraker Act authorized that all the silver coins of Puerto Rico known as the peso, and all other silver and copper coins, were to be redeemed at the prescribed rate of sixty cents in United States coin for one peso of Puerto Rico coin.⁷⁵ This section became effective on August 1, 1900 so that all debts owing on that date were payable either in the coins of Puerto Rico in circulation or in coins of the United States at the prescribed rate.⁷⁶ All debts contracted after August 1, 1900 were to be paid in United States currency which would then be the only acceptable legal tender.⁷⁷ The Court held that the word "centavo" used in the instrument at issue meant in Spain and in South America a small copper or nickel coin in value six-tenths

69. *Id.*

70. *Id.*

71. See *Alvarez y Sánchez v. United States*, 216 U.S. 167 (1910).

72. 30 S. Ct. at 363.

73. *Id.*

74. 200 U.S. 103 (1906).

75. The effect of the prescribed rate of exchange set out in the Foraker Act was to collect \$1,29,141.68 Puerto Rican pesos and convert these into \$3,077,485.08. See Silén, 2 Historia de la Nación Puertorriqueña 202 (1980). One source has estimated the exchange rate in 1899 to have been one Puerto Rican peso to ninety American cents, rather than the Foraker Act rate. This source estimates that the devaluation of the Puerto Rican currency resulted in a one-third reduction in the liquid capital on the Island. See *Puerto Rico and Puerto Ricans* 107-08 (A. López and J. Petras eds. 1974). It should be noted that writers on the exchange rate provision are apparently unaware of this Supreme Court decision. See also Commonwealth Office, *supra* note 26, at 68-69. Cf. Trias Monge, *supra* note 12, at 227; Silén, *supra* at 202; History Task Force, Centro de Estudios Puertorriqueños, *Labor Migration Under Capitalism: The Puerto Rican Experience* 95 (1979); Maldonado-Denis, *Puerto Rico: A Socio-Historic Interpretation* 73 (1972).

76. 26 S. Ct. at 177-78.

77. *Id.*

of an American cent whereas the centavo was the one-hundredth part of the peso.⁷⁸

The Court held that in the contract under consideration the parties could only have contemplated in 1894 the Spanish meaning of centavo and not the meaning of cents of a dollar when translated into English.⁷⁹ To hold otherwise was to provide for payment of the debt in question in American currency (rather than Puerto Rican pesos converted into such currency) which would have meant a windfall to the creditor not contemplated by the parties.⁸⁰ The fact that the Puerto Rico peso referred to the Foraker Act as a silver coin rather than a copper or nickel coin was ignored by the Court in sustaining the rate set out by Congress.

This case was distinguished in *City of San Juan v. St. John's Gas Co.*⁸¹ where the Supreme Court held that the City of San Juan was free to show that amounts owing in Puerto Rican currency could be paid by an equivalent amount of American currency.⁸² The contract there unlike that in *Serrales* was for payment in current foreign money, exclusive of Spanish gold; additionally, the parties had agreed that if current foreign money was required by the contract then United States currency was contemplated by the parties.⁸³ This was unlike the contract in *Serrales* since in the case the matter of American currency was within the intention of the parties.⁸⁴

The transition from Spanish and American rule saw the Supreme Court safeguard the prerogatives of Congress as reflected in the Foraker Act. The right of the military governors of Puerto Rico and of the President to impose duties and tariffs on the importation of goods was deemed to cease on April 11, 1899 when the Treaty of Paris came into effect.⁸⁵ The Treaty provided that it was for Congress to determine the civil rights and political status of the inhabitants of the ceded territories;⁸⁶ thus when Congress acted by passing the Foraker Act was imposing duties on goods brought into the port of New York from Puerto Rico at the rate of 15% of the levy on foreign goods such action was sustained by the Court.⁸⁷ To do so meant that a doctrine had to be

78. *Id.* at 180.

79. *Id.* at 180-81.

80. *Id.*

81. 195 U.S. 510 (1904).

82. 25 S. Ct. at 112-13.

83. *Id.*

84. *Id.*

85. See *Dooley I*, 182 U.S. 222.

86. See Article IX of the Treaty of Paris which provided in part:

The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

187 *The Consolidated Treaty Series*, *supra* note 60, at 103.

87. See *Downes v. Bidwell*, *supra*.

elaborated so that the applicable provisions of the U.S. Constitution that might have prohibited such levies were deemed not to apply.⁸⁸ Puerto Rico was subject to the doctrine of incorporation which meant that in an unincorporated territory such as the Island the Constitution did not apply in all of its provisions.⁸⁹

When Congress admitted American ships to the domestic coastal trade this meant that Puerto Rican vessels had been assimilated into the American nationality and restrictions of pilotage applicable on foreign vessels were deemed not to apply.⁹⁰ When the Court sustained the property rights of the Roman Catholic Church as affirmed by the Puerto Rico Supreme Court it safeguarded the local interpretation as it did when it struck down the judicial order of the military which conflicted with the local law.⁹¹ The Court sought to enforce the federal peremptory norms when applicable, while safeguarding the local interpretation which it sanctioned through the rule of local deference.

III. STATISTICAL OVERVIEW OF THE RULE OF LOCAL DEFERENCE

A number of statistical patterns emerge with respect to the corpus of U.S. Supreme Court case law on Puerto Rico. These patterns are depicted in the tables that follow. Table 1 reflects the actions of the Supreme Court on matters arising from the District Court of the United States for Puerto Rico [later known as the United States District Court for the District of Puerto Rico (hereinafter, the "District Court of Puerto Rico")], the Puerto Rico Supreme Court, and the First Circuit Court of Appeals in Boston, Massachusetts. The First Circuit from 1915 to 1961 had jurisdiction over appeals from both the District Court of Puerto Rico and the Puerto Rico Supreme Court. The reversals of First Circuit decisions in Table 1 reflect the application of the rule of local deference by the U.S. Supreme Court and its requirement that the First Circuit apply the local interpretation of the law or practice rather than its own.⁹²

88. See *Balzac v. People of Porto Rico*, *supra* (where the doctrine of incorporation enunciated in *Downes v. Bidwell* was adopted unanimously by the Supreme Court in 1922).

89. *Id.*

90. See *Ilus v. New York & Porto Rico Steamship Co.*, 182 U.S. 392 (1901). Ships in international law have the nationality of the state whose flag they are entitled to fly. They are therefore under the protection of that state; with the cession of Puerto Rico to the United States, the ships of the Island acquired American nationality and hence its protection. See Brownlie, *Principles of Public International Law* 424 (1983); Schwarzenberger and Brown, *supra* note 18, at 116-117; Art. 5, Para. 1 of the 1958 Geneva Convention of the High Seas in *Basic Documents in International Law* 98 (L. Brownlie ed. 1983).

91. See *Municipality of Ponce v. Roman Catholic Apostolic Church in Puerto Rico*, *supra*; see also *Ochoa v. Hernández Morales*, *supra*.

92. See e.g., *Sancho Bonet v. Texas Co.*, *supra*, at 471.

TABLE 1

UNITED STATES SUPREME COURT ACTIONS ON PUERTO RICO CASES

TRIBUNAL	AFFIRMANCE		REVERSAL		DISMISSAL	
	No.	%	No.	%	No.	%
District Court of Puerto Rico	33	45.2	31	42.5	9	12.3
Puerto Rico Supreme Court	12	70.6	3	17.6	2	11.8
First Circuit Court of Appeals	9.5*	28.8	20.5*	62.1	3	19.1

NOTE: (*) One case was affirmed in part and reversed in part; it is reflected as .5 under the affirmance and reversal columns.

The percentage is arrived at by taking the total of all matters decided (whether affirmance, reversal, or dismissal) and dividing the cases in each column by this number.

Table 1 reflects the application of the doctrine of judicial autonomy which in gross terms resulted in the affirmance of 70.6% of the decisions coming from the Puerto Rico Supreme Court to the U.S. Supreme Court. It also resulted in a 62.1% reversal rate for the First Circuit Court of Appeals, which usually sought to substitute its own interpretation on local law for that of the insular tribunal. These figures are further refined in Table 2 which shows that the Supreme Court reversed the First Circuit Court of Appeals in 71.4% of the cases arising from the appellate court's review of the Puerto Rico Supreme Court as compared to 65.6% of the cases coming from the District Court of Puerto Rico.

TABLE 2

UNITED STATES SUPREME COURT ACTIONS ON CASES FROM THE FIRST CIRCUIT COURT OF APPEALS

TRIBUNAL	AFFIRMANCE		REVERSAL		DISMISSAL	
	No.	%	No.	%	No.	%
Puerto Rico Supreme Court	4	28.6	10	71.4	0	0
District Court of Puerto Rico	5.5*	28.9	10.5*	55.3	3	15.8

NOTE: (*) One case was affirmed in part and reversed in part; it is reflected as .5 under the affirmance and reversal columns.

Table 2 also reflects the tendency of the U.S. Supreme Court to reverse the First Circuit Court of Appeals in 55.3% of the cases in which the appellate court reviewed the judgments of the District Court of Puerto Rico. It affirmed the Circuit Court at about the same rate, 28.9%, as that for Puerto Rico Supreme Court decisions, 28.6%.

Table 3 examines the U.S. Supreme Court's own review of the decisions of the District Court of Puerto Rico. These were direct appeals to the U.S. Supreme Court without intermediate review by a court of appeals. We have separated out the decisions of the Three-Judge District Courts of Puerto Rico which were empanelled to review the constitutionality of local statutes so that the Supreme Court's response to such rulings can be more clearly seen.

TABLE 3

**UNITED STATES SUPREME COURT
ACTIONS ON CASES FROM
THE DISTRICT COURT OF PUERTO RICO**

TRIBUNAL	AFFIRMANCE		REVERSAL		DISMISSAL	
	No.	%	No.	%	No.	%
District Court of Puerto Rico	32	47.1	27	39.7	9	13.2
Three-Judge District Court of Puerto Rico	1	25.0	3	75.0	0	0
Total	33	45.8	30	41.7	9	12.5

It will be seen from Table 3 that the U.S. Supreme Court was generally even-handed in its approach to affirming or reversing a decision from the District Court of Puerto Rico, but more likely to overturn a decision of a Three Judge District Court which had declared a local statute unconstitutional. The latter phenomenon is in keeping with the doctrine of legislative autonomy, which sought to protect the prerogatives of the local legislature of the Island unless plainly inconsistent with the U.S. Constitution or federal law. Two of the justices on the Supreme Court most responsible for the application of the rule of local deference whether in terms of the Island's legislative enactments or the decisions of its local tribunals were Mr. Justice (later Chief Justice) Edward Douglass White and Mr. Justice Oliver Wendell Holmes.

As will be seen in the judicial autonomy section, both these justices gave specific content and development to the rule of local deference. Between them they decided 53 of the 139 Puerto Rico matters coming before the U.S.

Supreme Court. Table 4 reflects the position of Mr. Justice White on 28 of the matters which he decided; Table 5 reflects the decisions of Mr. Justice Holmes concerning 25 matters.

TABLE 4

**MR. JUSTICE WHITE'S
ACTIONS ON PUERTO RICO CASES**

TRIBUNAL	AFFIRMANCE		REVERSAL		DISMISSAL	
	No.	%	No.	%	No.	%
U.S. Circuit Court for the Southern District of New York	2	100	0	0		
District Court of Puerto Rico	9	42.9	6	28.55	6	28.55
Puerto Rico Supreme Court	3	60.0	1	20.0	1	20.00

Mr. Justice White was twice as likely to affirm a Puerto Rico case than to reverse or dismiss it, which he did in 14 separate instances as contrasted to 7 matters reversed in total and 7 dismissed in total. He was also more likely to affirm a case coming from the Puerto Rico Supreme Court than one arising from the District Court of Puerto Rico.

TABLE 5

**MR. JUSTICE HOLME'S
ACTIONS ON PUERTO RICO CASES**

TRIBUNAL	AFFIRMANCE		REVERSAL		DISMISSAL	
	No.	%	No.	%	No.	%
Third Circuit Court of Appeals	1	100	0	0	0	0
First Circuit Court of Appeals on Cases from Puerto Rico Supreme Court	0	0	3	100	0	0
First Circuit Court of Appeals on Cases						

from District Court of Puerto Rico	0	0	0	0	2	100
District Court of Puerto Rico	7	58.3	5	41.7	0	0
Puerto Rico Supreme Court	6	100	0	0	0	0

Table 5 reflects the actions of the greatest exponent of the rule of local deference in Puerto Rico, Mr. Justice Holmes, and his actions were in line with the theory as he affirmed the Puerto Rico Supreme Court in each instance. He also reversed the First Circuit Court of Appeals in all cases in which the appellate court had not abided by the decision of the insular high court. He was also more likely to affirm a case from the District Court of Puerto Rico than Mr. Justice White, while less likely to dismiss an action coming before him. Additionally, he was called upon to pass upon decisions arising from the First Circuit Court of Appeals, whereas Mr. Justice White did so only on one occasion in which he dismissed the action for want of jurisdiction.⁹³ A review of these tables and the case law treated in this work will plainly reveal the importance of the concept of judicial autonomy in sustaining the local laws and practices of Puerto Rico. It will show that a rule of local deference was implemented towards this end, especially under the hands of Mr. Justice White and Mr. Justice Holmes.

IV. THE DOCTRINE OF JUDICIAL AUTONOMY

For the first part of the Twentieth Century decisions from the U.S. District Court of Puerto Rico and from the insular Supreme Court were appealed directly to the U.S. Supreme Court. The U.S. Supreme Court had little difficulty in applying local law where appropriate and in interpreting the Spanish Civil Code for these purposes. By act of Congress of January 28, 1915,⁹⁴ the First Circuit Court of Appeals received the jurisdiction to review the judgments and decisions of the Puerto Rico courts. Section 43 of the Second Organic Act of 1917 (hereinafter, "the Jones Act") confirmed this appellate jurisdiction by providing "[t]hat writs of error and appeals from the final judgments of the Supreme Court of Porto Rico may be taken and prosecuted to the Circuit Court of Appeals for the First Circuit and to the Supreme Court of the United States, as now provided by law."⁹⁵ Section of

The Jones Act attached the District Court of Puerto Rico to the First Circuit Court of Appeals with the right of appeal and review by the appellate court in all cases where the same would lie from any United States District Court to a circuit court.⁹⁶

During the period 1920 to 1944, there were fourteen cases taken from the Puerto Rico Supreme Court to the First Circuit Court of Appeals prior to review by the U.S. Supreme Court. The U.S. Supreme Court affirmed the First Circuit in four cases for an affirmance rate of 28.6%. The Court reversed the First Circuit in ten cases for a reversal rate of 71.4%. In the process of passing upon these cases, the U.S. Supreme Court evolved a doctrine of deference to the interpretations of local law by the Puerto Rico Supreme Court.

The doctrine of "judicial autonomy" was applied strictly to the First Circuit Court of Appeals and reached its highest formulation in *Sancho Bonet v. Texas Co.*⁹⁷

To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of the local legislature, it would not be sufficient if we or the Circuit Court of Appeals merely disagreed with that interpretation. Nor would it be enough that the Puerto Rican tribunal chose what might seem, on appeal, to be the less reasonable of two possible interpretations. And such judgment of reversal would not be sustained here even though we felt that of several possible interpretations that of the Circuit Court of Appeals was the most reasonable one. For to justify reversal in such cases, the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous.

The evolution and application of this rule meant that both the District Court of Puerto Rico and the First Circuit Court of Appeals were required to give due deference to the interpretation and application of local law.

This doctrine which we have characterized as "judicial autonomy" may be traced to Mr. Justice Holmes' pronouncement in *García Maytín v. Vela*.⁹⁸ The Puerto Rico Supreme Court had affirmed a judgment of the insular district court establishing the rights of two sisters of one Manuel García Maytín in property inherited from him. The defendants were ordered to deliver to the plaintiffs certain specified land, or if sold, the value of the land which was to be ascertained by appraisal. Cross appeals were lodged by plaintiffs and

93. See *El Banco Popular, ect. de San Juan, P.R. v. Wilcox*, 255 U.S. 72 (1921).

94. 38 Stat. 803 (1915).

95. See Commonwealth Office, *supra* note 26, at 108.

96. *Id.* at 107-08.

97. 308 U.S. 463, 471 (1940).

98. 216 U.S. 598 (1910).

defendants, and in affirming the decision against the defendants (although the appeal of plaintiffs was dismissed), Mr. Justice Holmes stated:

We are not prepared to overthrow the assumption made by the court, whose experience in such questions is entitled to much consideration that the plaintiffs had a sufficient interest to entitle them to bring an action to set aside the so-called partition on the daughter's death, and that, on their failing to do so, the right to dispute the same was barred by lapse of time (citations omitted)⁹⁹

He concluded that the Puerto Rico Supreme Court had issued a very lucid and persuasive opinion in which it established the plaintiff's position and answered the defendants' objections.¹⁰⁰

Mr. Justice Holmes returned to the theme of judicial autonomy in *Rijos Córdova v. Folgueras y Rijos*.¹⁰¹ The case involved two suits brought by persons each of whom sought to be declared the natural daughter of the same father in order to be entitled to a share in the father's estate. The Supreme Court of Puerto Rico affirmed the judgment of the insular district court for the judicial district of San Juan which had sustained a motion to dismiss the two lawsuits. In passing upon the objection to the insular Supreme Court's interpretation of local law, Mr. Justice Holmes held that the insular high court's construction did no violence to the express terms of the statute, that the matter concerned local affairs with which the Puerto Rico Supreme Court was called on constantly to deal, and that given the weight that was to be attributed to the local judgment, he was not prepared to say that the local decision was wrong.¹⁰²

In *Calaf y Fugurul v. Calaf y Rivera*¹⁰³ (decided the same day as *Rijos Córdova*) Mr. Justice Holmes passed upon the Supreme Court of Puerto Rico's application of the principle of *res judicata* and held that the insular high court had declared the true principle that a judgment or decree barred all ground for the relief sought in the action.¹⁰⁴ Having properly applied the principle, Mr. Justice Holmes held that the U.S. Supreme Court would require the clearest authority before it overruled an application which was observed to be obviously correct.¹⁰⁵ The judgment of the insular high court dismissing the complaint in this suit to void a will was affirmed.¹⁰⁶

99. 30 S.Ct. at 441.

100. *Id.* at 440.

101. 227 U.S. 375 (1913).

102. 33 S.Ct. at 412-13.

103. 232 U.S. 371 (1913).

104. *Id.* at 412-13.

105. *Id.*

106. *Id.*

Mr. Justice Holmes returned to the subject of deference to the decisions of the insular tribunals in *Martínez Nadal v. May*.¹⁰⁷ This was a suit to establish title to a one-half interest in a plantation on the Island. The District Court of Puerto Rico had issued a decision in favor of the defendant. In affirming the lower court's decision, Mr. Justice Holmes reiterated the general unwillingness of the U.S. Supreme Court to overrule local tribunals on matters of purely local concern.¹⁰⁸ The Supreme Court sought to ensure that the public policy enacted by the Puerto Rico legislature was to be applied where appropriate by both the federal and insular district courts. Thus, where the District Court of Puerto Rico failed to apply the local Puerto Rican statute for the qualifications of jurors it was reversed by the U.S. Supreme Court for failing to do so.¹⁰⁹

The U.S. Supreme Court affirmed the rule of local deference with respect to the Philippine Islands in *De Villanueva v. Villanueva*.¹¹⁰ The Supreme Court of the Philippines had affirmed a decree of the court of first instance of the province of Albay in which a demand for divorce and liquidation of community property was rejected. Mr. Chief Justice White delivered the opinion of the U.S. Supreme Court in which the decision of the high court of the Philippines was affirmed on the grounds that (i) the challenge to the findings of facts of the lower courts failed to create a "conviction of clear error" which was necessary in order to authorize a reversal of the findings; and (ii) the challenge to the correct application of local law to the facts in the case was lacking in the persuasive strength essential in order to produce the "conviction that clear error" was committed by the lower court, and thus require the Supreme Court to depart from the principle under which it followed and sustained local law as applied by the court below unless constrained to the contrary by a sense of clear error committed.¹¹¹ In support of the principle regarding the deference to be given the decisions of local tribunals on matters of local law, Mr. Chief Justice White cited *Martínez Nadal v. May*.¹¹²

Mr. Chief Justice White applied this rule to Puerto Rico in *Suris Cardona v. Quiñones*,¹¹³ where the Supreme Court of Puerto Rico had affirmed a decree of the insular district court of Mayagüez in rejecting a claim of title made by the plaintiff. He restated the rule of local deference, while relying on the authority of *Martínez Nadal* and *De Villanueva*, in terms of effectuating the

107. 233 U.S. 447 (1914).

108. 34 S.Ct. at 612.

109. 194 U.S. 461 (1904).

110. 239 U.S. 298 (1915).

111. 36 S.Ct. at 111.

112. *Id.* at 109-11.

113. 240 U.S. 83 (1916).

settled doctrine under which the U.S. Supreme Court did not upset, but, on the contrary, sustained, the action of the court below on matters concerning purely local law, except upon a conviction that clear error has been committed.¹¹⁴ Based upon this rationale, the contentions of the appellant were rejected. The effect of such a rule was to circumscribe the appellate review of cases coming from Puerto Rico.

In *Ana María Sugar Co. v. Quiñones*,¹¹⁵ Mr. Justice Brandeis examined the history of appellate review of Puerto Rico judgments as follows: (i) Section 35 of the Foraker Act limited the power to review the final judgments and decrees of the insular Supreme Court to matters of law; (ii) this section was superseded by section 244 of the Judicial Code which allowed writs of error and appeals from the insular high court; such appeals were subject to the same rules governing appeals from the United States district courts. This gave the U.S. Supreme Court the power to review questions of fact in cases on appeal in equity or admiralty, but in actions at law (which were reviewable only by writ of error) there was no right to review the factual determinations (even where the case was tried without jury); and (iii) in 1915 the First Circuit Court of Appeals obtained the right to review the judgments and decrees of the insular courts but with the same limitations as the U.S. Supreme Court.¹¹⁶

The subject matter of the dispute in *Ana María Sugar Co.* concerned a suit against the company to recover damages for breach of an oral contract to deliver sugar. Mr. Justice Brandeis denominated the case as one at law that should have been reviewed by writ of error instead of by appeal.¹¹⁷ The applicable federal statute, however, allowed the Court to characterize the matter on review properly, even if this had not been done by the party seeking review.¹¹⁸ The First Circuit Court of Appeals had denied consideration of ten assignments of errors directed to the findings of fact of the Puerto Rico Supreme Court.¹¹⁹ Mr. Justice Brandeis held that as long as the assignments of error raised no question of law, the First Circuit was without power to review such findings of fact in an action at law.¹²⁰

The first instance in which the First Circuit Court of Appeals was reversed by the application of the doctrine of judicial autonomy was in the case of *Bentley Díaz v. González y Lugo*.¹²¹ This was a suit brought by the respondents

to establish the nullity of a sale of their land while they were all minors. The insular Supreme Court sustained the sale and ordered the complaint dismissed. Mr. Justice Holmes delivered the Court's opinion affirming the Puerto Rico Supreme Court and reversing the First Circuit:

This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. It is enough to cite [*De Villanueva v. Villanueva*; [*Martínez*] *Nadal v. May*. This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here. When we contemplate such a system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to be brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have gotten from the books. In this case a slight difference in the caution felt in dealing with the interest of minors, and a slight change of emphasis in the reading of statutes, explain the divergence between the Supreme Court and the Circuit Court of Appeals. Our appellate jurisdiction is not given for the purpose of remodeling the Spanish-American law according to common law conceptions except so far as that law has to bend to the expressed will of the United States. The importance that we attribute to these considerations led to our granting the writ of certiorari and requires us to reverse the judgment below. (citations omitted)¹²²

This exegesis of the factors that supported the rule of local deference accords an autonomy to views of the insular judiciary which is as important as the autonomy of the legislative and executive branches of the Island's government.¹²³ It required that the federal forums yield to the local norms as developed by the insular courts unless such local interpretations were inconsistent with federal law.

Mr. Justice Holmes reiterated this rule of review in *B. Fernández & Bros. v. Ayllon*,¹²⁴ which was a suit to set aside the sale of land formerly belonging to the respondent. The First Circuit Court of Appeals overruled the Supreme Court

122. *Id.* at 105-06.

123. See Magruder, *The Commonwealth Status of Puerto Rico* 15 U. Pitt. L. Rev. 3-10 (1953); Trias Monge, *supra* note 12, at 295-97 (Trias Monge is in error when he says that the U.S. Supreme Court reversed the insular high court only once before 1917 in *Porto Rico v. Rosaly y Castillo*, 227 U.S. 124, 266 U.S. 144 (1924).

124. 266 U.S. 144 (1924).

114. 36 S.Ct. at 348-49.

115. 254 U.S. 245 (1920).

116. *Id.* at 248.

117. *Id.* at 249.

118. *Id.*

119. *Id.*

120. *Id.*

121. 261 U.S. 102 (1923).

of Puerto Rico as to whether the local district court, which had jurisdiction over the minors in question, could pass good title to the property. The U.S. Supreme Court reversed stating that the insular high court's decision turned upon local statutes and traditions, which required the court of appeals to use caution before overruling such decisions. The Court cited *Benítez Díaz v. González y Lugo* for this proposition and stated that aside from the respect due to the local judgment the insular high court's reasoning commanded its assent.¹²⁵ However, due deference did not mean that Mr. Justice Holmes would not examine reasoning which might not command his approval.

In *Pérez Camí v. Central Victoria, Ltd.*¹²⁶ Mr. Justice Holmes upheld the reversal of a ruling of the Puerto Rico Supreme Court by the First Circuit Court of Appeals. The case involved a suit to prevent the collection of a tax imposed by the municipality of Carolina, Puerto Rico. In a curious explanation of the Court's jurisdiction, Mr. Justice Holmes observed that the normal rule would have been to avoid the merits of the case if the First Circuit had deferred to the insular high court. However, as the First Circuit examined the merits of the case the U.S. Supreme Court would do so as well.¹²⁷ The Court found no plausible basis for the insular court's decision and felt compelled to agree with the First Circuit insofar as it understood the appellate court's reasoning.¹²⁸

The doctrine of judicial autonomy as expressed in the rule of local deference continued to be applied by the U.S. Supreme Court after the departure of Mr. Justice Holmes and Mr. Chief Justice White from the Court, especially in the 1930's and 1940's. Mr. Justice McReynolds applied the principle in reversing the First Circuit in *Matos v. Hermanos*.¹²⁹ The case involved a suit to declare the sale of infected cattle null and void. The Supreme Court of Puerto Rico sustained the sale by interpreting the provisions of the Puerto Rico civil code to this effect. It overruled the insular district court which had found the sales contract to be void. The First Circuit held the contract of sale to be illegal and reversed the insular high court. Mr. Justice McReynolds applied the deference rule and upheld the decision of the Puerto Rico Supreme Court on the basis that given the divergent views in the courts below and recognizing the deference due local courts on matters of purely local concern, it was not possible for the court to have the requisite sense of clear error committed to warrant reversing the insular Supreme Court.¹³⁰ He suggested that the First Circuit should have accepted and affirmed the considered judgment of the Puerto Rico high court.

125. *Id.* at 146.

126. 268 U.S. 469 (1925).

127. *Id.* at 470.

128. *Id.* at 471.

129. 300 U.S. 429 (1937).

130. *Id.* at 432.

The next opportunity to assert the rule of judicial autonomy was in *Sancho Bonet v. Yabucoa Sugar Co.*,¹³¹ which involved a suit for recovery of 1927 income taxes paid under the laws of Puerto Rico. The insular district court found that no right had been granted to sue at law for taxes which were voluntarily paid and without protest; it dismissed the complaint on this basis. The Supreme Court of Puerto Rico affirmed, but was reversed by the First Circuit Court of Appeals. Mr. Justice Black delivered the opinion of the Court which found that taxing statutes were purely local and entitled to deference particularly where Puerto Rico tribunals had interpreted Puerto Rican statutes. He held that the orderly development of Puerto Rico's government was served "by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the Island."¹³²

Mr. Justice Black found that the Court could not say that the Puerto Rican courts were wrong on the question of the taxing acts. He found the judgment of the Puerto Rican courts to be supported by logic and reasoning, to embody a recognition of a constitutional division between the legislative and judicial branches of government, to be grounded on the belief that the Puerto Rico legislature had declined to afford a right to sue to a taxpayer who voluntarily paid taxes without protest, and to be within the insular court's discretion to decline to read into a statute implications which it could not fairly find there.¹³³ In failing to sustain the construction of the local statutes, it was the First Circuit Court of Appeals which was in error. The principles enunciated in *De Villanueva*, *Benítez Díaz*, and *Rijos Córdova* were restated here and applied with the consequences that the interpretative prerogatives of the insular tribunals were upheld.

We have already indicated that the application of the rule of local deference reached its strongest pronouncement in *Sancho Bonet v. Texas Co.*¹³⁴ This was a case in which the subject firm sought to enjoin the Treasurer of Puerto Rico from enforcing by distraint the orders of the Puerto Rico Workmen's Relief Commission; the Commission had awarded compensation as a result of the death of three laborers employed by the firm. The Supreme Court of Puerto Rico interpreted the local statute not to permit such a collateral attack on the orders of the Commission and dismissed the action. The First Circuit Court of Appeals vacated the judgment and remanded the cause to the insular high court with directions to issue the injunction.¹³⁵

131. 306 U.S. 505 (1939).

132. *Id.* at 510.

133. *Id.* at 510-11.

134. 308 U.S. 463, 471.

135. *Id.* at 464-64.

The Supreme Court granted certiorari specifically to address the asserted violation of the well-established rule that Puerto Rican tribunals were not overruled in their interpretation of local statutes in the absence of clear or manifest error. Mr. Justice Douglas delivered the opinion of the Court and stated that for over sixty years the Court had consistently recognized the deference due the interpretations of local law made by local courts unless these appeared to be clearly wrong; the case law had resulted in repeated admonitions to this effect and this rule was deemed to be based on sound policy.¹³⁶ He cited the Court's concern for the orderly development of Puerto Rico through deference to its local tribunals which had been stated in *Sancho Bonet v. Yabucoa Sugar Co.*¹³⁷ He added in no uncertain terms: "We now repeat once more that admonition. And we add that mere lip service to that rule is not enough."¹³⁸ He then set out the elaboration of the rule noted earlier and reversed the judgment of the First Circuit.

The subject of land reform was one of intense concern in Puerto Rico during the 1930's. In 1935, the Puerto Rico legislature passed Act. No. 33 which conferred upon the Supreme Court of Puerto Rico exclusive original jurisdiction to take cognizance of all *quo warranto* proceedings instituted by the Puerto Rico government to enforce the Congressional restriction on corporations in Puerto Rico engaged in agriculture. This restriction limited the ownership of such corporations to no more than 500 acres of land and appeared in both the Foraker Act of 1900 and the Jones Act of 1917.¹³⁹ The Attorney General of Puerto Rico brought an action against Rubert Hermanos, Inc. to enforce this restriction alleging that the agricultural corporation owned more than 12,000 acres of land. The Supreme Court of Puerto Rico upheld the *quo warranto* proceeding against the subject firm, and the First Circuit Court of Appeals reversed.¹⁴⁰

Mr. Justice Frankfurter delivered the Court's opinion in this case, *Puerto Rico v. Rubert Hermanos, Inc.*¹⁴¹ and reversed the First Circuit. He interpreted the Court's ruling in *Sancho Bonet v. Texas Co.* to mean that Congress had provided Puerto Rico's legislature with authority over all matters of a legisla-

136. *Id.* at 470.

137. *Id.* at 470-71.

138. *Id.* at 471.

139. The local legislation was an attempt to solve the problem of agricultural latifundium on the Island. By 1930, this meant that four American sugar companies controlled over 180,000 acres of land and 11 of the 41 sugar mills on the Island. Some 26 firms or inter-related firms owned 280,000 acres of land, leased 120,000 acres and thereby controlled 20% of the Island's farm land or 50% of its sugar cane farms. See Ross, *The Long Uphill Path. A Historical Study of Puerto Rico's Program of Economic Development* 16 (1976); see also Rosenn, *Puerto Rico Land Reform: The History of an Instructive Experiment*, 33 Rev. Jur. U.P.R. 189 (1964).

140. See *Puerto Rico v. Rubert Hermanos, Inc.* 309 U.S. 543 (1940).

141. *Id.*

tive character not locally inapplicable. This meant that the grant of legislative power was as comprehensive and broad as language could make it. He construed the public policy embodied in the Puerto Rico statutes in terms of: (i) local concern to effectuate the Congressional restriction on corporate land holdings; (ii) the special needs of a congested population largely dependent for its livelihood on the land; (iii) the consistent policy of Congress in this regard against attempts to modify the restriction; and (iv) found that the Puerto Rico legislature was not barred (by the absence of a specific federal remedy for a violation of the restriction) from enacting its own local enforcement measures.¹⁴² Mr. Justice Frankfurter further held that the imposition of a fine by the insular high court pursuant to its grant of ancillary relief was within the scope of authority properly conferred on it by the Puerto Rico legislation; its exercise of that authority was accordingly upheld.¹⁴³

In *Rubert Hermanos II*¹⁴⁴ the Puerto Rico Supreme Court, upon the petition of the Island's Attorney General, had appointed a receiver for all the firm's property; it directed the receiver to handle the property as a going concern until Puerto Rico exercised its option to confiscate the real estate unlawfully held or to sell it at auction. The First Circuit Court of Appeals reversed this decision and was itself reversed by the U.S. Supreme Court. Mr. Justice Byrnes delivered the opinion of the Court and applied the doctrine of judicial autonomy. He found that the insular high court had resolved the conflict before it in favor of its power to appoint a receiver; it did so by holding that the relevant provisions of the Private Corporation Law did not apply but Section 132 of the Code of Civil Procedure did apply. Mr. Justice Byrnes repeated that the Supreme Court's decisions had consistently held that the interpretation of the Island's statutes by its own courts was to be accorded the greatest weight. He held that while the interpretation of the First Circuit Court of Appeals may have been equally plausible, it erred in reversing the judgment of the Puerto Rico Supreme Court.¹⁴⁵

Mr. Justice Byrnes concluded that the Puerto Rico Supreme Court was in the best position to determine what was required in this situation; it was within the discretion of the insular high court to resolve the difficulties that resulted in interpreting the local law. The order of the Puerto Rico Supreme Court was sustained in full, and (for the first time in this long line of cases) there was a dissent on the grounds that the appointment of the receiver was an abuse of discretion and that it was the First Circuit's duty to set the appointment aside.¹⁴⁶

142. *Id.* at 548.

143. *Id.* at 550 & n. 5.

144. *Puerto Rico v. Rubert Hermanos, Inc.*, 315 U.S. 637 (1942).

145. *Id.* at 646.

146. *Id.* at 647-48.

The attitude towards and the application of the local deference rule by the First Circuit in *De Castro v. Board of Com'rs of San Juan*¹⁴⁷ demonstrated a marked departure from previous decisions. In affirming the judgment of the Puerto Rico Supreme Court, the First Circuit stated that had it been free to hold a wholly independent point of view on the issue before it, it would have held that the insular high court went beyond the permissible parameters of interpretation. However, it added that it was constrained by the U.S. Supreme Court's ruling in *Sancho Bonet v. Texas Co.* to affirm the Puerto Rico Supreme Court. The insular high court had held that the applicable statute limited the term of the city manager of San Juan to the same length as that of the persons who appointed him. The petitioner alleged that the First Circuit's holding closed the doors of appellate review by discriminating in favor of those persons who through diversity jurisdiction could litigate local matters in the District Court of Puerto Rico.¹⁴⁸

The Supreme Court granted certiorari to review the decision of the First Circuit on the grounds raised by the petitioner and unanimously affirmed the appellate court's decision. The essential principle enunciated by Mr. Justice Holmes, viz., that deference was to be paid by the federal tribunals to the local norms and the interpretation of such norms by the insular tribunals, even though other interpretations were possible, was restated by the Court. The role of the appellate court in this area was the delicate task of examining and appraising the local law in its context, with a sympathetic disposition to safeguard in matters of local concern the law's adaptability to local practices and needs; where such an examination found the rule adopted by the local tribunal to be intelligible, in harmony with local law or practice, it was not to be rejected because it was believed that a better one could be developed or because it was out of harmony with the traditional system of law and statutory construction.¹⁴⁹

Given the claim of discrimination in favor of litigants who proceeded in the federal district court under diversity jurisdiction, the Supreme Court emphasized the applicability of the rule of local deference to both the federal district and the appellate courts. The Court insisted that it did not follow that the application of the rule of deference, by the appellate court, would lead to the establishment of local law differing from that developed in the federal district court sitting in the Island. The Court said it was the duty of the federal courts in the district and appellate courts to defer to the local understanding, when it had been expressed in the judicial decisions of the insular courts. It

147. 322 U.S. 451 (1944).

148. *Id.* at 452-54.

149. *Id.* at 458-59.

found no difference between this situation and that of the federal appellate courts required to follow state law in diversity cases.¹⁵⁰

The particular civil law background of Puerto Rico jurisprudence was the essential foundation for the doctrine of judicial autonomy. Its subtlety had been captured by Mr. Justice Holmes in *Benítez Díaz v. González y Lugo*¹⁵¹ and was restated by Mr. Chief Justice Stone:

From the beginning we have recognized that the appellate review of insular cases was not given to the federal courts for the purpose of superimposing upon the Spanish law our common law preconceptions, except so far as that law must yield to the express will of the United States. Hence we have emphasized as a cardinal principle of review in such cases that the mere fact that our own system of law and statutory construction would call for the application of one rule to a given set of facts, does not preclude the adoption of a different one by the insular courts. If the rule thus announced by the insular courts is one which is not plainly inconsistent with established principles of the local law, or in their absence is one accepted by the practice of the community, it will not be rejected here merely because it is not in logical harmony with the rules which we would apply to a community within the United States. It will be rejected only on a clear showing that the rule applied by the local court does violence to recognized principles of local law or established practices of the local community. (citations omitted)¹⁵²

Puerto Rican courts were free to develop their interpretation of local norms and unless such interpretation was plainly inconsistent with federal law it was entitled to due deference.

This line of cases led the First Circuit Court of Appeals to promulgate Rule 39(b) of its local rules of procedure which went into effect on September 20, 1940. Rule 39(b) authorized the summary dismissal or affirmance of judgments that were appealed from the Puerto Rico Supreme Court involving solely questions of local law, unless the statement on appeal filed by the appellant alleged that the judgment appealed from was inescapably wrong or patently erroneous.¹⁵³ Whether this rule constituted an abdication of the obligation of the Court of Appeals to decide cases on the merits was the subject of *Marla Mercado e Hijos v. Olivieri Commins*.¹⁵⁴ The issue was thus

150. *Id.* at 459.

151. 261 U.S. at 106-06.

152. 322 U.S. at 455-56.

153. See *Marla Mercado e Hijos v. Olivieri Commins*, 322 U.S. 465, 466 (1944).

154. 322 U.S. 465 (1944).

cast in terms of whether the decision of the Puerto Rico Supreme Court was so manifestly correct as to make any appeal from it frivolous, which in turn would justify the dismissal of the appeal without a hearing by merely inspecting the record on its face.¹⁵⁵

This case involved an agricultural partnership which sought a rescission of a sale of a plantation made by Elvira Olivieri Commins to persons other than the petitioners. Such a sale was alleged to be in fraud of an option to buy the property given to the partnership by Ms. Olivieri Commins. The insular district court gave judgment for the respondents and the Supreme Court of Puerto Rico affirmed. The First Circuit Court of Appeals applying Rue 39(b) considered the typewritten record, the appellants' statement on appeal, without oral argument, and affirmed the case without an opinion.¹⁵⁶

Mr. Chief Justice Stone carefully examined the decision of the Supreme Court of Puerto Rico and found it supported by the applicable statutory provisions. Speaking for a unanimous Supreme Court, he held that under the *De Castro* case it was the duty of the appellate court and of the U.S. Supreme Court to examine and assess local law in cases brought to review from the Island's courts, which could not normally be done summarily. However, full argument of the case under review had not shown any issue of Puerto Rico law, or a question of the deference due the decisions of the Puerto Rico Supreme Court so substantial as to preclude the summary action of the First Circuit.¹⁵⁷ The application of the rule of local deference by the First Circuit in the *De Castro* and *Marfa Mercado e Hijos* cases resulted in an affirmance of the decisions of the Puerto Rico Supreme Court and were in turn affirmed by the U.S. Supreme Court.

The tensions created by the dual system in Puerto Rico were harmonized through the application of the rule of local deference. The bifurcated courts created by the military authorities and sanctioned by the Foraker and Jones Acts were compelled to yield to the local law in its application and interpretation. The appellate review function which was added to the federal-insular duality was controlled by the U.S. Supreme Court with the result that its exercise was to be informed by the judgments of the insular tribunals and to be constrained from applying an equally plausible interpretation in their stead. The consequences of the anomaly of the review of the decisions of the highest court of Puerto Rico by the First Circuit Court of Appeals rather than by the U.S. Supreme Court were thus softened and led to the zealous concern of the U.S. Supreme Court which resulted in its application of the doctrine of judicial autonomy.

155. *Id.* at 466.

156. *Id.* at 466-67.

157. *Id.* at 471.

The concept of judicial autonomy preceded and continued after the creation of the Commonwealth of Puerto Rico on July 25, 1952. The Congress had granted the people of Puerto Rico the power to enact the constitution which gave rise to the Commonwealth (subject to the approval of Congress). This status, however, is not to be confused with that of states of the United States who have denominated themselves as commonwealths such as Virginia, since Virginia is a state and Puerto Rico is not. While some have argued that the creation of the Commonwealth changed Puerto Rico's status by providing it with sovereignty over matters not ruled by the Constitution,¹⁵⁸ the fact that the First Circuit exercised jurisdiction over Puerto Rico's highest court from 1915 until 1961 stands in sharp contrast to this proposition. Such jurisdiction continued for nine years after the establishment of the Commonwealth, and this can hardly be interpreted as a sign of institutional deference due it. The result was a Congressional act in 1961 which removed the jurisdiction of the First Circuit Court over the Puerto Rico Supreme Court and which provided for appeal and writ of certiorari from the insular high court to the U.S. Supreme Court.¹⁵⁹

Yet, the elements that compelled the deference which gave rise to the rule of local deference remain and have continued to be applied. They were restated in 1970 in a *per curiam* decision of the U.S. Supreme Court in *Fornaris v. Ridge Tool Co.*¹⁶⁰ The case involved a dealer who brought an action in the local court for damages for breach of his distributorship contract by the Ridge Tool Co. The suit was removed by the subject firm to the District Court of Puerto Rico on the basis of diversity jurisdiction. The Dealer's Contract Law was passed by the Puerto Rico legislature in 1964 and provided that a Puerto Rican dealer's contract with a manufacturer was renewable indefinitely at the option of the local dealer, unless the manufacturer had just cause to terminate the contract. Just cause was defined as the non-performance by the dealer of any essential obligation of the contract, or any action or omission by the dealer which adversely and substantially affected the interests of the principal or grantor in promoting marketing or distribution of the good or service. These provisions were applicable although a contract might have a termination clause.¹⁶¹

The District Court denied a motion to dismiss and the First Circuit Court of Appeals considered an interlocutory appeal. The First Circuit held that the statute violated the due process clause of the U.S. Constitution without

158. See Magruder, *supra* note 123; see also *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 671-74 (1974).

159. See Commonwealth Office, *supra* note 26, at 209-10.

160. 400 U.S. 41 (1970).

161. *Id.*

specifying whether the Fifth or Fourteenth Amendment was involved. In reversing the First Circuit Court of Appeals, the U.S. Supreme Court restated the principles that underlie the doctrine of judicial autonomy:

The relations of the federal courts to Puerto Rico has often raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal courts, reversing Puerto Rican courts, were inclined to construe Puerto Rican laws in the Anglo-Saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by the Court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be "inescapably wrong" (citation omitted).¹⁶²

The Court found that the Puerto Rico Supreme Court had not authoritatively construed the statute; it was unsure whether the insular high court would define "just cause" as broadly as the First Circuit had or whether it might judicially confine it to a narrow definition to avoid constitutional questions. It therefore reversed the First Circuit to remand the case to the District Court. The District Court was to abstain from passing on the matter until the Puerto Rico Supreme Court had declared its position on the local law question.¹⁶³

Interestingly enough, the U.S. Supreme Court held that the appeals filed in this case were improper. It found that Puerto Rico was not a state for the purposes of the jurisdictional statute, 28 U.S.C. Section 1254(2), and therefore appeals from the appellate court relying on a Puerto Rico statute were not authorized. This was contrasted with 28 U.S.C. Section 1258, another jurisdictional statute, which expressly provided for review of the final judgments or decrees rendered by the Commonwealth of Puerto Rico Supreme Court whether by appeal or writ of certiorari. The Court stated that applying its rule of strict construction of jurisdictional statutes that it would not give an expansive interpretation to the word "state" so as to include Puerto Rico under 28 U.S.C. Section 1254(2). It held that the appeals were improper and dismissed them. However, it treated the jurisdictional statements in the appeals as petitions for writs of certiorari and granted these.¹⁶⁴

The doctrine of judicial autonomy applied through the rule of local deference surfaced in General Order No. 101 as a desire by the United States chief executive to maintain the local laws and tribunals. Its further develop-

ment by the U.S. Supreme Court as a method to protect the interpretations of the insular tribunals against alternative views by the federal forums affecting the Island produced a viable concept which did much to safeguard the local view. It did not, however, remove the inevitable tensions and strains that arise from the separate institutional apparatus that has a reviewing function over the Island, and it is as necessary today as it was when Mr. Justice White and Mr. Justice Holmes were its chief exponents.

The very existence and application of the doctrine of judicial autonomy protected at least one international norm concerning annexed territories and that is that the laws and customs in effect would be continued, unless contrary to the fundamental rules of the annexing state. This principle was the gravamen of Lord Mansfield's decision in *Campbell v. Hall*^{164a} where the United Kingdom had guaranteed Grenada that its laws would be continued in force, except as modified by its own assembly with the consent of the governor and council. In derogation of this principle the King proclaimed a four and one half per cent duty on sugar exported from the Island; the duty was struck down by the court as violative of the King's original grant which was held to override the subsequent proclamation.^{164b}

In passing upon the controversy before him, Lord Mansfield set out six propositions which continued to serve as a viable framework for assessing the rights of conquered territories. The three most relevant norms here were that (i) the laws and legislative government of every dominion equally affected all persons and property within its limits, and this was the rule of decision for all questions which arose there as whoever purchased, lived, or sued there, placed himself under its laws; (ii) the laws of the conquered territory continued in force until altered by the conqueror; and (iii) if the sovereign (without Parliament) had the power to alter the old laws and introduce new laws, such legislation was subordinate to his own authority in Parliament, and no change could be made against fundamental principles.^{164c} Thus, the laws of the territory were in force until the constitutional processes of the annexing state decreed otherwise thereby insuring in the interim both legislative and judicial autonomy. The law of nations and the rights of territories converged at this time to allow for the development and application of the local view as a

164a. 1 Cowp. 204 (1774).

164b. *Id.* at 213.

164c. *Id.* at 208-09. The other principles were: (i) a conquered territory became a dominion of the sovereign, and therefore subject to his legislature; (ii) the conquered inhabitants once received under the sovereign's protection became subjects, and were not to be considered either as enemies or aliens; and (iii) the articles of capitulation which surrendered the country and the articles of peace which ceded it were sacred and inviolable to be interpreted according to their true intent and meaning.

162. *Id.* at 42.

163. *Id.* at 44.

164. *Id.* at 42 & n. 1.

rule of decision or law—a process properly denominated in Puerto Rico as the Rule of local deference reflected in the doctrine of judicial autonomy.

THE NULLIFICATION AND IMPLIED APPROVAL DOCTRINES

The scholarly literature on Puerto Rico has almost as a matter of course mentioned that under the Foraker Act of 1900 the laws promulgated by the Puerto Rico legislature (consisting of an appointed upper house—the Executive Council—and a popularly elected lower house—the Chamber of Deputies, were to be reported to Congress which reserved the power to nullify any of these acts.¹⁶⁵ The Jones Act of 1917 transformed the Puerto Rico legislature

165. The Foraker Act created a civilian government consisting of a governor (who was appointed by the President with the advice and consent of the U.S. Senate); an Executive Council of eleven members (the President appointed six members of the Council (who were also members of the governor's cabinet, namely, the Secretary, Attorney General, Treasurer, Auditor, Commissioner of the Interior, and Commissioner of Education) and the governor appointed the remaining five); and a Chamber of Deputies which was popularly elected on the basis of male suffrage. It should be noted that Puerto Rican women were not afforded the right to vote on the Island until 1932. The right was extended to women by act of the Puerto Rico legislature dated April 16, 1929 but with the proviso that it not take effect until 1932. This was despite the fact that in 1920 the Nineteenth Amendment to the U.S. Constitution granted the right to vote regardless of sex. See Clark, *Puerto Rico and the United States, 1917-1933*, at 45 (1975); Tribe, *American Constitutional Law* lxvi (1978). Obviously, the Nineteenth Amendment to the U.S. Constitution was not made applicable to Puerto Rico which would be consistent with the interpretation of the theory of incorporation set out in *Downes v. Bidwell*, *supra*.

Section 31 of the Foraker Act provided, *inter alia*,

That all laws enacted by the Legislative Assembly shall be reported to the Congress of United States, which hereby reserves the power and the authority, if deemed advisable, to annul the same.

See Commonwealth Office, *supra* note 26, at 74.

This provision was amended by Act of Congress approved July 15, 1909, which was a Congressional response to the refusal of the Chamber of Deputies to approve the governor's budget request. The Chamber had recessed without passing the budget request for the fiscal year in order to place pressure on Congress to obtain new legislation from that body on the Island. President Taft characterized the action as one of "ingratitude" and Congress promulgated the following amendment to Section 31 of the Foraker Act:

That if at the termination of any fiscal year the appropriations necessary for the support of Government for the ensuing fiscal year shall not have been made an amount equal of the sums appropriated in the last appropriation bill for such purpose shall be deemed to be appropriated; and until the Legislature shall act in such behalf the Treasurer may, with the advice of the Governor, make the payments necessary for the purposes aforesaid.

Id.

See, Lewis, *Puerto Rico: Freedom and Power in the Caribbean* 106-12 (1963), where the insular view of the dual veto phenomenon is described "as a degradation of the democratic dogma in their island society."; see also Maldonado-Denis, *supra* note 75, at 92, 95-96, 110, who quotes José de Diego, a contemporary leader, on the dual veto to the effect that it was meant to be conducive to despotic government. *Id.* at 110.

into two popularly elected chambers, namely, the House of Representatives and the Senate; however, it retained the feature of potential Congressional nullification and added the possibility of a Presidential veto.¹⁶⁶ The President was to be informed of any law passed by the legislature over the veto of the insular governor and such a statute was subject to his approval.¹⁶⁷ Additionally, the local laws of Puerto Rico whether under the Foraker or Jones Acts were subject to amendment by Congress.¹⁶⁸

166. Section 34 of the Jones Act provided, *inter alia*:

If when a bill that has been passed is presented to the governor for his signature he approves the same, he shall sign it; or if not, he shall return it, with his objections to the house in which it originated.... If, after such reconsideration, two thirds of all of the members of that house shall agree to pass the same it shall be sent, together with the objections, to the other house.... and if approved by two-thirds of all members of that house it shall be sent to the governor, who, in case he shall then not approve, shall transmit the same to the President.... If the President... approves the same he shall sign it and it shall become a law. If he shall not approve same he shall return it to the governor so stating, and it shall not become a law: *Provided* That the President of the United States shall approve or disapprove an Act submitted to him under the provisions of this section within ninety days from and after its submission for his approval; and if not approved within such time it shall become a law the same as if it had been specifically approved.... All laws enacted by the Legislature of Puerto Rico shall be reported to the Congress of the United States, as provided in section twenty-three of this Act, which hereby reserves the power and authority to annul the same.

Commonwealth Office, *supra* note 26, at 99.

167. *Id.* The fears that this power might be exercised by the President were realized when President Truman vetoed an insular act seeking to make Spanish the medium of instruction in the Puerto Rico public schools. In 1946, the Puerto Rico legislature passed Senate Bill No. 51 which provided that beginning with the 1946-47 school year, instruction in the public schools, including the university, were to be exclusively in Spanish. The bill was passed over the veto of the Island's governor. When the bill was returned to him, he transmitted it on April 30, 1946 to the Director of the Division of Territories and Insular Possessions in the U.S. Interior Department. The law remained in the Division from May 6 to August 6, 1946 when it was transmitted to the White House. On October 25, 1946, the President vetoed the legislature, and, on January 28, 1948, the Supreme Court of Puerto Rico sustained the efficacy of the veto by declaring that the statute never became a law in *Parrilla v. Martín, Comisionado*, 68 D.P.R. 90 (1948). See *Serrano Geyls, El Caso del Idioma: Un Comentario*, 17 Rev. Jur. U.P.R. 301-03, 334 no. 110 (1948). Spanish would not become the medium of classroom instruction in Puerto Rico's public schools until August 6, 1949 when the Commissioner of Education Villaronga implemented this policy in the Island's high schools with the approval of Puerto Rico's first elected governor. See Rodríguez Bou, *Significant Factors in the Development of Education in Puerto Rico* in United States-Puerto Rico Commission on the Status of Puerto Rico, 168 (1966); for a background into language policy in the Island's schools, see Negrón de Montilla, *Americanization in Puerto Rico and the Public School System, 1900-1930* (1970).

168. Section 8 of the Foraker Act provided, *inter alia*,

That the laws and ordinances of Puerto Rico now in force and effect shall continue in full force and effect, except as altered, amended, or modified hereinafter, or as altered or modified by military orders and decrees in force when this Act shall take effect, and so far as the same are not inconsistent or in conflict with the statutory laws of the United States not locally inapplicable, or the provisions hereof, until altered, amended, or repealed by the legislative authority hereinafter provided for

The literature on the actual impact of these provisions on Puerto Rico statutes is sparse and it seems that very little consideration has been given to the judicial interpretation of these provisions. A review of the relevant Supreme Court case law however discloses that the nullification provisions rather than used to limit the powers of the local legislature were seen as impliedly approving all acts not formally disapproved by Congress. Indeed, such a result would seem to follow from the rule of local deference which has already been described as the basis for the doctrine of judicial autonomy.

A. The Doctrine of Legislative Autonomy

Mr. Justice White provided the clearest elaboration of this rule of implied approval in *Romeu v. Todd*.¹⁶⁹ This was a suit brought in equity in the District Court of Puerto Rico to enjoin the sale of a piece of property which had been purchased by one Higinio Romeu without knowledge of the pendency of a suit concerning the property initiated by Robert H. Todd. The District Court held that the laws of Puerto Rico relating to filing a notice of *lis pendis* had no application in the case; it found in favor of Todd on the ground that the pendency of Todd's lawsuit in equity constituted constructive notice to third parties. The Supreme Court reversed the judgment on the ground that the lower court was required to apply the fundamental rules of real property obtaining in Puerto Rico including the rule relating to the filing of notice *lis pendis*.¹⁷⁰

Puerto Rico or by Act of Congress of the United States...

Commonwealth Office, *supra* note 26, at 67.

This provision repealed the local prohibition forbidding the marriage of priests, ministers, or followers of any faith; conferred on persons lawfully married all rights and remedies granted by law for either civil or religious marriages; and altered the marriage law by adding the ground of adultery by husband or wife. Section 8 was also subject of the government's contention in *Ochoa v. Hernández Morales*, *supra*; the government claimed that this section had approved the judicial order involved in that suit and the Supreme Court held that the military governor was without authority to issue the order in question thereby rejecting the government's claim.

Section 57 of the Jones Act provided:

That the law and ordinances of Puerto Rico now in force shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the Legislative authority herein provided for Puerto Rico or by Act of Congress of the United States; and such legislative authority shall have power, when not inconsistent with this Act, by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this Act as it may from time to time see fit.

Commonwealth Office, *supra* note 26, at 111-12.

169. 206 U.S. 358 (1907).

170. *Id.* at 27 S.Ct. at 725-26, 728.

In reversing the District Court, Mr. Justice White held:

The district court of the United States for Porto Rico is in no sense a constitutional court of the United States, and its authority emanates from Congress under the sanction of the power possessed by that body to govern territory occupying the relation to the United States which Porto Rico does...

....

[A]s a result of the relation which Porto Rico occupies to the United States, all the local law of that island has its ultimate sanction in the lawful exercise by Congress of its legislative authority.... This being true, we cannot assent to the conclusion that the court of the United States created by Congress had the authority to disregard the local law which Congress, by express legislation directed to be continued in force.¹⁷¹

Except where the local law was inconsistent with or in conflict with the laws of the United States, or otherwise altered or repealed by Congress, the District Court was compelled to give deference to and apply local Puerto Rican law.¹⁷²

The fact that Congress had the power to nullify the local law of Puerto Rico meant that such law was within the legislative control of Congress with the result that local enactments derived both authority and approval from the federal body. So long as Congress did not undertake to reverse a local Puerto Rico statute, its power of nullification legitimated the assertion of legislative autonomy and required deference from reviewing tribunals:

Considering the manifest intent of Congress, we cannot close our eyes to the fact that that body, in providing a government for Porto Rico, evidently intended to preserve to the people of that island the system of local law to which they had been accustomed; nor can we, consistently with this enlightened purpose, assent to the conclusion that the mere provision of the act by which a court was created to enforce the local law empowered the court so created to set at naught the local law by disregarding fundamental rules of real property governing in the island, thereby creating confusion and uncertainty, and tending to the destruction of the rights of innocent third parties. Especially is this conclusion rendered necessary when a consideration, previously adverted to, is called to mind; that is, that all the local law of Porto Rico is within the legislative control of Congress.¹⁷³

171. *Id.* at 728.

172. *Id.*

173. *Id.*

The power of Congress to render nugatory the legislative enactments of the Island resulted in positive affirmation of local norms so long as the latter were not themselves in conflict with federal preemptory norms.¹⁷⁴

174. See, e.g., the U.S. Supreme Court actions on real property and trust cases which constitute the largest category of cases decided by the Court in relation to Puerto Rico. These cases include *Sisto v. Sarria*, 196 U.S. 175 (1905) (where a co-heir was entitled to recover one half of the amount due on a mortgage debt which was claimed to have been discharged by legal payments); *Ortiz de Rodríguez v. Vivoni*, 201 U.S. 371 (1906) (an action for the partition of real estate was dismissed where the terms of the testator's will were clear as to its meaning); *Romeu v. Todd*, *supra*; *Fernández y Pérez v. Pérez y Fernández*, 202 U.S. 80 (1906) (where a common-law action of wrongful and malicious attachment was filed in the District Court of Puerto Rico and no such action was enforceable under Puerto Rican procedure, the District Court had no jurisdiction over the action and any proceedings were a nullity); *Gonzot v. Ríos de Rubio*, 209 U.S. 283 (1908) (the District Court of Puerto Rico had no jurisdiction to consider a bill in equity which sought to administer and settle the estate of a decedent in disregard of the authority of the local insular courts); *Ubarri y Yamategui v. López Laborde*, 214 U.S. 168 (1909) (there was no fraud in the case of a creditor enforcing his debts after a division of an estate); *López Laborde v. Ubarri*, 214 U.S. 173 (1909) (there was no right to retain an attachment over the property of two non-resident heirs over which the District Court of Puerto Rico had no jurisdiction); *Cabrera y Pruna v. American Colonial Bank*, 214 U.S. 224 (1909) where a mortgage was given as security for a debt, the property was mortgaged for the entire debt and liability extended to the entire debt); *Todd v. Romeu*, 217 U.S. 150 (1910) (the pendency of a lawsuit involving real property did not create a defect in the title or engender a lien on the property so long as the cautionary notice required by law was not obtained); *Volcey Souffront v. La Compagnie des Sucreries de Porto Rico*, 217 U.S. 475 (1910) (the decree or judgments of French and Puerto Rican courts prior to the cession of Puerto Rico to the United States were *res judicata* as to claims on real estate, unless these rights had subsequently arisen); *Pérez y Fernández v. Fernández y Pérez*, 220 U.S. 224 (1911) (where an action was sustained to collect an unsatisfied debt by the sale of real property and the jurisdiction of the court rested on notice by publication, the federal law gave a right to the party so affected to appear within one year and reopen the suit to make a defense); *Blanco y Blanco v. Hubbard*, 220 U.S. 233 (1911) (it was an error for the District Court of Puerto Rico to refuse to stay the execution of a judgment on real property of a third party purchaser who had not participated in the proceeding); *Ruiz de Noble v. Gallardo y Scary*, 223 U.S. 65 (1912) (it was an error for the District Court of Puerto Rico to apply the doctrine of laches, or passage of time short of the statute of limitations in Spanish law, to foreclose a lien on real property executed in 1865); *Cuebas y Arredondo v. Cuebas y Arredondo*, 223 U.S. (1912) (the District Court of Puerto Rico was correct in dismissing a suit to foreclose on real property where there was no diversity of citizenship between the plaintiff and all of the defendants); *Martino González v. Ramos Bust*, 224 U.S. 126 (1912) (the District Court of Puerto Rico was correct in dismissing a suit on the basis of *res judicata*); *Burnet v. Desmornes y Alvarez*, 226 U.S. 145 (1912) (where the nephew and heir of a decedent failed to raise the defense that the applicable statute of limitations had run, the Supreme Court of Puerto Rico had the power to enter a decision on behalf of the illegitimate children of the decedent); *Veve y Díaz v. Avalo Sánchez*, 226 U.S. 234 (1912) (where a seller of property received money on the faith of the statement that he was the owner of the property, he was bound to repay the same, or failing this, to perfect the title of the property, so that when he acquired the land which he had originally included in the land conveyed by mortgage, the title inured to the benefit of the land purchaser); *Gutiérrez del Arroyo v. Graham*, 227 U.S. 181 (1913) (the District Court of Puerto Rico was correct in enforcing a contract to sell land by providing specific performance in a bill in equity); *Porto Rico v. Rosaly y Castillo*, 227 U.S. 270 (1913) (the government of Puerto Rico is entitled to sovereign immunity from suits to which it has not consented); *Rosaly v. Graham y Frazer*,

In 1904, the Puerto Rico legislature modified the insular district courts which had been continued under the Foraker Act. This modification was attacked in a criminal case in which the defendant alleged that the change from the three judge courts created by the military orders to the one judge

227 U.S. 584 (1913) where one partner in a partnership has withdrawn capital from the firm over time becoming a debtor to the firm, there was not property interest remaining giving rise to any claim on the real property in issue); *Torres Zayas v. Lothrop, Luce & Co.*, 231 U.S. 171 (1913) (the state of the public record as to title is the dominant factor in the local law of Puerto Rico controlling proceedings for the foreclosure of a mortgage); *Van Syckel v. Arsuaña*, 231 U.S. 601 (1914) (a lease is extinguished by the purchase of the leased property under a foreclosure sale); *Calaf y Fugurul v. Calaf y Rivera*, *supra* (a prior judgment barred a suit seeking the filiation of five persons); *Porto Rico v. Ramos*, 232 U.S. 627 (1914) (an action in ejectment consented to by Puerto Rico was proper); *Martinez Nadal v. May*, *supra* (where a wife's assent to conveyance made by her husband was made necessary by the Civil Code of March 1, 1902, which did not go into effect until July 1, 1902, a conveyance made without the wife's assent on June 2, 1902 was appropriate); *Monogas v. Albertucci y Alvarez*, 235 U.S. 81 (1914) (a conditional contract in sale is not to be treated as the same as the mortgage); *Porto Rico v. Emmanuel*, 235 U.S. 251 (1914) (no damages against Puerto Rico for the improper registry of private land in its name could be awarded in light of the elapsed one year statute of limitations); *Mercelis v. Wilson*, 235 U.S. 579 (1915) (the District Court of Puerto Rico was correct in treating a bill in equity as in the nature of a bill to quiet title); *Gallardo y Scary v. Noble*, 236 U.S. 135 (1915) (where the object of a mortgage instrument was only to pledge the crops, the mortgage bound only the crops and not the sugar plantation); *Neron Longpre v. Díaz y Quiñones*, 237 U.S. 512 (1915) (in the absence of the bad faith of an heir, there is no liability for the return of fruits and revenues during the period of the heir's possession, even though the bad faith of the author of such acts was established during the period of the author's possession); *Parker v. Monroig*, 239 U.S. 83 (1915) (an easement of way across two farms for the operation of a private railway pursuant to an option to buy in a written agreement was an obligation that ran with the land); *De Elzaburu v. Chaves*, 239 U.S. 283 (1915) (special local possessory proceedings to establish ownership of property did not produce a *res judicata* effect); *Suris Cardona v. Quiñones*, *supra* (a party cannot claim the benefits which the local Puerto Rico law granted third parties, where the knew that his vendors of real property were not the owners and had no possession of the property sold); *Benítez Díaz v. González y Lugo*, *supra* (the authority to sell the land of a minor may be provided by a local court of competent jurisdiction and is not limited to the insular district court where the land is situated); *Bianchi v. Mendla Morales*, 262 U.S. 170 (1923) (Puerto Rico could exclude all claims of possessory rights consistently with the notion of due process); *B. Fernández & Bros. v. Ayllon*, *supra* (where title to land is good on its face and the possessor had no notice of any extrinsic defect, it will be found to be good title in ten years); *Public Service Comm'n of Puerto Rico v. Havemeyer*, 296 U.S. 506 (1936) (the cancellation of an irrigation privilege was proper); *Puerto Rico v. Rubert Hermanos, Inc.*, 309 U.S. 543 (1940) (Puerto Rico was entitled to enforce the Congressional restriction on the ownership of more than 500 acres by an agricultural corporation); *Puerto Rico v. Rubert Hermanos, Inc. (II)*, 315 U.S. 637 (1942) (the Puerto Rico Supreme Court had the power to appoint a receiver to preserve as a going enterprise real estate which constituted a working unit in growing, cutting, and gridding sugar); and *Maria Mercado e Hijos v. Olivieri Commis.*, *supra* (the assignment of mortgage credits conveyed rights under an option to purchase the property as an inseparable incident of the credits so that after the transfer there was no longer an entitlement to exercise the option). Overall these opinions sustained the local legislative prerogatives and applied where appropriate the Spanish civil law of the Island, while requiring the relevant federal tribunals to also apply local law.

courts enacted by the local legislature violated the Foraker Act.¹⁷⁵ Mr. Justice White found that the challenge to the local legislation raised a federal question. However, in light of the legislative grant of authority and the judicial power given Puerto Rico, he found the attack to be so frivolous that the Court was without jurisdiction to pass upon the matter.¹⁷⁶ Such a summary disposition nevertheless sustained the legislative prerogatives of Puerto Rico and was in keeping with the deference to be accorded local enactments.

A more serious challenge to a Puerto Rico statute was an attack on a summary foreclosure proceeding in which the only defense was payment. The local law was alleged to authorize a deprivation of property without due process of law.¹⁷⁷ Mr. Justice Holmes in *Bianchi v. Mendia Morales*¹⁷⁸ considered the constitutional due process objection to be simply another way of challenging the distinction between possessory and petitory suits prevalent in countries with Roman law and unfamiliar at common law. He held that Puerto Rico was free to exclude all claims of ultimate right from possessory actions; such exclusion would be consistent with due process. He found the constitutional claim to be only colorable and affirmed the dismissal of the bill.¹⁷⁹ The civil law distinctions were thus maintained.

The rulings in *Kent v. Porto Rico* and *Bianchi v. Mendia Morales* are consistent with the principle of local self-government which is affirmed by the doctrines of nullification and implied approval. The utility of these concepts is that they plainly establish a convenient way of affirming local law by using the test that once Congress is informed of a matter its silence on the issue may in a given situation be interpreted as approval. The classic example of the application of these principles was *Romeu v. Todd*. A similar illustration is that of *Gromer v. Standard Dredging Co.*¹⁸⁰ This case involved a decree of the District Court of Puerto Rico which enjoined the enforcement of a local tax on machinery and boats which were in the harbor of San Juan pursuant to a federal contract. The U.S. Supreme Court reversed the lower court rejecting thereby the claims that the property in question was not subject to the insular taxing power because it was situated in the harbor and that title to the harbor rested with the United States, not Puerto Rico.¹⁸¹

Mr. Justice McKenna delivered the opinion of the Court in this case and observed that the Foraker Act had turned over to the local government of

175. See *Kent v. Porto Rico*, 207 U.S. 113 (1907).

176. *Id.* at 28 S.Ct. 57.

177. See *Bianchi v. Mendia Morales*, *supra*.

178. *Id.*

179. 262 U.S. at 171-72.

180. 224 U.S. 362 (1912).

181. *Id.* at 32 S.Ct. 499, 503.

Puerto Rico all of the property obtained from Spain by the United States through cession with the exception of harbor areas and navigable rivers. A federal statute passed in 1902 further delimited the public property between Puerto Rico and the United States by reserving land and buildings for federal use. It exempted those public lands which it did not reserve to itself. This was interpreted by the Court to mean that the federal government could exercise proprietary reservations. The effect was not to limit the powers of the local government.¹⁸²

The Court cited the opinion of the Attorney General that the ordinary national control of the marine belt applied to the coastal waters of Puerto Rico no differently than it would any state or territory of the United States. Puerto Rico's control over its harbor margins was deemed to be in the same position as that between the United States and a state; the reason for this was the grant of power given by the Foraker Act to the Puerto Rico government. As a result, the United States was unable according to the Attorney General to appropriate the Puerto Rico's offshore island of Culebra for a naval base. Similarly, the Court believed that the United States had not reserved governmental control over the harbor areas, although it could have done so.¹⁸³

The Court cited the position of the executive on the nullification doctrine with respect to the Philippines:

It was said in the course of the [Attorney General's] opinion, after referring to the provisions of the Philippine act which directed that all laws passed by the Philippine government should be reported to the Congress, and the reservation by Congress of the power to annul the same (a similar provision is in the Porto Rico act), that "the relation of Congress to all territorial legislation is similar [certain organic acts of the States being cited], and thus it may be said that the exercise of local jurisdiction for ordinary municipal purposes is valid until and unless disapproved by Congress."¹⁸⁴

Local law was thus authorized unless otherwise disapproved by Congress, and this principle was applicable throughout the territories.

The principle of potential nullification was linked to the doctrine of legislative autonomy. The Court was free to imply Congressional consent since Congress had the power to indicate otherwise. Mr. Justice McKenna brought these elements together in terms of local autonomy and protection against abuse:

182. *Id.* at 500.

183. *Id.* at 501-02.

184. *Id.* at 502.

The governmental powers conferred upon Porto Rico must be coextensive with that area, subject to the reservation that all laws passed shall not be in conflict with the laws of the United States, and the power of enacting such laws is conferred upon the legislative assembly. There is precaution against abuse. They must be reported to Congress, which has the power to annul them.

The purpose of the act is to give local self-government, conferring an autonomy similar to that of the states and territories, reserving to the United States rights to the harbor areas and navigable waters for the purpose of exercising the usual national control and jurisdiction over commerce and navigation.¹⁸⁵

The Congressional supervisory role legitimated what it did not nullify thus lending its status to local enactments which were subject to its review. The Supreme Court sustained the local tax on the property in question. It should be added that even the three dissenting justices agreed that the territory of Puerto Rico had jurisdiction over the harbor and waters in issue and that the use of property for government purposes did not exempt it from taxation.¹⁸⁶

The Court had plainly evolved a doctrine of legislative autonomy and had found support for it in the nullification power of Congress. The relevant literature on the nullification power has viewed this as a limitation without detailing in which ways this was the case. Whatever the validity of that approach and given the Truman veto there is at least some merit to it, the literature has not examined the positive use made of the doctrine to sustain the enactments of the Puerto Rico legislature. The doctrine of legislative autonomy was strengthened rather than diminished by the principle of potential Congressional nullification.

The principles set out by Mr. Justice White and Mr. Justice McKenna were rearticulated by Mr. Justice Sutherland in *Puerto Rico v. Shell Co.*¹⁸⁷ This was a criminal prosecution under the Puerto Rico Anti-Trust Act of 1907 against the Shell Company for a conspiracy in restraint of trade. The Supreme Court of Puerto Rico and the First Circuit Court of Appeals held that the insular statute was void on the ground that the federal Sherman Anti-Trust Act, as amended, had occupied the entire field embraced by the Puerto Rico statute. The Supreme Court reversed on the ground that there was nothing in the relevant organic acts, nor in any other federal statute which limited the legislature only to those subjects where there was no specific federal law.¹⁸⁸

185. *Id.* at 502.

186. *Id.* at 503.

187. 302 U.S. 253 (1937).

188. *Id.* at 255, 271.

The objectives of the Foraker and Jones Acts were identified by the Court as providing the basis for local autonomy.¹⁸⁹ The grant of legislative power was deemed to be "as broad and comprehensive as language can make it."¹⁹⁰ This grant of power recognized the benefit of giving local government the power to be responsible for searching out local offenses and prosecuting them in the local tribunals.¹⁹¹ The Supreme Court pointed out that the officers in charge of enforcement of the local and federal anti-trust acts were under the control of the same sovereign; it assumed that they would work in harmony with one another and avoid any potential conflict.¹⁹² The concept of "same sovereignty" further meant that there was no problem of double jeopardy since the prosecution of either the federal or the insular government was a bar against the other.¹⁹³ In this respect the identity of federal and local sovereignty in Puerto Rico deprived the Island of the state's prerogative as an independent sovereign to pursue a separate prosecution for an offense already the subject of federal enforcement.

In sum, the U.S. Supreme Court seized upon the reservation made by Congress of its power to annul local legislation required to be reported to it by the territories so as to forge a principle of implied approval. This principle of approval was further developed into a doctrine of legislative autonomy which

189. The Court said:

The grant of legislative power in respect to local matters, contained in section 32 of the Foraker Act and continued in force by section 37 of the Organic Act of 1917, is as broad and comprehensive as language can make it. The primary question posed by the challenge to the validity of the act under consideration is whether the matter covered by the act is one "of a legislative character not locally inapplicable." It requires no argument to demonstrate that a conspiracy in restraint of trade within the borders of Puerto Rico is clearly a local matter, and that it falls within the precise terms of the power granted by sections 32 and 37 of the respective acts in which the grant is found. (citations omitted).

Id. at 261.

190. The Court said:

The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories. The effect was to confer upon the territory many of the attributes of quasi-sovereignty possessed by the states—as, for example, immunity from suit without their consent. By those acts, the typical American governmental structure, consisting of the three independent departments—legislative, executive and judicial—was erected. "A body politic"—a commonwealth—was created. The power of taxation, the power to enact and enforce laws, and other characteristically governmental powers were vested. And, so far as local matters are concerned, as we have already shown in respect of the continental territories, legislative powers were conferred nearly, if not quite, as extensive as those exercised by the state legislatures. (citations omitted)

191. *Id.* at 262.

192. *Id.* at 271.

193. *Id.* at 264.

sought to sustain the local enactments of Puerto Rico so long as these were not in conflict with federal law. The Supreme Court further applied the rule of local deference to the tribunals of the Island. However, where the local courts did not defer to the local statutes by declaring these unlawful, the Supreme Court intervened where appropriate to support the local enactment over the tribunal's interpretation that the statute was unlawful. A framework for the protection of local norms was thus created on the basis of a model of local deference.

B. Judicial Nullification

We have already seen how the U.S. Supreme Court has supported the legislative autonomy of Puerto Rico in areas such as the right to enforce the Congressional restriction of corporate land ownership¹⁹⁴ or the Island's ability to tax property in San Juan harbor.¹⁹⁵ The limits of this authority were defined in terms of conflict with federal law in which case the local statute was not entitled to deference and could be struck down by the high court. It is in this area that those who have raised the nullification argument and the concomitant fear that the local will would be made subordinate to the federal sovereign are on strongest ground. Yet, the fact that the Court has been sparing in its use of this aspect of its power of judicial review underlines the care with which the power has been used in practice.

Federal law on the Island possesses three characteristics, namely, that (i) it is an independent legal system; (ii) that it is a system common to the states and territories of the United States unless locally inapplicable; and (iii) that it can and does confer rights and obligations directly on private and public persons in the states and territories. We must, of course, add that the federal system also absorbed and applied where appropriate local law. To this extent the federal legal order becomes normalized on the basis of its infusion by and application of local modalities. The bifurcated court system between insular and federal tribunals further meant that the insular system was federalized to the extent that it applied federal norms. The misapplication of such federal norms by the insular high court in the case of the local antitrust statute made it subject to correction by the U.S. Supreme Court¹⁹⁶ as was also the case with respect to the insular tribunal on matters of local law.¹⁹⁷ In the end, however, the peremptory nature of federal law in terms of binding force or primacy, uniformity, and potential effect on local law did lead to conflict.

194. See *Puerto Rico V. Rubert Hermanos, Inc. (I)*, 309 U.S. 543.

195. See *Gromer v. Standard Dredging Co.*, *supra*.

196. See *Puerto Rico v. Shell Co.*, *supra*.

197. See e.g., *Fernández y Pérez v. Pérez y Fernández*, *supra*, where the Court said:

We think that it was the intention of Congress in the Porto Rican [Foraker] Act to require the district court exercising the jurisdiction of a circuit court, in analogy to

1. Federal Subordination of Local Norms

The U.S. Supreme Court has struck down a local enactment of Puerto Rico on six occasions.¹⁹⁸ In 1925, Mr. Justice Holmes held that a municipal tax of ten cents on every hundredweight of sugar manufactured in the municipality of Carolina, Puerto Rico was improper. This was the first instance in which the Court undertook to strike down a local statute and it did so on the basis that the municipal ordinance was not authorized by the applicable local statutes granting taxing powers to these subdivisions. In so doing, Mr. Justice Holmes affirmed the decision of the First Circuit Court of Appeals which had reversed the Puerto Rico Supreme Court on this point.¹⁹⁹

The next instance of the invalidation of a local statute was due directly to the fact of a conflict with federal law. In *Domenech v. National City Bank of New York*²⁰⁰ a Puerto Rico local tax on the capital of national bank's subsidiary located on the Island was held to be invalid as it contravened the Federal Banking Act. Although the relevant federal statute only referred to states, Mr. Justice Roberts held that it extended to territorial governments and set limits on the exercise of the taxing power. The rationale of the Court was that the Island's authority to tax was derived from Congressional consent and was equally subject to Congressional limitations.²⁰¹ The Court rejected the

the powers of the circuit courts in the states, to adapt itself, save in the excepted cases in equity and admiralty, to the local procedure and practice in Puerto Rico. This conclusion is in accord with the policy of the United States, evidenced in its legislation, concerning the islands ceded by Spain, and secures to the people thereof a continuation of the laws and methods of practice and administration familiar to them, which are to be controlling until changed by law.

Id. at 26 S.Ct. 565.

198. See *Pérez Camí v. Central Victoria, Ltd.*, *supra*; *Domenech v. National City Bank of New York*, 294 U.S. 199 (1935); *Puerto Rico v. Russell & Co., etc.*, 315 U.S. 610 (1942); *Bacardi Corp. v. Domenech*, 311 U.S. 150 (1940); *Examining Board v. Flores de Otero*, *supra*; and *Terral Torres v. Commonwealth of Puerto Rico*, *supra*. These cases constitute 4.3% of the 139 cases in which the Supreme Court has rendered written decisions on Puerto Rico subject matter.

199. *Pérez Camí v. Central Victoria, Ltd.*, *supra*, at 268 U.S. 470-72.

200. 294 U.S. 199.

201. The Court said:

Puerto Rico, an island possession, like a territory, is an agency of the federal government, having no independent sovereignty comparable to that of a state in virtue of which taxes may be levied. Authority to tax must be derived from the United States. But like a state, though for a different reason, such an agency may not tax a federal instrumentality. A state, though a sovereign, is precluded from so doing because the Constitution requires that there be no interference by a state with the powers granted to the federal government. A territory or a possession may not do so because the dependency may not tax its sovereign. True the Congress may consent to such taxation; but the grant to the island of a general power to tax should not be construed as a consent. Nothing less than act of Congress clearly an explicitly conferring the privilege will suffice. Not only do we find no such statutory consent, but we are confronted by Rev. St. [Section] 5219 as amended, which *proprio vigore*

Island's argument that the Federal Reserve Act supported its thesis that bank branches in dependencies or insular possessions should be treated as if they had been established in foreign countries. This claim was held to be unsound for although the United States lacked authority in foreign countries, it had power over its insular possessions such as Puerto Rico.²⁰²

In *Pérez Camí v. Central Victoria*, Mr. Justice Holmes had looked to the sovereign body, the local legislature, to see if it had authorized the tax in question on the theory that such a grant must be explicit. Mr. Justice Roberts in *Domenech v. National City Bank* applied the same approach and found no such explicit authorization by Congress for a tax on the subsidiary of a national bank. While in each case the sovereign body could have consented to the tax, such consent was neither to be implied, nor assumed from a general grant of power. Furthermore, in each case the political subdivision was not an independent sovereignty so both derived their power from the consent of the federal sovereign. The decisions are in harmony both in approach and outcome with the result that taxing authority which is not strictly provided for may not be exercised.

Mr. Justice Roberts opinion in *Puerto Rico vs. Russell & Co., etc.*²⁰³ further limited the Island's taxing authority where the enactment in question impaired the obligations of contract. He held that a tax imposed by Puerto Rico on certain lands using water from the Southern Coast Public Irrigation System on which no tax was levied and which contributed nothing to the expense of the maintenance system was improper. The case involved a contract reached between the Island's Commissioner of the Interior limiting the firm's predecessor in interest with respect to certain water rights and assuring the delivery of a specified amount of water in return. The Court found that the Puerto Rico statute authorizing the tax sought to avoid the exemption from taxation granted the firm's predecessor in interest and deemed it not to be a general tax. Since the Island was bound by the Foraker Act, a federal statute, not to impair the obligations of contract, the Court held the tax to be improper.²⁰⁴

It is interesting to note that the Puerto Rico Supreme Court had upheld the local tax in question on the ground that it was not precluded by the contracts in issue and worked no impairment of their obligation. The insular high court found that the rights possessed by the firm prior to the construc-

extends to territories, and the Congressional declaration that it, like other statutes of the United States, shall, if not locally inapplicable, apply to Puerto Rico. (footnotes omitted)

Id. at 204-05.

202. *Id.* at 201-06.

203. 315 U.S. 610.

204. *Id.* at 618-19.

tion of the irrigation system were taxable and the privileges secured by the contract were equally taxable. Since there was no covenant to tax the privileges secured by the contract, it found that the Commissioner of the Interior acted within his powers in taxing the privileges.²⁰⁵ Mr. Justice Roberts, on the other hand, focused upon the legislative history of the tax and found that it was an attempt to collect from persons whose land was not in the irrigation system a part of the expense of maintaining that system. This itself was a result of a court decision in favor of the predecessor firm which enjoined Puerto Rico from selling surplus waters which should have been delivered to the firm.²⁰⁶

The Supreme Court in *Russell & Co.* thereby divined an intent on the part of the legislature not to pass a general tax, but rather to seek to impair the contractual obligation in issue given its inability to sell the surplus waters. The tax could not be reconciled with the federal prohibition on the impairment of contract, with the result that the local enactment was subordinated to the federal norm. Such federal norms could also arise from the treaty obligations of the United States as was the case in *Bacardi Corp. v. Domenech*.²⁰⁷ Mr. Chief Justice Hughes held that the General Inter-American Convention for Trade Mark and Commercial Protection, which was ratified and proclaimed by the United States in 1931, was a part of United States law and that no special legislation was necessary to make it effective. More importantly, he held that it could not be overridden by the Puerto Rico legislature through local legislation designed to protect the use of foreign trade marks on rum manufactured on the Island.²⁰⁸

Mr. Chief Justice Hughes found that the Inter-American Convention protected foreign trademarks upon compliance with the formal provisions of the domestic law irrespective of citizenship or domicile. The foreign marks when duly registered were entitled to protection and a ratifying state could not escape the obligations of the treaty and deny protection by embracing its own nationals in such denial. He concluded that the Bacardi Corporation in Puerto Rico had an agreement with the Cuban Bacardi corporation to sell rum on the Island under its duly registered trademarks and labels. The Puerto Rico statute sought to deny the right to use these trademarks on the ground that they had been used outside Puerto Rico, or had not been used on the Island or in the continental United States prior to February 1, 1936.²⁰⁹

205. *Id.* at 614, 616.

206. *Id.* at 618-19.

207. 311 U.S. 150.

208. *Id.* at 165-66.

209. *Id.*

The Court held that Puerto Rico's assertion that the trademark could not be used because of its Cuban origin was the very thing prohibited by the treaty. The Island's concern for protection of its local trade could not save the local statute since the United States when exercising its treaty making power dominated local policy. The Court struck down that portion of the statute which prohibited the use of the trademark in question, but affirmed the local statute's prohibition on the bulk shipments of distilled spirits as a proper exercise of the police power. The right of Puerto Rico to prohibit absolutely the manufacture or sale of liquor was affirmed.²¹⁰ What it could not do was contravene the federal preemptory norm.

In 1976, the U.S. Supreme Court for the first time struck down a Puerto Rico statute on the ground that it violated the U.S. Constitution. The Supreme Court held in *Examining Board v. Flores de Otero*²¹¹ that a Puerto Rico statute restricting civil engineer licenses for private practice solely to United States citizens was unconstitutional. The distinction would thus assure licenses to Puerto Ricans, who were made American citizens by the Jones Act, while denying them to aliens in private practice. The Court held that Puerto Rico was a state for the purposes of the civil rights jurisdictional statute, and that it had the power to entertain a suit under the Civil Rights Act of 1871, 42 U.S.C. Section 1983, arising from the Island. Mr. Justice Blackmun found that the restriction imposed on the ability of aliens to engage in an otherwise lawful private practice of civil engineering was plainly unconstitutional whether under the Fifth or Fourteenth Amendments.²¹²

He held that if the Fourteenth Amendment applied to the Island, the Equal Protection Clause nullified the statutory exclusion, while if the Fifth Amendment and its Due Process clause applied, the discrimination was so egregious that it was unconstitutional. Refusing to resolve the question as to which Amendment applied, he found the statute in question to contravene the U.S. Constitution. Mr. Justice Blackmun reviewed three justifications tendered by the Examining Board in support of the statute: (i) to control the influx of Spanish-speaking aliens into the field on the Island; (ii) to raise the low standard of living and (iii) to provide the client of a civil engineer a guarantee of financial responsibility.²¹³

Mr. Justice Blackmun rejected the three claims on the grounds that (i) it was for the federal government to determine whether to admit an alien: once lawfully admitted the state could not seek to control the impact of the federal decision; (ii) raising the standard of living was a legitimate concern, but the

210. *Id.* at 167-68.

211. 426 U.S. 572.

212. *Id.* at 599-601.

213. *Id.* at 605-07.

means chosen here were neither precise, nor necessary; and (iii) financial responsibility could be assured without an indiscriminate prohibition against qualified aliens from the private practice of civil engineering.²¹⁴

An equally exacting scrutiny of a Puerto Rico statute was conducted by Mr. Chief Justice Burger in *Terrol Torres v. Commonwealth of Puerto Rico*.²¹⁵ There the local statute empowered the insular police to inspect the luggage of passengers and crew (arriving from the United States) who landed in airports and piers of Puerto Rico. The law was aimed at coping with the rising tide of crime on the Island due to the importation of narcotics, firearms and explosives from the United States mainland; it empowered the police to conduct these searches without requiring the police to have probable cause to believe that there was contraband in the luggage to be searched.²¹⁶

Mr. Chief Justice Burger formally applied the Fourth Amendment's prohibitions against searches without probable cause to the Island and held that the Puerto Rico law was unconstitutional. This was the first formal application of the Fourth Amendment to the Island.²¹⁷ The Chief Justice observed that Puerto Rico had no sovereign authority to prohibit entry into its territory and added that customs control on the Island was conducted by federal officers. He made plain that Congress had the power to make constitutional provisions applicable to the territories in which they would not otherwise be controlling. Moreover, Congress had left it to the Supreme Court to determine which constitutional provisions applied to the Island.²¹⁸ It follows from this that where the Supreme Court has made a constitutional norm applicable to Puerto Rico, the local laws in conflict with such norm will be struck down.

2. Limitations on the Application of Federal Norms

The desire on the part of the District Court of Puerto Rico to apply federal norms in cases arising from the Island has led to a number of conflicts with the

214. *Id.* at 605-07.

215. 442 U.S. 465.

216. *Id.* at 466-68.

217. Thus, it was not until 1979 that the Fourth Amendment was extended to Puerto Rico by this case. The Supreme Court does not cite, nor does the literature record, however, *Segurola v. United States*, 275 U.S. 106 (1927), where the Fourth Amendment was assumed to apply to the Island but an untimely objection prevented the Court from passing on the issue; it should also be noted that a Fourth Amendment claim was also raised in *Cerecedo v. United States*, 239 U.S. 1 (1915) but the case was dismissed for failure to provide a bill of exceptions. Mr. Justice Brown assumed that the Fourth Amendment would apply to Puerto Rico in *Downes v. Bidwell*, *supra*, at 21 S.Ct. 784, as a natural right enforced by the Constitution by a prohibition against interference with it. *Id.* This history is not developed in *Terrol Torres*, *supra*.

218. 442 U.S. at 470.

U.S. Supreme Court. In *Calero-Toledo v. Pearson Yacht Leasing Co.*²¹⁹ a three judge District Court of Puerto Rico empanelled to consider the constitutionality of a local forfeiture statute held the law unconstitutional for denying the owner of the property a hearing prior to seizure and forfeiture of his yacht and for constituting a penalty on an innocent party. The Supreme Court reversed in all respects and affirmed the local statute as an example of coping with an extraordinary situation, where the postponement of notice and hearing did not deny due process. The statutory scheme of forfeiture was not rendered unlawful by its application to the property interest of innocents.²²⁰

A three judge court was empanelled to consider the constitutionality of that portion of the federal Social Security Act which resulted in a loss of federal Supplemental Security Income benefits by beneficiaries moving from the continental United States to Puerto Rico. This panel decided in *Califano v. Gautier Torres*²²¹ that the distinction was a violation of the constitutional right to travel and determined that there was no compelling federal interest justifying it. It held the provision unconstitutional. The Supreme Court reversed this decision and held that it had never accepted that the constitutional right to travel embraced a doctrine which required that a newcomer to the Island was entitled to superior benefits than Island residents because such a person obtained the entitlement in the states. It sustained the government's justification for the denial of benefits to the Island's residents on the basis of the strong presumption of constitutionality that attached to the Congressional enactment so long as it was rational and not invidious. In this regard it found support in the three grounds advanced to explain the exclusion of Puerto Rico from the government program: (i) because of the unique status of the Island, its residents did not contribute to the public treasury; (ii) the cost of including Puerto Rico would be extremely great—estimated at three hundred million dollars; and (iii) inclusion in the program might disrupt the Island's economy.²²²

A District Court of Puerto Rico was reversed on a similar ground in *Harris v. Santiago Rosario*.²²³ There the District Court held that the lower level of reimbursement provided to Puerto Rico in the federal Aid to Families with Dependent Children Program violated the equal protection guarantee of the Fifth Amendment. Applying the same criteria as in the *Gautier Torres* case the U.S. Supreme Court reversed the District Court and further held that Congress was empowered by Article 4, Section 3, Clause 2 of the U.S. Constitution to make all needful rules and regulations respecting United States

territories. This meant that Congress could treat Puerto Rico differently from the states so long as there was a rational basis for its actions. Such a basis existed here with respect to the three criteria mentioned above and thus provided a rational basis for the challenged statutory classification.²²⁴

This decision meant that twenty-eight years after the creation of the Commonwealth of Puerto Rico, the U.S. Supreme Court considered Puerto Rico an unincorporated territory of the United States which could be treated differently from the states as long as Congress articulated a rational basis for the distinction. The cases further illustrate the limitations imposed upon the local courts in seeking to enforce the equal protection guarantees of the Constitution by eliminating the differences between the Island's residents and state-side citizens. Where Congress has expressly declined to make a federal norm applicable to the Island whether withing the taxing area or the welfare benefits area, the District Court is without power to seek to accomplish this end.

VI. THE DOCTRINE OF SOVEREIGN IMMUNITY

Section 7 of the Foraker Act had provided that Puerto Rico had the power to sue and be sued. This provision when first tested by the Puerto Rico Supreme Court was construed to mean that the Island could be sued without its consent. This interpretation was reversed by the Supreme Court in *Porto Rico v. Rosaly y Castillo*.²²⁵ Mr. Chief Justice White held Puerto Rico was entitled to sovereign immunity from suit without its consent and compared the Island's statutes to that of Hawaii (then an unincorporated territory) which had been deemed to have immunity from suit.²²⁶

However, where the government of Puerto Rico gave its consent to be a party to a suit concerning real property, and obtained a ruling from the District Court of Puerto Rico against the resistance of the plaintiff to make it a party, it was deemed to have consented to be sued.²²⁷ The application of the doctrine of sovereign immunity to the Island was an additional indicia of the deference to which the Puerto Rico government was entitled from the insular tribunals whether federal or the Puerto Rico Supreme Court.

224. *Id.* at 100 S.Ct. 1930.

225. 227 U.S. 270.

226. *Id.* at 33 S.Ct. 353.

227. *Porto Rico v. Ramos*, *supra*; cf. *Porto Rico v. Emmanuel* *supra*; See *Richardson v. Lajardo Sugar Co.*, 241 U.S. 44 (1916) (where the Court held that after Puerto Rico appeared and filed an answer in the District Court of Puerto Rico, it could not subsequently claim that it was immune from suit on the basis of sovereign immunity).

219. 416 U.S. 663 (1974).

220. *Id.* at 668-70, 654, 679-80.

221. 435 U.S. 1 (1978).

222. *Id.* at 98 S.Ct. 908 n. 7.

223. 446 U.S. 65 (1980).

VII. THE DOCTRINE OF TERRITORIAL INCORPORATION

On May 27, 1901, Mr. Justice (later Chief Justice) White presented the doctrine of territorial incorporation in *Downes v. Bidwell*.²²⁸ Ever since then this case and the other Insular cases decided on that day and thereafter by the Supreme Court have dominated the interest of the legal commentators on the Island. Suffice it to say here that the doctrine was adopted by a unanimous Supreme Court in *Balzac v. People of Porto Rico*²²⁹ in 1922 and has been applied to the Island ever since. It holds that Puerto Rico is an unincorporated territory of the United States. This means that the Constitution of the United States is in force in Puerto Rico. However, apart from fundamental personal rights declared in the Constitution such as the guarantee of due process of law, not all constitutional provisions were applicable to the Island.²³⁰ It was for Congress to determine which of its non-fundamental provisions, e.g., the right to a grand or petit jury (which were deemed mere modes of procedure and held inapplicable to the Island),²³¹ were to be applied to the Island. Ultimately, it was for the U.S. Supreme Court to determine what constitutional guarantees applied in Puerto Rico.²³²

The incorporation doctrine was founded on certain fears of the immediate and permanent incorporation of aliens residing in the insular possessions acquired by the United States into the country. The solutions proposed by the doctrine related to the autonomous development of local custom and practice subject to Congressional scrutiny. The doctrine afforded a basis upon which to preserve and develop the local law and practices of Puerto Rico. Contrary to what one might first conclude, the doctrine of incorporation sustained the importance of deference to local norms. The rule of local deference flourished into the doctrines of judicial autonomy, of nullification and implied approval, of legislative autonomy, and of sovereign immunity. The result was that Puerto Rico was assured in its order of personal and property relationships of continuity in its distinctive norms but retained the ability to experiment with new norms where appropriate.

In founding the doctrine of incorporation on the need for Congress to have the flexibility necessary to cope with new possessions, Mr. Justice White insured local flexibility protective of the vital concerns of the Island. His role in sustaining the local interpretation and custom has already been documented as has that of many other members of the Court. In summary, the

228. 182 U.S. 244.

229. 248 U.S. 298.

230. *Id.* at 25 S.Ct. 348.

231. *Id.* at 349.

232. See *Terral Torres v. Commonwealth of Puerto Rico*, *supra*, at 470.

doctrine of incorporation continues as a source for experimentation in the penumbra that exists between the United States and Puerto Rico relationship. Additional review of the Supreme Court jurisprudence on the Island will thus shed further light on the complexity of federal-insular relationships and conflicts.

VIII. SUPREME COURT JURISPRUDENCE ON PUERTO RICO

A. Civil Rights Cases

The civil rights cases²³³ of the Supreme Court encompass such areas as

233. As used here the term civil rights cases refers to that corpus of law arising the U.S. Constitution,

the laws and treaties of the United States, which has been referred to by Laurence H. Tribe as the model of preferred rights "[e]xpressed largely through doctrines involving freedom of expression and association, rights of political participation, rights of religious autonomy, and rights of privacy and personhood, this model has not attempted to define inherent limits on the power of all governments institutions but has aimed more modestly to exclude governmental power from specific substantive spheres, by identifying and protecting certain 'preferred rights' from all but the most compellingly justified instances of governmental intrusion," and the model of equal protection which "seek[s] to identify those fundamental aspects of social structure which should be presumptively open to all on equal terms, and those criteria of government classification which are most suspect as likely to reflect habitual reaction and prejudice rather than reflective understanding." Tribe, *supra* note 165, at 565-66. Content to these models has been provided by "controversial substantive judgments." *Id.* at 566. These civil rights cases also form the basis for an examination of the process of deprivation and non-fulfillment of values in human rights since "[i]n the comprehensive social process, individual human beings, affected by constantly changing environmental and predispositional factors, are continuously engaged in the shaping and sharing of all values, with achievement of many different outcomes in deprivation and fulfillment. It is these outcomes in deprivation and fulfillment in the shaping and sharing of values which constitute... the human rights which the larger community of humankind protects or fails to protect." McDougal, Lasswell, Chen, *The Social Setting of Human Rights: The Process of Deprivation and Non-Fulfillment of Values*, 46 Rev. Jur. U.P.R. 477 (1977). In this process, "the nation state remains, despite the growing roles of other groups, a dominant participant in the shaping and sharing of all values. The kinds and magnitudes of deprivations and non-fulfillments of human rights to which individuals are today subjected are largely determined by the nation-states of which they are members.... [T]he degree to which demands for human dignity values are fulfilled is still largely dependent upon the preformance of governmental functions within territorially organized communities." *Id.* at 481.

freedom of movement,²³⁴ the administration of criminal justice,²³⁵ the right to fair comment,²³⁶ removal from office,²³⁷ equal protection,²³⁸ and the *parens*

234. See *González v. Williams*, 192 U.S. 1 (1904) (where Puerto Ricans were held not be foreign aliens subject to deportation by New York immigration authorities).
235. See *Crowley v. United States*, 194 U.S. 461 (1904) (where the Court sustained a challenge to the composition of the grand jury on the ground that the District Court of Puerto Rico had not applied the local juror qualification statute); *Amado v. United States*, 195 U.S. 172 (1904) (objection to indictment on the basis that an offense was not stated under United States law—where defendant was indicted and convicted for failing to pay duties on liquor transported into the Island—failed to assert a federal right); *Rodriguez v. United States*, 198 U.S. 156 (1905) (challenge to grand jury improper due to failure to take exception to trial court ruling); *Kent v. Porto Rico*, *supra* (trivial assertion of federal right); *New York ex rel. Kopel v. Bingham*, 211 U.S. 168 (1909) (Puerto Rico held to be completely organized territory and request for extradition of fugitive from the Island by the insular governor was proper); *Cerecedo v. United States*, 239 U.S. 1 (1915) (failure to provide bill of exceptions prevented the Court from passing upon Fourth Amendment issue); *Balzac v. People of Porto Rico*, *supra* (Fifth Amendment right to indictment by grand jury and Sixth Amendment right to jury trial in criminal prosecutions do not apply in Puerto Rico); *Segurola v. United States*, *supra* (conviction for transporting intoxicating liquor in violation of the national prohibition act upheld); *Arroyo v. United States*, 359 U.S. 419 (1959) (erroneous criminal conviction under the Federal Labor Management Relations Act of 1947); *Calero-Toledo v. Pearson Yacht Leasing Co.*, *supra* (seizure and forfeiture of a yacht used for unlawful purposes was proper); *Terral Torres v. Commonwealth of Puerto Rico*, *supra* (the requirements of a warrant and probable cause for searches and seizures under the Fourth Amendment applied in Puerto Rico).
236. See *Zeno Gandia v. Pettingill*, 222 U.S. 452 (1912) (there was no proof of libel where newspaper's comments were fair comment and without malice).
237. See *De Castro v. Board of Com'rs*, *supra* (the term of the city manager of San Juan was limited to the term of the Board of Commissioners who appointed him).
238. See the voting rights cases, *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (Court upheld Section 4(e) of the Voting Rights Act providing Puerto Ricans educated in Spanish-language Commonwealth schools with right to vote despite state English literacy requirements); *Cardona v. Power*, 384 U.S. 672 (1966) (failure to allege sixth-grade schooling in Commonwealth schools in order to receive protection of Section 4(e) of Voting Rights Act); *Rivera Rodríguez v. Popular Democratic Party*, 457 U.S. 1 (1982) (legislature's limiting of political participation in by-election to members of one political party was proper). See also cases arising under the Federal Civil Rights Act of 1871, 42 U.S.C. Section 1983, *Examining Board v. Flores de Otero*, *supra* (Puerto Rico licensing restrictions on alien civil engineers declared unconstitutional); *Rivera Gómez v. Calero Toledo*, 446 U.S. 635 (1980) (complainant need not plead the bad faith of a public official in order to state a claim for relief under 42 U.S.C. Section 1983); *Chardón v. Rivera Fernández*, 454 U.S. 6 (1981) (the statute of limitations under 42 U.S.C. Section 1983 begins to run when notice of termination is received and not when employment is terminated); *Chardón v. Fumero Soto*, U.S. , 103 S. Ct. 2611 (1983) (in a class action suit under 42 U.S.C. Section 1983 the statute of limitations is tolled during the pendency of the class action and begins to run anew after the denial of class certification as provided by local law). See also welfare benefits cases, *Califano v. Gautier Torres*, *supra* (the loss of federal Supplemental Security Income benefits by beneficiaries moving from the continental United States to Puerto Rico was not unconstitutional); *Harris v. Santiago Rosario*, 446 U.S. 65 (1980) (the lower level of reimbursement provided to Puerto Rico in the federal Aid to Families with Dependent Children Program did not violate the equal protection guarantee of the Fifth Amendment).

patriae capacity of Puerto Rico.²³⁹ They may be distinguished from the insurance cases,²⁴⁰ the domestic relations cases,²⁴¹ torts,²⁴² bankruptcy,²⁴³

239. See *Alfred L. Snapp, etc. v. Puerto Rico, ex rel. Bdez.* U.S. , 102 S. Ct. 3260 (1982) (the Commonwealth of Puerto Rico has standing to maintain a suit in its capacity as *parens patriae* against State-side employers of Puerto Ricans for violations of federal law which discriminated against Puerto Ricans and injured the Puerto Rican economy).
240. See *Royal Ins. Co. v. Marín*, 192 U.S. 149 (1904) (new trial required where the lower court failed to provide sound construction of fire insurance policy); *Royal Ins. Co. v. Miller*, 199 U.S. 353 (1905) (the enforcement of a fire insurance policy on the stock of sugar and molasses in a sugar manufactory on an estate was proper); *Amadeo v. Northern Assur. Co.*, 201 U.S. 371 (1906) (the death of the insured did not defeat the jurisdiction of the Court to pass upon the tendered writs of error); *Guardian Assur. Co. of London, Ltd. v. Quintana*, 227 U.S. 100 (1913) (a motion to dismiss or affirm a writ of error was denied without prejudice where the death of the U.S. District Judge in Puerto Rico affected the filing of bill of exceptions); *José Rivera Soler & Co., Inc. v. United Firemen's Ins. Co. of Philadelphia*, 299 U.S. 45 (1936) (there was no conclusive presumption of fraud or purpose to defraud where the jury verdict was for less than the amount stated in proof of loss).
241. See *Ortega v. Lara*, 202 U.S. 339 (1906) (a breach of a promise to marry is a matter of local Puerto Rican law and does not raise a federal question); *Garrozi y Pietri v. Dasias*, 204 U.S. 64 (1907) (although the right to a separation of property arises from the reckless conduct of a husband, the right to ask for a separation does not give rise to the inference that the husband, after the dissolution of the community, may be held to account for money expended by him during the community because of reckless or extravagant conduct).
242. See *American Railroad Company of Porto Rico v. Castro*, 204 U.S. 453 (1907) (claim involving the negligent killing of a daughter by a railroad did not involve a federal question giving rise to review by the Supreme Court); *American Railroad Company of Porto Rico v. Cardona de Castro*, 210 U.S. 440 (1907) (a claim involving the personal injuries of a wife by a railroad did not involve a federal question giving rise to review by the Supreme Court); *Herencia v. Guzmán*, 219 U.S. 44 (1910) (the Supreme Court has no power to review the evidence of negligence and recoverable damages for personal injuries resulting from the negligent condition of a building); *San Juan Light & Transit Company v. Requena*, 224 U.S. 89 (1912) (when a thing which causes injury, without the fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as, in the ordinary course of things does not occur if the one having control uses proper care, this is reasonable evidence, in the absence of explanation, that the injury arose from the defendant's want of care); *American Railroad Company of Porto Rico v. Birch*, 224 U.S. 547 (1912) (a widow and her son were not the personal representatives of a deceased railroad employee for the purposes of a federal act on the liability of common carriers by railroad to their employees); *Basso v. United States*, 239 U.S. 602 (1916) (governments are not liable for unauthorized wrongs inflicted on a citizen by their officers, although occurring while engaged in the discharge of their official duties); *American Railroad Company of Porto Rico v. Didricksen*, 227 U.S. 145 (1913) (the loss of the society or companionship of a son is not a pecuniary loss under the Employers' Liability Act of 1908).
243. See *Armstrong v. Fernández*, 208 U.S. 324 (1908) (where the petition for bankruptcy alleged that the bankrupt was not a wage-earner, nor a person engaged chiefly in farming or the tillage of the soil, but rather a person who was chiefly engaged in commercial business, the petition for involuntary bankruptcy was proper); *Tefft, Weller & Co. v. Munsturi*, 222 U.S. 114 (1911) (an appeal in bankruptcy taken from an order disallowing a claim of a creditor for an alleged indebtedness of a bankrupt firm was not a controversy within the meaning of the Bankruptcy Act and must be dismissed for want of jurisdiction); *Mfununi v. Fricker*, 222 U.S. 121 (1911) (an order declaring a party to be a general partner a bankrupt firm and thus making the person liable for the firm debts was not reviewable by the U.S. Supreme Court).

commercial transactions cases,²⁴⁴ tax cases,²⁴⁵ maritime cases,²⁴⁶ and the more

244. See *Fraenkl v. Cerecedo*, 216 U.S. 295 (1910) (parties may not for the purpose of Supreme Court review attempt to inject a federal question into a suit which has already been decided by suggesting through an expansive interpretation a federal right was relied upon); *Will v. Tornabelli*, 217 U.S. 47 (1910) (the power to seek rescission of a contract is limited to contracts which are in fraud of the rights of the creditor); *Javierre v. Central Altagracia, Inc.*, 217 U.S. 502 (1910) (an injunction enforcing a contract to deliver sugar cane grown on two haciendas pursuant to a sugar contract for the term of five crops was improper when damages at law constituted an adequate remedy for the breach of contract); *Aran v. Zurrinach*, 222 U.S. 395 (1912) (there was no right to review before the Supreme Court where questions are raised concerning the application or methods of enforcement of applicable federal law, when the generality of statement and absence of specification of substance leads to the conclusion that they were frivolous); *Porto Rico Sugar Co. v. Vito Lorenzo*, 222 U.S. 481 (1912) (a contract to grind sugar cane implied that it had reference to the grinding seasons); *Valdés v. Central Altagracia, Inc.*, 225 U.S. 58 (1912) (the machinery levied upon by a judgment creditor of a corporation was movable property as applied to its interest where it had no notice of a lease provision converting the property into an immovable under Puerto Rican law); *Porto Rico v. Title Guaranty & S. Co.*, 227 U.S. 382 (1913) (where an ordinance only required a bond for the full completion of work within three years and under the conditions and plans specified and there was no repudiation of the contract, Puerto Rico could not accelerate the forfeiture simply on the ground that repudiation was likely to occur); *Pizá Hermanos v. Gandía Caldentey*, 231 U.S. 690 (1914) (where the parties admitted the propriety of charging an increase in the value of an estate as a profit, the question in controversy was narrowed merely to one of amount); *Valdés v. Larinaga*, 233 U.S. 705 (1914) (a contract gave a party an equitable interest in a concession to the extent of securing a share of profits, if any, and attached to these profits specifically if and when they came into being); *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264 (1916) (in the case of subcontracts, a reference by the contracting parties of an extraneous writing for a particular purpose makes it a part of their agreement only for the purpose specified); *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 248 U.S. 334 (1919) (a contract for a construction of a building, even in the absence of a stipulation on the subject, implied as an essential condition that a site should be provided on which the structure maybe built).

245. See *Gromer v. Standard Dredging Co.*, *supra* (Puerto Rico had the power to tax boats and machinery used for dredging work in San Juan harbor); *Richardson v. Tajardo Sugar Co.*, *supra* (firm entitled to refund on taxes paid to Puerto Rico); *Pérez Camí v. Central Victoria*, *supra* (a municipal tax on sugar was improper); *Smallwood v. Gallardo*, 275 U.S. 56 (there was no vested right to an injunction against Puerto Rico for the collection of illegal taxes); *Gallardo v. Santini Fertilizer Co.*, 275 U.S. 62 (1927) (the District Court of Puerto Rico had no jurisdiction over cases where parties sought to enjoin the collection of Puerto Rico taxes); *Domenech v. National City Bank of New York*, *supra* (Puerto Rico tax on the capital of a national bank was improper); *Sancho Bonet v. Yabucoa Sugar Co.*, *supra* (no right to tax refund from Puerto Rico for taxes voluntarily paid); *West India Oil Co. v. Domenech*, 311 U.S. 20 (1940) (Puerto Rico sales tax on the delivery of fuel oil which had previously been imported in bond and then withdrawn for delivery to vessels in Puerto Rican port for use as fuel was proper); *Puerto Rico v. Russell & Co.*, *supra* (special tax on certain lands exempted by tax through Puerto Rico contract was improper).

246. See *The Olinde Rodríguez*, *supra* (blockade of San Juan was effective); *Ribas y Hijo v. United States*, 194 U.S. 315 (1904) (no recovery allowed for use of merchant vessel taken by United States Army in 1898 War); *Huus v. New York & Porto Rico Steamship Co.*, *supra* (Puerto Rico ships admitted to American domestic coasting trade); *Gromer v. Standard Dredging Co.*, *supra* (Puerto Rico had jurisdiction over its harbor areas); *Luckenbach v. McCahan Sugar Refining Co.*, 248 U.S. 139 (1918) (time charter was not a demise of the vessel and libel for unseaworthiness of vessel was proper); *United States v. The Coamo*, 267 U.S. 220 (1925) (libel against ship for offloading aliens at a place other than Ellis Island required condemna-

general federal law cases.²⁴⁷ They establish a framework within which to assess the rights of Puerto Rico's residents. Puerto Ricans were entitled to travel freely between the United States and the Island (although at the time not American citizens); they were entitled from April 11, 1899 to the promulgation of the Jones Act in 1917 to American nationality^{247a} but not to American citizenship. The effect of the Supreme Court's decision in this respect in *González v. Williams* was to sanction the access of Puerto Ricans to the United States by converting their status from "alien immigrants" to that of "native migrants." Net migration to the United States between 1900-1909 has been estimated at a total of 2,000 persons, or an annual average of 200 persons. By 1910, New York City had 554 Puerto Ricans living there and by 1920 these numbers had climbed to 7,364. It has also been estimated that the annual average of migrants from the Island coming to the states between 1909-1919 rose to 1,100 per year for a total of 11,000 persons in the decade. In the period prior to 1917, the decision of the Supreme Court thus removed the barrier of potential screening by immigration officials, but did not assure the right to vote in the states (as these were limited to American citizens). In the period 1900-1969, some 800,000 Puerto Ricans migrated to the United States.

tion of vessel in the amount of \$1,000 for each alien); *Maysonet Guzmán v. Rulz Pichirilo*, 369 U.S. 698 (1962) (libel against vessel and action against owner of vessel in unseaworthy condition was proper); *Martín Gutiérrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963) (libel against vessel for negligent condition on dock and personal injuries was proper); *Weinberger v. Romero Barceló*, 456 U.S. 305 (1982) (Federal Water Pollution Act did not require the District Court of Puerto Rico to issue an injunction immediately enjoining all discharges of pollutants which did not comply with the Act's permit requirements; it retained the discretion to order alternative relief to obtain compliance).

247. See *Porto Rico, Light & Power Co. v. Dlaz Mor*, 253 U.S. 345 (1920) (a Spanish subject domiciled in Puerto Rico like an American domiciled on the Island cannot sue in the District Court of Puerto Rico on the basis of diversity of citizenship); *El Banco Popular de Economías y Préstamos de San Juan, Puerto Rico v. Wilcox*, 255 U.S. 72 (1921) (there was no right of successive appeals from the First Circuit Court of Appeals to the U.S. Supreme Court); *Puerto Rico v. Russell & Co., etc.*, 288 U.S. 476 (1933) (nonresidents of Puerto Rico who have taken advantage of its laws to organize a juridical entity for the purpose of carrying on business there cannot remove from the insular courts controversies arising under local law); *Puerto Rico v. Shell Co.*, *supra* (the existence of the Sherman Anti-Trust Act did not preclude the adoption of a local Puerto Rico Anti-Trust Act); *Bacardi Corp. v. Domenech*, *supra* (local prohibition on use of trademarks was improper as violative of Inter-American Convention on Trade Mark); *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604 (1950) (the federal Sugar Act of 1948 and the sugar quotas imposed on Puerto Rico by the U.S. Secretary of Agriculture were lawful); *United States v. Menasche*, 348 U.S. 528 (1955) (naturalization of alien proper); *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961) (consent decree is always affirmed without considering merits of cause).

247a. Thus, they were entitled to the protection of the United States, and were not to be considered either as enemies or aliens. Not being American citizens, Puerto Ricans who moved to the states were not eligible to vote.

The constitutional right to travel was fully and freely exercised by Puerto Ricans.²⁴⁸

Even as American citizens Puerto Ricans on the Island were not entitled to the Fifth Amendment right to a grand jury or the Sixth Amendment right to a petit jury.²⁴⁹ The Supreme Court held in *Balzac v. People of Porto Rico* that these rights were not applicable in an unincorporated territory such as Puerto Rico, unless made applicable by the local legislature. The doctrines of incorporation and legislative autonomy therefore merged in order to allow the Island's legislature the power to determine the most appropriate procedures for the administration of criminal justice.²⁵⁰ This deference was maintained in *Calero-Tolero v. Pearson Yacht Leasing Co.* where a forfeiture statute which did not provide pre-seizure notice and hearing was found not to have violated the due process clause of either the Fifth or Fourteenth Amendment. It reached its limit, however, when the Fourth Amendment was made expressly applicable to the Island in 1979.²⁵¹

From the beginning Puerto Rico has been subject to the constitutional precept that no person shall be deprived of life, liberty or property without due process of law.²⁵² The explicit articulation of the norm in *Calero-Toledo v. Pearson Yacht Leasing Co.* in 1974 did nothing to diminish this fact and refused to clarify the origin of the norm for the purpose of its application on the Island. The application of the equal protection guarantee of either the Fifth or Fourteenth Amendment also extends to Puerto Rico²⁵³ as does the Fourth Amendment.²⁵⁴ We know that as early as 1912 newspaper writers were protected by the doctrine of fair comment without malice derived from the First Amendment's freedom of the press²⁵⁵ and that the First Amendment has been assumed to be applicable to the Island.²⁵⁶

248. See Vázquez Calzada, *Demographic Aspects of Migration in History* Task Force, *supra* note 75, at 225; Senior and Watkins, *Toward A Balance Sheet of Puerto Rican Migration* in Status Commission, *supra*, and Note, 1 Colum. L. Rev. 51-52 (1901) (which discusses a case brought by a Puerto Rican seeking to vote in a New York election and who was denied the franchise on the ground that he lacked American citizenship).

249. See *Balzac v. People of Porto Rico*, *supra*.

250. For a history of Puerto Rican criminal procedure and its adoption in 1902 of the 1873 Criminal Code of California almost verbatim (itself heavily influenced by the draft of a New York Penal Code prepared in 1864 by David Dudley Field) which replaced the 1872 Spanish Code of Criminal Procedure extended to Puerto Rico in 1888, see Pérez Marchand, *La Justicia Penal en Puerto Rico, y Su Necesaria Evolución*, 3 Rev. Jur. U.P.R. 96 (1933); Torres, *The Puerto Rico Penal Code of 1902-1975: A Case Study of American Legal Imperialism* 6, 32-33 (1976).

251. See *Terral Torres v. Commonwealth of Puerto Rico*, *supra*.

252. See, e.g., *Ochoa v. Hernández Morales*, *supra*.

253. See *Examining Board v. Flores de Otero*, *supra*.

254. See *Terral Torres v. Commonwealth of Puerto Rico*, *supra*.

255. See *Zeno Gandia v. Pettingill*, *supra*.

256. *Id.*; see *Balzac v. People of Porto Rico*, *supra*, at 314.

The Court has assumed that the constitutional right to travel extends to the Commonwealth of Puerto Rico²⁵⁷ and has said that United States citizens are entitled to the privileges and immunities guaranteed by the Constitution when in Puerto Rico.²⁵⁸ The fact that it has not defined the scope of the constitutional protections applicable to the Island on other than a selective case by case basis is an indication of the continued viability of the incorporation doctrine. The welfare benefit cases such as *Califano v. Gautier Torres* and *Harris v. Santiago Rosario* underline this fact in their reliance on Congress' power over territories as a basis for treating Puerto Rico differently from the states.

While in the welfare benefit cases, this meant that Puerto Rico residents were not entitled to the same benefits received by state-side residents (thus making equal protection a function of locality), Puerto Ricans migrating to the states were entitled to the special protection afforded them by Section 4(e) of the Voting Rights Act of 1965. The Court held in *Katzenbach v. Morgan*²⁵⁹ that Congress was empowered to legislate under Section 5 of the Fourteenth Amendment affirmative protections for Puerto Ricans such that state voting laws which required a sixth grade education could be met by equivalent education in the Spanish-language schools of Puerto Rico. The English literacy requirements of the State of New York which were maintained through the schooling requirements were thus swept away in recognition of the fact that Congress had the authority to afford Puerto Ricans affirmative relief.²⁶⁰

This decision and its progeny have been used in the states to obtain bilingual ballots and assistance in Chicago, New York and Philadelphia.²⁶¹ The Supreme Court's decision in *Katzenbach v. Morgan* like its holding in the welfare benefit cases confirms Congress' power to treat Puerto Rico and Puerto Ricans differently so long as a rational basis for the distinctive treatment is provided. A review of the civil rights cases demonstrates that the Supreme Court has continued to apply the doctrine of territorial incorporation. The significance of this is that it makes clear that the legal status of Puerto Rico is precisely what Mr. Justice White first intimated in 1901: an unincorporated territory of the United States.

B. The Rights of Territories

The U.S. Supreme Court jurisprudence on Puerto Rico has delimited its

257. See *Terral Torres v. Commonwealth of Puerto Rico*, *supra*.

258. *Id.*

259. 384 U.S. 641.

260. *Id.*

261. See del Valle, *Language Rights and Due Process—Hispanics in the United States*, 17 Rev. Jur. Inter-Am. P.R. 93 & n. 13 (1982).

rights and responsibilities. Puerto Rico has been held to be exempt from the provision of Article I, Section 8, Clause 1 of the Constitution requiring all United States duties, imposts, and excises to be uniform throughout the United States;²⁶² from the Fifth Amendment grand jury trial requirement;²⁶³ and the Sixth Amendment petit jury requirement.²⁶⁴ The Island has been found to have the power to: (i) extend or deny the right of jury trial;²⁶⁵ (ii) establish the qualifications of jurors;²⁶⁶ (iii) to expect rendition of fugitives who have escaped from its jurisdiction to the states;²⁶⁷ (iv) seize and sell property used for unlawful purposes;²⁶⁸ (v) promulgate a local anti-trust statute;²⁶⁹ (vi) tax property in its harbors;²⁷⁰ (vii) refuse to provide a remedy for taxes which were voluntarily paid and were subsequently contested;²⁷¹ (viii) tax fuel oil which was imported duty-free into the Island;²⁷² (ix) enforce the Congressional restriction on the ownership of property;²⁷³ (x) limit political participation in by-elections to the members of one political party;²⁷⁴ and (xi) maintain a suit in its *parens patriae* capacity against state-side employers of Puerto Ricans for violations of federal law which had the effect of discriminating against Puerto Ricans and injuring the Puerto Rican economy.²⁷⁵

These powers and prerogatives have been developed through a regimen of local autonomy which has been sustained through the doctrines of legislative and judicial autonomy. The legislature of Puerto Rico has the power to enact or repeal local laws so long as these are not in conflict with federal law. When these have conflicted with federal peremptory norms the Supreme Court has nullified such enactments. Thus, Puerto Rico has been denied the power to tax the capital of a federal instrumentality,²⁷⁶ to deny the use of foreign trademarks,²⁷⁷ to discriminate against aliens in issuing licenses for the practice of

262. See *Downes v. Bidwell*, *supra*.

263. See *Balzac v. People of Porto Rico*, *supra*.

264. *Id.*

265. *Id.*

266. See *Crowley v. United States*, *supra*.

267. See *New York ex rel. Kopel v. Bingham*, *supra*.

268. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, *supra*.

269. See *Puerto Rico v. Shell Co.*, *supra*.

270. See *Gromer v. Standard Dredging Co.*, *supra*.

271. See *Sancho Bonet v. Yabucoa Sugar Co.*, *supra*.

272. See *West India Oil Co. v. Domenech*, *supra*.

273. See *Puerto Rico v. Rubert Hermanos, Inc. (I)*, *supra*.

274. See *Rivera Rodriguez v. Popular Democratic Party*, *supra*.

275. See *Alfred L. Snapp, etc. v. Puerto Rico*, *ex rel. Idéz*, *supra*.

276. See *Domenech v. National City Bank of New York*, *supra*.

277. See *Bacardi Corp. v. Domenech*, *supra*.

civil engineering,²⁷⁸ to impair the obligations of contracts,²⁷⁹ and to authorize searches without probable cause.²⁸⁰

Moreover, Puerto Rico has been made subject to the due process and equal protection components of the Fifth or Fourteenth Amendments,²⁸¹ to the First and Fourth Amendments,²⁸² to Article VI, Section 2, Clause 1 of the Constitution thereby affording United States citizens the privileges and immunities possessed by Puerto Rico's own residents;²⁸³ the power of Congress over interstate commerce;²⁸⁴ and ultimately the power of Congress over the territories. Its power to limit federal use of Puerto Rico territory for defense purposes is circumscribed.²⁸⁵ It has been held (prior to the creation of the Commonwealth) not to have the sovereignty of one of the states of the union which would enable it to pursue an independent prosecution for a federal offense since for these purposes it and the United States constituted the same sovereign.²⁸⁶ Under the law of nations, Puerto Rico is not a foreign country and under the Constitution it is an unincorporated territory. Those authors who have characterized Puerto Rico as an associated state have misunderstood its constitutional status.²⁸⁷ As we have seen, Puerto Rican enactments are subordinate to federal treaties and laws and Puerto Rico may not discriminate against aliens allowed into the Island by the United States. It is the U.S. Congress which has the power to determine the political status of the Island and to extend to it or not its various social security programs. It is the federal sovereignty which defines the Island's rights and obligations and to this extent the Island's autonomy is itself circumscribed.

This status stands in contrast to United Nations General Assembly Resolution 1514 (XV) which recognizes that the people of Puerto Rico like the peoples of all territories have the right to self-determination, including the right freely to determine their political status and pursue their economic, social and cultural development.²⁸⁸ The United States as a member of the United Nations is bound under Article 73(b) of the United Nations Charter to ensure the well-being of the inhabitants of territories which have not attained a full measure of self-government by developing self-government in such territories, taking due account in this instance of the political aspiration of the

278. See *Examining Board v. Flores de Otero*, *supra*.

279. See *Puerto Rico v. Russell & Co., etc.*, 315 U.S. 610.

280. See *Terral Torres v. Commonwealth of Puerto Rico*, *supra*.

281. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, *supra*; *Examining Board v. Flores de Otero*, *supra*.

282. See *Balzac v. People of Porto Rico*, *supra*; see *Terral Torres*, *supra*.

283. See *Examining Board v. Flores de Otero*, *supra*.

284. See *Puerto Rico v. Shell Co.*, *supra*.

285. See *Weinberger v. Romero-Barceló*, *supra*.

286. See *Puerto Rico v. Shell Co.*, *supra*.

287. See *De Smith, Micronesia and Microstates* 79 (1970) and cf. *Crawford*, *supra* note 2, at 295.

288. G.A. Res. 1514 (XV), 15 U.S. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960).

people of Puerto Rico, and assisting the Island's people in the progressive development of free political institutions, according to the particular circumstances of the territory and its people and the applicable stage of advancement.²⁸⁹

The concept of self-determination has come to be accepted as a norm of international law and as such has been characterized as a right of peoples.²⁹⁰ Judge Dillard in his separate opinion in the *Western Sahara Case*²⁹¹ described the restraint flowing from this norm as follows:

It seem[s] hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people.²⁹²

Such a determination by a people may take the form of (i) emergence as a sovereign independent state; (ii) free association with an independent state; or (iii) integration with an independent state.²⁹³ Free association has been further defined to be the result of a free and voluntary choice by the peoples of the territory concerned through informed and democratic processes; to this end it should respect the individuality and cultural characteristics of the territory and its people while allowing the territory the freedom to modify the status of that territory through democratic means and constitutional processes.²⁹⁴

Finally, factors indicative of the free association of a territory on an equal basis with the metropolitan or other country as an integral part of the country or other form include, *inter alia*, constitutional considerations defined as follows:

(i) whether the constitutional guarantees extend equally to the associated territory; (ii) whether there are powers in certain matters constitutionally reserved to the territory or to the central authority; and (iii) whether there is no provision for the participation of the territory on a basis of equality in any changes of the constitutional system of the State.

...

289. U.N. Charter art. 73(b).

290. See *Namibia Case*, 1971 I.C.J. 16, at 31; *Western Sahara Case*, 1975 I.C.J. 12.

291. 1975 I.C.J. 12.

292. *Id.* at 122.

293. See General Assembly Resolution 1541 (XV) of December 15, 1960, G.A. Res. 1541 (XV), 15 U.N. GAOR Supp. 16, at 29, U.N. Doc. A/4684 (1960).

294. *Id.*, Annex (Principle VI).

[(iv)] Representation without discrimination in the central legislative organs on the same basis as other inhabitants and regions.

...

[(v)] In a federal system an identical decree of self-government for the inhabitants and local bodies of all parts of the federation.

[(vi)] Local self-government of the same scope and under [the] same conditions as enjoyed by other parts of the country.²⁹⁵

In applying these principles to the legal status of Puerto Rico as defined by the U.S. Constitution we may conclude that it is locality which governs the constitutional rights and responsibilities of the people of Puerto Rico, for it is locality (under the incorporation doctrine and the territorial clause of the U.S. Constitution)²⁹⁶ which determines the applicability of the Constitution with regard to all of its provisions. To this extent it is the territorial status of Puerto Rico which determines the destiny of the people of Puerto Rico rather than the converse as posited in the *Western Sahara Case*. It is because Puerto Rico is an unincorporated territory that a Puerto Rican receiving specific federal welfare benefits granted to the citizens of the states is no longer entitled to them upon arriving in the Island.²⁹⁷ For similar reasons, Puerto Rico has no voting representatives in the United States Congress; its sole Resident Commissioner is assigned to the House of Representatives and has no power to cast a vote on the floor of the House.²⁹⁸ Its people therefore lack representation in the central legislative organ on the same basis accorded American citizens who are resident in the states.

The presence of the territorial clause in the U.S. Constitution and its application to Puerto Rico means that the instrument's constitutional guarantees may be varied in the Island's case. The guarantees therefore do not apply equally as in the rest of the union; moreover, Congress has the power to pass legislation affecting the Island without having voting members from the Island present and participating. The states, of course, are free to elect voting members of Congress which Puerto Rico cannot do. Nor does Puerto Rico have the power afforded a state to vote upon amendments to the U.S. Constitution; nor for that matter do its people have the right to vote for the President of the United States.

The norm of self-determination when measured in the case of Puerto Rico

295. See General Assembly Resolution 742 (VIII) of 27 November 1953, Annex, Third Part, G.A. Res. 742 (VIII), 8 U.N. GAOR Supp. 17, at 25, U.N. Doc. A/2630.

296. U.S. Const. art. 4, sec. 3, cl. 2 provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States...."

297. See *Califano v. Gautier Torres*, *supra*.

298. See Commonwealth Office, *supra* note 26, at 103, 154; see also Lewis, *supra* note 165, at 420.

against the above criteria is reduced to the concept of local self-government under the same scope and under the same conditions as enjoyed by the rest of the country. The tensions created by the Island's legal status as an unincorporated territory of the United States have been eased through the doctrines developed and applied by the U.S. Supreme Court. The rule of local deference has reconciled such conflicts and the Supreme Court has been consistent in its protection of the local law or custom so long as these do not contravene federal law. The Court's interpretation of the Congressional powers of nullification over insular legislation transformed nullification into a doctrine of implied approval of local law. The doctrines of legislative and judicial autonomy ensured that the Island would have a full measure of local self-determination (though not in the comprehensive sense already treated) in order to develop separately. The doctrine of sovereign immunity, i.e., that the Island's government could not be sued without its consent, was an additional mode of paying deference to the local body politic.

To the extent that these doctrines of autonomy and deference were applied, the Supreme Court has ensured the preservation and development of the Spanish civil law tradition on the Island. It has also compelled the tribunals under its jurisdiction to follow its leadership in safeguarding the judicial autonomy of the insular courts. The rule of local law and decisions has thereby been preserved and allowed to flourish, except where plainly inconsistent with federal norms.

The case law we have examined attests to the proposition that Puerto Rico's status as an unincorporated territory has been interpreted to preserve its local prerogatives; this same status could be used as a viable basis for a preferred constitutional status. The very power that allows the Congress to differentiate Puerto Rico and its citizens for the purposes of a federal program could be used to grant the Island powers equivalent to sovereignty in areas such as control of immigration, ability to pass laws inconsistent with federal norms, and foreign affairs. The application of the international norm of self-determination would, of course, require the Island's people to be accorded an opportunity to freely accept or reject such powers along with their inalienable right to decide for and be granted their political independence.²⁹⁹ The autonomy nurtured by the U.S. Supreme Court since the turn of

299. It should be noted that the decisions of the United Nations with respect to the status of Puerto Rico are themselves not without controversy. The adoption by the General Assembly of Resolution 748 (VIII) on November 27, 1953 ended the obligation on the United States to transmit information on Puerto Rico to the Secretary General as required by Article 73(e) of the Charter and withdrew Puerto Rico from the list of non-self-governing territories on the ground that it had obtained the status of self-government. See Commonwealth Office, *supra* note 26, at 199. This notwithstanding the United Nations General Assembly's Special Committee on the Situation with Regard to the Implementation of the Granting of Independence to Colonial Countries and Peoples (established in

the century is in line with the underlying basis for self-determination, namely, that it is ultimately for the people of Puerto Rico to determine the nature and scope of their destiny—a decision which still awaits them.

1961) has recognized and reaffirmed the inalienable right of the people of Puerto Rico to self-determination and independence in conformity with General Assembly Resolution 1514 (XV) of 14 December 1960, and its full applicability with respect to Puerto Rico. It has passed resolutions to this effect on August 1972, 30 August 1973, 12 September 1978, 15 August 1970, 20 August 1980, 21 August 1981 and 4 August 1982. See U.N. Doc. A/37/194 (1982).

**Revista
Jurídica
de la
Universidad
Interamericana
de Puerto Rico**



Facultad de Derecho

Vol. XVIII

Septiembre-Diciembre 1987

Nº 1

LANGUAGE RIGHTS AND DUE PROCESS — HISPANICS IN THE UNITED STATES

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According to the United States Census, of the 9,178,000 persons of Spanish origin in the United States, 6 million or 65.4 percent reported that Spanish was the language used in the home.¹ Among the persons who make up this group approximately 2 million Spanish-origin school children do not have a command of the English language.² The import of these statistics for the present and the immediate future is that state and local governments must address the specific needs of Mexican Americans, Puerto Ricans, Cubans and other persons of Spanish origin in affording them due process and equal protection of the laws.³

Indeed, because Hispanics have been discriminated against by state and local authorities in the past on the basis of language, they have sought relief from the courts in affording them equal rights to effective participation in governmental programs.⁴ What has been most revealing is that courts have varied in their decisions depending in part on the national origin of the individual Hispanic.

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1. U.S. Dept. of Commerce, U.S. Bureau of the Census, Current Population Reports, Population Characteristics, Persons of Spanish Origin in the United States: March 1972 and 1971, at 16, Table 4 (No. 250, Series P-20, 1973).
2. Hearings on H.R. 9840 and H.R. 10224 Before the Gen. Subcomm. on Education of the House Comm. on Education and Labor, 90th Cong., 1st Sess., n. 17, at 15, Table 11.
3. There are 5,073,000 persons of Mexican origin in the United States, 1,454,000 of Puerto Rican origin (in the continental United States, excluding Puerto Rico), 565,000 persons of Cuban origin, 556,000 of Central or South American origin, and 1,582,000 of other Spanish origin. U.S. Dept. of Commerce, U.S. Bureau of the Census, Current Population Reports: Population Characteristics: Persons of Spanish origin in the United States: November 1969, at 10, Table 6 (No. 213, Series P-20, 1970).
4. See generally, *Mendez v. Westminster School Dist.*, 64 F. Supp. 544 (S.D.Ca. 1946), *aff'd* 161 F.2d 774 (9th Cir. 1947); *Gonzalez v. Shelly*, 96 F.Supp. 1004 (D.Ariz. 1951); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

Thus, in *Carmona v. Sheffield*,⁵ the district court held that the failure to provide unemployment insurance benefits forms in Spanish to plaintiffs who spoke, read and understood only Spanish was not a denial of due process. It granted defendant's motion to dismiss for failure to state a claim upon which relief can be granted. On the other hand, the district court in *Pabon v. Levine*,⁶ denied defendant's motion for summary judgment which was brought on the ground that "[n]either the Constitution . . . nor any state or federal statute requires the [Unemployment Insurance] Division to conduct its business or any portion thereof in Spanish or any other foreign language in order to accommodate non-English speaking persons." The district court found that plaintiff, a citizen of the United States who was born in Puerto Rico, but who spoke virtually no English and could not read, nor write English made out a claim under Title VI of the Civil Rights Act of 1964.⁷

What is most interesting with respect to these two cases is that the California court focused upon two concerns, namely, that the provision of bilingual notices would be such an administrative burden as to cause the government to grind to a halt and secondly that the United States is an English-speaking country and as such has required an understanding of the English language as a condition to naturalization.⁸ The latter concern of the California court raises an issue which is only relevant to naturalized Mexicans, Cubans and persons of other Spanish origin, but is irrelevant to Puerto Ricans who are citizens of the United States from birth and who come from an Island Commonwealth of the United States where Spanish is the official language.⁹

Yet, California courts even where they have found that English literacy requirements are violative of the rights of Spanish-speaking persons have failed to require the state to accommodate its programs to the language needs of Spanish speaking citizens. In *Castro v. State of California*,¹⁰ the State Supreme

5. 325 F.Supp. 1341 (N.D.Ca. 1971), *aff'd* 475 F.2d 738 (9th Cir. 1973); *accord*, *Guerrero v. Carlson*, 9 Cal. 3d 808, 512 P.2d 833, 109 Cal. Rpt. 201 (1973), *cert. denied* 414 U.S. 1137 (1974) (the failure to provide welfare notices in Spanish did not violate the due process clause).
6. 70 F.R.D. 674 (S.D.N.Y. 1976). A copy of the settlement obtained in this case is on file with the law journal, not otherwise officially reported.
7. 42 U.S.C. § 2000d.
8. 8 U.S.C. § 1423(1).
9. The Organic Act of March 2, 1917, 39 Stat. 951 (known as the "Jones Act"), gave American citizenship to all Puerto Ricans, and permitted them free entry into the country. The Supreme Court in the course of construing the Jones Act noted that the statute sought to place Puerto Ricans "on an exact equality with citizens from the American homeland, to secure them more certain protections against the world, and to give them an opportunity, should they desire, to move into the United States proper and there without naturalization to enjoy all political and other citizens." All analogies with respect to 8 U.S.C. § 1423(1) and its naturalization requirements are thus inapposite with respect to Puerto Ricans.
10. 85 Cal. Rptr. 20 (1970).

Court held that a state constitutional provision providing that the right to vote in the state rested on a showing that the person was able to read English was unconstitutional as applied to literate Spanish speakers. This notwithstanding the court refused to adopt or require a bilingual electoral apparatus relying instead on its assumption that newly enfranchised voters literature in Spanish could prepare themselves to vote with the assistance of others capable of reading and translating to them.¹¹

In contrast to these decisions, district courts have interpreted the Voting Rights Act of 1965¹² to require states and localities to provide Puerto Rican voters bilingual ballots, bilingual pamphlet information, and bilingual interpreters to assist them in the exercise of the franchise.¹³ A bilingual electoral apparatus has been in place in New York City for multilingual school board elections since at least 1973,¹⁴ in all federal, state and local elections in New York City since 1974, in Chicago since 1972,¹⁵ and in Philadelphia since 1975.¹⁶

TOWARDS A THEORY OF LANGUAGE DISCRIMINATION

Puerto Ricans, Mexican Americans and other persons of Spanish origin are distinct ethnic and national origin groups with certain characteristics which

11. *Id.* at 33-34. The Court held:

It is clear that the goal of efficient and inexpensive administration, while praiseworthy, cannot justify depriving citizens of fundamental rights. But this does not imply that the state must not only provide all qualified citizens with an equivalent opportunity to exercise their right to vote, but must also provide perfect conditions under which such right is exercised. . . . California is not required to adopt a bilingual electoral apparatus as a result of our decision today. . . . The state interest in maintaining a single language system is substantial and the provision of ballots, notices, ballot pamphlets, etc., in Spanish is not necessary either to the formation of intelligent opinions on election issues or to the implementation of those opinions through the mechanics of balloting. It reasonably may be assumed that newly enfranchised voters who are literate in Spanish can prepare themselves to vote through advance study of the sample ballots with the assistance of others capable of reading and translating them.

12. 42 U.S.C. §§ 1973 (b) (e), 1973aa, 1971; *also* Voting Rights Act of 1970, 42 U.S.C. § 1973 *et seq.*
13. *Puerto Rican Organization for Political Action (PROPA) v. Kusper*, 350 F.Supp. 606 (N.D.111. 1972), *aff'd* 490 F.2d 575 (7th Cir. 1973); *Lopez v. Dinkins*, 73 Civ. 659 (S.D.N.Y. 1973); *Coalition for Ed., Dist. One v. Board of Elec., City of N.Y.*, 370 F.Supp. 42 (S.D.N.Y. 1974); *Torres v. Sachs*, 381 F.Supp. 309 (S.D.N.Y. 1974); *Arroyo v. Tucker*, 372 F.Supp. 764 (E.D.Pa. 1974); *Echevarria v. Carcy*, 402 F.Supp. 183 (S.D.N.Y. 1975).
14. *Lopez v. Dinkins*, *supra*.
15. *Torres v. Sachs*, *supra*.
16. *PROPA v. Kusper*, *supra*.
17. *Arroyo v. Tucker*, 372 F.Supp. 764 (E.D.Pa. 1974).

identify them to the majority community.¹⁸ As Judge Justice aptly put it in *United States v. Texas*¹⁹ when speaking of Mexican American children but which is applicable to all Hispanics:

Mexican American students exhibit numerous characteristics which have a casual connection with their general inability to benefit from an educational program primarily designed to meet the needs of so-called Anglo Americans. These characteristics include 'cultural incomparabilities' and English language deficiencies -- two traits which immediately and effectively identify those students sharing them as members of a definite group whose performance as norm habitually will fall below that of Anglo American students who do not exhibit these traits. It would appear, therefore, . . . that it is largely these ethnically linked traits -- albeit combined with other facts such as poverty, malnutrition, and the effects of past educational deprivation -- which account for the identifiability of Mexican American students as a group and which have, as a consequence, elicited . . . the different and often discriminatory treatment shown on the record in this case.

Language is an incident of one's national origin and together with cultural characteristics differentiate Hispanics from the majority. Language based discrimination is a result of a classification which is based upon the prime national origin characteristic of Puerto Ricans and others: their language. To discriminate against this characteristic of Puerto Rican national origin is to discriminate on the basis of national origin.

Courts have traditionally had little problem in dealing with discrimination based on immutable characteristics such as a person's race, color, sex, and even national origin.²⁰ In this context, sex means a person's gender, an immutable characteristic from birth,²¹ and color refers to skin pigmentation, which is also an immutable characteristic with which a person is born.²² The concept of race

18. *Hernandez v. Texas*, 347 U.S. 475 (1974); *Katzenbach v. Morgan*, *supra*.
19. Civ. Action No. 5281 (E.D. Tex. 1971), *rev'd and remanded on other grounds* 467 F.2d 848 (5th Cir. 1972).
20. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Korematsu v. United States*, 323 U.S. 214 (1944); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1948); *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969); *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974).
21. *Diaz v. Pan American World Airways*, 442 F.2d 385 (5th Cir.), *cert. denied* 404 U.S. 950 (1971); *Willingham v. Macon Telegraph Publishing Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975).
22. *Cf. Plessy v. Ferguson*, 163 U.S. 537 (1896).

is given its common meaning and applied to such criteria as pigmentation, hair form, and phenotype.²³

However, courts have had and continue to have difficulty with characteristics that appear mutable and which may be differentiated from those set forth above. Such characteristics encompass hair length as differentiated from sex,²⁴ grooming codes,²⁵ citizenship as differentiated from national origin,²⁶ and language.²⁷ The consequence of courts ignoring the obvious, well-established proposition that national origin discrimination includes discrimination against an aspect of national origin, namely, language, is to find that the Spanish language is separate from the cultural and national origin groups of which it is a characteristic and that therefore no invidious discrimination has occurred.

Using this latter formulation the district court in *Frontera v. Sindell*²⁸ found that it was "not claimed that discrimination, if any was practised here, is against persons with a background of Spanish nationality, however remote that background may be, but only the limited class of people who speak and understand Spanish better than they do English," and went on to hold that plaintiff had failed to prove his claim of employment discrimination in testing. Similarly, the Massachusetts Supreme Judicial Court affirmed a conviction by its Housing Court against two Puerto Ricans who failed to comply with written orders issued by the Housing Department to vacate unsafe premises despite the fact that these orders were written in English and neither defendant spoke, read or understood English.²⁹

These courts have failed to examine language based discrimination as another although sometimes more sophisticated form of national origin discrimination. Yet, other courts have clearly found that national origin discrimination can arise in the context of language based discrimination and have provided an adequate remedy where this has been the case. In *Yu Cong Eng v. Trinidad*,³⁰ a Chinese merchant engaged in the wholesale lumber business in the Philippines was required by statute to keep his account books in the English or Spanish language, or local dialects, but not in Chinese which was the only language he understood. The Supreme Court found that this would deprive some 12,000 Chinese merchants of their liberty and property without due process of law,

23. EEOC Dec. 70-90, 2 EEP 236 (1969).
24. *Thomas v. Firestone Tire and Rubber Company*, 392 F.Supp. 372 (N.D. Tex. 1975).
25. *Willingham v. Macon Telegraph Publishing Co.*, *supra* note 21.
26. *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973).
27. *Frontera v. Sindell*, 522 F.2d 1215 (6th Cir. 1975).
28. 70 Civ. (September 16, 1974) (unreported decision).
29. *Commonwealth of Massachusetts v. Olga Olivo and Lucy Colon*, No. 236 (1975).
30. 271 U.S. 500 (1926).

while denying them the equal protection of the laws. It therefore struck down the statute as unconstitutional.

Similarly, the Supreme Court has held that a statute which forbade the teaching in any school of any language other than English before a student attained the eighth grade to be violative of the Fourteenth Amendment.³¹ In *Hernandez v. Erlenbusch*,³² the district court found that a tavern's policy of prohibiting the use of any foreign language at the bar violated the rights of Spanish-speaking patrons to buy, drink and enjoy what the tavern had to offer on an equal footing with English-speaking patrons. The court held that this constituted a violation of the right of Spanish-speaking patrons to make and enforce contracts, to purchase personal property and to enjoy the same benefit of laws afforded white citizens.³³ The impact of the no foreign language rule was tantamount to racial discrimination against Mexican-Americans who constituted one-fourth of the tavern's patrons.³⁴

The connection between national origin discrimination and language has been acknowledged by the Equal Employment Opportunity Commission³⁵ in cases where company rules restricted communication in Spanish between employees,³⁶ where the union refused to publish a collective bargaining agreement in Spanish,³⁷ where a union refused to publish its constitution and by-laws in Spanish,³⁸ and where testing unlawfully discriminated against Spanish-speaking applicants.³⁹ The relatedness of national origin discrimination to language based discrimination has also been similarly construed by Congress and federal agencies.⁴⁰ The U.S. Department of Health, Education and Welfare has provided

guidelines which require that "[s]chool systems are responsible for assuring that students of a particular race, color, or national origin are not denied the opportunity to obtain the education generally obtained by other students in the system,"⁴¹ and made this guideline more specific by requiring federally-funded school districts "to rectify the language deficiency" of national origin minority group children "in order to open" the instruction to those students who had "linguistic deficiencies."

HEW clarified this guideline in 1970 and required in unambiguous terms that:

Where inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students.⁴²

This regulation is designed to deal with the situation where the effect of the educational instruction program offered only in English is to deprive the child of an opportunity to effectively participate in the school without the need to show purposeful intent on the part of the school district.⁴³ The import of the regulation itself has been codified by Congress in the Equal Educational Opportunity Act⁴⁴ which requires affirmative action by the school to overcome language

31. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. State of Iowa*, 262 U.S. 404 (1923).
32. *Hernandez v. Erlenbusch*, 368 F.Supp. 752 (D. Ore. 1973).
33. *Id.* at 755.
34. *Id.*
35. See 29 C.F.R. §1606.1(b) which states, *inter alia*:

Title VII is intended to eliminate covert as well as overt practices of discrimination Examples of cases of this character which come to the attention of the Commission include: The use of tests in the English language where the individual tested came from circumstances where English was not that person's first language or mother tongue, and where English language skill is not a requirement of the work to be performed. . . .

36. EEOC Dec. No. 71-446, CCH EPD ¶6173 (1970).
37. EEOC Dec. No. 71-2029, CCH EPD ¶6243 (1971).
38. EEOC Dec. No. 73-0479, CCH EPD ¶6381 (1973).
39. EEOC Dec. No. 73-0377, CCH EPD ¶6376 (1972).
40. See Bilingual Education Act, Title VII of the 1978 Elementary and Secondary Education Act, 20 U.S.C. §3231 *et. seq.*, Equal Educational Opportunities Act, 20 U.S.C. §1703. (f); the Equal Employment Opportunity Commission, 29 C.F.R. §1606.1(b); and, the United States Department of Health, Education and Welfare, 33 Fed. Reg. 11595.

41. 33 Fed. Reg. 4955 (1968).
42. 33 Fed. Reg. 11595 (1970).
43. *Lau v. Nichols*, 414 U.S. 563, at 568 (1974); *also see*, *Rios v. Read*, 73 F.R.D. 589 (F.D.N.Y. 1977). The Supreme Court has distinguished between claims of disparate treatment from claims that stress "disparate impact" in employment cases. In the former the employer treats some people less favorably than others because of their race, color, religion, sex, or national origin. The Court stated that in this case proof of discriminatory motive was critical, although it could in some instances be inferred from the mere fact of differences in treatment. On the other hand, claims of disparate impact "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." In this type of case, proof of discriminatory motive is not required. See *Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, at 1854, n. 15. This distinction lends itself to application with respect to language based discrimination where the effect or a rule is applied equally to everybody, *e.g.*, no language will be spoken at the job or the tavern, but its impact falls more harshly on national origin minorities such as Mexican Americans or Puerto Ricans. Or, such a rule may have been intentionally designed to exclude a specific language group such as where merchants who keep their account books in the only language they understand are proscribed from continuing to do so. *Yu Cong Eng v. Trinidad*, *supra* note 29. Both concepts of disparate treatment and disparate impact are applicable in the language discrimination area and plaintiffs should be allowed to proceed on either basis to show that they have been discriminated.
44. 20 U.S.C. §1703(f) provides that "[n]o state shall deny equal educational opportunity

barriers that impede a student's equal participation in the instructional program. This latter requirement has been interpreted to require that a school district acknowledge the black vernacular or standard dialect of its students and take steps to overcome the resultant language barrier.⁴⁵

In short, where Hispanics and other language-based minority groups can demonstrate that classifications constructed by private or public persons falls more harshly on them than on the majority group, courts should find that they have made out a *prima facie* case of national origin discrimination.⁴⁶ The burden of going forward should then shift to the defendant to establish that its classification is designed and administered to meet the needs of Hispanics and others and that less drastic or alternative approaches either would not produce a better result or would be infeasible.⁴⁷ Where the defendant cannot show that its policies and practices meets the needs of Hispanics, but instead perpetuates the discriminatory effect already demonstrated by plaintiff, such practices should be enjoined. On the other hand, if the defendant is able to show some legitimate, non-discriminatory basis for its action, the plaintiff should then be free to show that such reason is mere pretext and if this is done then the court should grant appropriate relief.⁴⁸

The object of this allocation of burdens is to allow language-based minority claims to be fully developed and explored by the courts. In the main, defendants have claimed that they operate a facially and administratively neutral program and plaintiffs should be allowed to show that the discriminatory impact which their scheme has upon national origin language groups cannot be justified.⁴⁹ Providing Puerto Ricans who speak, read, and understand only Spanish with the same English language notices, formal documents, and personnel is not an act of neutrality since it is tailored to serve only those who speak, read and understand English and not those who are members of language based minority groups.⁵⁰ As one court has eloquently observed, "the notion that sharply

to an individual on account of his or her race, color, sex, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instruction."

45. *Martin Luther King, Jr., et al v. Ann Arbor Sch. Dist.*, 473 F. Supp. 1371 (E.D.Mich. 1979).

46. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Lau v. Nichols*, *supra* at 568; *Ríos v. Read*, *supra* at 597 & n. 7.

47. *McDonnell Douglas Corp. v. Green*, *supra*.

48. *Id.*

49. *See, e.g., Carmona v. Sheffield*, *supra* note 5; *Guerrero v. Carlson*, *supra* note 5.

50. *Pabón v. Levine*, *supra* note 6.

disparate people are legally fungible cannot survive the constitutional quest for genuine and effective equality."⁵¹

Facially neutral actions which have been shown to have a discriminatory effect upon minorities have been held to be unlawful in instances where a housing ordinance appeared neutral but in reality burdened minorities,⁵² or where examinations tailored for white, middle class children tended to classify black children, upon whom it adversely impacted, as mentally retarded.⁵³ Similarly, the Supreme Court has held that there is "no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."⁵⁴ The difference in treatment between English-speakers and speakers of languages other than English is obvious when viewed in terms of the discriminatory impact on Mexican Americans, Puerto Ricans and others who cannot effectively participate in government programs because of language differences.⁵⁵ For this reason courts have required that translators be assigned to Hispanic defendants who were unable to communicate in English,⁵⁶ that voting materials be supplied to Puerto Ricans in Spanish,⁵⁷ that contracts written in English but negotiated in Spanish may be considered unconscionable, and

51. *Aspira of New York v. Board of Education of the City of New York*, 58 F.R.D. 62, 63 (S.D.N.Y. 1973).

52. *Hunter v. Erikson*, 393 U.S. 385 (1969).

53. *P. v. Riles*, 343 F. Supp. 1306 (N.D.Ca. 1972); *Accord*, *Guadalupe Organization v. Tempe Elementary Sch. Dist. No. 3*, No. Civ. 71-435 (D. Ariz. Jan. 24, 1972) (where Spanish-speaking students successfully challenged their improper classification as mentally retarded based on the usage of tests written and administered in English only).

54. *Lau v. Nichols*, *supra* note 43, at 566.

55. *Mendez v. Westminster Sch. Dist.*, *supra* note 4; *Gonzales v. Shelly*, *supra* note 4.

56. *United States ex rel Negrón v. State of New York*, 434 F. 2d 386 (2d Cir. 1970); *Arizona v. Natividad*, 111 Ariz. 191, 526 P.2d 730 (1974); *Parra v. Page*, 430 P.2d 834 (Okla. Cr. 1967); *Garcia v. State*, 151 Tex. Cr. R. 593, 210 S.W.2d 574 (1948); *State v. Vasquez*, 101 Utah 444, 121 P.2d 903 (1942); *Escobar v. State*, 30 Ariz. 159, 245 P.2d 356 (1926); *Zunango v. State*, 63 Tex. Cr. R. 58, 138 S.W. 713 (1911). In *Negrón*, a Puerto Rican defendant was unable to understand English and his lawyer spoke no Spanish. The Second Circuit Court of Appeals stated:

Not only for the sake of effective cross-examination, however, but as a matter of simple humaneness, Negrón deserved more than to sit in total incomprehension as the trial proceeded. Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a new-comer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy. *Id.* at 390-391.

57. *PROPA v. Kusper*; *Lopez v. Dinkins*; *Torres v. Sachs*; *Arroyo v. Tucker*; *Echevarria v. Carey*; *supra* note 13.

that a person's inability to communicate in English is a factor in setting aside a default judgment.⁵⁸

It is plain that English only requirements may have a disparate impact upon Hispanics and other language based minority groups. In those instances where plaintiffs have made such a showing defendants have claimed administrative burden as their chief defense to accommodating their forms or services to the needs of language-based groups.⁵⁹ This argument has been set forth in its classic form by the district court in *Carmona v. Sheffield*⁶⁰ which characterized plaintiffs' claims as follows:

In essence, plaintiffs' contention would require the State of California and, presumably, all other states and the Federal Government to provide forms and to conduct its affairs and proceedings in whatever language is spoken and understood by any person or group affected thereby. The breadth and scope of such a contention is so staggering as virtually to constitute its own refutation. If adopted in as cosmopolitan a society as ours, enriched as it has been by the immigration of persons from many lands, it would virtually cause the processes of government to grind to a halt. The conduct of official business, including the proceedings and enactments of Congress, the Courts and administrative agencies, would become all but impossible. The application of Federal and State statutes, regulations and proceedings would be called into question.

This argument is summarized in the belief that the additional burdens imposed on a state's finite resources and in having to deal in one language with all its citizens is reasonable.⁶¹

Yet, this argument misses the point because it assumes too much. Any question of administrative burden is a question of fact and should not be resolved by a trier of fact prior to full discovery and development. Arguments of

58. *Frostifresh Corp. v. Reynoso*, 52 Misc. 2d 26, 274 N.Y.S. 2d 757 (Nassau Cty. Dist. Ct. 1966), *rev'd as to damages* 54 Misc. 2d 119, 281 N.Y.S. 2d (App. T. 1967). See *Jefferson Credit Corp. v. Marciano*, 60 Misc. 2d 138, 302 N.Y.S. 2d 390 (N.Y. Civ. Ct. 1969); *Albert Merrill School v. Godoy*, 78 Misc.2d 647, 357 N.Y.S.2d 378 (1974); *Cota v. Southern Arizona Bank & Trust Co.*, 17 Ariz. App. 326; *Puterman v. Puterman*, 66 Wyo. 89, 205 P.2d 815 (1949); *Industrial Loan Daly v. Okamura*, 25 Ariz. 50, 213 P.389 (1923); *Flannery v. Kusha*, 147 Minn. 156, 179 N.W. 902 (1920).

59. *Carmona v. Sheffield*, *supra* note 5; *Pabon v. Levine*, *supra* note 6.

60. 325 F.Supp. at 1342.

61. *475 F.2d at 739.

administrative burden have not been accepted in other contexts without close scrutiny⁶² and affording plaintiffs their right to discovery and a full trial on genuine issues of material fact. This is especially true where national origin discrimination is implicated as it must be when language based national origin minority groups are involved.⁶³ Any defense based on administrative burden ignores the settled proposition that the presence of less restrictive alternatives weighs heavily in testing the lawfulness of a particular practice or policy.⁶⁴

Finally, Justice Blackmun in his concurrence in *Lau v. Nichols*⁶⁵ provided an effective way of handling the situation that arises in language based national origin discrimination cases. What he said there goes to the heart of the administrative burden argument in the weighing of equities:

Against the possibility that the Court's judgment may be interpreted too broadly I stress the fact that the children with whom we are concerned here number about 1800. This is a very substantial group that is being deprived of any meaningful schooling because the children cannot understand the language of the classroom.

I wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German, or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.

In order to reach the questions of relief and the defense of administrative burden, the court must first determine the disparate effect of the challenged stated practice by finding that the number of persons involved constitutes a substantial group.

Thus, using the approach set forth above, the arguments that surround the

62. See, e.g., *Shapiro v. Thompson*, 344 U.S. 618 (1969).

63. *Korematsu v. United States*, *supra* note 20; *Pabon v. Levine*, *supra* note 6.

64. See *Shelton v. Tucker*, 364 U.S. 479 (1960); *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972); *Shapiro v. Thompson*, *supra*, at 638; *Kracmer v. Union Sch. Dist. No. 15*, 395 U.S. 621 (1969).

65. 414 U.S. at 571-572.

provision of relief to all language groups fails unless all such groups are able to prove entitlement and the numbers involved must be substantial to meet the Blackmun test. The problem of language-based discrimination then becomes capable of resolution at the initial stages of the proceeding. And the trier of fact can readily determine what numbers are involved and what the relevant statistics are since this type of proof is commonplace in most employment discrimination cases decided on a regular basis by courts today.⁶⁶ Rather than dismiss the action at the initial pleading stage, the *Carmona*⁶⁷ should have adopted the better reasoned approach of the court in *Pabon*⁶⁸ and allowed full and complete development of the case to see if in fact plaintiffs could prove a case of language based national origin discrimination.

The standard arguments set forth in *Frontera*⁶⁹ by the Sixth Circuit of Appeals, namely, that the national language of the United States is in English, that the laws are printed in English, that legislative business is conducted in English, that some states designate English as their official language, that English language literacy is required for naturalization, and that there is a governmental interest in dealing with the citizenry in a common language fails to address the fact that "there is no greater inequality than the equal treatment of unequals."⁷⁰

Moreover, the fact that persons born in Puerto Rico after April 10, 1899 are citizens of the United States and since they are citizens from birth means that they are not required to learn English as were the immigrants who came and continue to come to the United States⁷¹ and hence the comparison made by the courts to the naturalization statute begs the question. Indeed, since Spanish is the primary language of the people of Puerto Rico and in the medium of instruction in the Island's public schools which are recipients of federal funds, many persons who are born and educated in Puerto Rico are American citizens who are unable to speak, understand or read English.⁷²

The citation of the naturalization statute requiring English literacy of those who desire to become citizens is a false analogy in the case of Puerto Ricans. A true mirror of Congressional intent would be to examine the debates with respect to the exemption given Puerto Ricans who obtained a sixth grade education in Commonwealth schools where the language of instruction was other than

66. *Teamsters v. U.S.*, *supra* note 43.

67. *Id.*

68. *Id.*

69. 532 F.2d at 1220.

70. *Dennis v. United States*, 339 U.S. 162, 184 (1950) (dissent).

71. 8 U.S.C. § 1402.

72. *Torres v. Sachs*, *supra* note 13, at 311.

English.⁷³ These persons were exempted from meeting the English literacy voting requirements of the states and in the course of the debates on this legislation Congress considered the quality of instruction in American flag schools, a recognition of the relationship between the Congress and the Commonwealth of Puerto Rico, an awareness of the federal acceptance of the use of Spanish as the medium of instruction in Commonwealth schools, and the fact that Congressional policies have encouraged migration from the Commonwealth to the States.⁷⁴

In passing upon the constitutionality of this exemption for Puerto Ricans, the Supreme Court made plain what apparently some courts have misunderstood:

Congress might have also questioned whether denial of a right deemed so precious and fundamental in our society was a necessary or appropriate means of encouraging persons to learn English, or of furthering the goal⁷⁵ of an intelligent exercise of the franchise. (footnote omitted)

Whether the right to vote or the right to education furnished by state should be conditioned on the basis of English language mastery has been rejected by Congress and the Supreme Court,⁷⁶ while states have been required to accommodate their policies and practices to the needs of Puerto Ricans and other language based national origin groups.⁷⁷

The distinctions between Mexican Americans and Puerto Ricans in terms of naturalization requirements is a spurious one and should be rejected outright by the courts. The sole issue raised by these groups in terms of language based national origin discrimination is whether the otherwise neutral practices of private or public persons fall more harshly on them because of their language background and where that is the case whether and to what kinds of relief are they

73. 79 Stat. 439, 42 U.S.C. § 1973b(e); see, e.g., 111 Cong. Rec. 16235; Voting Rights, Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H.R. 6400, 89th Cong., 1st Sess., 508-513 (1965); Literacy Tests and Voter Requirements in Federal and State Elections, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary on S. 480, S. 2570 and S. 2979, 87th Cong., 2d Sess., 507-513 (1962).

74. *Katzenbach v. Morgan*, *supra* note 4, at 657-658.

75. *Id.* at 654.

76. 42 U.S.C. & 197b(e); 20 U.S.C. § 1703(f); *Katzenbach v. Morgan*, *supra*; *Lau v. Nichols*, *supra* note 43.

77. *Katzenbach v. Morgan*, *supra*; *PROPA v. Kusper*, *supra* note 13; *Ríos v. Read*, *supra* note 43; *Guadalupe Organization v. Tempe Elementary Sch. Dist. No. 3*, *supra* note 53.

entitled. It is plain that courts that continue to separate language from national origin will yield the results set forth in *Carmona*⁷⁸ without ever understanding the full dimensions of the claim for civil rights before them. On the other hand courts can and should continue to hear the claims of language based national origin minority groups and where the numbers involved are substantial they should find that plaintiffs have made out a *prima facie* case requiring the defendants then to justify their actions in terms of legitimate, non-discriminatory reasons. Plaintiffs should be allowed to probe the validity of any defense made on the basis of administrative burden, and, courts should weigh such burdens as against the rights involved and available alternatives. Needless to say that courts of equity have traditionally been flexible in fashioning remedies within the scope of the violation that has been proven. In this way, language based national origin minority groups will have a complete opportunity to develop their claims and the courts will do both for Puerto Ricans and Mexican Americans as well as others what due process requires: a full and fair opportunity to be heard.⁷⁹

78. *Supra* note 5.

79. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (due process requires that notice be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of [an] action and afford them an opportunity to present objections"); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) ("consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."); *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (the right to be heard is a basic aspect of the duty of government to follow a fair process of decision-making when it acts to deprive a person of his property); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 522 (1972).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAFAEL A. PABON, :
 Plaintiff, : **SETTLEMENT AND**
 -against- : **STIPULATION OF**
 : **DISMISSAL**
LOUIS L. LEVINE, et al., : **75 Civ. 1067**
 Defendants. : **(Judge Weinfeld)**

The plaintiff and the defendants in agreement that this lawsuit should be resolved without the time and expense of further litigation, hereby stipulate as follows:

I. Spanish-surnamed and/or Spanish-speaking claimants* are entitled to equal access to the benefits and services provided under the unemployment insurance program. In that regard all Spanish-speaking claimants shall receive the following assistance:

A. The Spanish language instruction sheet, L.O. 24 S, which is a facsimile and an explanation of the Original Claim For Benefits form, L.O. 330, shall be provided together with and attached to the L.O. 330, and a procedure shall be developed and implemented to record in the claimant's file that the claimant has received a copy of the L.O. 24 S.

B. A Spanish Language version of Claimant's Information Booklet, L.O. 318.3, shall be provided which shall incorporate in full the text contained in L.O. 318.3; and which shall include any additions made pursuant to this stipulation.

C. (1) A facsimile of the certification that is contained in the "pay order" used by the Unemployment Insurance Division of the New York State Department of Labor (the "Division") together with an explanation of the meaning and purpose of such certification shall be contained in the Spanish language version of the Claimant's Information Booklet discussed in Subparagraph 1 (B); and

(2) A form containing facsimiles of the certification language contained in all other types of certification forms used by the "Division" shall be printed in Spanish and shall be provided to Spanish speaking claimants, and a procedure shall be developed and implemented by defendants to distribute such facsimile.

* Refers to claimants who are Spanish dominant with English language deficiencies.

D. A printed explanation form in Spanish shall be provided together with and attached to every notice of determination adversely affecting the claimant made pursuant to Labor Law § 597 and sent to Spanish-speaking claimants. Along with the notation of disqualification made with regard to any claimant, a notation will be made in all cases involving Spanish-speaking claimants to indicate that a Spanish explanation form was also sent.

E. A sign in Spanish and English in letters large enough to be read from all parts of the area in which it is displayed shall be posted stating that all Spanish-speaking claimants can request and receive assistance and written materials in Spanish.

F. A procedure shall be developed and implemented whereby Spanish-speaking staff employed by the Division shall translate the summaries contained in the Summary of Interview Form, L.O. 413 in all local offices where there are a significant number of Spanish-speaking claimants.

G. A Hearing Information Form shall be provided in Spanish setting forth defendants' hearing procedures and claimant's appeal rights and a procedure shall be developed and implemented for the distribution of such form; and such form shall inform claimants that Spanish-speaking staff is available to translate decisions and unless infeasible, transcripts of hearings, and to answer questions regarding claimant's appeal rights or defendants' hearing procedures, identifying where such staff persons are available.

II. In order to more effectively implement defendant's unemployment insurance program with respect to Spanish-speaking claimants defendants shall in good faith take steps which shall include: (a) the development and preparation of a scientific sampling method to identify Spanish-speaking claimants and to conduct a survey pursuant thereto in Division local offices with significant numbers of Spanish surnamed claimants, (b) unless impossible, the redeployment of Spanish-speaking client contact staff and the redesignation of staff items to Spanish-speaking parenthetical titles so as to fully provide services and assistance to Spanish-speaking claimants, and (c) the development of a method to determine when redeployment and redesignation is required, and any such method shall provide Spanish-speaking claimants with access to benefits and services equal to that provided to English-speaking claimants.

III. The defendants agree to use their best efforts to meet the following goals and timetables from the date of the signing and filing of this stipulation:

A. The development and preparation of the research method to be used to conduct the survey of Spanish-speaking claimants described in Subparagraph II(a) above as well as the conduct of the survey within six months.

B. Provision of the results of such Spanish-speaking claimants survey within one month after the survey is conducted.

C. Redeployment and redesignation as needed shall be implemented within two months after the results of the survey are provided.

D. The development, preparation and distribution of the full and expanded translation of the Claimant Information Booklet described in Subparagraph I(B) within one year and the sign described in Subparagraph I(E) within two months.

E. The development, preparation and distribution of facsimiles and Spanish explanation forms described in Subparagraphs I(C) and (D) and the procedure pursuant to which they will be distributed within six months.

F. Development, preparation and distribution of the Spanish language version of the Hearing Information Form described in Subparagraph I(G) and the procedure pursuant to which it will be distributed within two months.

IV. Representatives of the defendants shall consult with representatives of the plaintiff with respect to the development, preparation, and implementation of all items contained in this stipulation.

V. Progress reports regarding the implementation of this stipulation shall be submitted to plaintiff's counsel twenty days prior to the dates set forth in Paragraph III above. Such reports shall include copies of relevant supporting documentation and other materials relating to such implementation. If any of the timetables set forth in Paragraph III cannot be met, defendants shall inform plaintiff's counsel in writing explaining specifically the reasons therefor.

VI. The parties stipulate to submit the issue of whether or not plaintiff Beny Gonzalez should receive a decision on the merits to a federal magistrate. This procedure will in no way be considered precedent or in derogation of N.Y.S. Labor Law § 626 which provides for exclusive procedures. If the magistrate finds that the plaintiff should receive a decision on the merits, the Appeal Board, on its own motion shall re-open the case in the interest of justice and grant Mr. Gonzalez a decision on the merits. If the magistrate determines that the plaintiff should not receive a decision on the merits, it shall in no way affect the other provisions set forth herein.

VII. The parties agree that upon the filing of the magistrate's decision with respect to Beny Gonzalez pursuant to Paragraph VI, this action will be dismissed without prejudice, plaintiffs and defendants each to bear their own costs with respect to court fees and depositions but as to the transcript of the conference on September 20, 1976 with Magistrate Sol Schreiber, plaintiff and defendants each to bear half of the cost of such transcript.

Dated: New York, New York
October 12, 1976

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SO ORDERED

U.S.D.J.

DATED: New York, New York
October 21, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RAFAEL A. PABON,

Plaintiff,

75 Civ. 1067
(Judge Weinfeld)

-against-

LOUIS L. LEVINE, et al.,

Defendants

SETTLEMENT AND STIPULATION
OF DISMISSAL

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UNRAVELLING PUERTO RICO'S COLONIAL STATUS: THE PUERTO RICAN PLEBISCITE

By Manuel del Vallé and José Luis Morín*

I. INTRODUCTION

The United Nations has dedicated itself to the decolonization of the peoples of the world. The United Nations' immediate involvement in the transition of trust territories to full independence has marked its commitment to self-determination. Namibia represents a recent example of this U.N. participation in free and fair processes leading to the self-determination of a people. The case of Puerto Rico can provide another opportunity to insure the success of such a process.

In *Downes v. Bidwell*, the United States Supreme Court held that Puerto Rico is an unincorporated territory of the United States with the result that the United States Congress determines the rights of the Island and its people.¹ Such a prerogative is at odds with international norms of "self-determination." The authors recommend a reassessment of the non-binding referendum process now under discussion in Puerto Rico and the United States Congress for a process supervised by the United Nations and which provides for the full participation of the Puerto Rican people wherever they are found in their diaspora.

In short, in 1989, nearly one hundred years after the invasion of the island by the United States, the people of Puerto Rico still seek and are entitled to the right to determine their own destiny.

II. BACKGROUND

On April 25, 1898, the United States Congress declared war on Spain, and on July 25, 1898, United States troops landed in Guanica, Puerto Rico. The Treaty of Paris of 1898 followed Spain's defeat which ceded the Island of Puerto Rico and its Spanish-speaking inhabitants to the English-speaking United States. The Treaty gave the United States Congress the power to define the rights of the Island's inhabitants and the Island's legal status. From 1898-1900, Puerto Rico was ruled by military

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1. The authors are in agreement with the thesis of Justice Harlan's dissent in *Downes v. Bidwell*, 182 U.S. 244, 379-80 (1901) that the "spirit and genius" of the United States Constitution proscribes the holding of colonies: The idea that this country may acquire territories anywhere upon the earth, by conquest or treaty, and hold them as mere colonies or provinces — the people inhabiting them to enjoy only such rights as Congress chooses to accord them — is wholly inconsistent with the spirit and genius as well as with the words of the Constitution.

authorities until the establishment of a civil government pursuant to the Island's First Organic Act (commonly known as the "Foraker Act" to provide temporary revenues and a civil government for Puerto Rico).

The Foraker Act was in effect from March 1, 1900 until March 2, 1917. It was replaced by the Second Organic Act (known as the "Jones Act") of 1917, which imposed without plebiscite United States citizenship on Puerto Rico and provided them with a bill of rights. From 1898 until 1948, the people of Puerto Rico had no right to elect the Island's governor, who was appointed by the United States President. During this period, except for one instance, the Island's appointed governors were always non-Puerto Ricans.

In the Island's history, there has never been a referendum binding the United States Congress to accept the desires of the people of Puerto Rico as to their political status. In 1967, a non-binding referendum selected Commonwealth status; this selection has been all but ignored by the current U.S. Congress which again seeks to impose on Puerto Rico a non-binding referendum process. As the authors seek to show a binding plebiscite under contemporary international norms should be held on the Island and should involve the supervisory role of the United Nations as in the case of Namibia.

United States Role in Puerto Rico

The colonial relationship between the United States and Puerto Rico has been determined on the basis of the Island's dependency on the larger metropolitan power.² This dependency serves as a basis for what the United Nations has called a "decolonization" process that would allow for the free and fair expression of the people of Puerto Rico regarding future status.

In terms of any decolonization process, the United States colonial role in Puerto Rico is characterized by a number of features:

- (i) imposition of English on the Island's Spanish-speaking teachers and students as the language of instruction in the Island's public schools;³
- (ii) substitution of United States currency for the local currency further limiting the Island's economic self-determination;
- (iii) no popular participation in the drafting or adoption of the Organic laws for the Island;
- (iv) no voting representation in either the United States House of Representatives or the Senate;
- (v) the transplantation to the Island of a United States federal court conducted entirely in English for Spanish-speaking claimants;
- (vi) an inability of Puerto Ricans to control immigration to the United States and a necessary determination by the United States Supreme Court

2. Gordon K. Lewis, *Puerto Rico: Freedom and Power in the Caribbean* (1963); Manuel Maldonado-Denis, *Puerto Rico: A Socio-Historic Interpretation* (1972).

3. This was eliminated in 1948 under the administration of the first elected governor of Puerto Rico, who implemented a policy of Spanish as the language of instruction in the Island's public schools. See Juan Jose Osuna, *History of Education in Puerto Rico* (1949); Aida Negron de Montilla, *Americanization in Puerto Rico and the Public School System, 1900-1930* (1970).

in 1904⁴ that Puerto Ricans were not "foreigners" and hence should not be deported under the procedures of American immigration law;

(vii) no right to conduct its own foreign affairs and commerce;

(viii) review of all appeals from the Island's Spanish-speaking Supreme Court which applies a Spanish civil code by the English-speaking First Circuit Court of Appeals in Boston, Massachusetts which applies common law precedent and is often reversed for misunderstanding the Island's legal system.⁵

These features produce a series of institutional obstacles that adversely affect the Island's economy and that can only be addressed by a binding referendum process that offers an option to the people of Puerto Rico to terminate or otherwise modify them.

Socio-Economic Profile of Puerto Rico

Puerto Rico is no different than other island dependencies of major powers in the impact that such powers have on economic development. This includes the Island's transformation from a monocultural agricultural system dependent on the export of sugar to a manufacturing economy which imports almost all its foodstuffs.

From 1900 to the present, nearly one-third of the Island's population migrated from Puerto Rico to the continental United States.⁶ This process was promoted both by the United States and Puerto Rico as a safety valve for the transformation of the Island's labor-intensive agricultural base essentially in sugar to a capital-intensive manufacturing base in intermediate goods. The shift to the industrial economy, which occurred after the proclamation of the Commonwealth in 1952, has made Puerto Rico more dependent on the importation of capital and the exemption from United States revenue laws.

The Island's industrial economic growth has been tied to the fact that it has been exempt from United States individual and corporate tax laws, thus allowing United States and other foreign corporations to repatriate their profits without taxation.⁷ Between 1950 and 1979, Puerto Rico's economy grew at an average annual rate of 5.2 percent per year, after accounting for inflation.⁸

From 1979 to 1983, the economy declined at an average annual rate of about 1 percent. It recovered to a 3.9 percent annual growth rate from 1983 to 1988. Over this period, Puerto Rico's economy was transformed from an agricultural to a manufacturing base.⁹ Puerto Rico continues

4. *Gonzalez v. Williams*, 102 U.S. 1 (1904).

5. Manuel del Vallé, *Puerto Rico Before the United States Supreme Court*, 19 *Revista Jurídica de la Universidad Interamericana de Puerto Rico* 13 (1984).

6. Stanley L. Friedlander, *Labor Migration and Economic Growth* (1965).

7. United States Internal Revenue Code, Section 936.

8. United States General Account Office, Fact Sheet for the Chairman, Committee on Energy and Natural Resources, U.S. Senate, *Puerto Rico. Update of Selected Information Contained in a 1981 GAO Report* (August 1989) at 4.

9. *Id.*

to suffer from persistent rates of high unemployment, poverty and crime rates.¹⁰

Manufacturing provided 62 percent of the island's net income in 1988. However, the manufacturing sector's share of total employment dropped from about 20 to 18 percent between 1979 and 1988. This occurred because of more rapid growth in some nonmanufacturing sectors of the economy.¹¹

For example, since 1980, employment increased rapidly in finances and services. The Commonwealth Government, however, remains the largest employer on the island, employing 201,000 workers or 23 percent of the workforce.¹² Puerto Rico's public debt totaled about \$10.1 billion in 1987. On a per capita basis, Puerto Rico's debt was estimated at \$2,971 in 1989.¹³

In 1979, nearly two thirds of the island's population — currently at 3.3 million inhabitants — had incomes below the United States poverty level, compared to one-eighth of the total U.S. population.¹⁴ Per capita income in 1988 was \$5,157, but this was still 47 percent of Mississippi's \$10,992, the state of the United States with the lowest per capita income.¹⁵

The Island's official unemployment rate was 17.5 percent in fiscal year 1979, increased to 23.5 percent in fiscal year 1983, and was 15.9 percent in fiscal year 1988.¹⁶ The unofficial unemployment figures are much higher. However, this was still much higher than Louisiana's 10.9 percent for calendar year 1988, the state with the highest unemployment rate. Fifty-one percent of the island's population was under age 25 in 1980, compared to a U.S. average of 41 percent.¹⁷

These statistics underlie Puerto Rico's political and economic dependency on the United States, which has impelled all political parties to conclude that the Island's present status is that of a classic colony. Representatives of the political parties in favor of statehood, an enhanced form of the present Commonwealth status, and independence respectively have each testified before the United Nations Decolonization Committee and the committees of the United States Congress decrying the Island's colonial status.¹⁸

10. *Id.*

11. *Id.*

12. *Id.*, p.3, 18.

13. *Id.*, at 6.

14. *Id.* at 5; Martin Tolchin, "Administration Gives Momentum to a Vote on Puerto Rico's Status," *New York Times*, Friday, November 17, 1989, at A24.

15. *Id.*, at 15.

16. *Id.*, at 5.

17. *Id.*

18. The Island's New Progressive Party is the Island's Republican party and seeks statehood for Puerto Rico; the Popular Democratic Party which is related to the United States Democratic Party seeks an enhanced form of Commonwealth; and the Puerto Rican Independence Party and the Puerto Rican Socialist Party are among a number of political parties seeking the Island's independence from the United States.

III. UNITED NATIONS SUPERVISORY ROLE AND PUERTO RICO

As a founding member of the United Nations, the United States had stipulated with other founders that all members with territories which had not yet attained self-government would be required to submit reports on the economic, social and educational conditions of each territory. Prior to 1952, the United States submitted such reports with regards to Puerto Rico.

In 1953, a year after the proclamation of the Commonwealth of Puerto Rico, the United States ceased to submit any further reports on the Island. However, the Island's legal status had not changed at that time, nor has it changed since.

The United States Supreme Court has been clear throughout its jurisprudence that under Article 4, Section 3, Clause 2 of the United States Constitution Puerto Rico was and is an "unincorporated territory" of the United States to which all of the rights in the Bill of Rights to the United States Constitution do not apply.

It is because Puerto Rico is an unincorporated territory that a Puerto Rican in the United States who receives specific federal welfare benefits granted to the citizens of the states is no longer entitled to them upon arriving in the Island. For similar reasons, Puerto Rico has no voting representatives in the United States Congress; its sole Resident Commissioner is assigned to the House of Representatives and has no power to cast a vote on the floor of the House. Its people therefore lack representation in the central legislative organ like that accorded American citizens who are residents in the several states.

The territorial clause in the U.S. Constitution and its application to Puerto Rico has meant that this instrument's constitutional guarantees may be limited for those residing on the Island. Constitutional guarantees are not available in Puerto Rico as in the rest of the United States; moreover, Congress has the power to pass legislation affecting the Island and its people's rights without the participation of elected representatives of the Island.

Each of the fifty states is, of course, free to elect voting members of Congress, unlike Puerto Rico. Neither does Puerto Rico have the power to vote upon amendments to the U.S. Constitution; nor can its people vote for the President of the United States.

Congress has never granted Puerto Rico the prerogative of pursuing a binding plebiscite and has reserved its right under Article 4, Section 3, Clause 2 of the United States Constitution to determine the Island's legal status and destiny.

However, the world community has endorsed the international law principle of "self-determination" with respect to Puerto Rico under United Nations General Assembly Resolution 1514 (XV) which recognizes that the people of Puerto Rico like the peoples of all territories have the right to self-determination, including the right freely to determine their

political status and pursue their economic, social and cultural development.¹⁹

The United States, as a member of the United Nations is bound under Article 73(b) of the United Nations Charter to ensure the well-being of the inhabitants of territories which have not attained a full measure of self-government by developing self-government in such territories, taking due account in this instance of the political aspiration of the Puerto Rican People, and assisting the Island's people in the progressive development of free political institutions, according to the particular circumstances of the territory and its people and the applicable stage of advancement.²⁰

Given the need for a process free from the intervention of the occupying power, it is important that any plebiscite in Puerto Rico have three central features: (i) that it be opened to participation by all persons who constitute the Puerto Rican people; (ii) that it be binding upon the United States Congress; and (iii) that it be free and fair under the auspices of the United Nations as the most obvious arbiter.

A. Self-Determination as a Right of People

The concept of self-determination has come to be accepted as a norm of international law and as such has been characterized as a right of peoples.²¹ Judge Cillard in his separate opinion in the *Western Sahara Case*²² described this rule of law as follows:

It seem[s] hardly necessary to make more explicit the cardinal restraint which the legal right of self-determination imposes. That restraint may be captured in a single sentence. It is for the people to determine the destiny of the territory and not the territory the destiny of the people.²³

Such a determination by a people may take the form of (i) emergence as a sovereign independent state; (ii) free association with an independent state; or (iii) integration with an independent state.²⁴ Free association has been further defined to be the result of a free and voluntary choice by the people of the territory concerned through informed and democratic processes; to this end it should respect the individuality and cultural characteristics of the territory and its people while allowing the territory the freedom to modify the status of that territory through democratic means and constitutional processes.²⁵

Finally, factors indicative of the free association of a territory on an equal basis with other sovereign states or other nations as an integral part

19. G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. 16, at 66, U.N. Doc. A/4684 (1960).

20. U.N. Charter art. 73(b).

21. See *Namibia Case*, 1971 I.C.J. 16, at 31; *Western Sahara*, 1975 I.C.J. 12.

22. 1975 I.C.J. 12.

23. *Id.* at 122.

24. See General Assembly Resolution 1514 (XV) of December 15, 1960, G.A. Res. 1514 (XV), 15 U.N. GAOR Supp. 16, at 29, U.N. Doc. A/4684 (1960).

25. *Id.* Annex (Principle VI).

of that country or another form, among others that should be considered, are:

- (i) whether the constitutional guarantees extend equally to the associated territory;
- (ii) whether there are powers in certain matters constitutionally reserved to the territory or to the central authority;
- (iii) whether there is any provision for the participation of the territory on a basis of equality in any changes of the constitutional system of the State;
- (iv) whether there is representation without discrimination in the central legislative organs on the same basis as other inhabitants and regions;
- (v) whether in a federal system there is an identical degree of self-government for the inhabitants and local bodies of all parts of the federation; and
- (vi) whether there is local self-government of the same scope and under the same conditions as enjoyed by other parts of the country.²⁶

In applying these principles to the legal status of Puerto Rico as defined by the U.S. Constitution we must conclude that under American law it is locality which governs the constitutional rights and responsibilities of the people of Puerto Rico. For it is locality which determines the applicability of the Constitution with regard to all of its provisions. To the extent it is the territorial status of Puerto Rico which determines the political destiny of Puerto Rico rather than the people of Puerto Rico, the legal principles of the Western Sahara Case are contravened.

B. International Law Entitles the People of Puerto Rico Not Resident In Puerto Rico to vote on the Future Status of the Island

The United Nations Charter recognizes not only the rights of nation states but also recognizes the rights of "peoples" to "self-determination" when it declared as one of its purposes:

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . ²⁷

The concept of "self-determination of peoples" imposes a restraint on nation-states that would determine the future of a "people." In the present context this means that it is up to the People of Puerto Rico, wherever they may be found, whether on the Island or abroad to determine the destiny of Puerto Rico, and not for the Government of Puerto Rico or Puerto Rico as a political unit of the American Government to determine the Island's destiny.

The International Covenants on Human Rights on this point are clear that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their

26. G.A. Res. 742 (VIII) 27 Nov., 1953, Annex, Third Part, 8 U.N. GAOR Supp.17, at 25 U.N. Doc. A/2630.

27. U.N. Charter art. 1, para. 2 (1945).

economic, social and cultural development."²⁸ This principle is consonant with that of the Universal Declaration of Human Rights that the "will of the people shall be the basis of the authority of government."²⁹

The international community has seen the direct intervention and benefit from the supervision of elections for self-determination in the decolonization process. Most recently, in Namibia, a trust territory torn by the violence and repression of South Africa as the illegally occupying power, the United Nations has successfully supervised the election of a constituent assembly for the drafting of that country's constitution.

Given Puerto Rico's own history of political strife and repression, especially that aimed at the Island's advocates for independence, including the death of independence advocates at the hands of the Island's police in Cerro Maravilla in the 1970s, there is a need for a United Nations supervised process in order to ensure a free and fair plebiscite by all of the Puerto Rican people.³⁰

Any plebiscite held in Puerto Rico must be in accordance with the 1952 United Nations General Assembly Resolution 637 that the desires of peoples to self-determination are to be ascertained by plebiscites or other recognized means.³¹

C. The Importance of the Concept "Consent of the Governed" in U.S. Law

The essence of the international rule of the rights of peoples is consistent with the American principle of consent of the governed and at odds with the principle of American territorial jurisprudence which states that it is locality and not citizenship which determines the rights of Americans.³²

For example, in *Balzac v. People of Puerto Rico*,³³ the U.S. Supreme Court unanimously concluded that Puerto Rico was an unincorporated territory of the United States, that is, a locality in which only those provisions of the U.S. Constitution applied that the Congress or the Court had determined applied to the Island.

Despite the fact that Puerto Ricans were American citizens the Court concluded that the Sixth Amendment to the United States Constitution providing for jury trial did not apply to Puerto Ricans on the Island³⁴.

28. G.A.Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N.Doc. A/6546 at 49, 53.

29. G.A.Res. 217A, U.N. Doc. 74-75 at arts. 15, 21(i)(1946).

30. Manuel Suarez, *Requiem on Cerro Maravilla, The Police Murders in Puerto Rico and the U.S. Government Coverup* (1987); See also Manuel Maldonado-Denis, *Puerto Rico: A Socio-Historic Interpretation* (1972).

31. G.A.Res. 637, 7 U.N. GAOR Supp. (No. 20) at 26, 15, U.N. Doc. A/2361 (1952).

32. See Manuel del Vallé, "Puerto Rico Before the United States Supreme Court," 19 *Revista Juridica de la Universidad Interamericana de Puerto Rico* 13 (1984).

33. The actual name of the case is *Balzac v. People of Porto Rico*, 248 U.S. 298 (1922). The United States Supreme Court and the United States Government identified the Island as "Porto Rico" until 1932, when the United States finally changed the spelling to "Puerto Rico," the appropriate name for it in Spanish.

34. *Id.*, See also *supra* note 3.

although Puerto Ricans moving to the United States mainland would be entitled to jury trial in several states of the United States.

The legal rights of Puerto Ricans, therefore, depend on their location.³⁵ It is precisely this concept which a United Nations supervised plebiscite would change in Puerto Rico replacing a Congressionally imposed territorial status with the consent of the people of Puerto Rico.

D. The Puerto Rican People

The international principle of "self-determination" as applied focuses on the rights of individual members of the Puerto Rican people over and above any right possessed by Puerto Rico. If the determination as to who composes the People of Puerto Rico is not limited by U.S. law as applied to their colony, then it follows that in the plebiscite on the status of the island, all Puerto Ricans wherever they may be found, regardless of locality, may return to vote or be provided absentee ballots as was done in Namibia.

The Island of Puerto Rico is free to define a Puerto Rican as a person who has at least one parent who is Puerto Rican and to afford all Puerto Ricans regardless of current residence the opportunity to participate in the upcoming plebiscite. Puerto Rico may make applicable some of the same electoral requirements of Puerto Ricans outside the Island as they do on the Island, namely, that each person be over 18 years of age and produce proper identification.

Suffrage without residence for all Puerto Ricans will then comply with the international norm that it is the People of Puerto Rico wherever they may be found whether in Madrid, New York, or San Juan who are to determine the destiny of Puerto Rico.

The international community has seen the direct intervention and benefit from the supervision of elections for self-determination in the decolonization process. Most recently, in Namibia, a country torn by political strife and repression, the United Nations has successfully supervised the election of a constituent assembly for the drafting of that country's constitution.

IV. CONCLUSION

The plebiscite to decide the political future of Puerto Rico should include all members of the Puerto Rican people, who can be defined as those persons, one of whose parents was born in Puerto Rico or who themselves reside in Puerto Rico. This could be further refined to include Puerto Ricans who are eighteen years of age or over and who would be able to vote in person or by proxy in ballots drafted in English and in Spanish.³⁶

35. See *supra* note 6.

36. The migration of the Puerto Rican people to the United States during the twentieth century has resulted in a community which is bilingual in English and Spanish. The different language abilities of Puerto Ricans both in the States and on the Island can be best addressed by ballots in English and Spanish, which would be consistent with Voting Rights Act of 1965, as amended, which has resulted in the use of bilingual ballots. See, *Torres*

The United Nations endorses the principle of international law that "it is for the people to determine the destiny of the territory and not the territory the destiny of the people."³⁷ A Puerto Rican plebiscite governed by existing norms of international law should require the participation of the Puerto Rican people, consisting of all those born from parents at least one of whom was born in Puerto Rico as well as all persons who live in Puerto Rico, shall have the right to freely determine their political future.³⁸

v. Sachs, 381 F.Supp. 309 (S.D.N.Y. 1974); *Arroyo v. Tucker*, 372 F.Supp. 764 (E.D.Pa. 1974). Also see elsewhere in this volume, Cartagena, J., "The English-Only Movement: Violations of the International Covenant on Economic, Social and Cultural Rights".

37. *Western Sahara*, 1975 I.C.J. 12 at 122.

38. The United States Census has historically defined a Puerto Rican to be a person one of whose parents was born in Puerto Rico. We have borrowed this definition in order to give a maximum opportunity to vote to all of those who thus constitute the Puerto Rican people. See for example U.S. Census, 1980.