

The Exclusion of Non-English-Speaking Jurors: Remediating a Century of Denial of the Sixth Amendment in the Federal Courts of Puerto Rico

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ABSTRACT

This Article explores the constitutional implications of the Jury Selection and Service Act's English language juror prerequisite, as applied in the federal courts in Puerto Rico. The language requirement results in the exclusion of approximately 90% of the age-eligible population of Puerto Rico from federal jury service and disproportionately excludes Puerto Ricans of color and the poor. I argue that application of the language requirement in Puerto Rico violates monolingual Spanish speakers' fundamental Sixth Amendment right to a jury selected from a fair cross section of the community in federal criminal proceedings. I also examine the English language juror prerequisite under the Puerto Rican Federal Relations Act and offer a new test to determine the local applicability of not just this language requirement, but all federal statutes to Puerto Rico. This examination is contextualized in the U.S. Supreme Court's Insular Cases and extraterritorial application of the Constitution, as well as the intrinsically linked relationship between language, political status, and citizenship in Puerto Rico. Ultimately, I advocate for the implementation of a juror language accommodation program modeled after the New Mexico state courts.

INTRODUCTION

“That juror looks like a defendant!” exclaimed a genuinely surprised veteran court employee in hushed tones as the juror passed through the courthouse’s inner corridor leading to a jury room. After clerking for the United States District Court for the District of Puerto Rico for two years, her

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meaning was unquestionably and disturbingly clear: she was referring to the fact that the juror was black. Although black Puerto Ricans and other Latinos of African descent regularly appeared as criminal defendants in this federal court, black jurors were rare.¹

Historically, the majority of Puerto Rican residents have been prohibited from serving as federal jurors due to the federal procedural rule requiring jurors to speak, read, and write in English.² For the more than a century that the United States has claimed Puerto Rico as a territory and operated federal courts on the island,³ federal juries have not been “a body truly representative of the community”⁴ in several respects. Because less than a quarter of the population of Puerto Rico speaks English, and even fewer speak English at an advanced level that would allow them to serve on a jury, an estimated 90% of Puerto Rico’s citizenry is denied the privilege and responsibility of serving on federal juries.⁵

Furthermore, in Puerto Rico the ability to speak the English language is highly correlated with a privileged socioeconomic background. Unfortunately, black Latinos and other Puerto Ricans of color come disproportionately from lower socioeconomic classes, and thus tend to not speak English. As such, English language ability in Puerto Rico often acts as a proxy for race, color, class, and educational level. This means the bulk of black Latinos, Puerto Ricans of color, the poor, and under-educated are excluded from the jury pool. Federal jurors in Puerto Rico therefore end up coming from socioeconomic, educational, racial, and color backgrounds that do not reflect the general population.

This Article contends that the English language mandate, as applied in Puerto Rico, deprives monolingual (and functionally monolingual) Spanish speakers of their Sixth Amendment right to a jury selected from a fair cross-section of the community in federal criminal proceedings. By way of background, Part I provides an overview of the establishment of a federal court in Puerto Rico, the development of the English language juror prerequisite, and the use of English by the people of Puerto Rico.

¹ This assertion comes from observations by judicial law clerks clerking for the United States District Court for the District of Puerto Rico from August 2004 to August 2008. Although anecdotal evidence supports the assertion that black Latinos are overrepresented as federal criminal defendants but disproportionately excluded as jurors, there has been no study into this phenomenon. As such, no empirical data is available at this time.

² See 28 U.S.C. § 1865(b) (2006); Act of June 25, 1906, Pub. L. No. 294, ch. 3542, 34 Stat. 466 (defining the qualification of jurors in the United States District Court for Puerto Rico); Organic Act of 1917 (Jones Act), ch. 145, § 44, 39 Stat. 966 (1917) (repealed 1968).

³ Although at times I will refer to Puerto Rico in common speech as “the island,” the Commonwealth of Puerto Rico is in fact composed of a group of islands.

⁴ *Smith v. Texas*, 311 U.S. 128, 130 (1940).

⁵ Hyon B. Shin & Rosalind Bruno, *Language Use and English-Speaking Ability: 2000*, U.S. CENSUS BUREAU BRIEF, Oct. 2003, at 5, www.census.gov/prod/2003pubs/c2kbr-29.pdf (reporting that the 2000 Census found 71.9% of residents of Puerto Rico “[s]poke English less than ‘very well’”); Elías R. Gutiérrez, *Discrimination in Federal Court* (Sept. 4, 2002) (unpublished manuscript), available at <http://graduados.uprrp.edu/planificacion/facultad/elias-gutierrez/FederalJuryPR%5B1%5D.pdf>.

Part II examines the legal and political foundations that have contributed to a century of deprivation of the Sixth Amendment right to a jury selected from a fair cross section of the community in Puerto Rico. This examination focuses on the federal government's long-standing refusal to allow Puerto Rico the right of self-governance and Puerto Rican citizens the right to participate in the important self-governance activities of voting and jury service in the federal system. Central to this discussion are the United States Supreme Court's Insular Cases, which sanctioned colonialism and developed the doctrine of extraterritorial application of the Constitution to U.S. territories.⁶ Initially, this series of opinions withheld application of the Sixth Amendment right to trial by jury in Puerto Rico outright,⁷ and later—as this Article contends—established a legal and political landscape for second-class citizenship status and continued inferior Sixth Amendment protections for residents of Puerto Rico, especially for black Latinos, other persons of color, and the poor.

Part III examines the constitutionality of the English language juror requirement. This analysis focuses on the Sixth Amendment and argues that monolingual Spanish speakers in Puerto Rico are a distinct group, unfairly and systematically excluded from federal jury service, and thus can establish a fair-cross-section violation under *Duren v. Missouri*.⁸ This conclusion is supported by examination of the original purposes behind the fair-cross-section requirement. Finally, the Article refutes the argument of the United States Court of Appeals for the First Circuit that, although application of the English language qualification in Puerto Rico may constitute a prima facie fair-cross-section violation, the federal government's interest in conducting proceedings in English justifies the language requirement.

Part IV sets forth a statutory argument for why application of the English language juror requirement in Puerto Rico is inappropriate and should be abolished. The Article argues that the English language requirement should be found locally inapplicable in Puerto Rico under the Puerto Rican

⁶ *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922); *Downes v. Bidwell*, 182 U.S. 244, 289 (1901) (White, J., concurring); Ediberto Román, *Reparations and the Colonial Dilemma: The Insurmountable Hurdles and Yet Transformative Benefits*, 13 BERKELEY LA RAZA L.J. 369, 380–81 (2002).

⁷ *Balzac*, 258 U.S. at 312–13 (holding that the Sixth Amendment does not apply in Puerto Rico because only fundamental rights apply in an unincorporated territory like Puerto Rico and Sixth Amendment rights were not recognized as fundamental rights). The Sixth Amendment rights to an impartial jury (which includes the right to a jury selected from a fair cross section of the community), right to counsel, and right to confront witnesses have since been deemed fundamental rights by the Court. *Taylor v. Louisiana*, 419 U.S. 522 (1975) (fair-cross-section requirement is a fundamental right); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to a jury trial is a fundamental right); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (right to counsel is a fundamental right). Thus modernly, the Sixth Amendment right to a jury selected from a fair cross section of the community likely applies in Puerto Rico. See, e.g., *United States v. De La Paz-Rentas*, 613 F.3d 18, 24 (1st Cir. 2010); *United States v. Angulo-Hernandez*, 565 F.3d 2, 12 (1st Cir. 2009).

⁸ 439 U.S. 357 (1979).

Federal Relations Act of 1952.⁹ The Article critiques the current juridical approach to statutory construction under the “not locally inapplicable”¹⁰ clause of the Puerto Rican Federal Relations Act and proposes an alternative test. Further, the Article advocates that, irrespective of whether the courts would find the Jury Selection and Service Act’s (“JSSA”) language prerequisite applicable to Puerto Rico, Congress should exempt Puerto Rico from the requirement pursuant to its plenary power under the Territories Clause of the Constitution.¹¹

Part V proposes a solution to the juror-exclusion dilemma. This prescriptive analysis focuses on a comparative examination of New Mexico state courts where interpreters are provided to non-English-speaking jurors and, to a lesser degree, sign language interpretation accommodation. This Article proposes a combination of simultaneous and consecutive interpretation and translation to enable non-English-speaking citizens to serve on federal juries in Puerto Rico. This proposal, although not without some administrative costs, would accommodate the federal government’s interests in conducting judicial proceedings in English and preserving an English record for appellate review, while ensuring a representative juror pool and equal access to the federal courts. This offers a practical and viable framework that can be applied beyond the shores of Puerto Rico to courts across the nation located in jurisdictions with large populations of non-English-speaking citizens.

I. ENGLISH IN PUERTO RICO AND THE FEDERAL COURTS

In order to fully understand the constitutional implications of the mandate that all federal jurors in Puerto Rico must be proficient in the English language, it is necessary to review: (a) the establishment of the United States District Court for the District of Puerto Rico and its unilateral imposition of English language requirements; (b) the JSSA’s English language juror prerequisite; and (c) the historical and contemporary use of English by the people of Puerto Rico.

A. *Establishment of the Court and its English-Only Requirements*

In June of 1898, near the conclusion of the brief Spanish-American War, the United States invaded Puerto Rico and promptly set up a military government.¹² Approximately six months later, Spain officially ceded Puerto Rico (as well as the Philippines, Cuba, and Guam) to the United States

⁹ 48 U.S.C. § 734 (2006).

¹⁰ *Id.*

¹¹ U.S. CONST. art. IV, § 3, cl. 2.

¹² See generally FRANK FREIDEL, *THE SPLENDID LITTLE WAR* (1958); DAVID F. TRASK, *THE WAR WITH SPAIN IN 1898* (1981).

through the Treaty of Paris.¹³ In 1900, in an effort to establish a temporary civil government in Puerto Rico, the United States Congress enacted the Organic Act of 1900, more commonly known as the “Foraker Act.”¹⁴ The Foraker Act established Puerto Rico as a territory belonging to the United States, but denied American citizenship to Puerto Ricans.¹⁵ In addition to denying Puerto Rico sovereignty outright, the Act ensured that although Puerto Ricans could participate in the colonial government in a limited way, they could not have a determinative effect over the island’s governance.¹⁶ Furthermore, Puerto Ricans were not granted any representation in Congress or the right to vote for president, a deprivation of political rights that continues to this day.¹⁷

In the very same breath as denying sovereignty and U.S. citizenship to the people of Puerto Rico, the Foraker Act established the United States District Court for the District of Puerto Rico.¹⁸ This court took over for the U.S. provisional military court that had been in existence since shortly after invasion.¹⁹ The District Court of Puerto Rico mirrored its mainland federal counterparts and had jurisdiction to hear similar matters as other federal courts.²⁰ Like the legislative and executive branches of the government, the judicial branch was also predominately governed without Puerto Rican involvement. All key officers of the court (such as the district judge, U.S. Attorney, and U.S. Marshal) were appointed to four-year terms by the president with Senate ratification, and without any Puerto Rican representation or input.²¹

With the political conquest complete, efforts at a cultural takeover or “Americanization” were deployed. The primary strategy in this plan of assimilation was English-only requirements. This campaign was primarily targeted on two fronts: public affairs—most notably the federal courts—and

¹³ Treaty of Peace, U.S.-Spain, Dec. 10, 1898, art. 2, 30 Stat. 1754, 1775 [hereinafter Treaty of Paris].

¹⁴ Organic Act of 1900 (Foraker Act), ch. 191, 31 Stat. 77 (1900) (repealed 1917).

¹⁵ *Id.* § 7. In this Article, I will use the term “Puerto Ricans” to refer to persons who are both residents of the Commonwealth of Puerto Rico and ethnically Puerto Rican.

¹⁶ *See id.* For instance, the governor of Puerto Rico was to be appointed by the President of the United States and ratified by the Senate rather than by election by the people of the jurisdiction. *Id.* § 17. Further, the cabinet was also to be appointed by the president and ratified by the Senate, and Puerto Ricans could occupy only five of the eleven cabinet seats. *Id.* § 18.

¹⁷ Puerto Rico’s only representative in the federal system is a resident commissioner who has no voting privileges. *See* 48 U.S.C. § 891 (2006); Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico’s Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1163 (2009).

¹⁸ Foraker Act § 34; *see generally* GUILLERMO A. BARALT, HISTORY OF THE FEDERAL COURT IN PUERTO RICO: 1899–1999 (Andrés Palomares ed., Janis Palma trans.) (2004) (providing the most complete history of the United States District Court for the District of Puerto Rico available to date). Initially the court was misnamed the District Court for “Porto Rico.”

¹⁹ Foraker Act § 33.

²⁰ *Id.* § 34; BARALT, *supra* note 18, at 116.

²¹ Foraker Act § 34.

the education system.”²² Despite the fact that close to none of the island’s inhabitants spoke English,²³ all proceedings of the court were required to be conducted in English.²⁴ Subsequently, judicially prescribed local rules provided “that all pleadings, . . . motions, and proceedings were to be in English” and that “documents were to be translated into English when necessary.”²⁵

In 1906, Congress issued “An Act Defining the qualification of jurors for service in the United States district court in Porto Rico.”²⁶ This act specified, among other things, that all jurors “have . . . a sufficient knowledge of the English language to enable [them] to duly serve as . . . juror[s].”²⁷ The second Organic Act, the Jones Act of 1917, granted Puerto Ricans U.S. citizenship and required that all district court jurors “have a sufficient knowledge of the English language to enable [them] to serve as juror[s].”²⁸ The Jones Act’s English language requirement remained in force for over fifty years until it was replaced in 1968 by the JSSA’s “qualifications for jury service.”²⁹

B. *The Jury Selection and Service Act’s English Language Requirement*

The JSSA applies to all federal district courts and delineates the prerequisites for federal jury service, including a language requirement.³⁰ The JSSA states, in relevant part, that a person is not qualified for jury service in any federal court if he or she does not speak English or “is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form”³¹ The JSSA English language requirement has been held to apply to the United States District Court for Puerto Rico.³² As discussed in more detail below, the JSSA was enacted to establish a uniform jury selection process in an effort

²² As Judge Peter J. Hamilton, the sixth district judge to serve in the District of Puerto Rico, observed, “‘the public schools and the federal court are the two educational forces for Americanization on the island.’” José A. Cabranes, *Judging in Puerto Rico and Elsewhere*, FED. LAW., June 2002, at 40, 42 (quoting Richard Graffam, *The Federal Courts’ Interpretation of Puerto Rican Law: Whose Law Is It, Anyway?*, 47 REV. COL. ABOG. P.R. 111, 113 n.4 (1986)).

²³ See José Julián Álvarez González, *Law, Language and Statehood: The Role of English in the Great State of Puerto Rico*, 17 LAW & INEQ. 359, 363 (1999).

²⁴ Foraker Act § 34 (“All pleadings and proceedings . . . shall be conducted in the English language.”).

²⁵ BARALT, *supra* note 18, at 121.

²⁶ Act of June 25, 1906, Pub. L. No. 294, ch. 3542, 34 Stat. 466 (defining the qualification of jurors for service in the United States District Court for Puerto Rico).

²⁷ *Id.*

²⁸ Organic Act of 1917 (Jones Act), ch. 145, § 44, 39 Stat. 966 (1917) (repealed 1968).

²⁹ 28 U.S.C. § 1865(b) (2006).

³⁰ *Id.*

³¹ *Id.* § 1865(b)(1)–(3).

³² See *United States v. De La Paz-Rentas*, 613 F.3d 18, 24 (1st Cir. 2010); *United States v. Dubon-Otero*, 292 F.3d 1, 17 (1st Cir. 2002); *United States v. Aponte-Suarez*, 905 F.2d 483, 492 (1st Cir. 1990); *United States v. Benmuhar*, 658 F.2d 14, 19–20 (1st Cir. 1981); Alicia

to ensure that jury pools are drawn from a “fair cross section of the community”³³ and that “[n]o citizen shall be excluded from service as a grand or petit juror in the [federal courts] on account of race, color, religion, sex, national origin, or economic status.”³⁴ Paradoxically, despite the JSSA’s purported anti-discrimination purposes, application of the JSSA language requirement in Puerto Rico systematically discriminates against many of the very same population groups that the statute was designed to protect and ensures that both grand and petit juries are not selected from a fair cross section of the community.³⁵

C. *The Federal Jury Selection Process in Puerto Rico*

Section 1863 of the JSSA provides that “[e]ach United States district court shall devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve [the fair-cross-section and non-discrimination policies of the JSSA].”³⁶ In conformity with § 1863, the United States District Court for the District of Puerto Rico enacted the *Amended Plan for the Random Selection of Grand and Petit Jurors Pursuant to the Jury Selection and Service Act of 1968*³⁷ (“Jury Plan”). There are several administrative steps required to select a jury under the Jury Plan. First, the Clerk of the Court maintains a “Master Jury Wheel”³⁸ by randomly selecting names of registered voters from the Commonwealth State Elections Commission every four years, following each election.³⁹ The number of names selected must amount to at least five-tenths of one percent (0.5%) of voters from the most recent election.⁴⁰ To ensure that the voting precincts (and by extension, geographical places of residence) are proportionally represented, the names are chosen through a stratified sampling process.⁴¹ After the Clerk of Court determines the number of names needed to maintain the Master Jury Wheel, this number is juxtaposed against the total number of registered voters resulting in a selection quo-

Pousada, *The Mandatory Use of English in the Federal Court of Puerto Rico*, 20 *CENTRO J.* 136 (2008).

³³ 28 U.S.C. § 1861 (2006).

³⁴ *Id.* § 1862.

³⁵ See *infra* Part III.A.

³⁶ 28 U.S.C. § 1863(a).

³⁷ *Id.* (providing that each district court must enact a jury plan in accordance with the JSSA). The District for Puerto Rico’s plan, *Amended Plan for the Random Selection of Grand and Petit Jurors Pursuant to the Jury Selection and Service Act of 1968, as Amended* (Feb. 22, 1982) [hereinafter *Jury Plan*], is available at http://www.prd.uscourts.gov/CourtWeb/pdf/jury/Amended_Jury_Plan.pdf.

³⁸ *Jury Plan*, *supra* note 37, § 10(A).

³⁹ Elías R. Gutiérrez, Analysis and Evaluation of the Fairness Resulting from the Jury Selection Processes in the Federal District Court of Puerto Rico 2 (Sept. 2001) (unpublished manuscript), available at <http://graduados.uprrp.edu/planificacion/facultad/elias-gutierrez/ERGJurySelection.pdf>.

⁴⁰ *Jury Plan*, *supra* note 37, §§ 10(A), 10(B)(2).

⁴¹ *Id.* § 10(B).

tient.⁴² Following a determination of the quotient, a starting number is manually drawn.⁴³ The names of the selected voters are then input into the Jury Management System, which randomly selects names of people who will be issued questionnaires.⁴⁴

The Clerk of the Court then mails the selected individuals a Juror Qualification Questionnaire and instructions.⁴⁵ Returned Juror Qualification Questionnaires are then preliminarily screened for eligibility.⁴⁶ If a form indicates that the individual does not meet the minimum-age, U.S. citizenship, or English language requirements, the form is removed from consideration.⁴⁷ The remaining individuals are placed on a “Qualified Jury Wheel” and summoned to a jury orientation session where individuals are questioned to determine their English language ability.⁴⁸ Jurors who cannot “read, write, speak, and understand the English language with a degree of proficiency sufficient to satisfactorily complete the Juror Qualification Form *and to render satisfactory jury service* in [the] Court” are excluded.⁴⁹

D. English in Puerto Rico

1. The Official Language Acts: Making Puerto Rico Officially Bilingual

For most of its history as a territory or commonwealth of the United States, both Spanish and English have been the official languages of Puerto Rico. At the time the United States conquered Puerto Rico, Spanish had been the sole language of the vast majority of the island’s population for four centuries.⁵⁰ One of the first official acts under U.S. colonial rule was to declare English as one of the official languages of Puerto Rico. The Language Act of 1902 provided:

In all the departments of the Commonwealth Government and in all the courts of this island, and in all public offices the English

⁴² *Id.* § 10(B)(3) (“The quotient is the ratio of selected to unselected names. For example if the Clerk should determine that to supply court jury requirements for four years, it will need 20,000 names, and if there are a total of 2,200,000 on the consolidated list of registered voters, the ‘quotient’ to be used would be 2,200,000/20,000 or 110; therefore, the Clerk would take every 110th registered voter’s name for the Master Jury Wheel.”).

⁴³ *Id.* § 10(B)(4).

⁴⁴ *Id.* § 10(B)(5).

⁴⁵ *Id.*; Gutiérrez, *supra* note 39, at 2.

⁴⁶ *Jury Plan*, *supra* note 37, § 10(B)(5). For an example of the questionnaire, see United States District Court, Sample Jury Qualification Questionnaire, Custom Form No. F-15467, available at <http://www.prd.uscourts.gov/CourtWeb/pdf/jury/QualificationQuestionnaireWithInstructions.pdf>; see also Gutiérrez, *supra* note 39, at 2.

⁴⁷ 28 U.S.C. § 1865(b) (2006); Gutiérrez, *supra* note 39, at 2.

⁴⁸ Gutiérrez, *supra* note 39, at 2.

⁴⁹ 28 U.S.C. § 1865(b); *Jury Plan*, *supra* note 37, § 6(A) (emphasis added).

⁵⁰ Ennio M. Colón et al., *Founding of a Mixed Legal System*, 32 REV. JUR. U. INTER. P.R. 232, 242 (1998).

language and the Spanish language shall be used indiscriminately; and, when necessary, translations and oral interpretations shall be made from one language to the other so that all parties interested may understand any proceedings or communications made therein.⁵¹

This Act remained in place until 1991 when the pro-commonwealth Popular Democratic Party (“PDP”) passed a bill making Spanish the Commonwealth’s only official language.⁵² The Spanish-only law was short-lived and quickly replaced in 1993 by a pro-statehood New Progressive Party bill reinstating English as one of the official languages of the Commonwealth.⁵³ The 1993 Language Act also provides that: “When necessary, written translations and oral interpretations shall be made from one language to the other so that the interested parties can understand any proceeding or communication in said languages.”⁵⁴

Thus, aside from a brief hiatus under the 1991 Act, Puerto Rico has been officially bilingual for over a century. However, as the Puerto Rico legislature noted in passing the Spanish-only law of 1991, Puerto Rico is “a homogeneous cultural and linguistic society,”⁵⁵ where Spanish is king. This is one rare point of agreement in the highly contentious political environment of Puerto Rico. The three primary political parties are distinguished primarily by their stance on Puerto Rico’s political status, advocating for enhanced commonwealth status, statehood, or independence.⁵⁶ One of the only issues on which all the parties agree is that Spanish is the language of the people of Puerto Rico.⁵⁷ “Puerto Rico is a monolingual society where Spanish reigns and English plays an absolutely minor role.”⁵⁸ There is one notable exception: the federal court.

⁵¹ P.R. LAWS ANN. tit. 1, § 51 (repealed 1991).

⁵² P.R. LAWS ANN. tit. 1, § 56 (repealed 1993) (“It is hereby declared and established that Spanish shall be the official language of Puerto Rico to be used in all its departments, municipalities, or other political subdivisions, agencies, offices and government dependencies of the Executive, Legislative and Judiciary Branches of the Commonwealth of Puerto Rico.”).

⁵³ P.R. LAWS ANN. tit. 1, § 59 (1993) (“Spanish and English are established as official languages of the Government of Puerto Rico. Both languages may be used, indistinctively, in all departments, municipalities or other political subdivisions, agencies, public corporations, offices and government dependencies of the Executive, Legislative and Judiciary Branches of the Commonwealth of Puerto Rico . . .”).

⁵⁴ *Id.*

⁵⁵ Statement of Motives, P.R. LAWS ANN. tit. 1, § 56 (repealed 1993).

⁵⁶ Johnny Smith, *Commonwealth Status: A Good Deal for Puerto Rico?*, 10 HARV. LATINO L. REV. 263, 271 (2007) (“The three major political parties of Puerto Rico are structured around the major points of view on the status debate. As its name suggests, the Puerto Rican Independence Party (“PIP”) supports independence. The New Progressive Party (“NPP”) favors statehood. The Popular Democratic Party (“PDP”) supports maintaining some form of commonwealth status.”).

⁵⁷ See Edelmira L. Nickels, *English in Puerto Rico*, 24 WORLD ENGLISHES 227, 228 (2005).

⁵⁸ Alvarez González, *supra* note 23, at 360.

2. *Political and Personal Resistance to English as an Effort toward Preservation of Cultural Identity and Cultural Sovereignty*

The battle for and against colonization in Puerto Rico has often been fought over language. The mandated use of English in Puerto Rico has been highly controversial and subject to organized and individual resistance. No combat zone has been more bombarded than the arena of public education.⁵⁹ In an attempt to “Americanize”⁶⁰ Puerto Ricans, the United States initially implemented English as the language of instruction in the public schools.⁶¹ Consequently, “[i]n the eyes of many Islanders, Puerto Rican classrooms became the battlefield where the war against English, or specifically ‘Americanization’ was fought.”⁶² The goal of the federal government was to make Puerto Ricans bilingual within a generation, namely through the public schools.⁶³ These labors were met with conflict. In the mid-1930s, Puerto Rican political leaders and educators, who linked language with political and cultural autonomy, began to actively oppose instruction in English.⁶⁴ After vigorous efforts by these groups, Spanish became the official language of instruction in the public schools in 1949.⁶⁵

Over sixty years later, public schools at all grade levels are still taught exclusively in Spanish,⁶⁶ with English used only in second or foreign language classes.⁶⁷ Public school teachers are often opposed to English or bilingual instruction in the classroom.⁶⁸ This is not surprising since the Teachers’ Association of Puerto Rico, of which virtually all public school

⁵⁹ Pedro A. Malavet, *Puerto Rico: Cultural Nation, American Colony*, 6 MICH. J. RACE & L. 1, 67–70 (2000).

⁶⁰ Amílcar Antonio Barreto, *Speaking English in Puerto Rico: The Impact of Affluence, Education and Return Migration*, 7 CENTRO J. 5, 6 (2000).

⁶¹ Amílcar Antonio Barreto, *Statehood, the English Language, and the Politics of Education*, 34 POLITY 89, 90 (2001).

⁶² Nickels, *supra* note 57, at 229.

⁶³ *Id.*; Arnold Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 11 GA. J. INT’L & COMP. L. 211, 228 (1981) (quoting letter from Franklin D. Roosevelt to José M. Gallardo (Apr. 17, 1937), reprinted in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE CONSTITUTION PREVAILS, 1937, at 160–61 (1941)).

⁶⁴ Nickels, *supra* note 57, at 229 (quoting EDITH ALGREN DE GUTIÉRREZ, THE MOVEMENT AGAINST TEACHING ENGLISH IN SCHOOLS IN PUERTO RICO 10 (1987)); see also Barreto, *supra* note 60, at 6.

⁶⁵ Erna Kerkhof, *The Myth of the Dumb Puerto Rican: Circular Migration and Language Struggle in Puerto Rico*, 75 NEW W. INDIAN GUIDE 257, 259 (2001); see also Barreto, *supra* note 61, at 89.

⁶⁶ See Arlene Clachar, *Ethnolinguistic Identity and Spanish Proficiency in a Paradoxical Situation: The Case of Puerto Rican Return Migrants*, 18 J. MULTILINGUAL & MULTICULTURAL DEV. 107, 108 (1997).

⁶⁷ See Alicia Pousada, *The Competent Bilingual in Puerto Rico*, 142 INT’L. J. SOC. LANGUAGE 103, 103 (2000).

⁶⁸ See Barreto, *supra* note 60, at 6 (“Studies show that to this day teachers in Puerto Rico still harbor a strong cultural resistance towards the United States and much of that resistance is aimed at the teaching of the English language. Teachers of English as a second language are often viewed as agents promoting cultural defection despite the recognition that knowledge of English is a marketable skill.”); Kerkhof, *supra* note 65, at 281.

teachers are members, was founded in 1911 with the express purpose of undoing English education.⁶⁹ A movement that began as an effort to reinstitute Spanish language instruction in the public schools eventually developed into a movement against English.⁷⁰

Puerto Rican cultural identity is deeply rooted not only in the Spanish language, but also in resistance to English language teaching and acquisition.⁷¹ “Beyond its role as a medium of communication, the Spanish language in Puerto Rico also serves as a cultural trait intimately tied to contemporary cultural identity.”⁷² For most Puerto Ricans, the Spanish language is the most important characteristic of Puerto Rican cultural identity.⁷³ There is a prevalent belief in Puerto Rico that bilingualism can be a serious threat to one’s *puertorriqueñidad* or “Puertoricanness,” and that learning English can result in the unlearning of Spanish, which is synonymous with loss of culture.⁷⁴ Since “Puerto Rico has never been a nation in the sense of a politically independent state; in the Puerto Rican context nation means a distinct cultural-linguistic unit.”⁷⁵ As such, the defense of Spanish and defiance of English have been means to maintain national and cultural identity, as well as fight for a sense of sovereignty.

A pull between the cultural value of Spanish and economic value of English creates a quandary. There is a widely-shared sentiment that English diminishes Puerto Rican identity and is a threat to Hispanic culture, but no one disputes that English is necessary for socioeconomic mobility.⁷⁶ In other words, “English is seen as a marker of ‘out group’ membership; however, it is also a valued skill.”⁷⁷ Bilingual Puerto Ricans simply have better job and economic prospects than those who do not speak English.⁷⁸ English ability then becomes a “symbol of class differentiation,”⁷⁹ and like most badges of the elite class, it is difficult to obtain. The English taught in public school as a second or foreign language is limited in quantity and quality. Rather than

⁶⁹ Kerkhof, *supra* note 65, at 267 n.8.

⁷⁰ *See id.* at 268 (citing ALGREN DE GUTIERREZ, *supra* note 64); Melvyn Resnick, *ESL and Language Planning in Puerto Rican Education*, 27 TESOL Q. 259, 265 (1993).

⁷¹ *See* Alicia Pousada, *On the Horns of a Language Planning Dilemma*, 30 TESOL Q. 499, 500 (Fall 1996); Pousada, *supra* note 32, at 144; Resnick, *supra* note 70.

⁷² Barreto, *supra* note 61, at 90.

⁷³ *See generally* Pousada, *supra* note 32, at 139.

⁷⁴ Erwin H. Epstein, *National Identity and the Language Issue in Puerto Rico*, 11 COMP. EDUC. REV. 133, 137 (1967); William C. Schweers & Jorge A. Vélez, *To Be or Not To Be Bilingual in Puerto Rico: That Is the Issue*, 2 TESOL Q. 23, 26–27 (Autumn 1992).

⁷⁵ Eugene V. Mohr, *Language, Literature and Journalism*, in *THE AMERICAN PRESENCE IN PUERTO RICO* 135, 137 (Lynn-Darrell Bender ed., 1998).

⁷⁶ *See, e.g.*, Barreto, *supra* note 60, at 7; Kerkhof, *supra* note 65; Pousada, *supra* note 32, at 138 (“Viewed simultaneously as a tool of economic advancement and an instrument of ideological repression, English is perceived by many Puerto Ricans as a necessary evil that poses a threat to Spanish and Puerto Rican culture.”); Pousada, *supra* note 71, at 500; Resnick, *supra* note 70, at 271; Schweers & Vélez, *supra* note 74, at 23–26.

⁷⁷ Barreto, *supra* note 60, at 5.

⁷⁸ Nickels, *supra* note 57, at 234 (“English-speaking skills highly and positively correlate with income level.”).

⁷⁹ *Id.* at 230; *see also* Kerkhof, *supra* note 65, at 269.

teaching Standard English, linguists have observed that “Spanglish” or “Englañol” (an informal hybrid of Spanish and English) is taught.⁸⁰ As a result, despite mandatory English language courses in schools, most high school graduates do not speak English or only do so poorly.⁸¹ Moreover, a significant number of Puerto Ricans from the lower socioeconomic strata do not even get the benefit of this limited instruction in English due to the high level of school attrition, particularly among the poor. At least 40% of adults residing in Puerto Rico do not have a high school education.⁸² This is an educational attrition rate two times higher than the U.S. average.⁸³ In Puerto Rico, like in the United States, low socioeconomic class is highly correlated with low-level educational attainment and not completing compulsory levels of school.⁸⁴

Conversely, wealthier Puerto Ricans enroll their children in expensive private schools where English is the language of instruction.⁸⁵ These more affluent families also tend to send their children to college in the United States.⁸⁶ Thus, the positive correlation between English language ability and higher socioeconomic status is continually perpetuated. The upper echelons speak English, these skills result in higher income, and this wealth allows their children’s continued matriculation in English language private schools. Meanwhile, the lower-middle class and poor have no choice but to study at public schools, which do not provide an adequate English education.⁸⁷

⁸⁰ See Rose Nash, *Englañol: More Language Contact in Puerto Rico*, 46 AM. SPEECH 106, 121 (1971); Rose Nash, *Spanglish: Language Contact in Puerto Rico*, 45 AM. SPEECH 223 (1970).

⁸¹ Kerkhof, *supra* note 64, at 257.

⁸² U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, EDUC. ATTAINMENT OF 2000 IN PUERTO RICO (finding only 60% of residents of Puerto Rico 25 years or older had at least a high school education).

⁸³ U.S. CENSUS BUREAU, U.S. DEP’T OF COMMERCE, EDUC. ATTAINMENT OF 2000 IN THE UNITED STATES (finding 80.4% of U.S. residents 25 years or older had at least a high school education).

⁸⁴ See generally Neil Allison & Arthur MacEwan, Students Dropping Out of Puerto Rico Public Schools Measuring the Problem and Examining the Implications 2 (2002) (unpublished manuscript), available at <http://economia.uprrp.edu/ensayo%20125.pdf>.

⁸⁵ See Barreto, *supra* note 60, at 7; Barreto, *supra* note 61, at 95 (discussing how private schools continued to teach in English after Spanish became the language instruction in public schools, but these “schools charge tuition rates beyond the reach of ordinary Puerto Ricans”); Kerkhof, *supra* note 65, at 269; Pousada, *supra* note 32, at 139; Schweers & Vélez, *supra* note 74, at 27–28 (stating that most middle- and upper-class families in Puerto Rico send their children to private schools).

⁸⁶ Barreto, *supra* note 60, at 7.

⁸⁷ There is one smaller demographic group in Puerto Rico that does not fit the general pattern that English ability is correlated with class. Puerto Rican return immigrants (individuals originally from Puerto Rico who immigrated to the U.S. mainland and later returned) and their children often speak English but are low income. However, this group is not representative of the general community excluded from the federal jury pool. See Clachar, *supra* note 66, at 109 (stating that Puerto Rican return migrants “have lifestyles, social behaviors, and cultural values which are at variance with those of island-raised Puerto Ricans . . . [Further,] no single distinctive characteristic appears to polarise [sic] the two groups more than language”). Although both groups would generally have some proficiency in Spanish and use Spanish in “all domains” of life, these groups “represent two different ethnic groups in Puerto

3. *Use of English by the People of Puerto Rico*

Despite the fact that Puerto Rico is officially bilingual, the majority of Puerto Ricans do not speak English. Studies generally indicate that only 20 to 28% of the population of Puerto Rico speaks English.⁸⁸ These statistics, particularly the census data, may be inflated because they are conducted in Spanish and survey-takers may tend to overstate their English language abilities.⁸⁹ When considering English ability in the context of jury service, rather than casual conversation, the level of the language skill is particularly important. In the 2000 census a mere 17.6% of the population aged 18 or older indicated they spoke English very well.⁹⁰ It is estimated that less than 10% of adult Puerto Ricans speak English at a level adequate for service on a federal jury.⁹¹

Research by Professor Elías R. Gutiérrez, of the University of Puerto Rico, concludes that 91% of the jury-age-eligible population of the Commonwealth is excluded under the English language requirement.⁹² Professor Gutiérrez's research further reveals that not only does the language requirement "systematically discriminate[] against the majority of the resident population of Puerto Rico," it systematically excludes persons of lower income and education, as well as women.⁹³

English proficiency requirement for jury service in Puerto Rico biases selection against low-income groups and works systematically against that portion (86.9%) of males that receive 20.8% of the income and that portion (95%) of women that receive 17% of the income. Thus, on the basis of a seemingly neutral criterion, the selection process is systematically excluding from jury service 91% of the population that would otherwise qualify by age. The English proficiency criterion ultimately constitutes an unallowable economic status filter.⁹⁴

Rico. The state of affairs gives rise to an interethnic situation . . . in which language is a distinctive characteristic of membership in each of these two ethnic groups, a significant dimension for interethnic categorization, and the medium for facilitating intragroup cohesion." *Id.*; see also Pousada, *supra* note 32, at 139 ("Often [return migrants] are not considered to be 'real Puerto Ricans' by island residents and may be criticized for their limited Spanish proficiency or their use of non-standard varieties of English.").

⁸⁸ Shin & Bruno, *supra* note 5, at 2 (reporting that the 2000 Census found 71.9% of residents of Puerto Rico "[s]poke English less than 'very well'"); Resnick, *supra* note 69, at 259 (noting that "some 80% of the population remains functionally monolingual in Spanish").

⁸⁹ Alvarez González, *supra* note 23, at 368.

⁹⁰ Pousada, *supra* note 32, at 138; Shin & Bruno, *supra* note 5, at 2.

⁹¹ *Se discrimina al usar el inglés en algunos tribunals de Puerto Rico?*, NYDAILYNEWS.COM, Feb. 24, 2009, http://www.nydailynews.com/latino/espanol/2009/02/25/2009-02-25_se_discrimina_al_usar_el_ingles_en_alguno-2.html?page=1 (stating that pursuant to a University of Puerto Rico study, more than nine out of every ten Puerto Ricans cannot speak English at an advanced level and accordingly cannot participate in federal juries).

⁹² Gutiérrez, *supra* note 5.

⁹³ *Id.* at 2-3.

⁹⁴ *Id.* at 3.

As “[t]here is a strong statistical correlation between higher social class and superior English proficiency,”⁹⁵ the jury pool is composed of Puerto Ricans from upper educational, economic, and social backgrounds and is not representative of the community.⁹⁶

Further, since socioeconomic status correlates closely with race in Puerto Rico, unequal representation of socioeconomic background on juries translates into unequal representation of racial and color backgrounds. People of higher socioeconomic status and educational background tend to be predominately of European (Spanish) descent and lighter skinned. Puerto Ricans of mixed race and, even more pronouncedly, Puerto Ricans of predominately African heritage are statistically poorer and less educated.⁹⁷ Thus, not only are potential federal jurors in Puerto Rico wealthier and more educated, they are also disproportionately white when compared to the general public.

II. A CENTURY OF DENIAL OF THE SIXTH AMENDMENT

For over a century, the people of Puerto Rico have been denied the constitutional right to a jury pool selected from a fair cross section of the community. However, Congress has not intervened. This is not due to any lack of power on behalf of Congress to remedy the injustice, but rather due to the lack of political power held by the residents of Puerto Rico. History and commonsense tell us that the likelihood of federal legislative action is highly correlated with the political power of the populations who stand to benefit from the potential legislation. Although Puerto Rico is subject to federal laws and control, Puerto Ricans’ participation in the federal political

⁹⁵ Pousada, *supra* note 32, at 138 (“The highest concentration of English speakers in Puerto Rico is found in Guaynabo which is also the most affluent municipality, while the least English fluency is found in Las Marias, one of the very poorest towns on the island”) (citing Barreto, *supra* note 59, at 8–9 (finding “a connection between affluence and bilingualism”).

⁹⁶ It should be noted that there is a small population of Anglophone expatriates from the U.S. mainland residing in Puerto Rico who are not of Puerto Rican or Latino background. These individuals are rarely summoned for jury service. It appears that no research has been conducted on why these individuals are not summoned. A likely explanation is that most expatriates probably retain their stateside voter registration in order to continue to be able to participate in federal elections. Since jury lists come from the Commonwealth roster of register voters, individuals who are not registered to vote in Puerto Rico will not be called to jury service.

⁹⁷ See Liza Mónica Ayuso Quiñones, *La Guerra Contra las Drogas, Guerra Contra el Pobre: Aspectos Socioeconómicos de la Política Pública*, 75 REV. JUR. U.P.R. 1411, 1441 & n.128 (2006) (stating there is a prevalent belief that in Puerto Rico the poorer classes consist mostly of Afro-Puerto Ricans and persons of mixed race); see also Jorge Duany, *Neither White nor Black: The Representation of Racial Identity Among Puerto Ricans on the Island and in the U.S. Mainland*, in NEITHER ENEMIES NOR FRIENDS: LATINOS, BLACKS, AFRO-LATINOS 177 (Anani Dzidzienyo & Suzanne Oboler eds., 2005) (discussing race in Puerto Rico and how racial classifications are focused on skin color over familial heritage and how “many people prefer to identify as white to avoid racial stigmatization”); Maxine W. Gordon, *Race Patterns and Prejudice in Puerto Rico*, 14 AM. SOC. REV. 294, 298, 300 (1949).

system is severely limited. Puerto Rico's only elected federal representative is a single Resident Commissioner, who is a member of the U.S. House of Representatives but cannot vote on legislation.⁹⁸ While Puerto Rico is subject to all executive powers, Puerto Ricans are not allowed to vote in U.S. presidential elections.⁹⁹ Native-born Puerto Ricans' U.S. citizenship is statutorily, rather than constitutionally, conferred as a birthright and thus potentially revocable.¹⁰⁰ Residents of Puerto Rico are also afforded limited protection under the Constitution.¹⁰¹ And, of course, the majority of Puerto Ricans cannot participate in the federal judicial system as jurors.

This second-class status and political powerlessness at the federal level have their origins in the United States Supreme Court's Insular Cases.¹⁰² The Insular Cases sanctioned colonialism and incomplete application of constitutional rights in Puerto Rico. Colonialism and deficient constitutional protec-

⁹⁸ See 48 U.S.C. § 891 (2006); Lawson & Sloane, *supra* note 17, at 1164.

⁹⁹ U.S. CONST. art. II, § 1 cl. 2 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .") (emphasis added); see also Lani E. Medina, *An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Political Status*, 33 FORDHAM INT'L L.J. 1048, 1050 (2010) (citing *Igartúa-De La Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005) (holding residents of Puerto Rico do not have a right to vote in presidential elections)).

¹⁰⁰ Organic Act of 1917 (Jones Act), ch. 145, § 44, 39 Stat. 966 (1917) (repealed 1968) (making persons born in Puerto Rico on or after January 13, 1941 citizens of the United States); Eduardo Guzmán, Comment, *Igartúa De La Rosa v. United States: The Right of the United States Citizens of Puerto Rico to Vote for the President and the Need to Re-evaluate America's Territorial Policy*, 4 U. PA. J. CONST. L. 141, 163–64 (2001); see Adriell I. Cepeda Derieux, Note, *A Most Insular Minority: Reconsidering Judicial Deference to Unequal Treatment in Light of Puerto Rico's Political Process Failure*, 110 COLUM. L. REV. 797, 797–98 (2010) ("[T]he statutory citizenship status of the inhabitants of Puerto Rico . . . is not equal, full, permanent, irrevocable citizenship protected by the 14th Amendment of the U.S. Constitution . . .") (quoting H.R. REP. NO. 105-131, pt. 1, at 19 (1997)); see also Christina Duffy Burnett, "They Say I Am not an American . . .": *The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659, 662 (2008).

¹⁰¹ Initially Puerto Rico was subject to incomplete constitutional protection pursuant to the "Insular Cases," and currently the rights to equal protection and due process are applied differently to Puerto Rico than the rest of the nation. See Cepeda Derieux, *supra* note 99, at 797–98.

¹⁰² JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 4 (1985); Malavet, *supra* note 59, at 29, 39. The "Insular Cases" include the original cases of 1901 considering the political status of Puerto Rico: *De Lima v. Bidwell*, 182 U.S. 1 (1901) (holding that through ratification of the Treaty of Paris, Puerto Rico became a territory of the United States and thus not a foreign country for purpose of tariff laws); *Dooley v. United States*, 182 U.S. 222 (1901) (holding application of tariff law to products exported from the United States to Puerto Rico is permissible); *Armstrong v. United States*, 182 U.S. 243 (1901) (holding war powers allow the federal government to receive duties on Puerto Rico importations from the United States); *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding Puerto Rico is domestic in the sense that it belongs to the United States but is foreign in that it is not part of the United States for the purposes of the revenue clauses of the Constitution). A broader usage of the term "Insular Cases" also includes *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (holding although Puerto Ricans are U.S. citizens, they have no Sixth Amendment right to trial by jury), *Ocampo v. United States*, 234 U.S. 91 (1914), *Dowdell v. United States*, 221 U.S. 325 (1911), *Rasmussen v. United States*, 197 U.S. 516 (1905), *Dorr v. United States*, 195 U.S. 138 (1904), and *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

tions meant not only limited political sovereignty, but also limited opportunities for citizens to participate in the two primary opportunities for self-governance in our democratic system: electoral voting and jury service. Further, the decision to colonize Puerto Rico and the Insular Cases' sanction of this colonization were greatly influenced by xenophobia and racism. At the time, many politicians felt that Puerto Rico was not suitable for incorporation into the union or capable of self-government due to the population's African and mixed-race heritage and the fact that the population spoke Spanish. A century later, the Insular Cases remain "good" law¹⁰³ and (along with their political and legal progeny) continue to limit Puerto Ricans' political influence and ability to participate in self-governance at the federal level. In the jury context, this exclusion from democratic participation falls particularly hard on the same groups of Puerto Ricans whose race, color, and language motivated the Insular Cases: black Puerto Ricans, persons of mixed race, and monolingual Spanish speakers.

A. *The Insular Cases*

The Treaty of Paris provided that "[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress."¹⁰⁴ Thus, the sovereignty, citizenship, and application of the protections of the Constitution to Puerto Ricans remained open and subject to the whim of the U.S. legislature.¹⁰⁵ These issues were addressed by the Supreme Court in a line of cases collectively termed the "Insular Cases."¹⁰⁶ The Insular Cases dealt with two highly interrelated questions: (1) whether colonialism was constitutionally permissible and (2) whether the rights guaranteed under the Constitution applied in the newly acquired territories. Jurists and scholars often conflate these issues and focus only on the Supreme Court's extraterritorial application of the Constitution.¹⁰⁷ However, the possibly more significant consequence of the Insular Cases was that their reasoning sanctioned colonialism, and by extension se-

¹⁰³ See *Boumediene v. Bush*, 553 U.S. 723, 759 (2008) (stating that the Insular Cases informed the Court's analysis of whether habeas corpus was available to aliens detained at Guantanamo Bay).

¹⁰⁴ Treaty of Paris, *supra* note 13, at 1759.

¹⁰⁵ These issues were hotly debated in legal academia before being addressed by the Supreme Court. The so-called "Harvard Debate" produced a succession of articles that in many ways framed the Insular Cases. See, e.g., Simeon E. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory*, 12 HARV. L. REV. 393 (1899); C. C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Abbot L. Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899); Carman F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898); Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 404 (1899).

¹⁰⁶ For list of Insular Cases, see *supra* note 102.

¹⁰⁷ See Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 1, 10–11 (Christina Duffy Burnett & Burke Marshall eds., 2001).

verely limited Puerto Ricans' ability to participate in federal self-governance activities of electoral voting and jury service.

1. *Judicial Authorization of Colonialism*

The United States opted for a colonial system of government over Puerto Rico because it wanted to possess the island for economic and military purposes, but did not want to slate Puerto Rico for eventual statehood.¹⁰⁸ However, since a colonial form of government was to be used by Americans, to whom "colonialism" was not a popular political theory, a constitutional analysis was necessary to justify imperialism.¹⁰⁹ The Insular Cases provided an opportunity for the Court to provide such a justification. These decisions confirmed Congress's discretion not to incorporate a territory into the United States, making it clear that acquisition of a territory does not have to lead to either future statehood or independence.¹¹⁰ In other words, a colonial government need not be temporary or a step towards statehood; it can be an end in itself. By virtue of the Treaty of Paris and the Foraker Act, Puerto Rico was no longer a foreign country,¹¹¹ but would not be considered part of the United States either.¹¹² As such, in the words of Justice Edward Douglass White, Puerto Rico is "foreign . . . in a domestic sense."¹¹³ This distinction of foreignness, in terms of geographic location as well as race and culture, provided a justification to deny Puerto Rican residents the constitutional and political protections afforded to mainland U.S. citizens.

2. *The Extraterritorial Application of the Constitution*

After determining that the United States did indeed have the constitutional authorization to take possession of the islands without any promise of incorporation into the union, the Court turned to the issue of whether the Constitution applied *ex proprio vigore* ("by its own force") to the territories.¹¹⁴ In making this assessment, the Court distinguished between territories that were deemed "incorporated" and those that were designated "unincorporated." Unlike incorporated territories, unincorporated territories, including Puerto Rico, were determined not to have the full protection

¹⁰⁸ Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid*, 29 U. PA. J. INT'L L. 283, 289–90 (2007).

¹⁰⁹ *Id.* at 290.

¹¹⁰ See Sarah Helene Duggin & Mary Beth Collins, 'Natural Born' in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It, 85 B.U. L. REV. 53, 93 (2005); Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the Insular Cases*, 77 U. CHI. L. REV. 781, 790 n.82 (2010).

¹¹¹ *De Lima v. Bidwell*, 182 U.S. 1, 196–97 (1901).

¹¹² *Downes v. Bidwell*, 182 U.S. 244, 287 (1901); see also *id.* at 341–42 (White, J., concurring).

¹¹³ *Id.* at 341 (White, J., concurring).

¹¹⁴ See *Rassmussen v. United States*, 197 U.S. 516, 530 (1905) (Harlan, J., concurring).

of the Constitution.¹¹⁵ In other words, while all of the constitutional provisions applied to incorporated territories, not all of them applied to unincorporated territories.

In determining which rights apply to unincorporated territories, the Court made a distinction between fundamental and non-fundamental constitutional rights.¹¹⁶ The Court determined that only certain rights were “fundamental” and that only these fundamental rights applied to Puerto Rico.¹¹⁷ Initially, fundamental rights included due process and the provision against ex post facto laws and bills of attainder.¹¹⁸ Non-fundamental rights included Sixth Amendment rights to a grand jury, trial by jury, and to confront witnesses.¹¹⁹ Later, Sixth Amendment rights were deemed fundamental,¹²⁰ and thus are currently applicable in Puerto Rico. However, the vestiges of second-class citizenship, racism, and xenophobia that motivated the Insular Cases continue to perpetuate limited Sixth Amendment fair-cross-section protections for the bulk of Puerto Rico’s residents.

3. *The Racial Implications of the Insular Cases: Setting the Stage for Juror Exclusion*

The decisions to colonize Puerto Rico, as well as the other Treaty of Paris territories, and to limit constitutional protections of their inhabitants were greatly motivated by concerns about the race, color, and language of the islands’ inhabitants. The United States had possessed several territories before acquiring Puerto Rico, Cuba, the Philippines, and Guam. However, these preceding territories were treated differently: from the outset they had been slated for statehood and promised political rights and citizenship.¹²¹ Puerto Rico and the other Treaty of Paris acquisitions were not. Stateside there were concerns about the prospect of joining these islands into the union from the beginning. Not only were the islands non-contiguous and geographically distant, they were composed of persons with different racial and language backgrounds than that of the Anglo-Protestant majority in

¹¹⁵ *Hawaii v. Mankichi*, 190 U.S. 197, 215–18 (1903).

¹¹⁶ *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922).

¹¹⁷ *Id.*

¹¹⁸ *Downes v. Bidwell*, 182 U.S. 244, 277, 282 (1901); see also Robert A. Katz, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. CHI. L. REV. 779, 783 (1992).

¹¹⁹ *Balzac*, 258 U.S. at 313–14; see generally Jacques Semmelman, *Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings*, 76 CORNELL L. REV. 1198, 1227 n.214 (1991) (“Fundamental rights are those which are ‘basic to a free society,’ that are ‘implied in the concept of ordered liberty,’ and the denial of which would ‘shock the conscience.’” (quoting LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 269, 501 n.75 (1st ed. 1972))).

¹²⁰ For discussion of the Supreme Court’s evolving understanding of whether Sixth Amendment rights are fundamental rights, see *supra* note 7.

¹²¹ Juan F. Perea, *Fulfilling Manifest Destiny: Conquest, Race, and the Insular Cases, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION*, *supra* note 107, at 140, 156; cf. *O’Donoghue v. United States*, 289 U.S. 516, 537 (1933).

power in the United States.¹²² The population of Puerto Rico was primarily mixed race (of Spanish, African, and indigenous ancestry), which accordingly “rendered the island incapable of independent self-government in the eyes of Americans.”¹²³

This belief that the territories’ inhabitants’ racial, color, and language backgrounds made them unsuitable for self-governance also influenced the Insular Cases. The Insular Cases should not be viewed in isolation. The original Insular Cases,¹²⁴ which affirmed colonization and disparate treatment of a discrete racial group (Puerto Ricans), were rendered only five years after the Supreme Court’s decision in the infamous case of *Plessy v. Ferguson*.¹²⁵ *Plessy* approved so-called “separate but equal” treatment of African Americans, but was eventually overruled by *Brown v. Board of Education* in 1954.¹²⁶ The Insular Cases, however, remain forceful law that continues to authorize disparate treatment of an entire class of citizens.¹²⁷ As First Circuit Judge Juan Torruella has suggested, the Insular Cases have created a perpetual “doctrine of separate and unequal.”¹²⁸

As Juan Perea has elucidated, the decision to colonize Puerto Rico and the judicial reasoning sanctioning this status in the Insular Cases were heavily motivated by concerns about the racial make-up of Puerto Ricans and their supposed unfitness for statehood or self-rule.¹²⁹ This sentiment is revealed in the seminal Insular Case of *Downes v. Bidwell*,¹³⁰ where “[t]he Court viewed citizenship as reserved for ‘civilized’ people like Anglo Americans, and not for others . . . fear[ing] ‘extremely serious’ consequences if citizenship were conferred upon ‘savages.’”¹³¹ The *Downes* Court further

¹²² Perea, *supra* note 121, at 156–57; Torruella, *supra* note 108, at 288–89.

¹²³ Perea, *supra* note 121, at 156 (internal quotations omitted); see generally RUBIN FRANCIS WESTON, *RACISM IN U.S. IMPERIALISM: THE INFLUENCE OF RACIAL ASSUMPTIONS ON AMERICAN FOREIGN POLICY, 1893–1946*, at 15 (1972).

¹²⁴ *De Lima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *Dooley v. United States*, 182 U.S. 222 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901).

¹²⁵ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹²⁶ *Id.* at 552; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy sub silentio*); see *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (desegregating public buses by referring to *Brown*).

¹²⁷ Torruella, *supra* note 108, at 286 (“As in the instance of the legal framework established by *Plessy*, the Insular Cases have had lasting and deleterious effects on a substantial minority of citizens. The ‘redeeming’ difference is that *Plessy* is no longer the law of the land, while the [Insular Cases] . . . are responsible for the establishment of a regime of de facto political apartheid, which continues in full vigor.”).

¹²⁸ *Id.* at 291; see TORRUELLA, *supra* note 102, at 117, 265.

¹²⁹ See Perea, *supra* note 121, at 157.

¹³⁰ *Downes v. Bidwell*, 182 U.S. 244 (1901). For a detailed study of the case see Pedro A. Malavet, “*The Constitution Follows the Flag . . . But Doesn’t Quite Catch Up With It*”: *The Story of Downes v. Bidwell*, in *RACE LAW STORIES* 111, 111–46 (Rachel F. Moran & Devon W. Carbado eds., 2008).

¹³¹ Perea, *supra* note 121, at 157.

expressed that different treatment of governance was warranted due to the island's racial composition:

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.¹³²

In *Downes*, the Court found the fact that Puerto Rico and other Treaty of Paris possessions were comprised of "alien races" justified denial of self-government and the indefinite extension of colonial power over Puerto Rico.

If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.¹³³

The congressional debates concerning the Jones Act and its provision statutorily granting citizenship to Puerto Ricans were preoccupied with the perceived inferiority of the races of Puerto Rico. Of particular concern was the prevalence of African heritage, the perceived incapability of the islands' inhabitants to comprehend Anglo-Saxon government or to self-govern, and the alleged potential dangers posed by incorporation of these groups into the United States.¹³⁴ The Jones Act eventually gave Puerto Ricans U.S. citizenship, but this was, and continues to be, an inferior citizenship statutorily conferred and not constitutionally acquired. As Senator Joseph B. Foraker summarized, the legislature was not comfortable with the terms "aliens" or "subjects," so they adopted the term "citizens."¹³⁵ But in so doing they did not intend to give Puerto Ricans "any rights that the American people do not want them to have."¹³⁶ Even after the Jones Act granted Puerto Ricans citizenship, the Insular Cases' extraterritorial application of limited constitutional rights was still applicable because "[i]t is locality that is

¹³² *Downes*, 182 U.S. at 282.

¹³³ *Id.* at 287.

¹³⁴ Perea, *supra* note 121, at 161.

¹³⁵ José A. Cabranes, *Citizenship and the American Empire: Notes on the Legislative History of the United States Citizenship of Puerto Ricans*, 127 U. PA. L. REV. 391, 428 (1978) (quoting 33 CONG. REC. 2473-74 (1900) (statement of Sen. Foraker)).

¹³⁶ *Id.*

determinative of the application of the Constitution . . . and not the [citizenship] status of the people who live in it."¹³⁷

Lawmakers' beliefs that Puerto Ricans were racially inferior and unfit for self-governance not only determined colonial rule, but also determined the specific attributes of that government. This included the unilateral imposition of English as the language of the federal court. The English-only mandates in the federal courts simultaneously ensured Anglo- and Anglophone-American rule in the court and the exclusion of Puerto Rican participation in (although not subjugation to) the federal court. At the time of its implementation, Congress could have chosen to conduct court in Spanish or interpret the English proceedings into Spanish. If the United States had wanted Puerto Rican participation, it undoubtedly would have pursued one of these options. It did not. Thus, one of the original purposes of the English language requirement was to subordinate Puerto Ricans and wholly exclude the populations which the government deemed as most undesirable: those of African and mixed race heritage.

It comes as no surprise then that a government which believed Puerto Ricans incapable of self-governing or understanding Anglo-American political systems would essentially shut out that group from decisionmaking as jurors in the national court. Not only were the judges and officers of the court white Americans, early juries were also composed substantially of mainland Americans.¹³⁸ As few native inhabitants of Puerto Rico spoke English, it was challenging for the court to find enough jurors qualified to serve.¹³⁹ Thus, federal jury service was reserved for only a privileged minority. Sadly, over a century later, little has changed. Although mainlanders do not usually sit on federal juries, the bulk of Puerto Rico's inhabitants are excluded from service and juries are selected from a relatively elite socioeconomic, racial, and color group.

In no other court in our federal system would the exclusion of all but 10% of the adult population from jury service be allowed. The near total exclusion of persons of color from the jury box would not be tolerated. However, in the United States District Court for the District of Puerto Rico, these injustices have existed for over a century. A critical examination of the constitutionality and local applicability of the federal English language juror requirement in Puerto Rico is long overdue.

¹³⁷ *Balzac v. People of Porto Rico*, 258 U.S. 298, 309 (1922).

¹³⁸ Cabranes, *supra* note 22, at 43.

¹³⁹ See Baralt, *supra* note 18, at 121–23 & n.35.

III. CONSTITUTIONALITY OF THE ENGLISH LANGUAGE JUROR REQUIREMENT

A. *The Sixth Amendment Fair-Cross-Section Requirement*

The notion of a “jury of one’s peers” dates back at least eight centuries to the Magna Carta.¹⁴⁰ In American criminal¹⁴¹ jurisprudence, this concept is advanced not by a guarantee that an individual petit jury will represent the defendant’s personal background or even that of the community, but rather that the jury pool will be selected from a “fair cross section” of the community.¹⁴² This fundamental imperative has developed through interpretation of the Sixth Amendment’s Impartiality Clause and the Fourteenth Amendment’s Equal Protection Clause, and was later statutorily codified in the JSSA.¹⁴³

1. *Development of the Requirement*

The Sixth Amendment provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed”¹⁴⁴ At the time of its adoption, in 1791, juries were not particularly representative of the communities from which they were drawn, since the privilege of serving as jurors was limited to white male property owners.¹⁴⁵ It would be another almost ninety years before the United States

¹⁴⁰ MAGNA CARTA § 39 (1215) (“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.” (translation)); see Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 458 (2004).

¹⁴¹ This Article focuses on the criminal aspects of juror exclusion in Puerto Rico because of the unique constitutional protections and punitive consequences associated with criminal proceedings. The lack of representative juries in civil trials in the District Court for Puerto Rico also warrants study, but is beyond the scope of this paper.

¹⁴² *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (“Defendants are not entitled to a jury of any particular composition; but the jury wheels, pools of names, panels or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.”) (internal citations omitted); JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 99 (2000) (“[T]he particular jury a person gets may not itself form a cross section of the community. But so long as jurors are summoned randomly from an initially representative list, the democratic nature of jury membership is said to be preserved.”); RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 119 (2003).

¹⁴³ 28 U.S.C. § 1861 (2006) (“It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.”).

¹⁴⁴ U.S. CONST. amend. VI.

¹⁴⁵ JONAKAIT, *supra* note 142, at 114; Mitchell S. Zuklie, Comment, *Rethinking the Fair Cross-Section Requirement*, 84 CAL. L. REV. 101, 107 (1996) (citing JON M. VAN DYKE, *JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS* 13–14 (1977)).

Supreme Court recognized the right of African American males to participate in juries, finding that the exclusion of this population on the basis of race violated the Equal Protection Clause of the Fourteenth Amendment.¹⁴⁶

The subsequent jurisprudence addressing juror exclusion similarly focused on the Fourteenth Amendment.¹⁴⁷ Unlike other Equal Protection cases of the time, which may have concentrated primarily on the intent of the state to discriminate on the basis of a protected characteristic, the juror-exclusion cases included facially neutral statutes that resulted in a statistical underrepresentation of certain groups in the community. For instance, in *Norris v. Alabama*, the defendants successfully established an Equal Protection violation by demonstrating that, despite the existence of qualified blacks in the community, in at least twenty-four years no black individual had ever served on a jury.¹⁴⁸ Proof that qualified blacks “constituted a substantial segment of the population of the jurisdiction” and that “some” were qualified to serve as jurors but had never been summoned over an extended period of time was later termed the “rule of exclusion” and was found sufficient to establish a *prima facie* case of an Equal Protection violation.¹⁴⁹

In the 1940 case of *Smith v. Texas*, a unanimous Supreme Court expanded upon the rule of exclusion and first articulated the importance of juries “truly representative” of the community, the concept preceding the modern fair-cross-section requirement.¹⁵⁰ In Harris County, Texas, African Americans constituted 20% of the population, and it was estimated that a minimum of three to six thousand such individuals were qualified for jury service.¹⁵¹ However, for the period of 1931–1938, only 3.5% of individuals summoned for grand jury service and only 1.3% of grand jurors who served during that period were African American.¹⁵² Upon review of this statistical evidence, the Court reversed an African American defendant’s conviction, having found that blacks had been unconstitutionally excluded from the county’s jury system.¹⁵³ Justice Black, on behalf of the Court, stated:

It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body *truly representative* of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war

¹⁴⁶ *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879).

¹⁴⁷ *See, e.g., Pierre v. Louisiana*, 306 U.S. 354, 357 (1939); *Martin v. Texas*, 200 U.S. 316, 319 (1906); *Carter v. Texas*, 177 U.S. 442, 447 (1900).

¹⁴⁸ *Norris v. Alabama*, 294 U.S. 587, 591 (1935).

¹⁴⁹ *Hernandez v. Texas*, 347 U.S. 475, 480 (1954).

¹⁵⁰ *Smith v. Texas*, 311 U.S. 128, 130 (1940) (holding that “juries as instruments of public justice . . . [should] be a body truly representative of the community”).

¹⁵¹ *Id.* at 128–29.

¹⁵² *Id.* at 129.

¹⁵³ *Id.* at 131–32.

with our basic concepts of a democratic society and a representative government.¹⁵⁴

Two years later in *Glasser v. United States*, the Supreme Court applied this community representation concept within the parameters of the Sixth Amendment's Impartiality Clause to the systematic exclusion of women from juries in the federal courts.¹⁵⁵ Expounding upon its decision in *Smith v. Texas*, the Court explained that "the proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a [sic] truly representative of the community"¹⁵⁶ Even more importantly, the Court, for the first time, introduced the theory of the fair cross section as intrinsically linked with impartiality and true representativeness. The Court found "officials charged with choosing federal jurors" must not make "selections which do not comport with the concept of the jury as a *cross-section of the community*."¹⁵⁷

The first century and a half of juror-exclusion cases focused predominantly on African Americans,¹⁵⁸ and to a lesser degree, women.¹⁵⁹ However, it had long been recognized, at least in theory, that exclusion of other classes of persons from jury service could also be unconstitutional.¹⁶⁰ The question then remained: which groups are protected? The Supreme Court began to explore this query in *Hernandez v. Texas*, a 1954 case challenging the exclusion of Mexican Americans from grand jury service in Jackson County, Texas.¹⁶¹ The initial inquiry was whether Mexican Americans constituted a distinctive group or class in the community, which could be demonstrated by the community attitude toward and treatment of that group.¹⁶² The Court held that Mexican Americans were a distinctive class and that exclusion solely on the basis of ancestry or national origin is discrimination prohibited under the Fourteenth Amendment.¹⁶³

In 1968, Congress codified the fair-cross-section requirement in the JSSA as a means to facilitate compliance with the Sixth Amendment's Impartiality Clause.¹⁶⁴ The JSSA provides that "all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community"¹⁶⁵ The Act

¹⁵⁴ *Id.* at 130 (emphasis added) (citations omitted).

¹⁵⁵ *Glasser v. United States*, 315 U.S. 60, 85 (1942).

¹⁵⁶ *Id.* at 86.

¹⁵⁷ *Id.* (emphasis added).

¹⁵⁸ *See, e.g.*, *Pierre v. Louisiana*, 306 U.S. 354, 357 (1939); *Martin v. Texas*, 200 U.S. 316, 319 (1906); *Carter v. Texas*, 177 U.S. 442, 447 (1900).

¹⁵⁹ *See, e.g.*, *Ballard v. United States*, 329 U.S. 187 (1946); *Glasser*, 315 U.S. at 84.

¹⁶⁰ *See Hernandez v. Texas*, 347 U.S. 475, 477 (1954) (citing *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879)).

¹⁶¹ *Id.*

¹⁶² *Id.* at 479.

¹⁶³ *Id.* at 482.

¹⁶⁴ 28 U.S.C. § 1861 (2006).

¹⁶⁵ *Id.*

further delineates that “[n]o citizen shall be excluded from service as a grand or petit juror in the district courts of the United States . . . on account of race, color, religion, sex, national origin, or economic status.”¹⁶⁶ The Act is consistent with the preceding jurisprudence on juror exclusion, in that it ensures the right to cross-sectional jury selection, rather than merely providing a remedy for intentional discrimination.

In the 1970s, the Supreme Court continued to distance itself from an intentional discrimination standard, recognizing violations of the constitutional right to an impartial jury where the exclusion of a group from the jury pool was statistically significant, but not absolute, and the governing juror statute or policies were facially neutral but had a disproportionate systematic impact.¹⁶⁷ The Court further recognized that a criminal defendant has standing to object to the systematic exclusion of a group even where the defendant is not a member of that group.¹⁶⁸

Most notably, the Court in *Taylor v. Louisiana* declared unequivocally that the fair-cross-section requirement is fundamental to the Sixth Amendment right to trial by jury.¹⁶⁹ The Court found the fundamental Sixth Amendment right to have a jury selected from a fair cross section had been denied to a male defendant when, as a result of an opt-in procedure requiring women to declare in writing their desire to be subject to jury service before being placed on the jury wheel, only 10% of the jury wheel was comprised of women, even though women represented 53% of the jurisdiction’s population.¹⁷⁰ In reaching this conclusion, the Court found that women were “sufficiently numerous and distinct from men and that if they are systematically eliminated from jury panels, the Sixth Amendment’s fair-cross-section requirement cannot be satisfied.”¹⁷¹ The Court also noted that “the two sexes are not fungible [A] flavor, a distinct quality is lost if either sex is excluded.”¹⁷²

Later, in *Duren v. Missouri*, the Supreme Court explicitly delineated the contemporary requirements of a fair-cross-section challenge and found that an exemption from jury duty for members of an entire sex violated the Sixth Amendment.¹⁷³ The defendant, convicted of first-degree murder and first-degree robbery, argued that his constitutional rights had been violated due to

¹⁶⁶ *Id.* § 1862.

¹⁶⁷ *Taylor v. Louisiana*, 419 U.S. 522, 531 (1975).

¹⁶⁸ *Peters v. Kiff*, 407 U.S. 493, 500 (1972) (finding that a white defendant had standing to challenge the systematic exclusion of blacks from jury service since “the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community”); *Taylor*, 419 U.S. at 526 (finding that a male defendant had standing to challenge the exclusion of women from the jury pool).

¹⁶⁹ *Taylor*, 419 U.S. at 530 (“We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment”).

¹⁷⁰ *Id.* at 524, 537.

¹⁷¹ *Id.* at 531.

¹⁷² *Id.* at 531–32.

¹⁷³ *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

a state statute that granted broad exemptions to any woman who requested to be excluded from jury duty, which led to an unrepresentative, gendered jury venire.¹⁷⁴ The Court set forth a three-part test that defendants needed to prove in order to establish a prima facie violation of the fair-cross-section requirement:

(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.¹⁷⁵

However, the Court said that the government could overcome a demonstration of a fair-cross-section violation if "those aspects of the jury-selection process," which result "in the disproportionate exclusion of a distinctive group," advanced a significant state interest.¹⁷⁶

The Supreme Court reaffirmed *Taylor's* finding that women constituted a "distinctive" group in the community.¹⁷⁷ They relied on the statistical census data in *Duren*, indicating that women made up 54% of citizens eligible for jury service in the community, in order to establish the second prong.¹⁷⁸ Then, the Court found that women were grossly underrepresented at certain stages in the jury-selection process, which established systematic exclusion.¹⁷⁹ Finally, the Court found that Missouri's exemption of "all women because of the preclusive domestic responsibilities of some" was insufficient to meet the significant state interest requirement to justify the underrepresentation.¹⁸⁰ Ultimately, the Court held that the broad exemptions were unreasonable and operated to violate the right to an impartial jury recognized in *Duren*.¹⁸¹

2. *Fair-Cross-Section Challenges to the Language Requirement in Puerto Rico*

Defendants appearing in criminal proceedings in the United States District Court for the District of Puerto Rico have unsuccessfully challenged the constitutionality of the English proficiency juror requirement as violating their Sixth Amendment rights on the ground that the requirement impermis-

¹⁷⁴ *Id.* at 360 (The Missouri statute provided that "[n]o citizen shall be disqualified from jury service because of sex, but the court shall excuse any woman who requests exemption there from before being sworn as a juror").

¹⁷⁵ *Id.* at 364.

¹⁷⁶ *Id.* at 367-68.

¹⁷⁷ *Id.* at 364.

¹⁷⁸ *Id.* at 365.

¹⁷⁹ *Id.* at 365-67.

¹⁸⁰ *Id.* at 369.

¹⁸¹ *Id.* at 370.

sibly excludes non-English speakers. This issue has received only cursory treatment by the United States Court of Appeals for the First Circuit, and has never been addressed by the United States Supreme Court.

In the ostensibly decisive case of *United States v. Benmuhar*, the defendant argued that his Sixth Amendment right to a representative jury from a fair cross section of the community had been violated because the English language requirement systematically excluded persons who did not speak, “‘read, write, or understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form’”¹⁸² The United States Court of Appeals for the First Circuit assumed *arguendo* that non-English speakers were a distinctive group.¹⁸³ The court further found that Benmuhar had sufficiently demonstrated that the English requirement operates systematically to exclude this group.¹⁸⁴

However, the court also found that the government had a significant interest in having national courts all operate in the national language of English and that this interest was “‘primarily advanced by the [English] requirement.’”¹⁸⁵ The court then noted several factors that supported the “‘significant’” interest: providing venue alternatives; providing uniformity expected in national courts, which are different from local courts; providing nonresident non-Spanish-speaking citizens use of the district court; providing easy access for members of the Attorney General’s staff; allowing easy transfer of judges; and avoiding “‘translation distortions.’”¹⁸⁶ Ultimately, the court held that Benmuhar’s Sixth Amendment rights were not violated by the English language requirement’s exclusionary effect on the jury selection process.¹⁸⁷

Nearly ten years after *Benmuhar*, the First Circuit cursorily reaffirmed its decision in *United States v. Aponte-Suarez*¹⁸⁸ by upholding the English language requirement. Defendant Aponte-Suarez, along with others, appealed his conviction on multiple conspiracy and drug charges.¹⁸⁹ He argued that the grand jury that indicted him and the petit jury that tried him both lacked the proficiency in English required of federal jurors; that Puerto Ricans were less proficient in English as a population; and that the language

¹⁸² *United States v. Benmuhar*, 658 F.2d 14, 19 (1st Cir. 1981) (quoting 28 U.S.C. § 1865(b)(2) (2006)). The defendant also alleged that other distinctive groups were over-represented or underrepresented in juries including, *inter alia*, rural residents, women, persons with less than an eighth grade education, certain persons of lower socio-economic backgrounds or occupations, and blacks. *Id.* at 19 n.2. However, the court limited their inquiry to persons without English language proficiency, “‘since appellant [did] not suggest that other unspecified factors operate[d] in a systematic fashion so as to cause jury disproportionality.’” *Id.* at 19.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 19 (internal quotations omitted).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *United States v. Aponte-Suarez*, 905 F.2d 483 (1st Cir. 1990).

¹⁸⁹ *Id.* at 486.

requirement systematically excluded residents, resulting in a fair-cross-section violation.¹⁹⁰ The court found that there was no evidence of a lack of proficiency among the jurors who indicted or tried the defendant.¹⁹¹ Then, without any further analysis, the court summarily affirmed the holding in *Benmuhar*. The court held that “the overwhelming national interest served by the use of English in a United States court justifies proceedings in the District Court of Puerto Rico in English and requiring jurors to be proficient in that language.”¹⁹²

Five years later, a defendant yet again raised a Sixth Amendment fair-cross-section argument on language grounds. In *United States v. Flores-Rivera*,¹⁹³ the First Circuit once more upheld the English language requirement. Defendant Flores-Rivera argued that the language requirement violated his Fifth and Sixth Amendment rights by excluding two-thirds of the Puerto Rican population.¹⁹⁴ Unsurprisingly, the court disregarded Flores-Rivera’s argument in passing, simply stating that the issue had already been decided in *Benmuhar* and affirmed in *Aponte-Suarez*.¹⁹⁵ In the 2002 case of *United States v. Dubón-Otero*, defendants sought to distinguish these prior cases as “having been decided in part upon the absence of any viable alternative” and suggested that simultaneous translation be employed to allow non-English speakers to serve on juries.¹⁹⁶ Without commenting on the prospect of translation, the court rejected defendants’ contentions and simply reiterated that the national interest in use of English in a U.S. court justifies requiring jurors be proficient in English and that “[t]his justification is independent of the presence or lack of any viable alternatives.”¹⁹⁷

Thus, in the First Circuit the current law provides that the JSSA English language prerequisite systematically excludes non-English speakers, but that this procedure is constitutional because it advances the federal government’s interest in conducting proceedings in English. This case law is flawed because it ignores the fact that the government’s interest in maintaining English language proceedings and the rights of non-English speakers are not at odds with each other. Monolingual Spanish speakers in Puerto Rico could easily and effectively serve as jurors in the English language federal court through the use of interpreters.

¹⁹⁰ *Id.* at 491–92.

¹⁹¹ *Id.* at 492.

¹⁹² *Id.* (citing *United States v. Benmuhar*, 658 F.2d 14, 19 (1st Cir. 1981)).

¹⁹³ *United States v. Flores-Rivera*, 56 F.3d 319 (1st Cir. 1995).

¹⁹⁴ *Id.* at 326.

¹⁹⁵ *Id.*

¹⁹⁶ *United States v. Dubón-Otero*, 292 F.3d 1, 17 (1st Cir. 2002).

¹⁹⁷ *Id.*

3. *Making a Fair-Cross-Section Case for Monolingual Spanish Speakers*

There are five primary groups who are systematically excluded under the JSSA language requirement in Puerto Rico: black Latinos, Puerto Ricans of color, the poor, persons with less than a high school education, and non-English (or more narrowly, monolingual Spanish) speakers. From a pragmatic view, a fair-cross-section challenge focusing on the exclusion of black Latinos and mixed race Puerto Ricans under the JSSA requirement would be the most prudent. It is well settled that the exclusion of racial or color groups can violate the fair-cross-section requirement, and thus the distinctiveness prong of a *Duren* analysis could easily be satisfied.¹⁹⁸ However, for the purposes of this Article, the focus will be on the larger issue of whether the exclusion of monolingual Spanish speakers¹⁹⁹ (a group which includes most black Latinos, Puerto Ricans of color, the poor, and persons with less than a high school education) can amount to a fair-cross-section violation in Puerto Rico.

The initial obstacle in asserting that the exclusion of monolingual Spanish speakers from federal juries in Puerto Rico constitutes a fair-cross-section violation under the Sixth Amendment is the fact that the JSSA expressly disqualifies non-English proficient persons from federal jury service. Some courts have held that non-English speakers cannot be considered a cognizable group entitled to representation in the jury pool for Sixth Amendment purposes because such individuals are not eligible for jury service under the JSSA.²⁰⁰ This reasoning risks being circular: the exclusion of non-English speakers does not violate the Sixth Amendment's fair-cross-section requirement because non-English speakers are statutorily prohibited from jury service. In other words, they can be constitutionally excluded simply because they are statutorily excluded.

Such a *circulus in probando* is akin to the flawed reasoning that a statute specifically prohibiting a racial or gender group from jury service could be the basis to foreclose fair-cross-section challenges for these populations. The anticipated response to this analogy is likely that racial and gender classifications are subjected to heightened constitutional scrutiny, and thus exclusion of these populations would be found facially unconstitutional as violative of the equal protection guarantees of the Fourteenth and Fifth Amendments. Under equal protection analysis, non-English speakers and

¹⁹⁸ *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

¹⁹⁹ For the purposes of this Article, the term monolingual Spanish speaker includes functionally monolingual Spanish speakers who may speak some English but not enough to qualify for jury service in Puerto Rico under the JSSA and the United States District Court for Puerto Rico's Jury Plan.

²⁰⁰ See, e.g., *United States v. Test*, 550 F.2d 577, 595 (10th Cir. 1976). However, the First Circuit, which includes Puerto Rico, has assumed that non-English speakers constitute a cognizable group. See *United States v. Benmuhar*, 658 F.2d 14, 19 (1st Cir. 1981).

language classifications are not afforded heightened constitutional scrutiny unless there is a sufficient nexus between the language discrimination and race, ethnicity, or national origin.²⁰¹ However, the Sixth Amendment analysis here focuses on a potential fair-cross-section claim, not an equal protection claim. A fair-cross-section claim must only result from a “systematic” exclusion, does not require any demonstration of intent to discriminate against or exclude a group, and does not implicate different levels of judicial scrutiny for different classifications of groups.²⁰² Fair-cross-section and equal protection juror-exclusion claims “protect[] different values. Whereas the Equal Protection Clause prohibits discrimination, the fair-cross-section requirement of the Sixth Amendment defines the type of jury to which criminal defendants are entitled: a jury drawn from a *representative* pool.”²⁰³

We turn now to whether the exclusion of monolingual Spanish speakers in Puerto Rico amounts to a fair-cross-section violation under the Sixth Amendment. As discussed above, the Court in *Duren v. Missouri* set forth a three-part test to determine a fair-cross-section violation:

²⁰¹ See *Hernandez v. New York*, 500 U.S. 352, 371–72 (1991) (plurality opinion) (concluding that peremptory challenges to prospective jurors on the basis of bilingual language ability was subject to only minimal scrutiny when a prosecutor presents a sufficient race-neutral reason for asserting the challenge); John Hill et al., *Watch Your Language! The Kansas Law Review Survey of Official-English and English-only Laws and Policies*, 57 U. KAN. L. REV. 669, 709 (2009) (“‘Most courts have concluded that language classifications do not require heightened scrutiny.’”) (quoting Colin A. Kisor, *Using Interpreters to Assist Jurors: A Plea for Consistency*, 22 CHICANO-LATINO L. REV. 37, 46 (2001)); Andrew P. Averbach, Note, *Language Classifications and the Equal Protection Clause: When Is Language a Pretext for Race or Ethnicity*, 74 B.U. L. REV. 481, 488 (1994); Donna F. Coltharp, Comment, *Speaking the Language of Exclusion: How Equal Protection and Fundamental Rights Analyses Permit Language Discrimination*, 28 ST. MARY’S L.J. 149, 168, 172–73 (1996) (“[L]anguage discrimination nearly always receives minimal scrutiny. . . . No lower court has found language, by itself, to be a suspect classification. However, a few courts have found a sufficient connection between language and national origin to trigger strict scrutiny.”). There are persuasive arguments that language discrimination should be subject to heightened scrutiny under the equal protection law. See Cristina M. Rodríguez, *Accommodating Linguistic Difference: Toward a Comprehensive Theory of Language Rights in the United States*, 36 HARV. C.R.–C.L. L. REV. 133, 171 (2001).

²⁰² JONAKAIT, *supra* note 142, at 120; Robin E. Schulberg, *Katrina Juries, Fair Cross-Section Claims, and the Legacy of Griggs v. Duke Power Co.*, 53 LOY. L. REV. 1 (2007). Another concern about recognizing monolingual Spanish speakers as a cognizable group for Sixth Amendment fair-cross-section purposes is the mutability of language ability. However, unlike anti-discrimination law, mutability of the group’s central shared characteristic is not fatal. A cognizable group can be any “recognizable, distinct class, singled out for different treatment under the laws, as written or applied.” *Castaneda v. Partida*, 430 U.S. 482, 494 (1977); ABRAMSON, *supra* note 142, at 117. Recognized groups for fair-cross-section purposes have included groups based on potentially mutable characteristics such as religion and economic status. See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 223–24 (1946) (holding a federal court’s exclusion of daily-wage workers from the jury list on financial hardship grounds violated the fair-cross-section requirement and would result in discrimination “against persons of low economic and social status”). See generally Rodríguez, *supra* note 201, at 142 (considering language as mutable and presenting language rights in terms of a mutability continuum).

²⁰³ Schulberg, *supra* note 202, at 3, 24 (emphasis added).

(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury selection process.²⁰⁴

The first factor, and indeed "[t]he essence of a fair-cross-section claim[,] is the systematic exclusion of a distinctive group in the community."²⁰⁵ "In assessing a group's distinctiveness . . . [c]ourts generally consider whether members of the group share: (1) an attribute that defines and limits the group; (2) a common attitude, idea, or experience that distinguishes the group from other segments of society; and (3) a 'community of interest' that the jury pool would not adequately reflect if it expressly excluded members of the group."²⁰⁶ Spanish speakers in Puerto Rico share many attributes and experiences that define and limit their group, namely a common linguistic experience, which forms a central basis for Puerto Rican identity, and the economic and educational limitations that not being bilingual in a U.S. territory presents. Monolingual Spanish speakers in Puerto Rico are the prevailing group on the island and the embodiment of Puerto Rican culture. The social and cultural identity of the Puerto Rican people is rooted in monolingual Spanish. As such, the absence of monolingual Spanish speakers results in the absence of not just a "community of interest," but the dominant culture, from federal juries.

Examination of the Sixth Amendment implications of the exclusion of monolingual Spanish speakers in Puerto Rico reveals shortcomings in the criteria employed to determine whether a group is distinctive for the purposes of the fair-cross-section requirement. This jurisprudence has been developed in the context of the states rather than a colonized territory or commonwealth and presupposes a small minority group discriminated against by society at large. Behind this paradigm is an assumption that persons traditionally discriminated against, such as racial, ethnic, color, or national origin groups, exist in only small numbers and the bulk of the population is from the "majority" (as opposed to "minority") groups of the community. The excluded group is implicitly understood to be a small, unpopular, or historically disadvantaged minority and thus singled out for discrimination by the masses. The case law assumes that the majority is in power and the minority is subject to that power. The development of this model is understandable given the fact that key fair-cross-section cases have

²⁰⁴ *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

²⁰⁵ *Lockhart v. McCree*, 476 U.S. 162, 174 (1986) (quoting *Duren*, 439 U.S. at 364) (internal quotations omitted).

²⁰⁶ *Barber v. Ponte*, 772 F.2d 982, 997 (1st Cir. 1985) (en banc); Zuklie, *supra* note 145, at 102.

been developed in the context of protecting racial minorities and, to a lesser degree, women from impermissible exclusion.

In the case of Puerto Rico this model does not work. The group subject to juror exclusion is the majority, albeit a politically disenfranchised majority. And the population eligible for jury service is the minority. The result is that due to the small size and elite composition of the group, the included group (bilingual Puerto Ricans) appears to be more homogeneous and share more attributes, attitudes, and experiences amongst themselves than the masses of excluded monolingual Spanish speakers. In the context of a colonial-styled government where the majority is ruled by a foreign and distant imperial power, the ultimate question of whether a group is entitled to fair-cross-section protection should focus less on distinctiveness measured by shared attributes, attitudes, ideas, or experiences, but rather on the third factor: whether the group shares a “community of interest” which the jury pool would not adequately reflect if the group is systematically excluded. Here, the language requirement excludes the interest of not just *a* community but *the* community of Puerto Rico, almost all Puerto Ricans, populations of color, and people from the lower socioeconomic strata. Essentially everyone but the island’s socioeconomic, educational, racial, and ethnic elite are systematically barred. In our democracy the exclusion of a minority group is generally considered abhorrent, as it should be. But perhaps even more threatening to democracy is the exclusion of the greater part of a community. In a political system of majority rule, the prospect of majority disenfranchisement of a fundamental right should cause great concern. At its core, the fair-cross-section requirement serves a democratic “political function”²⁰⁷ and requires that jury pools be selected from the broader society and not just a small elite section.²⁰⁸

In *Lockhart v. McCree* the Supreme Court emphasized that “it [is] obvious that the concept of ‘distinctiveness’ must be linked to the purposes of the fair-cross-section requirement.”²⁰⁹ These purposes include: (1) “‘guard[ing] against the arbitrary exercise of power,’” (2) “‘ensuring that the ‘commonsense judgment of the community’” will temper an “‘overzealous or mistaken prosecutor,’” (3) “‘preserving ‘public confidence in the fairness of the criminal justice system,’” and (4) “‘implementing our belief that ‘sharing in the administration of justice is a phase of civic responsibility.’”²¹⁰

These first two purposes are fundamentally interrelated. The commonsense judgment of the community is needed to guard against arbitrary exercise of governmental power, so that the government is not acting as prosecutor, judge, and jury.²¹¹ Here, the exclusion of approximately 90% of

²⁰⁷ *Taylor v. Louisiana*, 419 U.S. 522, 529 (1975).

²⁰⁸ ABRAMSON, *supra* note 142, at 124–25.

²⁰⁹ *Lockhart*, 476 U.S. at 175.

²¹⁰ *Id.* at 174–75 (quoting *Taylor*, 419 U.S. at 522, 531) (alteration in original) (internal punctuation omitted).

²¹¹ Schulberg, *supra* note 202, at 25 (quoting *Taylor*, 419 U.S. at 530).

the population undoubtedly raises a high probability that the composition of juries is skewed such as to deprive criminal defendants of the commonsense judgment of the community. As Justice Marshall explained in *Peters v. Kiff*:

When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience . . . unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.²¹²

The prohibition of monolingual Spanish-speaking Puerto Ricans, the bulk of the population, removes the dominant experience and culture of the Puerto Rican people from the jury. It would be extremely difficult, if not impossible, to identify all of the unique “qualities of human nature and varieties of human experience[s]” absent from the jury room when over 90% of the population is excluded. The language prerequisite especially eliminates black Latinos, Puerto Ricans of color, and persons from lower socioeconomic backgrounds from the jury pool. Individuals from these groups may have often come from neighborhoods and housing projects where a significant amount of federal crimes occur. Exclusion of both the majority populace and the less privileged segments of the population deprive the jury from experiences and perspectives necessary to execute the commonsense judgment of the community.

Under the language requirement, federal juries in Puerto Rico represent only the socioeconomic, racial and color elite: a narrow section of the community. As the Supreme Court has articulated, “[b]ecause the purpose of the jury is to guard against arbitrary abuses of power by interposing the commonsense judgment of the community between the State and the defendant, the jury venire cannot be composed only of special segments of the population.”²¹³ To prohibit community participation on such a large scale is contrary to the representational function of the jury and ultimately results in biased juries.²¹⁴

Turning to the third purpose of the fair-cross-section requirement, it is inevitable that the exclusion of most of the population undermines “public confidence in the fairness of the criminal justice system.”²¹⁵ Reservation of

²¹² *Peters v. Kiff*, 407 U.S. 493, 503–04 (1972).

²¹³ *Teague v. Lane*, 489 U.S. 288, 314 (1989).

²¹⁴ *Taylor*, 419 U.S. at 529 n.7 (quoting H.R. REP. NO. 1076, at 8 (1968), reprinted in 1968 U.S.C.A.N. 1797) (“It must be remembered that the jury is designed not only to understand the case, but also to reflect the community’s sense of justice in deciding it. As long as there are significant departures from the cross-sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.”).

²¹⁵ *Lockhart v. McCree*, 476 U.S. 162, 175 (1986) (quoting *Taylor*, 419 U.S. at 531).

the privilege of jury service to only a small segment of society of predominantly socioeconomically privileged and lighter-skinned individuals gives rise to a conspicuous appearance of unfairness that undermines the credibility of the federal system in the eyes of the populace. Credibility of the federal courts is further diminished by the fact that proceedings are not translated for the public.²¹⁶

Finally, since resident Puerto Ricans have no federal voting power, jury service is the only opportunity to participate in self-governance in the federal system. Exclusion of most citizens from the privilege of serving on a jury goes against the fourth purpose of the fair-cross-section requirement to implement our democracy's belief that "sharing in the administration of justice is a phase of civic responsibility."²¹⁷ Puerto Rico is a remarkably politically engaged society, which boasts one of the highest voter turnout rates not only in the Western Hemisphere, but in the world.²¹⁸ The massive denial of the right to participate in federal juries is an indignity that reemphasizes the inferior citizenship status native Puerto Ricans are given upon birth in the Commonwealth. These fundamental purposes of the fair-cross-section requirement sustain the conclusion that monolingual Spanish speakers in Puerto Rico are a sufficiently distinctive group in the community.

The second element of a *prima facie* violation of the fair-cross-section requirement under *Duren* is that the representation of monolingual Spanish speakers in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community.²¹⁹ Approximately 90% of the population eighteen years of age or older is composed of functionally monolingual Spanish speakers. The qualified jury wheel includes virtually no monolingual Spanish speakers and any monolingual Spanish speakers included on this list will be dismissed at the juror orientation stage. This is not fair and reasonable because, as discussed in more detail below, monolingual Spanish speakers could effectively serve with juror language accommodation.

The final *Duren* factor is that the "underrepresentation is due to systematic exclusion of the group in the jury selection process."²²⁰ Here, underrepresentation of monolingual Spanish speakers is due solely to systematic exclusion posed by the JSSA requirement that potential jurors speak, read, write, and understand English and the District Court for Puerto Rico's Jury Plan. The other flaw in the jury procedure is that non-English speakers are

²¹⁶ See Schweers, *supra* note 74, at 26 (discussing how use of exclusive English in the United States District Court for Puerto Rico "is an unpleasant reminder to many of Puerto Rico's continued colonial status").

²¹⁷ *Lockhart*, 476 U.S. at 175 (quoting *Taylor*, 419 U.S. at 531).

²¹⁸ In Puerto Rico voter turnout is over 82%. See Katherine Culliton-González, *Time to Revive Puerto Rican Voting Rights*, 19 BERKELEY LA RAZA L.J. 27, 58 (2008); Medina, *supra* note 99, at 1074.

²¹⁹ *Duren v. Missouri*, 439 U.S. 357, 364 (1979).

²²⁰ *Id.*

not allowed interpreters. The only objection to these jurors is their deficient language skills or literacy, which can be remedied through the use of interpretation.

4. *The Federal Government's Interest in English Language Proceedings*

In *Duren*, the Supreme Court instructed that the government could overcome a demonstration of a fair-cross-section violation if “those aspects of the jury-selection process,” which resulted “in the disproportionate exclusion of a distinctive group,” advanced a significant state interest.²²¹ The First Circuit in *Benmuhar* held that even assuming a prima facie case had been made that the language requirement constituted a fair-cross-section violation, this was defeated by the government’s interest in holding proceedings in the national language of English.²²² Later, the First Circuit found that the government was justified in excluding citizens from the jury pool on language grounds irrespective of the presence of viable alternatives such as interpretation.²²³ The aspects of the jury selection process that exclude jurors who are not proficient in English and do not permit the use of translation to allow non-English speakers to serve do not advance the government’s interest in conducting federal court in English. The government’s interest and the rights of non-English speakers to serve as jurors with interpretation accommodation clearly are not mutually exclusive.

When faced with the prospect of allowing non-English-speaking jurors to use interpreters, there are likely four primary concerns: juror reliance on the translation rather than English testimony or official English translation, the accuracy of translation, the presence of a thirteenth person during deliberation, and the cost of or ability to administer interpretation. Irrespective of the strength of these concerns stateside, none of these objections pose serious obstacles in Puerto Rico, particularly when weighed against the unconstitutional exclusion of up to 90% of the jury-age population.²²⁴

In Puerto Rico all the federal judges and most of the counsel are fully bilingual.²²⁵ The defendants in criminal proceedings are usually monolingual Spanish speakers or otherwise do not have sufficient English language ability to understand the proceedings.²²⁶ Accordingly, most defendants are provided simultaneous interpretation throughout the proceedings pursuant to their rights under the Sixth Amendment Confrontation

²²¹ *Id.* at 367–68.

²²² *United States v. Benmuhar*, 658 F.2d 14, 20 (1st Cir. 1981).

²²³ *United States v. Dubón-Otero*, 292 F.3d 1, 17 (1st Cir. 2002).

²²⁴ *Cf. Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (holding that cost justifications are not persuasive when fundamental rights are implicated).

²²⁵ Andrea Freeman, *Linguistic Colonialism: Law, Independence, and Language Rights in Puerto Rico*, TEMP. POL. & CIV. RTS. L. REV. (forthcoming 2011).

²²⁶ See Pousada, *supra* note 32, at 140.

Clause.²²⁷ Testimony of witnesses, except federal officers, is usually in Spanish.²²⁸ If a defendant chooses to testify, his or her testimony is almost always in Spanish.²²⁹ It is a well-known local litigation strategy to have a witness or party speak in Spanish, even if he or she is fully bilingual, because it is perceived that the jurors will be more receptive to information presented in their native language.²³⁰ Audio or video recording or correspondence evidence is often in Spanish. It is a common occurrence for everyone in the courtroom (from the judge, counsel, defendant, jurors, court staff, and witnesses) to be fluent in Spanish and hours of Spanish testimony to be heard, with English used only to dutifully translate the proceedings into an English record. As a critic observed:

Use of English [in the United States District Court for Puerto Rico] is at times absurd, as when attorneys, parties, jurors and the judge are all native Spanish speakers, and yet all is translated back and forth between English and Spanish for no other reason than to comply with a statutory mandate, for no one pays any attention to the English translations.²³¹

The first apprehension to allowing interpretation is precisely this last point: non-English-speaking jurors will not be listening to the English language testimony or the official English translation. The concern is that the jurors may get a different meaning from the testimony or foreign language translation since they are not deliberating on the English record. This concern has gained prominence after the controversial *Hernandez v. New York* decision, where the Supreme Court rejected a *Batson*²³² claim that preemptory challenges to exclude Latino jurors on the ground that they were English-Spanish bilingual and might be guided by Spanish language testimony over its official translation violated equal protection.²³³ *Hernandez v. New York* has not been applied in Puerto Rico because to do so would potentially exclude the entire jury pool since essentially every individual in the jury pool speaks Spanish and every criminal case introduces Spanish language testimony or other evidence. Interestingly, the experience of bilingual jurors in Puerto Rico could be said to have disproven the fears expressed by the

²²⁷ *Id.*

²²⁸ Freeman, *supra* note 226, at 8.

²²⁹ *Id.*

²³⁰ Pousada, *supra* note 32, at 148 (citing M. Gerard-Delfin, *Language Under Scrutiny in Federal Court*, SAN JUAN STAR, Sept. 5, 2002, at 2).

²³¹ Alvarez González, *supra* note 23, at 373 (quoting Muñoz Argüelles, *The Status of Languages in Puerto Rico*, in CARMELO DELGADO CINTRÓN, EL DEBATE LEGISLATIVO SOBRE LAS LEYES DEL IDIOMA EN PUERTO RICO 79 (1994)).

²³² *Batson v. Kentucky*, 476 U.S. 79, 92 (1986). Under a *Batson*-styled claim, “[i]f a defendant can establish a prima facie case of a racially discriminatory peremptory, then the prosecution must give a reason for the exercise of that peremptory challenge.” NANCY S. MARDER, *THE JURY PROCESS* 87 (2005).

²³³ *Hernandez v. New York*, 500 U.S. 352 (1991).

Court and the government in *Hernandez v. New York*. Bilingual jurors have served on the federal court there for decades without revealing significant problems regarding conflicts with the official English record.

The situation of monolingual Spanish speakers is different. The concern with bilingual jurors is that they will disregard the English translation. The problem with monolingual Spanish jurors is that they will never meaningfully hear the English testimony, counsel argument, or translation. They will rely, and ultimately deliberate, on the original Spanish language testimony, evidence, or translations. The underlying concern here is essentially one of accuracy. If the translations (whether they be to English or Spanish) are accurate, then there is no problem. There are three reasons that this is not an insurmountable obstacle in the District Court for Puerto Rico. First, the system there already effectively and accurately translates voluminous key Spanish language testimony and evidence into English. Interpretation is not new to the court, and there is no indication that translation from English to Spanish will pose any more difficulty than the reverse.²³⁴ Criminal defendants currently receive English-to-Spanish interpretation in almost every case.²³⁵ The quality of this interpretation is generally considered sufficient for Sixth Amendment Confrontation Clause purposes. Thus, it should be sufficient for jurors.

Second, virtually every officer of the court is fully bilingual and, as they presently do for Spanish-to-English language translation, will be able to catch translation errors. Third, allowing interpretation and translation for jurors may actually increase accuracy. Although there has been little complaint about the translation provided to establish an English record, there has been criticism that jurors sometimes do not have the sufficient English language ability to fully understand proceedings.²³⁶ If jurors (including bilingual jurors) had access to translation in their native language, the accuracy of their understanding and deliberations would undoubtedly be enhanced. Thus, accuracy might be increased overall.

The third objection to allowing jurors to serve with interpretation is the presence of a thirteenth person during deliberation. Courts and scholars have distinguished between allowing interpretation in open court (whether it be for defendant or juror) and having an outsider enter the inner sanctum of the jury deliberation room.²³⁷ There is substantial support for this practice in our federal legal system already if one analogizes to the tradition of allowing certain deaf jurors interpreters to accompany and assist them during deliber-

²³⁴ This is not to say that court interpretation is without challenges. See SUSAN BERKSELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 1–2 (1990) (exploring how “the nature of judicial proceedings is altered when these proceedings are mediated through the mechanism of a foreign language interpreter”).

²³⁵ Freeman, *supra* note 225, at 8.

²³⁶ See, e.g., *United States v. Nickens*, 955 F.2d 112, 117 (1st Cir. 1992); *United States v. Cepeda Penes*, 577 F.2d 754, 759 (1st Cir. 1978).

²³⁷ See Alice J. Baker, *A Model Statute to Provide Foreign-Language Interpreters in the Ohio Courts*, 30 U. Tol. L. Rev. 593, 611 (1999).

ations.²³⁸ However, this is almost a non-issue in Puerto Rico because jurors in this jurisdiction deliberate in Spanish.²³⁹ This would obviously not change if monolingual Spanish speakers were permitted to serve. The prospect of having an interpreter in the jury room would only arise in the rare (almost unheard-of) situation of a non-Spanish-speaking person being empanelled. This event, which would not likely occur for years on end, could be addressed by providing the Anglophone with an interpreter.

The final objection to allowing juror interpretation is the cost of or ability to administer an interpretation plan. There will undoubtedly be increased costs associated with such a program. However, the bulk of the infrastructure needed to accommodate monolingual Spanish speakers is already in place. As discussed above, in most cases simultaneous English-to-Spanish interpretation is already provided by the court to criminal defendants. Monolingual jurors could simply be given additional headsets to listen to the translation that is already being provided.²⁴⁰ The hiring of additional court interpreters will not be without cost.²⁴¹ Still, this investment is nominal when compared with remedying the constitutional deprivation of fundamental rights of up to 90% of the Commonwealth's adult population—literally millions of people.

IV. THE LOCAL APPLICABILITY OF THE JUROR LANGUAGE REQUIREMENT IN PUERTO RICO

Employment of federal statutes in Puerto Rico that conflict with local Puerto Rican laws and policies have been subject to significant controversy ever since the establishment of Puerto Rico as a territory. In recent years, the debate about the local applicability of federal statutory law under the Puerto Rican Federal Relations Act²⁴² has centered on the Federal Death Pen-

²³⁸ See, e.g., *United States v. Dempsey*, 830 F.2d 1084, 1091 (10th Cir. 1987) (holding that the presence of a sign language interpreter for a deaf juror was permissible and did not pose confidentiality problems, chill or have any “inhibiting influence” on jury deliberations, or deprive defendant of a fair and impartial trial by jury).

²³⁹ Cf. *United States v. Morris*, 977 F.2d 677, 685–86 (1st Cir. 1992) (indicating that deliberation in Spanish in the United States District Court for Puerto Rico is acceptable and there is no requirement that jurors deliberate in English).

²⁴⁰ Of course if a defendant needed translation services to speak with his or her counsel, it may be improper for the same interpreter to provide service to jurors. However, it is virtually unheard of that a defendant would have defense counsel that did not speak English. In this unlikely instance, separate interpreters could be used.

²⁴¹ According to the U.S. Bureau of Labor Statistics, as of March 2009 language specialists in the federal government earned an average annual salary of \$79,865. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK, 2010–11 EDITION, INTERPRETERS AND TRANSLATORS, available at <http://www.bls.gov/oco/pdf/ocos175.pdf>. A job posting advertising a certified court interpreter opening in the United States District Court for the District of Puerto Rico from June 2010 states a starting salary of \$88,695 plus a 10.44% cost-of-living allowance. See U.S. District Court for the District of Puerto Rico, Career Opportunity Court Interpreter (English-Spanish) (June 15, 2010), http://www.prd.uscourts.gov/CourtWeb/pdf/Vacancy/JA_10_06_Court_Interpreter.pdf.

²⁴² Puerto Rican Federal Relations Act, 48 U.S.C. §§ 731b–731e (2006).

alty Act.²⁴³ The application of the JSSA English language juror prerequisite to Puerto Rico presents another opportunity to reconsider the application of federal statutes to Puerto Rico and to question the current model used to determine whether a federal statute is “locally inapplicable.” This Article proposes a new test and argues that the JSSA language requirement should be found locally inapplicable to Puerto Rico under Section 9 of the Puerto Rican Federal Relations Act.²⁴⁴

1. *The “Not Locally Inapplicable” Standard*

From the inception of Puerto Rico as a territory of the United States and through the present, the federal government has instructed that federal statutory laws apply with the same force and effect in Puerto Rico as the United States, *but only if* these statutes are “not locally inapplicable.” The original Organic Act, the Foraker Act of 1900, provided that “the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico [sic] as in the United States”²⁴⁵ This language remained effectively unaltered in the second Organic Act, the Jones Act of 1917.²⁴⁶

In 1950, Public Law 600 authorized the people of Puerto Rico to adopt their own constitution and organize a local republican government containing the fundamental guarantees of the federal Bill of Rights.²⁴⁷ Law 600 was a bilateral compact between the United States and Puerto Rico, wherein Puerto Rico became a “commonwealth” and was allowed to increase its self-determination and power to govern local affairs, but still remained subject to the Territory Clause of the Constitution.²⁴⁸ Public Law 600 repealed numerous provisions of the Jones Act, but retained the “locally inapplicable” language of the Act.²⁴⁹ Section 9 of the Puerto Rican Federal Relations Act provides: “The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States”²⁵⁰

²⁴³ Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591–98 (2006); see Ricardo Alfonso, *The Imposition of the Death Penalty in Puerto Rico: A Human Rights Crisis in the Path Towards Self-Determination*, 76 REV. JUR. U.P.R. 1077, 1089 (2007); Elizabeth Vicens, Note, *Application of the Federal Death Penalty Act to Puerto Rico: A New Test for the Locally Inapplicable Standard*, 80 N.Y.U. L. REV. 350, 362 (2005).

²⁴⁴ 48 U.S.C. § 734 (2006).

²⁴⁵ Organic Act of 1900 (Foraker Act), ch. 191, § 14, 31 Stat. 77, 80 (1900) (repealed 1917).

²⁴⁶ Organic Act of 1917 (Jones Act), ch. 145, § 44, 39 Stat. 966, 951 (1917) (repealed 1968).

²⁴⁷ 48 U.S.C. § 731b (2006).

²⁴⁸ U.S. CONST. art. IV, § 3, cl. 2; 48 U.S.C. § 734 (2006).

²⁴⁹ 48 U.S.C. § 734.

²⁵⁰ *Id.*

There is no settled rule to determine whether a federal statute is locally inapplicable to Puerto Rico.²⁵¹ The lack of a clear test is due, at least in part, to the fact that in determining the applicability of a given federal statute, Puerto Rico has not been treated uniformly in terms of its political status.²⁵² For the purposes of some statutes, Puerto Rico has been inconsistently treated as a state,²⁵³ territory,²⁵⁴ or *sui generis* entity.²⁵⁵ Generally, it has been accepted that “the character and aim of the statute in question will determine whether it is locally applicable to the Commonwealth of Puerto Rico.”²⁵⁶ In other words, the primary issue presented in an analysis of whether a federal statute applies to Puerto Rico “is whether the matter covered by the act is one ‘of a legislative character not locally inapplicable.’”²⁵⁷ The Supreme Court has stated that the grant of power to Puerto Rico over local matters and the associated “not locally inapplicable” standard “is as broad and comprehensive as language could make it.”²⁵⁸ Justice Breyer, while still serving as a circuit judge, observed that “the history of the ‘locally inapplicable’ language reveals a design to defer to local legislatures in local matters and an intent to interpret the phrase dynamically [N]ot only developing social and economic conditions but also emerging territorial self-government could render general federal law inapplicable.”²⁵⁹

²⁵¹ Vicens, *supra* note 243, at 352–53.

²⁵² *Id.* at 363.

²⁵³ *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 40 (1st Cir. 1981) (holding Puerto Rico is to be treated as a state for purposes of Sherman Antitrust Act).

²⁵⁴ Alfonso, *supra* note 243, at 1090; *see also* Rubén Rodríguez Antongiorgi, *Review of Federal Decisions on the Applicability of United States Laws in Puerto Rico Subsequent to the Establishment of the Commonwealth of Puerto Rico*, 26 REV. JUR. U.P.R. 321, 336 (1956) (“[T]he new constitution vested in the people of Puerto Rico broader legislative powers than they had theretofore enjoyed, but it seems clear that the change was not sufficient to make it necessary to hold that Puerto Rico was no longer a territory within the meaning of that word”) (quoting *Detres v. Lion Bldg. Corp.*, 234 F.2d 596, 599 (7th Cir. 1956)).

²⁵⁵ Alfonso, *supra* note 244, at 1090–91; Vicens, *supra* note 243, at 360.

²⁵⁶ Vicens, *supra* note 243, at 350–51 (quoting P.R. FED. AFFAIRS ADMIN., DOCUMENTS ON THE CONSTITUTIONAL RELATIONSHIP OF PUERTO RICO AND THE UNITED STATES 226 (Marcos Ramírez Lavandero ed., 3d ed. 1988)).

²⁵⁷ *Puerto Rico v. Shell Co.*, 302 U.S. 253, 261 (1937).

²⁵⁸ *Id.*

²⁵⁹ *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank N.A.*, 649 F.2d 36, 43 n.34 (1st Cir. 1981); *see also* Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 827 n.131 (2005). The majority of challenges asserted under section 9 of the Puerto Rican Federal Relations Act (“PRFRA”) during recent times have been rejected. *See* *United States v. Acosta-Martinez*, 252 F.3d 13 (1st Cir. 2001) (reversing the district court’s conclusion that the Federal Death Penalty Act was locally inapplicable to Puerto Rico under the PRFRA); *TAG/ICIB Services, Inc. v. Pan Am. Grain Co.*, 215 F.3d 172 (1st Cir. 2000) (holding that PRFRA did not preclude application of Interstate Commerce Commission Termination Act’s statute of limitations in Puerto Rico); *Camacho v. Autoridad de Telefonos de Puerto Rico*, 868 F.2d 482 (1st Cir. 1989) (holding that the PRFRA did not preclude application of Omnibus Crime Control and Safe Streets Act in Puerto Rico); *United States v. Rivera Torres*, 826 F.2d 151 (1st Cir. 1987) (Clean Water Act applicable in Puerto Rico); *Caribtow Corp. v. Occupational Safety & Health Rev. Com’n*, 493 F.2d 1064, 1065–68 & nn. 2–10 (1st Cir. 1974) (Occupational Safety and Health Act applicable in Puerto Rico), *cert. denied*, 419 U.S. 830 (1974); *NLRB v. Security Nat. Life Ins. Co.*,

It is clear from the plain language of the statute that federal law applies unless it is inappropriate under local law.²⁶⁰ This is how the statute was originally understood. The statutory language is not unique to Puerto Rico. Other territories of the United States were subject to this same provision in their organic acts.²⁶¹ The “not locally inapplicable” provision was originally introduced by politicians from southern states as an effort to exempt New Mexico and other new territories from any federal prohibition against slavery.²⁶² Thus, under the proviso as originally intended, New Mexico would have been exempt from any federal abolition or ban on slavery if New Mexico chose to permit slavery.²⁶³

In adopting this language into the Foraker Act, the drafters recognized that occasions would arise where local laws and policies would conflict with federal law, such that the federal law should be rendered inapplicable to Puerto Rico.

Senator Foraker, in [crafting the Foraker Act of] 1900, deliberately chose this model (rather than following the simpler Wisconsin territorial act model—“so far as . . . may be applicable”). His choice reflects, if anything, a more, rather than less, deferential

494 F.2d 336 (1st Cir. 1974) (National Labor Relations Act applies in Puerto Rico because the statute was not in conflict with the Puerto Rican Labor Relations Act); *Moreno Rios v. United States*, 256 F.2d 68, 71–73 (1st Cir. 1958) (Narcotic Drug Import and Export Act applicable in Puerto Rico). However, some section 9 challenges have been successful, albeit in narrow instances and applications. See *Cordova*, 649 F.2d at 37 (Section 3 of Sherman Act forbidding agreements “in restraint of trade or commerce in any Territory of the United States” did not apply to Puerto Rico); *Liquilux Gas Services of Ponce, Inc. v. Tropical Gas Co.*, 303 F. Supp. 414 (D.P.R. 1969) (holding Robinson-Patman Act inapplicable to local Puerto Rican transactions); *Trigo Bros. Packing Corp. v. Davis*, 159 F. Supp. 841 (D.P.R. 1958) (holding provisions of the Federal Alcohol Administration Act not applicable to Puerto Rico for domestically bottled and distributed products); *United States v. Figueroa Rios*, 140 F. Supp. 376 (D.P.R. 1956) (holding the Firearms Act is inapplicable to commerce within Puerto Rico); cf. *Guerrido v. Alcoa Steamship Co.*, 234 F.2d 349, 355 (1st Cir. 1956) (“[T]he rules of admiralty and maritime law of the United States are presently in force in the navigable waters of the United States in and around the island of Puerto Rico to the extent that they are not locally inapplicable either because they were not designed to apply to Puerto Rican waters or because they have been rendered inapplicable to these waters by inconsistent Puerto Rican legislation.”).

²⁶⁰ See *Rivera Torres*, 826 F.2d at 156 (“To be ‘locally inapplicable,’ the Puerto Rican legislation must be incompatible with or specifically exclusive of the federal legislation it seeks to supplant.”).

²⁶¹ See, e.g., Organic Act for the Territory of Alaska, Aug. 24, 1912, ch. 387, § 3, 37 Stat. 512.

²⁶² Alfonso, *supra* note 243, at 1089 (quoting *Cordova*, 649 F.2d at 43 n.34); see Compromise of 1850 (Texas and New Mexico), Pub. L. No. 111-137, 9 Stat. 446, 452 (“[T]he Constitution, and all laws of the United States which are not locally inapplicable, shall have the same force and effect within the said Territory of New Mexico as elsewhere within the United States.”); see also HOLMAN HAMILTON, PROLOGUE TO CONFLICT: THE CRISIS AND COMPROMISE OF 1850 144–46 (1964) (discussing Senator Cass’s “Nicholson” letter, in which he expressed his view that the territories should be able to manage their own internal affairs).

²⁶³ CONG. GLOBE, 31ST CONG., 1ST SESS. 436–39, 508–10, 570–73, 592, 902, 911, 944–48 (1850) (tracking the congressional debate on the controversial admission of new territories which would either be admitted as free states to bolster the Northern vote or slave-holding states to bolster the Southern vote).

view of the effect of local social, economic and legislative developments on general federal law.²⁶⁴

The establishment of Puerto Rico as a commonwealth made this deference to local law under the “locally inapplicable” standard even more salient.²⁶⁵ The Puerto Rican Federal Relations Act was a bilateral compact between Congress and the people of Puerto Rico, which transformed Puerto Rico from a territory to a commonwealth with significantly enhanced powers of self-government and autonomy.²⁶⁶ The requirement that federal statutes only apply to Puerto Rico if they are “not locally inapplicable” took on increased significance and “vitality” when it was placed in Section 9 of the Federal Relations Act.²⁶⁷ At the time of its enactment, the Puerto Rican Federal Relations Act was understood as rendering “federal legislation, both existing and prospective . . . not applicable to Puerto Rico where local conditions would make this undesirable.”²⁶⁸

The applicability of federal statutes was initially questioned under section 9 even where the statute mentioned Puerto Rico or had been previously applied to Puerto Rico before becoming a commonwealth.²⁶⁹ However, in more recent times, the First Circuit has moved away from the plain meaning and its own, as well as the Supreme Court’s, earlier interpretation of the “not locally inapplicable” standard. This line of interpretation focuses almost exclusively on congressional intent to apply a given statute to Puerto Rico. “If Congress has made clear its intent that a federal statute apply to Puerto Rico, then the issue of whether a law is otherwise ‘locally inapplicable’ does not, by definition, arise.”²⁷⁰ This construction ignores the original meaning as provided by the framers of the Organic Acts. Even more significantly, the interpretation overlooks the Federal Relations Act drafters’ meaning and the

²⁶⁴ *Cordova*, 649 F.2d at 44 n.34.

²⁶⁵ *Liquilux Gas Services of Ponce, Inc. v. Tropical Gas Co.*, 303 F. Supp. 414, 419 (D.P.R. 1969) (“While the wording of section 9 did not change from its original wording, that section clearly took on important new meaning in 1952.”).

²⁶⁶ Act of July 3, 1950, Pub. L. No. 81-600, ch. 446, 64 Stat. 319 (“[F]ully recognizing the principle of government by consent this Act is now adopted in the nature of a compact so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption.”); see also *Lebowitz*, *supra* note 62, at 222–23.

²⁶⁷ *United States v. Rios*, 140 F. Supp. 376, 381–82 (D.P.R. 1956). Prior to Puerto Rico’s establishment as a commonwealth, its legislature and legislative procedures were dictated by Congress, making its government “mere agencies of the Congress.” *Id.* at 380. However, after its establishment as a commonwealth, the people of Puerto Rico chose their government, and that government did not have to report to Congress or the president for supervision. *Id.* at 380–81. The vast difference over Puerto Rico’s power of self-governance after its establishment as a commonwealth made “the Commonwealth legislature and governor reign supreme over all matters of local concern.” *Id.* at 381.

²⁶⁸ *Lebowitz*, *supra* note 63, at 219.

²⁶⁹ *Id.* at 237.

²⁷⁰ *United States v. Acosta-Martinez*, 252 F.3d 13, 18 (1st Cir. 2001) (holding the Federal Death Penalty Act applies in Puerto Rico despite the fact that Puerto Rico has a constitutional ban on the death penalty).

fact that Puerto Rico's language, as well as political and legal institutional cultures, may render certain applications of federal law locally inapplicable.

2. *A New Test to Determine the Local Applicability of Federal Statutes to Puerto Rico*

Since the enactment of the Federal Relations Act, scholars have persuasively challenged the inconsistent interpretation of the "not locally inapplicable" standard and posed alternative models of statutory construction that are more consistent with the statute's original intent. This scholarship has experienced a re-emergence in the aftermath of the controversial First Circuit decision in *United States v. Acosta-Martinez*, which applied the Federal Death Penalty Act to Puerto Rico despite the fact that the Act did not mention Puerto Rico and the Puerto Rican Constitution explicitly forbids²⁷¹ the death penalty.²⁷² For instance, in an exceptional student note, Elizabeth Vicens proposes an alternative paradigm of statutory interpretation "where the statute on its face is either ambiguous or silent with respect to whether it applies to Puerto Rico, and where a strong local interest is implicated, there should be a rebuttable presumption that Congress did not intend the statute to apply to Puerto Rico."²⁷³

One of the most notable proposed models of interpretation of section 9 is by Arnold Leibowitz, U.S. territorial relations scholar and former General Counsel of the United States-Puerto Rico Commission on the Status of Puerto Rico. He has long recommended:

[W]here Congress has indicated the desire to cover intra-Puerto Rico transactions or has used general language to indicate that all areas within the United States are to be covered and the Act also covers intra-State transactions, then section 9 should not come into play unless the party seeking to interpose it makes a reviewable record of the facts not brought to the attention of Congress demonstrating local conditions are such that federal law should not be applied.²⁷⁴

In other words, under the Leibowitz paradigm, irrespective of congressional intent that a given federal statute applies to Puerto Rico, the local applicability of a federal statute could be challenged when the moving party can demonstrate facts concerning local conditions that Congress did not consider.

Examination of application of the JSSA language requirement to Puerto Rico reveals potential shortcomings of these tests. A limitation of Vicens's

²⁷¹ P.R. CONST. art. II, § 7 ("The right to life, liberty and the enjoyment of property is recognized as a fundamental right of man. The death penalty shall not exist.").

²⁷² *Acosta-Martinez*, 252 F.3d at 21.

²⁷³ Vicens, *supra* note 243, at 367.

²⁷⁴ Leibowitz, *supra* note 63, at 238.

proposed test is that it does not apply to situations where the statute mentions Puerto Rico, but where Congress did not consider the local implications of its legislation. Leibowitz's test takes such instances into account, but might be interpreted as overly broad. For instance, under the Leibowitz proposal a challenge could be made where the federal conflict with local law is relatively insignificant. This might result in excessive litigation over inconsequential differences between federal and commonwealth laws.

Building upon the proposals of Leibowitz and Vicens and with the original purpose of the "not locally inapplicable" standard firmly in mind, I propose a new test to determine the local applicability of federal statutes to Puerto Rico:

- (1) If Congress does not explicitly state that a statute applies to Puerto Rico then it should be deemed not locally applicable to Puerto Rico.²⁷⁵
- (2) If the statute explicitly states that it applies to Puerto Rico, a challenge can be made under section 9 of the Puerto Rican Federal Relations Act, but only under limited circumstances. A moving party can make a *prima facie* case by showing that:
 - (a) application of the federal statute would likely result in the deprivation of constitutional rights under either the federal or Commonwealth constitutions; *and*
 - (b) Congress did not consider reviewable facts which provide the basis for the constitutional deprivation.

If the plaintiff can establish a *prima facie* case, then a rebuttable presumption arises that the statute is not locally applicable to Puerto Rico. The government could, in turn, satisfy its burden by demonstrating either that Congress considered the facts at issue or that the alleged constitutional deprivation is not likely to occur if the federal statute is applied to Puerto Rico.²⁷⁶

This proposed test seeks to ensure that when Congress intends a statute to apply to Puerto Rico, it will make a clear statement indicating this after considering the unique local implications imposed by the law. By limiting challenges to only those federal statutes that are likely to result in a constitutional violation (rather than all statutes that conflict with commonwealth law) the test will ensure that judicial exception of Puerto Rico from federal legislation will be infrequent.²⁷⁷ However, in cases that implicate the most important rights, courts will be able to inquire into whether Congress consid-

²⁷⁵ I would propose that this apply retroactively.

²⁷⁶ Congress could of course anticipate and forestall litigation by sufficiently considering the local impact of federal statutes in Puerto Rico.

²⁷⁷ See Leibowitz, *supra* note 63, at 238–39 (expressing the importance of infrequent judicial exception under section 9 of the Federal Relations Act because of "the need for certainty of coverage of federal law without judicial interpretation, but also because judicial interpretation is slow and limited to a given situation").

ered the manner in which the statute contradicts important local interests and conditions.

Possible lines of criticism of this proposal include fears that it might disregard the Supremacy Clause,²⁷⁸ violate the separation of powers, and unduly give more preferable treatment to Puerto Rico than the states. Though these concerns raise important issues, they are ultimately unfounded. This proposal does not undermine the federal preemption doctrine. Under the proposal, federal law is still the “law of the land,” even in Puerto Rico. However, if Congress wants a statute to apply to Puerto Rico it must explicitly specify this in the statutory language and sufficiently consider the federal and commonwealth constitutional implications, and in turn the local appropriateness, of applying the law to Puerto Rico. In cases where a federal statute is found inapplicable to Puerto Rico, it would be due to federal law (the Puerto Rican Federal Relations Act) limiting the reach of the statute. Thus, the Supremacy Clause would not be implicated.

A possible criticism is that in certain situations the proposal violates separation of powers by allowing courts to make factual findings to supplement those of Congress and to effectively overrule Congress’ intention that a statute applies to Puerto Rico. Ultimately this concern is unwarranted. Under the proposal, Congress remains free to legislate over Puerto Rico as it sees fit. However, Congress must make their intent that a statute applies to Puerto Rico unambiguous and consider the local impact of a given federal statute. When Congress fails to make their intent clear and consider the local implications of legislation that likely poses a federal or local constitutional violation, the courts can then be called upon to ensure that section 9 of the Puerto Rican Federal Relations Act is enforced. This is consistent with the doctrine of separation of powers because it provides much needed checks and balances on Congressional power. Moreover, protecting underrepresented groups is a core function of the judiciary, and under the proposal set forth here the courts would not be trampling on the prerogative and institutional competence of the legislature.²⁷⁹

At first glance it may appear that this additional burden of inquiry into the local constitutional consequences of a federal statute puts Puerto Rico in a more privileged position than the states. Congress would not be obligated to specifically articulate its intent for a federal statute to apply to a certain state or consider the local effects of a federal statute for a given state. However, any concern that the states would be treated less favorably than Puerto Rico ignores political reality. The states have political representation, while

²⁷⁸ U.S. CONST. art. VI, § 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

²⁷⁹ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 76 (1980).

Puerto Rico does not. Congress is already accountable to the states, but not to Puerto Rico.²⁸⁰

Under current First Circuit jurisprudence, the legislative intent needed to find that a federal statute applies to Puerto Rico is interpreted broadly. A statute need not mention Puerto Rico or territorial application, but can simply be related to another statute that applies to Puerto Rico.²⁸¹ This should not be considered adequate under the compact between Congress and the people of Puerto Rico that federal statutory laws have the same force and effect in Puerto Rico as in the states so long as the statutes are “not locally inapplicable.” Additional consideration for the local applicability of federal statutes is also warranted because Puerto Rico is unique within our federal system. Puerto Rico is not a state and does not have meaningful or effective representation in Congress. As discussed in Part II, there is no constituency base to ensure that the interests of the people of Puerto Rico are taken into consideration in enacting the laws which govern Puerto Ricans. A requirement that Congress explicitly declare its intention that a given statute applies to Puerto Rico and consider the local impact of its implementation is consistent with section 9 of the Federal Relations Act. Moreover, such an obligation would act as a safeguard for the rights of residents of Puerto Rico who are subject to the powers of Congress but lack representation.

3. *The Local Inapplicability of the Language Requirement*

The application of the JSSA English juror prerequisite in Puerto Rico presents an example of the impropriety of imposing federal laws on Puerto Rico that are inapposite to local law and made without adequate consideration of local repercussions. The requirement that all potential jurors read, write, speak, and understand English is in direct conflict with local legislation, policies, and interests, and it results in a deprivation of constitutional rights. As mentioned above, the delineation of Spanish as the language of Puerto Rico appears in several locations in Puerto Rican law. Although both Spanish and English are official languages, Puerto Rico operates in monolingual Spanish in almost all areas of public and private life, the primary exceptions being the federal court and elite private primary and secondary schools. All three major political parties have taken a unified stance—a rare point of consensus—that Spanish is the language of public affairs and public participation.²⁸² All branches of the Puerto Rican government—the Executive, Legislature, and Judiciary—have taken strong and consistent positions

²⁸⁰ The denial of this fundamental Sixth Amendment right set within the backdrop of political powerlessness is precisely the sort of constitutional deprivation that should be subject to “more searching judicial inquiry.” *Carolene Prods.*, 304 U.S. at 153 n.4.

²⁸¹ See *United States v. Acosta-Martinez*, 252 F.3d 13, 18 (1st Cir. 2001) (holding the Federal Death Penalty Act applicable in Puerto Rico even though the Act’s statutory language was silent about the localities in which it applied because the substantive criminal statutes charged against the defendants contain punishment provisions that include the death penalty).

²⁸² See Pousada, *supra* note 32, at 138.

defending Spanish as the language of government, business, culture, public affairs, and ultimately, the law of the land.²⁸³ This espousal is most impassioned in the spheres of the courts and public education.

As discussed above, the medium of the public education curriculum in Puerto Rico is Spanish, except for limited second or foreign language courses in English. It is well recognized both in the United States and Puerto Rico that schools, and particularly public schools, are intended to instill democratic values in youth and prepare them for active and responsible participation as citizens in their communities. Perhaps no privilege or responsibility of citizenship, aside from voting, is as celebrated as jury duty.²⁸⁴ In Puerto Rico, the Commonwealth government has chosen to prepare its populace for citizenship and public participation by means of the Spanish language. The Puerto Rican government's mandate that the medium of public education be Spanish without meaningful English preparation is in significant tension with the requirement that federal jurors be proficient in English.

The conflict between the JSSA language requirement and local Puerto Rican law is further demonstrated by the commonwealth law requiring that its courts operate exclusively in Spanish. In the locally celebrated and renowned 1965 case, *People v. Superior Court*, the Supreme Court of Puerto Rico rejected a motion under the 1902 Language Act for a trial in English, holding that the courts of Puerto Rico must only use Spanish because "the language of the Puerto Rican people . . . has been and continues to be Spanish . . . and that is a reality that cannot be changed by any law."²⁸⁵

The 1993 Language Act provides that both Spanish and English are the official languages of Puerto Rico and can be used indistinctively, but translation must be made when necessary for interested parties to understand a governmental proceeding.²⁸⁶ Excluding non-English speakers from the federal courts without allowing interpretation or translation for these individuals is incompatible with this law.

The provision stating that federal statutes apply to Puerto Rico unless they are locally inapplicable was enacted to ensure that federal law, when wholly incompatible with local law, policy, and circumstance, would not apply to Puerto Rico. This is precisely that type of situation. The local law declaring Spanish the language of the people, government, courts, education, and citizenry, combined with the requirement that judicial and other public proceedings conducted in English must be translated into Spanish, makes the JSSA requirement inapplicable. Under the original and clear purpose of the "not locally inapplicable" standard, it is apparent that local law is entirely

²⁸³ *People v. Superior Court*, 92 P.R. 580, 589–90 (1965); Alvarez González, *supra* note 23, at 369 n.52.

²⁸⁴ See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) ("Indeed, with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.").

²⁸⁵ *Superior Court*, 92 P.R. at 588–89.

²⁸⁶ P.R. LAWS ANN. tit. 1, §§ 51, 59, 59(a) (2009).

incompatible with the JSSA English language juror requirement. As explored below, allowing Puerto Rico to opt out of the JSSA English juror prerequisite will not defeat the federal government's interest in conducting proceedings in English and preserving an English language record for appeal because non-English speakers can be accommodated through language interpretation and translation. Further, allowing Puerto Rico to opt out of the JSSA requirement would actually further the core purposes of the JSSA that juries be derived from a fair cross section of the community and that citizens not be excluded from service on the basis of race, color, national origin, or economic status.²⁸⁷

However, under the current and prevailing jurisprudential framework, it is unlikely that a court would find an exception for Puerto Rico under section 9 of the Puerto Rican Federal Relations Act. Although section 1865 (the JSSA English language prerequisite proviso) itself does not mention Puerto Rico, one section of the broader statute does. Section 1863(b)(2) provides an exception for Puerto Rico and the Canal Zone, stating that these jurisdictions may compile potential juror lists from other sources than voter registrars.²⁸⁸ In the U.S. House Report on the JSSA, the House determined that the jury plan for Puerto Rico "may prescribe sources other than voter lists since . . . the voter lists would contain many names of persons not literate in English and therefore not qualified for jury service."²⁸⁹ Further, the Federal Relations Act's provision containing requirements for jury service (including the prerequisite that jurors speak English) was repealed on the date that the JSSA went into effect.²⁹⁰ Under current jurisprudence, this statutory reference, legislative history, and coinciding congressional action would likely serve as sufficient indication that Congress intended for the JSSA to apply to Puerto Rico and render the issue outside the purview of section 9 of the Federal Relations Act.

Applying the new proposed test set forth in this Article, a challenge could be successfully asserted under section 9 that application of the JSSA language requirement is not locally applicable. As discussed above, it is likely that employment of this statutory provision deprives a sizable portion of the population of Puerto Rico of their fundamental Sixth Amendment right to a jury selected from a fair cross section of the community. Thus, application of this provision of the statute violates the federal Constitution. Moreover, reviewing the JSSA text and legislative history illustrates that Congress did not consider the fact that the language requirement results in the exclusion of over 90% of the age-eligible population from jury service

²⁸⁷ 28 U.S.C. §§ 1862, 1863(b)(3) (2006).

²⁸⁸ *Id.* § 1863(b)(2).

²⁸⁹ H.R. REP. NO. 90-1076, at 1800 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1792, 1800.

²⁹⁰ 48 U.S.C. § 867 (repealed 1968 pursuant to effective date of 28 U.S.C. § 1861).

and defeats the core anti-discrimination and fair-cross-section purposes of the JSSA.²⁹¹

Irrespective of whether courts continue to follow the *Acosta-Martinez* line of interpreting the “not locally inapplicable” standard, Congress should amend the JSSA to make the English language juror prerequisite inapplicable to Puerto Rico. Exceptions for Puerto Rico in the JSSA are not unprecedented. As stated above, the only place in the JSSA that explicitly mentions Puerto Rico excuses Puerto Rico from the requirement that voter lists be used to select the names of prospective jurors.²⁹² Congress has the ability to exempt Puerto Rico from the English language juror prerequisite. For better or worse, it is well-accepted that Congress acting pursuant to its plenary power over Puerto Rico under the Territory Clause of the United States Constitution “may treat Puerto Rico differently from States so long as there is a rational basis for its actions.”²⁹³ The fact that 90% of the population of Puerto Rico does not have sufficient English proficiency to serve as jurors alone would support a rational (if not compelling) basis to exempt Puerto Rico from the language requirement. Not to mention the fact that over-representational omission of certain racial, ethnic, color, and economic populations is at odds with the policies behind the JSSA.²⁹⁴

Congress and the courts have been quick to acknowledge that Puerto Rico’s territorial or commonwealth status permits different treatment from that of states, as long as a rational basis justifies the difference. But the resultant different treatment of Puerto Ricans has customarily amounted to detrimental treatment, such as limited application of constitutional protections,²⁹⁵ denial of supplemental security income benefits for the aged and disabled if they reside in Puerto Rico,²⁹⁶ or lower levels of aid to Puerto Rican families with dependent children under federal welfare programs²⁹⁷ when compared to state-side residents. Congress has determined that U.S.

²⁹¹ The legislative history shows that Congress was aware that utilization of voter registers for a source of names for the jury list would include many names of individuals who do not speak English and thus are ineligible for jury service. H.R. REP. NO. 90-1076 at 1800. Nevertheless, there is no evidence that Congress considered the extent of this exclusion and its disproportional exclusion of groups on the basis of race, ethnicity, education, and economic status.

²⁹² 28 U.S.C. § 1863(b)(2).

²⁹³ *Harris v. Rosario*, 446 U.S. 651, 651–52 (1980). *But see id.* at 653–56 (Marshall, J., dissenting) (noting that the Court’s supposition that “Congress needs only a rational basis to support less beneficial treatment for Puerto Rico, and the citizens residing there . . . from discriminatory legislation, as long as Congress acts pursuant to the Territory Clause” is not supported by any authority).

²⁹⁴ 28 U.S.C. § 1862.

²⁹⁵ *See supra* Part II, discussing the Insular Cases.

²⁹⁶ *Califano v. Gautier Torres*, 435 U.S. 1 (1978) (per curiam) (holding revocation of individuals’ supplemental security income benefits when they moved from the states to Puerto Rico was proper and did not violate the right of interstate travel under the Fifth Amendment).

²⁹⁷ *Harris v. Rosario*, 446 U.S. 651 (1980) (per curiam) (holding lower level of aid under the federal Aid to Families with Dependent Children program to Puerto Ricans did not violate the Fifth Amendment’s equal protection guarantee).

citizens deserve less protection under the Constitution or fewer social services simply because they reside in Puerto Rico. It is difficult to understand why place of residence has warranted such different treatment of U.S. citizens.²⁹⁸ However, in the case of the language of Puerto Rican residents, there is a genuine difference. The deferential treatment of allowing Puerto Ricans to serve as jurors irrespective of their English language ability is warranted and necessary to allow equal access to the courts and achieve the central cross-sectional and non-discrimination tenets of the JSSA.

V. SOLUTION: LANGUAGE ACCOMMODATION FOR NON-ENGLISH-SPEAKING JURORS

This Article proposes that otherwise qualified monolingual Spanish speakers be permitted to serve on federal juries with the assistance of interpreters,²⁹⁹ building upon the extensive interpretation and translation services already in place in the federal court. For example, the current infrastructure of simultaneous English-to-Spanish translation already provided to most defendants in criminal proceedings pursuant to the Confrontation Clause of the Sixth Amendment could be expanded to provide interpretation to jurors.

Jury service has not always been reserved for English speakers. In determining whether non-English speakers should be allowed to serve as federal jurors with language interpretation accommodation, we need not look for models beyond the U.S. legal system. Our legal system has multiple examples, both historical and current, where non-English speakers have served and currently do serve as jurors through the accommodation of interpretation. After the United States acquired the southwestern territories from Mexico through the Treaty of Guadalupe Hidalgo of 1848 and Sale of La Mesilla in 1853 until the early 20th century, monolingual Spanish speakers often served as jurors with the assistance of interpreters in the southwestern states.³⁰⁰ The reasons for allowing monolingual Spanish speakers to serve on

²⁹⁸ See Consejo de Salud Playa de Ponce v. Rullan, 586 F. Supp. 2d 22 (D.P.R. 2008) (criticizing the decisions in *Califano v. Gautier Torres*, 435 U.S. 1 (1978), and *Harris v. Rosario*, 446 U.S. 651 (1980)); see also *Harris*, 446 U.S. at 652–56 (Marshall, J., dissenting) (questioning the Court’s decision that heightened scrutiny is “unavailable to protect Puerto Rico . . . from discriminatory legislation, so long as Congress acts pursuant to the Territory Clause”).

²⁹⁹ The other obvious alternative is to conduct proceedings in Spanish. The argument for Spanish language proceedings has been articulately advanced by Professor Alicia Pousada and need not be reiterated here. Pousada, *supra* note 32, at 146–49 (arguing that prevailing notions of international human rights law demonstrate that Spanish should be the operating language of the federal court). Ultimately, this is a political issue, one that this Article expresses no opinion about. Rather, for the purpose of this Article, it is presupposed that the U.S. government has a significant state interest in operating its courts in English and offers a pragmatic solution to the juror-exclusion predicament that would fit within this framework.

³⁰⁰ Laura E. Gómez, *Race, Colonialism, and Criminal Law: Mexicans and the American Criminal Justice System in Territorial New Mexico*, 34 LAW & SOC’Y REV. 1129, 1166, 1172–73 (2000); Douglas A. Kibbee, *Minority Language Rights: Historical and Comparative Perspectives*, 3 INTERCULT. HUM. RTS. L. REV. 79, 90 (2008); Colin A. Kisor, *Using Interpreters to Assist Jurors: A Plea for Consistency*, 22 CHICANO-LATINO L. REV. 37, 41–43 (2001);

juries at that time justify the practice in Puerto Rico. These lands were acquired by treaty from Spanish-speaking nations, the language of the people was predominately Spanish, and without allowing Spanish speakers to serve the potential jury pool was too small.³⁰¹

More recently, and in the context of both state and federal courts, the reasoning warranting interpretation for deaf jurors also supports interpretation for non-English speakers. Historically, deaf persons were excluded from juries because, like non-English speakers, they lacked the requisite language skills but were otherwise qualified to serve.³⁰² Some courts recognized the injustice in this prohibition and permitted deaf citizens to serve with the assistance of sign language translators. Later, Congress acted, effectively prohibiting discrimination of deaf persons from juries in both the Rehabilitation Act of 1973³⁰³ and the Americans with Disabilities Act³⁰⁴ of 1990.³⁰⁵

The most striking model for allowing non-English speakers to serve as jurors is the time-proven practice in the New Mexico state courts. Ever since New Mexico was a territory it “has encouraged participation of non-English speakers, particularly Spanish-speaking citizens, in its jury system.”³⁰⁶ This practice arose out of necessity since “in certain counties the English speaking citizens possessing the qualifications of jurors could be counted by tens instead of hundreds . . . ,”³⁰⁷ as well as a sense of fundamental fairness, which recognized that Spanish was a dominant language of the people. In 1911, the common law practice of allowing non-English speakers to serve on juries was made a constitutional right. Article VII of the New Mexico Constitution provides, in relevant part:

The right of any citizen of the state to vote, hold office or sit upon juries, shall never be restricted, abridged or impaired on account of religion, race, language or color, or inability to speak, read or write

see, e.g., Town of Trinidad v. Simpson, 5 Colo. 65, 68 (1879) (holding it was “fully within the power of the court to appoint an interpreter . . . to interpret the testimony of witnesses and arguments of counsel” for a non-English-speaking juror).

³⁰¹ There are concerns that the United States District Court for Puerto Rico’s jury pool is too small, not only in terms of its lack of representativeness, but in actual size. Due to the limited number of citizens who meet the language requirement, some jurors consecutively sit on multiple juries, creating a phenomenon of repeat or “career jurors.”

³⁰² Kisor, *supra* note 300, at 38. The analogy here is not about accommodation for disability or alterableness, but rather that the two groups may lack spoken English language literacy and may be able to serve as jurors with interpretation.

³⁰³ 29 U.S.C. § 794(a) (2006).

³⁰⁴ 42 U.S.C. § 12132 (2006).

³⁰⁵ *See* Kibbee, *supra* note 300, at 91 n.35; Kisor, *supra* note 300, at 39.

³⁰⁶ Edward L. Chávez, *New Mexico’s Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 303, 303 (Fall 2008).

³⁰⁷ *Id.* at 305 (quoting Territory of New Mexico v. Romine, 2 N.M. 114, 123 (1881) (internal punctuation omitted)).

the English or Spanish languages except as may be otherwise provided in this constitution.³⁰⁸

New Mexico state courts have successfully allowed Spanish-speaking³⁰⁹ jurors to participate in juries since the 1860s, longer than Puerto Rico has been a U.S. territory.

In New Mexico courts, interpretation services are provided to non-English-speaking jurors by certified court interpreters during all phases of trial.³¹⁰ The court maintains half a dozen court staff interpreters and then contracts with many private practice interpreters.³¹¹ The interpreter provides simultaneous and consecutive interpretation, as well as written translation.³¹² The New Mexico state courts have established detailed Non-English-Speaking Juror Guidelines, which provide practical guidance for instituting a program allowing service by non-English-speaking jurors.³¹³ Participants in court proceedings are informed of the function of interpreters through various means. The New Mexico courts have a model jury instruction used to explain the role and professional requirements of the court interpreter.³¹⁴ The court interpreter also takes an oath in open court “that he or she will only provide translation services to the non-English-speaking juror and will not otherwise participate in the trial or jury deliberations.”³¹⁵

Non-English speaking jurors have reported positive experiences with their jury service, and onlookers have commented that “it is rather anticlimatic to observe a trial with non-English-speaking jurors because it is actually not very different from a jury trial with all English-speaking jurors.”³¹⁶ “Once the judge and the court staff have received intensive training, the system operates as smoothly as it does when there are no non-English-speaking jurors.”³¹⁷ Inspired by the successful employment of non-English speakers on juries in New Mexico, Chief Judge Edward L. Chávez, of the New Mexico Supreme Court, encourages other jurisdictions to follow suit. In his words: “Not only should our non-English-speaking citizens enjoy the privileges of citizenship, they should share in the responsibilities.”³¹⁸ “All adult citizens should participate [in jury service], because above all, justice requires an unapologetic and undaunted courage to exercise one’s

³⁰⁸ N.M. CONST. art. VII, § 3.

³⁰⁹ See Chávez, *supra* note 306, at 308 (Spanish speakers represent approximately 57% of the non-English-speaking jurors requiring interpreters in the jurisdiction. The court has provided interpretation in dozens of other languages over the years).

³¹⁰ *Id.* at 309.

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.* at 317 (Appendix A provides a copy of the Guidelines).

³¹⁴ *Id.* at 308.

³¹⁵ *Id.*

³¹⁶ *Id.* at 310.

³¹⁷ *Id.* at 311.

³¹⁸ *Id.* at 316.

moral genius. All people, no matter their station in life or their ability to speak and understand the English language have that moral genius.”³¹⁹

The use of interpreters for non-English-speaking jurors works in the state courts of New Mexico, and it can work in the federal court of Puerto Rico.

CONCLUSION

The power of criminal juries is unparalleled in our society. Through jury service, citizens are bestowed with the privilege of direct participation in self-government and the awe-inspiring responsibility of determining the innocence or guilt of an individual tried for a crime. Across from the jury box, criminal defendants are guaranteed the fundamental constitutional right to a jury drawn from a fair cross section of the community. But not in the federal court in Puerto Rico.

Due to the English language juror prerequisite, over 90% of the otherwise-eligible population is excluded and essentially only an elite unrepresentative minority is allowed to serve as federal jurors. The people of Puerto Rico are subject to the federal government but lack any way to meaningfully participate in it as jurors or voters. Justice under the Sixth Amendment has been denied by the federal government to the people of Puerto Rico for over a century. This injustice should not be allowed to continue in the federal court, particularly when all that stands in the way is an interpretation program, the likes of which has already been successfully employed in the American legal system.

The problem of juror exclusion in Puerto Rico is not merely a Puerto Rican problem: it is an American problem. Examination of this dilemma reveals inequities in our federal court system and shortcomings in our constitutional fair-cross-section jurisprudence. This inquiry also exposes the continuing effects of American imperialism and its concomitant xenophobia and racism, as well as the necessity for legislative and judicial action to rectify the legacy of U.S. colonialism. It demonstrates the critical need for a new assessment to determine the local applicability of federal statutes in Puerto Rico, such as the test proposed in this Article. Ultimately, it challenges us to renounce the second-class status of non-English-speaking citizens, not only in Puerto Rico but throughout the United States, and to implement a policy of juror language accommodation to ensure the preservation of Sixth Amendment rights for all persons.

³¹⁹ *Id.* at 304.

