

# APPLICATION OF THE FEDERAL DEATH PENALTY ACT TO PUERTO RICO: A NEW TEST FOR THE LOCALLY INAPPLICABLE STANDARD

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*Ever since Puerto Rico was acquired by the United States following the Spanish-American War, Congress and the courts have struggled with applying federal law to the island. Puerto Rico has been treated alternately as a state, territory, or something in between for purposes of federal law since the island became a commonwealth in 1952. In this Note, Elizabeth Vicens argues that in determining whether a federal statute should apply to Puerto Rico, in the absence of a clear statement by Congress, courts should inquire whether the law contradicts an overriding local interest. This test is based on the language of the Puerto Rican Federal Relations Act, which states that federal laws that are "not locally inapplicable" shall be applied to the island. After supporting the proposed model of statutory interpretation, Vicens applies the test to a recent controversial application of federal law to Puerto Rico: the application of the Federal Death Penalty Act. Vicens argues that under her model, the First Circuit should not have applied the Federal Death Penalty Act in United States v. Acosta-Martinez. The Note concludes that this test will aid Congress and the courts in a murky area of law, as well as help to improve U.S.-Puerto Rican relations.*

## INTRODUCTION

Section 9 of the Puerto Rican Federal Relations Act (PRFRA) reads: "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 . . . ."<sup>1</sup> This clause has been the basis for much of the litigation on the question whether federal laws are applicable to the island.<sup>2</sup> While no single rule has emerged, "[i]n general, the character and aim of the

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<sup>1</sup> 48 U.S.C. § 734 (2000).

<sup>2</sup> 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) [hereinafter DOCUMENTS].

statute in question will determine whether it is locally applicable to the Commonwealth of Puerto Rico.”<sup>3</sup> Unsurprisingly, Puerto Rico’s unique position in the federal system—a position shaped by a lack of representation at the federal level and significant historical and cultural differences with the United States—has given rise to numerous issues of interpretation when Congress has not clearly specified the application of particular federal statutes to Puerto Rico.

These interpretative issues were illustrated recently by the First Circuit’s controversial decision in *United States v. Acosta-Martinez*,<sup>4</sup> which held that the federal death penalty, as applied under the Federal Death Penalty Act of 1994 (FDPA),<sup>5</sup> could be administered legally in Puerto Rico. The decision resulted in widespread opposition across the island.<sup>6</sup> The FDPA itself is silent as to whether it should extend to Puerto Rico. However, the majority of Puerto Rico’s population firmly opposes the death penalty on cultural and religious grounds.<sup>7</sup> No execution has taken place in Puerto Rico since

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<sup>3</sup> DOCUMENTS, *supra* note 2, at 227; *see also infra* Part I.C.

<sup>4</sup> 252 F.3d 13 (1st Cir. 2001), *cert. denied*, 535 U.S. 906 (2002). Hectór Acosta-Martinez and Joel Rivera-Alejandro, alleged gang leaders, were accused in 1998 of the kidnapping and murder of Jorge Hernández Diaz. The two allegedly abducted Hernández at gunpoint in front of his convenience store. The victim was shot and dismembered, his body stuffed into garbage bags and dumped on the side of a road. Ivan Román, *Death-Penalty Debate Goes to Heart of Puerto Rico’s Status*, ORLANDO SENTINEL, July 13, 2003, at A21, 2003 WL 57958492. Federal jurisdiction was based on a number of charges, including: killing in retaliation for cooperating with the government, use of a firearm in an intentional crime of violence resulting in death (both punishable by death), and conspiracy to interfere with interstate commerce by extortionate means. *Acosta-Martinez*, 252 F.3d at 15. The defendants’ challenge to the U.S. Attorney’s decision to seek the death penalty was upheld by the District Court of Puerto Rico. Judge Salvador Casellas held that the Federal Death Penalty Act (FDPA) was “locally inapplicable.” *United States v. Acosta Martinez*, 106 F. Supp. 2d 311, 311–13 (D.P.R. 2000).

<sup>5</sup> 18 U.S.C. §§ 3591–3598 (2000 & Supp. 2002).

<sup>6</sup> *See* Ivan Román, *Death-Penalty Foes Multiply as Murder Trial Nears*, ORLANDO SENTINEL, Mar. 26, 2000, at A6, 2000 WL 3589509 (noting that activists, ministers, legal scholars, and politicians in Puerto Rico oppose death penalty); *see also* Leonard Post, *Puerto Rico Clashes with U.S. Justice Department, Pennsylvania over Death Penalty*, MIAMI DAILY BUS. REV., July 22, 2003, at 12, WL 7/22/2003 MIAMIDBR 12 (quoting Arturo Luis Davila-Toro, President of Puerto Rico Bar Association, as calling application of federal death penalty “a serious constitutional confrontation” between United States and Puerto Rico and quoting Anabelle Rodriguez, Secretary of Justice of Puerto Rico, as stating that constitutional prohibition of death penalty is “reflective of our collective consciousness”).

<sup>7</sup> *See Acosta-Martinez*, 252 F.3d at 19 (“We fully accept the strength of Puerto Rico’s interest and its moral and cultural sentiment against the death penalty . . . .”); Abby Goodnough, *Acquittal in Puerto Rico Averts Fight over Government’s Right to Seek Death Penalty*, N.Y. TIMES, Aug. 1, 2003, at A14 (“Polls also have found that much of the heavily Catholic population opposes the death penalty on religious and moral grounds.”); Adam Liptak, *Puerto Ricans Angry That U.S. Overrode Death Penalty Ban*, N.Y. TIMES, July 17, 2003, at A1 (“Puerto Rico is . . . heavily Roman Catholic, and polls show that many residents oppose capital punishment on religious and moral grounds.”); Román, *supra* note

1927,<sup>8</sup> and the constitution of Puerto Rico, ratified by the U.S. Congress in 1952 as part of the bilateral agreement to make Puerto Rico a commonwealth,<sup>9</sup> specifically prohibits capital punishment.<sup>10</sup>

Although the defendants in *Acosta-Martinez* ultimately were acquitted by the jury,<sup>11</sup> questions about the application of the federal death penalty are still highly relevant. Puerto Rico has submitted the greatest number of potential death penalty cases of the ninety-four federal court districts and currently has the highest number of pending cases in the United States.<sup>12</sup>

As the *Acosta-Martinez* case demonstrates, there are numerous questions presented by the application of federal laws to Puerto Rico.

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6 ("Some isolated voices to the contrary, virtually no politician or public figure here speaks up for the death penalty."). Catholic leaders have repeatedly stressed the Church's opposition to the death penalty. See, e.g., POPE JOHN PAUL II, THE GOSPEL OF LIFE [EVANGELIUM VITAE] para. 56, at 100 (1995) (stating that Catholic faith supports execution only in cases of "absolute necessity"), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/encyclicals/](http://www.vatican.va/holy_father/john_paul_ii/encyclicals/); U.S. CONFERENCE OF CATHOLIC BISHOPS, A GOOD FRIDAY APPEAL TO END THE DEATH PENALTY (1999) ("[W]e must commit ourselves to a persistent and principled witness against the death penalty . . ."), at <http://www.nccbuscc.org/sdwp/national/criminal/appeal.htm>.

<sup>8</sup> Román, *supra* note 4.

<sup>9</sup> H.R.J. Res. 430, 82d Cong., 66 Stat. 327 (1952) ("[T]he constitution of the Commonwealth of Puerto Rico . . . is hereby approved by the Congress of the United States . . .").

<sup>10</sup> P.R. CONST. art. II, § 7 ("The death penalty shall not exist."). This codified a local law in place since 1929. Act of Apr. 26, 1929, No. 42, § 1, 1929 P.R. Laws 232 ("The death penalty is hereby definitively abolished in Porto Rico."). During debates regarding the constitution, a proposed modification to allow Congress to enact the death penalty was unanimously defeated. See Edgardo Manuel Román Espada, *Proceso Histórico de la Abolición de la Pena de Muerte en Puerto Rico*, 64 REVISTA DEL COLEGIO DE ABOGADOS DE PUERTO RICO 13-14 (2003). For a history of the abolition of the death penalty in Puerto Rico, see *id.* at 1-14; Juan Alberto Soto González & Juan Carlos Rivera Rodríguez, *La Pena de Muerte, una Batalla Entre una Ley Federal y la Constitución de Puerto Rico*, 41 REV. DER. P.R. 253, 257-59 (2002).

<sup>11</sup> See *infra* note 146 and accompanying text.

<sup>12</sup> *United States v. Acosta Martinez*, 106 F. Supp. 2d 311, 312 n.1 (D.P.R. 2000); see also Román, *supra* note 6 ("Puerto Rico's eight defendants facing death in pending federal cases is the highest number anywhere in the United States."). For recent federal death penalty cases in Puerto Rico, see, for example, *In re Sterling-Suárez*, 306 F.3d 1170 (1st Cir. 2002), requiring that learned counsel be provided reasonably soon after an indictment and prior to submission of a death penalty request to the Attorney General, and *United States v. Gomez-Olmeda*, 296 F. Supp. 2d 71 (D.P.R. 2003), striking a death penalty charge against the defendant due to the untimeliness of the death penalty notice and the misleading of defense counsel by the government. See also Post, *supra* note 6, at 12 (noting that extradition trial of man facing potential capital murder charges in Pennsylvania has resulted in "clash of cultures and governments over the death penalty"). See generally David Bruck et al., Fed. Death Penalty Res. Counsel Project, *Summaries of Cases Authorized for the Death Penalty 1988-2003* (providing comprehensive list and descriptions of all federal capital prosecutions between 1998 and 2003), at [http://www.capdefnet.org/fdprc/fdprc\\_web\\_contents3.htm](http://www.capdefnet.org/fdprc/fdprc_web_contents3.htm) (last visited Feb. 13, 2005).

One could argue that the Supremacy Clause<sup>13</sup> should apply across the board, and that Puerto Rico should be treated as a state. On the other hand, one also could argue that Puerto Rico always should be treated differently by the courts with respect to any federal statute, due to the unique issues raised by its status as a commonwealth.

This Note proposes a more nuanced test, based on the “locally inapplicable” standard of the PRFRA. Namely, in the absence of a clear statement by Congress as to whether a particular federal statute should apply to Puerto Rico, where federal law contradicts a fundamental Puerto Rican interest, federal courts should interpret the law as “locally inapplicable.” Therefore, when the law on its face is ambiguous or silent as to its applicability to Puerto Rico, and a strong local interest is implicated, there should be a rebuttable presumption that the legislature has not considered whether the law should apply to Puerto Rico in the same manner as it applies to the states. This presumption could be rebutted by incontrovertible evidence of legislative intent regarding the application of the law to Puerto Rico, including legislative history demonstrating that Congress specifically considered the impact of the legislation on the Commonwealth.

Under the test this Note suggests, a court would undergo the following analysis: First, it would consider whether the statute is ambiguous or silent in its application to Puerto Rico. Second, if the statute is silent or ambiguous, the court would determine whether there is an overriding local interest<sup>14</sup> that weighs against application of the statute. Finally, if the second prong of the test is answered in the affirmative, then the statute should be held “locally inapplicable” to

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<sup>13</sup> U.S. CONST. art. VI, cl. 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 . . .”).

<sup>14</sup> This Note recognizes that there will not always be a readily identifiable and essentially undivided “Puerto Rican interest.” In our system of federalism, we recognize that “local” interests should be accorded deference. At the same time, it should be recognized that there generally will be an internal minority (individual or group dissenters). Within Puerto Rico, especially, there is a great deal of political disagreement regarding U.S.-Puerto Rican relations. For example, those who are pro-statehood generally argue that the best solution for the application of federal laws to Puerto Rico is to ensure that Puerto Rico has federal representation and is accorded all the rights and privileges of a state. Those who are proponents of independence generally argue that no federal laws should apply to Puerto Rico. This Note does not address the status debate in Puerto Rico. Rather, its purpose is to address questions arising from the current application of federal laws to Puerto Rico. Thus, while recognizing that there is no single “Puerto Rican interest,” this Note argues that there are a number of cultural and legal differences between Puerto Rico and the United States that justify distinguishing Puerto Rico within the federal system. These differences are discussed *infra* notes 94–100 and accompanying text.

Puerto Rico unless there is overriding evidence that Congress intended otherwise.

This Note identifies the necessity of and basis for this test and applies it to the *Acosta-Martinez* case and the FDPA as a case study. Part I analyzes the basis for the proposed test, focusing on the legal history of U.S.–Puerto Rico relations. Part II applies the first prong of the test to the FDPA and the *Acosta-Martinez* case, and concludes that the FDPA is silent where Puerto Rico is concerned. Part III examines local factors that weigh against the application of the FDPA to determine whether in fact local factors render the FDPA “locally inapplicable.”

## I

### BASIS FOR STATUTORY INTERPRETATION TEST

Since the United States acquired Puerto Rico in 1898 as a result of the Treaty of Paris,<sup>15</sup> the legal relationship between the island and the mainland has been controversial and ambiguous. More than one hundred years later, Puerto Rico remains an unincorporated territory of the United States,<sup>16</sup> subject to the Territorial Clause,<sup>17</sup> and lacking meaningful federal representation.<sup>18</sup> With the passage of Public Law 600 in 1950,<sup>19</sup> Puerto Rico and the United States entered into a compact that increased the self-determination of the island, while cementing the political, economic, and cultural relations between Puerto Rico and the United States. Since then, Puerto Rico has been treated alternately by both Congress and the courts as a territory, commonwealth, or state. While, for the most part, federal statutes have been applied to Puerto Rico, some argue that the compact “made clear that federal laws that were ‘locally inapplicable’ would

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<sup>15</sup> Treaty of Peace, Dec. 10, 1898, U.S.–Spain, 30 Stat. 1754, 1755 [hereinafter Treaty of Paris] (“Spain cedes to the United States the island of Porto Rico . . .”).

<sup>16</sup> See *Balzac v. Porto Rico*, 258 U.S. 298, 304–05 (1922). Today, the unincorporated territories include Puerto Rico, the Commonwealth of the Northern Mariana Islands (CNMI), Guam, the U.S. Virgin Islands, and American Samoa. The Puerto Rican population makes up roughly ninety-five percent of those living in unincorporated territories. 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, 1 (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter *FOREIGN IN A DOMESTIC SENSE*].

<sup>17</sup> U.S. CONST. art. IV, § 3, cl. 2 (providing Congress with right “to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States”).

<sup>18</sup> See *infra* Part I.B.

<sup>19</sup> Public Law 600, ch. 446, Pub. L. No. 81-600, 64 Stat. 319 (1950) (codified at 48 U.S.C. § 731 (2000)).

not apply to the Commonwealth.”<sup>20</sup> The question whether a particular statute should apply has been litigated in the courts on numerous occasions.<sup>21</sup>

This Part will analyze the constitutional development of the U.S.–Puerto Rican legal relationship in order to provide the context for the model of statutory interpretation that the Note proposes. Specifically, Section A will provide the legal history of U.S.–Puerto Rican relations. Section B will examine Puerto Rico’s current status within the federal system. Section C will discuss the “locally inapplicable” standard and the current application of federal laws to the island. Finally, Section D will outline the Note’s proposed model of statutory interpretation within the context of the current U.S.–Puerto Rican legal relationship.

### A. Constitutional Development of U.S.–Puerto Rican Relations

Following the conclusion of the Spanish-American War, the United States sought to establish rule over Puerto Rico under the terms of the Treaty of Paris.<sup>22</sup> Congress passed the Foraker Act,<sup>23</sup> a revenue bill that established civil government on the island. Subsequent American rule raised a number of important questions regarding the extent to which the Constitution “followed the flag”<sup>24</sup> in Puerto Rico.

The Treaty of Paris states: “The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.”<sup>25</sup> The United States had

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<sup>20</sup> Brief of the Commonwealth of Puerto Rico as Amicus Curiae in Support of Petitioners at 1, *Acosta-Martinez v. United States*, 535 U.S. 906 (2002) (No. 01-7137) [hereinafter *Brief of Commonwealth*] (quoting 48 U.S.C. § 734 (2000)); see also *infra* Part I.C.

<sup>21</sup> See Juan R. Torruella, *One Hundred Years of Solitude: Puerto Rico’s American Century*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 16, at 241, 241–47 (noting that Puerto Rico’s status as commonwealth, created through legislation rather than under Constitution, has led to confusion in courts).

<sup>22</sup> Treaty of Paris, *supra* note 15, at 1760.

<sup>23</sup> Foraker Act, ch. 191, 31 Stat. 77 (1900). It was in the Foraker Act that the caveat that federal laws “locally inapplicable” to Puerto Rico would not automatically apply first appeared. *Id.* § 14, 31 Stat. at 80. This limitation was later included in the Jones Act, ch. 145, § 9, 39 Stat. 951, 954 (1917) (codified as amended at 48 U.S.C. § 734 (2000)). See *infra* note 43 and accompanying text.

<sup>24</sup> This phrase was popularized by Finley Peter Dunne in his satirical “Mr. Dooley” newspaper column. Finley Peter Dunne, *The Supreme Court’s Decisions*, in *MR. DOOLEY’S OPINIONS* 21, 26 (1901) (“[N]o matter whether th’ constitution follows th’ flag or not, th’ supreme coort follows th’ illiction returns.”) Dunne satirized the extent to which the important constitutional questions raised by the U.S. acquisition of these territories were determined by the politics of the time. *Id.* at 21–26.

<sup>25</sup> Treaty of Paris, *supra* note 15, at 1759.

acquired other territories with the eventual promise of statehood.<sup>26</sup> The issue thus raised by the Treaty of Paris was “whether racially and culturally distinct peoples brought under American sovereignty without the promise of citizenship or statehood could be held indefinitely without doing violence to American values—that is, whether certain peoples could be permanently excluded from the American political community and deprived of equal rights.”<sup>27</sup> This issue was first debated among noted academics at the turn of the twentieth century.<sup>28</sup> The argument that won the day was that of Abbott Lawrence Lowell, future president of Harvard Law School, who contended that the Treaty of Paris supported the view that Congress has discretion over whether to incorporate a territory into the United States.<sup>29</sup>

The Supreme Court adopted Lowell’s views, resolving the legal questions regarding the constitutional status of the territories acquired under the Treaty of Paris in a series of decisions known as the *Insular Cases*.<sup>30</sup> The Court adopted a theory under which the newly acquired

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<sup>26</sup> See *District of Columbia v. Carter*, 409 U.S. 418, 431–32 (1973) (“From the moment of their creation, the Territories were destined for admission as States into the Union, and ‘as a preliminary step toward that foreordained end—to tide over the period of ineligibility—Congress, from time to time, created territorial governments . . . .’” (quoting *O’Donoghue v. United States*, 289 U.S. 516, 537 (1933))).

<sup>27</sup> 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, 395 (1978).

<sup>28</sup> The so-called “Harvard Debate” produced a series of important and influential articles on the subject of the application of the U.S. Constitution to the territories. See, e.g., Carmen F. Randolph, *Constitutional Aspects of Annexation*, 12 HARV. L. REV. 291 (1898); C.C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); 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); James Bradley Thayer, *Our New Possessions*, 12 HARV. L. REV. 464 (1899); Abbott Lawrence Lowell, *The Status of Our New Possessions—A Third View*, 13 HARV. L. REV. 155 (1899).

<sup>29</sup> Lowell, *supra* note 28, at 175–76.

<sup>30</sup> The *Insular Cases* include: *Balzac v. Porto Rico*, 258 U.S. 298 (1922), holding that Puerto Ricans, while citizens, have no right to a jury, as constitutional rights are determined by locale; *Downes v. Bidwell*, 182 U.S. 244 (1901), holding that Puerto Rico belongs to but is not part of the United States within the revenue clauses of the Constitution; *Armstrong v. United States*, 182 U.S. 243 (1901), holding that war powers grant the government power to seek duties on importations made into Puerto Rico from the United States, even though Puerto Rico and the United States are foreign countries with respect to revenue laws; *Dooley v. United States*, 182 U.S. 222 (1901), upholding the application of tariff laws to products exported from the United States to Puerto Rico; *De Lima v. Bidwell*, 182 U.S. 1 (1901), holding that after the ratification of the Treaty of Paris, Puerto Rico became a territory of the United States, and thus not a foreign country within the meaning of tariff laws. See generally Marybeth Herald, *Does the Constitution Follow the Flag into United States Territories or Can It Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707 (1995) (examining constitutional questions raised by *Insular Cases* in context of CNMI); Juan M. García Passalacqua, *La Falsedad del Canon: Análisis Crítico de la Historia Constitucional de Puerto Rico*, 65 REV. JUR. U.P.R. 589 (1996) (analyzing and

territories could be distinguished from previous acquisitions in that they were "unincorporated" territories. The Court found that, following its cession under the Treaty of Paris, Puerto Rico had ceased to be a "foreign country."<sup>31</sup> However, the Court also held that it could not be considered part of the United States under the Constitution.<sup>32</sup> The exact status of Puerto Rico was, according to the Court, dependent on Congress. The Supreme Court found that the ability of the United States to acquire the lands under the treaty implied the power to prescribe the terms upon which it was willing to receive the island and its inhabitants.<sup>33</sup> Puerto Rico became, in the words of Justice White, "foreign in a domestic sense."<sup>34</sup>

The *Insular Cases* determined that only "fundamental" constitutional rights had to be extended to Puerto Rico and the other "unincorporated" territories. This led to an interesting debate regarding the scope of "fundamental" rights, a debate which was complicated by the fact that differentiating between states and territories under the Constitution can be problematic. As Sanford Levinson notes, for example, the Privileges and Immunities Clause<sup>35</sup> applies to "the Citizens of each State." Puerto Ricans are citizens, but they do not belong to a state.<sup>36</sup> Also, Article IV, Section 4 guarantees a republican form of government only to "every State in this Union."<sup>37</sup> These are but a few examples of the difficulties that have arisen in this context.

The result of this constitutional quandary has been an unpredictable and sometimes bizarre application of the Constitution and Bill of

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questioning aspects of José Trías Monge's canonical work on consitutional history of Puerto Rico); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REV. JUR. U.P.R. 225 (1996) (analyzing doctrinal, theoretical, and ideological foundations of *Insular Cases* and examining their effect on Puerto Rico).

<sup>31</sup> *De Lima*, 182 U.S. at 196-97.

<sup>32</sup> *Downes*, 182 U.S. at 287, 341-42 (White, J., concurring).

<sup>33</sup> *Id.* at 289-91.

<sup>34</sup> *Id.* at 341-42. Justice White's was one of four concurring opinions in *Downes*. Through the *Insular Cases*, the Supreme Court adopted White's doctrine of incorporation. It is interesting and still relevant to note Justice Harlan's vigorous dissent: "It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence." *Id.* at 382 (Harlan, J., dissenting).

<sup>35</sup> U.S. CONST. art. IV, § 2, cl. 1 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

<sup>36</sup> Sanford Levinson, *Installing the Insular Cases into the Canon of Constitutional Law, in FOREIGN IN A DOMESTIC SENSE*, *supra* note 16, at 121, 125.

<sup>37</sup> U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . .").



Rights to Puerto Rico.<sup>38</sup> For instance, while it has never specifically been held to do so, the Commerce Clause has inherently been applied to Puerto Rico.<sup>39</sup> In *Balzac v. Porto Rico*,<sup>40</sup> one of the *Insular Cases*, the Supreme Court held that Puerto Ricans were not guaranteed a right to a jury trial in Puerto Rican courts under the Sixth Amendment.<sup>41</sup> Although Puerto Ricans have been granted due process protection, the Court has expressly declined to decide whether that protection is provided by the Fifth or Fourteenth Amendment.<sup>42</sup> The right to intervention by a grand jury under the U.S. Constitution does not apply to Puerto Rico.<sup>43</sup>

In 1917, Puerto Ricans were granted citizenship under the Jones Act.<sup>44</sup> The *Insular Cases* were held to still apply, as "[i]t is locality

<sup>38</sup> See David M. Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, 110 F.R.D. 449, 473 (1986) (arguing that "[p]ragmatism has been the determining approach taken by Congress, the President and the Supreme Court" in treatment of Puerto Rico within federal system); see also T. Alexander Aleinikoff, *Puerto Rico and the Constitution: Conundrums and Prospects*, 11 CONST. COMMENT. 15, 15 (1994) (noting that constitutional status of Puerto Rico "raises complex and interesting puzzles"). This same inconsistency has also characterized judicial and congressional policy on the application of federal laws to Puerto Rico, as under section 9 of the Puerto Rican Federal Relations Act (PRFRA). See *infra* Part I.C.

<sup>39</sup> See, e.g., *Sea-Land Servs., Inc. v. Municipality of San Juan*, 505 F. Supp. 533 (D.P.R. 1980) (holding that "prohibitive effect of the commerce clause is binding on Puerto Rico through territorial clause"); see also Roberto P. Aponte Toro, *A Tale of Distorting Mirrors: One Hundred Years of Puerto Rico's Sovereignty Imbroglia*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 16, at 251, 255 ("[I]n this area, the answer to Puerto Rico's concern is 'do not ask how, just assume you are in.'"). But cf. *Buscaglia v. Ballester*, 162 F.2d 805 (1st Cir. 1947) (holding that Commerce Clause does not apply to Puerto Rico).

<sup>40</sup> 258 U.S. 298 (1922).

<sup>41</sup> *Id.* at 309 ("In Porto Rico, however, the Porto Rican can not insist upon the right of trial by jury.").

<sup>42</sup> The Supreme Court has stated:

It is clear now . . . that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico. . . . The Court, however, thus far has declined to say whether it is the Fifth Amendment or the Fourteenth which provides the protection. Once again, we need not resolve that precise question . . . .

Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 600-01 (1975) (citation omitted); see also *Colon-Rosich v. Puerto Rico*, 256 F.2d 393, 397 (1st Cir. 1958) (declining to decide whether due process protections apply to Puerto Rico under Fifth or Fourteenth Amendment); *Stagg v. Descartes*, 244 F.2d 578, 583 (1st Cir. 1957) (same); *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953) (declining to decide whether Fifth or Fourteenth Amendment applies for purposes of reaching decision in case). This is a difficult quandary for the courts. Since Puerto Rico is not a dependency, the Fifth Amendment is not applicable. U.S. CONST. amend. V. On the other hand, the Fourteenth Amendment applies only to states. U.S. CONST. amend. XIV.

<sup>43</sup> See *Mercado v. López Acosta*, 26 P.R. Dec. 105 (1918).

<sup>44</sup> Jones Act, ch. 145, § 5, 39 Stat. 951, 953 (1917) (codified as amended at 48 U.S.C. § 734 (2000)). Some argue that the timing of the Jones Act suggests that Congress granted citizenship as a means of drawing Puerto Ricans into World War I, see, e.g., Cabranes,

that is determinative of the application of the Constitution . . . and not the status of the people who live in it.”<sup>45</sup> The principle of incorporation was retained in 1950, when the United States and Puerto Rico entered into a compact under Public Law 600, leading to the establishment of Puerto Rico as a commonwealth.<sup>46</sup> Under the terms of this compact, Puerto Rico enjoyed a greater degree of self-government than it had previously, and established its own constitution, ratified by Congress and effective after approval by a Puerto Rican referendum in 1952.<sup>47</sup>

When Puerto Rico became a commonwealth, its legal relationship with the United States underwent a dramatic shift:

[T]he federal government’s relations with Puerto Rico changed from being bounded merely by the territorial clause, and the rights of the people of Puerto Rico as United States citizens, to being bounded by the United States and Puerto Rican Constitutions, Public Law 600, the Puerto Rican Federal Relations Act and the rights of the people of Puerto Rico as United States citizens.<sup>48</sup>

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*supra* note 27, at 404–06, but this claim is largely unproven. Since 1917, however, Puerto Ricans have been legally drafted and have “fought valorously” in “defense of our Nation and the liberty of others.” Memorandum for the Heads of Executive Departments and Agencies, 57 Fed. Reg. 57,093, 57,093 (Nov. 30, 1992).

<sup>45</sup> *Balzac*, 258 U.S. at 309.

<sup>46</sup> Public Law 600, ch. 446, Pub. L. No. 81-600, 64 Stat. 319 (1950) (codified at 48 U.S.C. § 731 (2000)). The term “commonwealth” was adopted by the island with some debate. See Arnold H. Leibowitz, *The Applicability of Federal Law to the Commonwealth of Puerto Rico*, 56 GEO. L.J. 219, 221 n.12 (1967). The creation of the Commonwealth through the 1950–1952 legislation also stirred debate over whether the compact created a new status for Puerto Rico that differed from either a state or a territory. See discussion *infra* notes 65–68 and accompanying text.

<sup>47</sup> Public Law 600, § 1, 64 Stat. at 319 (codified as amended at 48 U.S.C. § 731b (2000)) (“[R]ecognizing 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.”). The Puerto Rican Constitution establishes a republican form of government. P.R. CONST. art I, § 2. Article II provides a Bill of Rights based on the U.S. Bill of Rights, as well as the Universal Declaration of the Rights of Man adopted by the United Nations a few years earlier, thereby guaranteeing more protection for individual rights than does the U.S. Constitution. See P.R. CONST. art II; DOCUMENTS, *supra* note 2, at 179. Public Law 600 also provided that once the Puerto Rican Constitution was enacted, there would be an automatic repeal of numerous sections of the Jones Act of 1917 relating to the structure of the insular government. Public Law 600, § 5, 64 Stat. at 320. The remaining sections, including the “locally inapplicable” language, remained in effect and were renumbered in the PRFRA. See Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S.-Flag Islands*, 14 U. HAW. L. REV. 445, 451 (1992) (noting that concept of “‘commonwealth’ anticipates a substantial amount of self-government . . . and some degree of autonomy . . . [and] derives its authority not only from the United States Congress, but also by the consent of the citizens of the entity”).

<sup>48</sup> *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank*, 649 F.2d 36, 41 (1st Cir. 1981). In *Hodgson v. Union de Empleados de los Supermercados Pueblos*, 971 F. Supp. 56 (D.P.R. 1974), Chief Judge Cancio found that Congress’s power over Puerto Rico

The *Insular Cases* recognized the ultimate power Congress has to determine whether federal laws may be applied to Puerto Rico.<sup>49</sup> However, both case law and the 1950–1952 legislation have created a mutuality of respect between the island and the federal system, whereby any changes in Puerto Rico’s status, constitution, or form of government demand bilateral ratification.

[I]n this view Commonwealth is not a “territory” covered by the “territorial clause” of the Constitution, nor quite obviously is it a state; rather, Commonwealth is *sui generis* and its judicial bounds are determined by a “compact” which cannot be changed without the consent of both Puerto Rico and the United States.<sup>50</sup>

Further, Congress and the courts have recognized Puerto Rico’s cultural autonomy. The test proposed in this Note reflects this constitutional relationship, in that it recognizes congressional discretion while retaining the respect and value that Congress and the courts have placed on Puerto Rico’s unique and autonomous interests.

### B. Lack of Federal Representation

Puerto Rico, to a great extent, is excluded from the federal decisionmaking process. Puerto Rico’s only “representative” in Congress, the Resident Commissioner, has the right to speak but not to vote on legislation before the House of Representatives. All executive powers extend to Puerto Rico, although Puerto Ricans may not vote in the presidential election.<sup>51</sup>

There are also limitations to Puerto Rico’s participation in the federal judicial system. All cases appealed from the District Court of Puerto Rico go to the First Circuit in Boston. Therefore, a single cir-

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does not derive from the Territorial Clause, but rather from the U.S.–Puerto Rican compact. *Id.* at 59. See also Leibowitz, *supra* note 45, at 233 (noting that federal government operates within legal boundaries created by U.S. constitutional interpretation of commonwealth status, rights of Puerto Rican inhabitants as U.S. citizens, and PRFRA, rather than Territorial Clause).

<sup>49</sup> At the time *Downes v. Bidwell*, 182 U.S. 244 (1901), was decided, no U.S. territory had remained “unincorporated” for more than nine years (upper Louisiana from 1803–1812). Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PAC. L. & POL’Y J. 180, 227 n.148 (2003). The Court in the *Insular Cases* “never dreamed” that Puerto Rico and the other territories would remain unincorporated as long as they have. *Id.*; see also *District of Columbia v. Carter*, 409 U.S. 418, 431–32 (1973) (“From the moment of their creation, the Territories were destined for admission as States into the Union . . . .”); *O’Donoghue v. United States*, 289 U.S. 516, 536–38 (1933) (noting “transitory,” “purely provisional,” “impermanent” character of territorial governments in anticipation of statehood); *Downes*, 182 U.S. at 343–44 (White, J., concurring) (arguing that it would be unconstitutional to “permanently hold territory which is not intended to be incorporated”).

<sup>50</sup> See Leibowitz, *supra* note 45, at 222.

<sup>51</sup> See PEDRO A. MALAVET, *AMERICA’S COLONY* 11 (2004).

cuit court has heard most of the legal questions regarding Puerto Rico's unique constitutional position. This is in contrast to questions of law regarding states' rights, for which the Supreme Court is able to use a circuit split as a "test." The Supreme Court can study the legal arguments and implications in the "laboratory"<sup>52</sup> of states and circuits before making important constitutional decisions regarding sensitive questions of law. The distinct constitutional questions presented by Puerto Rico's status within the federal system do not benefit from this "laboratory" effect.

Moreover, English is the required language for conducting trials in all federal district courts, even in Puerto Rico. Given that a majority of Puerto Ricans on the island do not speak English fluently,<sup>53</sup> this has a dramatic limiting effect on participation.<sup>54</sup>

In addition, the power of federal appointment historically created underrepresentation both within the plenary system and on the bench.<sup>55</sup> This issue was mitigated to a great extent after the passage of the 1950–1952 legislation, when Puerto Rico was granted greater powers of self-government. Most recently, the appointment of a non-Puerto Rican to the position of U.S. Attorney in Puerto Rico has sparked a great deal of resentment,<sup>56</sup> especially in light of the *Acosta-Martinez* decision, since the local U.S. Attorney has the power to recommend whether the federal death penalty should be applied.<sup>57</sup>

Overall, Puerto Rico's lack of federal representation means that Puerto Ricans have no effective role in the political process of enacting a federal statute and have relatively little input in how the laws are executed and applied. Additionally, there is less opportunity for relevant questions of law to be vigorously debated within the federal court system. The test proposed in the Note addresses some of

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<sup>52</sup> This term originates from Justice Brandeis's statement in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), that it is "one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory." *Id.* at 311 (Brandeis, J., dissenting).

<sup>53</sup> José Julián Álvarez-González, *Law, Language and Statehood: The Role of English in the Great State of Puerto Rico*, 17 LAW & INEQ. 359, 367 (1999).

<sup>54</sup> See *infra* Part III.A.2.

<sup>55</sup> See José A. Cabranes, *Some Common Ground*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 16, at 44 (noting that it was not until 1946 that U.S. President appointed Puerto Rican to position of Governor); cf. Elective Governor's Act, ch. 490, § 1, 61 Stat. 770, 770–71 (1947) (giving Puerto Rico right to select Governor); Helfeld, *supra* note 38, at 470 (noting that it has been practice of presidents since 1948 to appoint only Puerto Rican attorneys to Puerto Rican district court).

<sup>56</sup> See Ivan Román, *Putting Outsider in Corruption-Fighter Post Fuels Bipartisan Anger*, ORLANDO SENTINEL, May 19, 2002, at A22, 2002 WL 3047648 (noting that Justice Department recommendation of Texas prosecutor Humberto Garcia for post of U.S. Attorney raised great deal of protest).

<sup>57</sup> See *infra* Part III.D.

these democratic procedural concerns by ensuring that, where Congress is either silent or ambiguous with respect to a law, fundamental local interests will be taken into account.

*C. The "Locally Inapplicable" Standard and the Puerto Rican Federal Relations Act*

As noted earlier, the "locally inapplicable" language in the PRFRA was borrowed from the Jones Act, which in turn incorporated the language from the Foraker Act.<sup>58</sup> Similar language, which has been incorporated into all congressional acts governing territories since the Territory of Wisconsin was organized in 1836,<sup>59</sup> has been interpreted by courts to preclude the application of all but expressly applied federal law.<sup>60</sup> This language was included in the enabling acts for most organized territories, which unlike Puerto Rico were both "organized" (meaning that a local government has been established) and "incorporated" (meaning that the Constitution is made fully applicable to them, and that eventual inclusion in the union is anticipated).<sup>61</sup>

Since the 1952 compact, the Supreme Court has had numerous occasions to consider the application of the "locally inapplicable" standard.<sup>62</sup> Under the terms of section 9, it arguably has been "understood that when local law conflicted with federal law, an express statement of Congress was required to make the federal law applicable to

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<sup>58</sup> See *supra* note 23 and accompanying text.

<sup>59</sup> See Act of Apr. 20, 1836, ch. 54, § 12, 5 Stat. 10, 15 ("[T]he laws of the United States are hereby extended over, and shall be in force in, [the] Territory [of Wisconsin], so far as the same, or any provisions thereof may be applicable.").

<sup>60</sup> See, e.g., *Summers v. United States*, 231 U.S. 92, 104–05 (1913) (holding federal criminal statute locally inapplicable to Territory of Alaska); *Stark v. Starrs*, 73 U.S. (6 Wall.) 402, 416–17 (1867) (holding that federal land act could not be applied to Oregon Territory until amended to apply expressly); see also *Wilkerson v. Utah*, 99 U.S. 130, 130 (1878) (finding that government of Territory of Utah held power over "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States").

<sup>61</sup> See *supra* notes 56–57 and accompanying text; see also STANLEY K. LAUGHLIN, JR., *THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS* 79–104 (1995) (discussing unincorporated organized territories of United States); Leibowitz, *supra* note 45, at 240–41 (exploring doctrine of incorporated and unincorporated territories); Rivera Ramos, *supra* note 30, at 259 (suggesting that, in general, act of "organizing" territory indicates congressional intent to "incorporate" territory); Van Dyke, *supra* note 46, at 449–50 (providing overview of terms "incorporated" and "organized" as they pertain to territories).

<sup>62</sup> See Brief of Commonwealth, *supra* note 20, at 9; see also *infra* notes 60–64. Arnold Leibowitz notes: "With the advent of Commonwealth, section 9 gained increased importance since it quickly was seized upon to question the applicability of federal law in a variety of situations, even where Puerto Rico was specifically mentioned in the statute or where the statute had previously applied to Puerto Rico." Leibowitz, *supra* note 45, at 237.

the Commonwealth.”<sup>63</sup> This principle was applied in *Camacho v. Autoridad de Teléfonos de Puerto Rico*,<sup>64</sup> where the First Circuit held that wiretapping was allowed under Title III of the Omnibus Crime Control Act of 1968,<sup>65</sup> as Congress had “unmistakably” applied it to Puerto Rico.<sup>66</sup> The First Circuit used similar reasoning in *Garcia v. Friesecke*,<sup>67</sup> where it found that “only the plainly expressed will of the United States is to prevail against the presumption of local control over matters of local concern.”<sup>68</sup> Similarly, in *Guerrido v. Alcoa Steamship Co.*,<sup>69</sup> the First Circuit held that Puerto Rican law could not trump federal law that has “expressly [been] made applicable to Puerto Rican waters.”<sup>70</sup>

Where Congress has either not been explicit, or where there has been conflict with regard to a statute, the courts have alternated between treating Puerto Rico as a state, territory, or commonwealth, basing their decisions on congressional intent and rational basis review without explicitly following a uniform rule of statutory interpretation.<sup>71</sup> While Puerto Rico has been treated as a state with

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<sup>63</sup> See Brief of Commonwealth, *supra* note 20, at 12; see also, e.g., *Moreno Rios v. United States*, 256 F.2d 68, 74 (1st Cir. 1958) (holding this to be case for Narcotics Drugs Import & Export Act); *Mitchell v. Rubio*, 139 F. Supp. 379 (D.P.R. 1956) (upholding application of Fair Labor Standards Act to Puerto Rico because of express congressional intent).

<sup>64</sup> 868 F.2d 482 (1st Cir. 1989).

<sup>65</sup> Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. III, § 802, 82 Stat. 197, 212 (codified as amended at 18 U.S.C. §§ 2510-2522 (2000)).

<sup>66</sup> *Camacho*, 868 F.2d at 488.

<sup>67</sup> 597 F.2d 284 (1st Cir. 1979).

<sup>68</sup> *Id.* at 290-91 (citation omitted).

<sup>69</sup> 234 F.2d 349 (1st Cir. 1956).

<sup>70</sup> *Id.* at 355.

<sup>71</sup> *Compare* Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 581-86 (1976) (holding Puerto Rico to be state for purpose of phrase “under color of state law” under federal civil rights statute), *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 675 (1974) (holding that statutes of Puerto Rico are “State statute[s]” under Three Judge Court Act), *SEC v. Quing*, 252 F. Supp. 608, 609-10 (D.P.R. 1966) (holding Puerto Rico to be state with respect to Investment Company Act of 1940), *and* *Carrión v. Gonzalez*, 125 F. Supp. 819, 819 (D.P.R. 1954) (holding Smith Act, approved prior to 1952, as still applicable where applied in same manner as to one of States), *with* *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (holding that Puerto Rico may constitutionally be treated differently from states under federal welfare program), *and* *Califano v. Torres*, 435 U.S. 1, 5 (1978) (holding that Congress could provide lower Supplemental Security Income (SSI) benefits to elderly and disabled in Puerto Rico). *Compare also* *Americana of P.R., Inc. v. Kaplus*, 368 F.2d 431, 436-37 (3d Cir. 1966) (finding Puerto Rico to be territory for purposes of federal statute ensuring “full faith and credit” for judicial proceedings), *and* *Detres v. Lions Bldg. Corp.*, 234 F.2d 596, 600 (7th Cir. 1956) (holding Puerto Rico to be territory for purpose of jurisdiction over diversity cases), *with* *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank*, 649 F.2d 36, 41-42 (1st Cir. 1981) (finding § 3 of Sherman Act, prohibiting agreement in restraint of trade in any territory, no longer applicable to Puerto Rico as commonwealth).

respect to most federal laws, Congress has specifically exempted the island from a number of federal statutes, including tax<sup>72</sup> and maritime laws.<sup>73</sup> In addition, Puerto Ricans are ineligible for benefits or receive reduced benefits under numerous federal programs, including Supplemental Security Income, Medicaid, and the Federal Aid to Families with Dependent Children Program (FAFDC).<sup>74</sup> In a per curiam opinion in *Harris v. Rosario*,<sup>75</sup> the Court upheld Congress's provision of lesser benefits to Puerto Rican residents under the FAFDC, stating that Congress "may treat Puerto Rico differently from the States so long as there is a rational basis for its actions."<sup>76</sup> However, the First Circuit, in subsequent cases, has held Congress to a higher standard than a "rational basis test," stating that "Congress cannot amend the Puerto Rico constitution unilaterally,"<sup>77</sup> and that Puerto Rico should be treated as a state and therefore "'sovereign over matters not ruled by the Constitution.'"<sup>78</sup> As one article notes, "the great problem with section 9 is not its existence, but the absence of institutional arrangements for testing its range of applicability."<sup>79</sup>

The need for a consistent interpretative standard for the "locally inapplicable" language is exacerbated by the fact that Congress has

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<sup>72</sup> With the exception of federal employees, residents of U.S. territories do not pay federal taxes. See Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 566 (2004). Because of the lack of a federal income tax, Puerto Rico sets its tax rates at a much higher level. See Aleinikoff, *supra* note 38, at 21.

<sup>73</sup> See, e.g., *Guerrido*, 234 F.2d at 355 (holding federal maritime statutes not made expressly applicable by Congress "locally inapplicable" where "rendered inapplicable to [Puerto Rican] waters by inconsistent Puerto Rican legislation"). See generally Gustavo A. Gelpi, Jr., *The Maritime Law of Puerto Rico*, 28 J. MAR. L. & COM. 647 (1997) (discussing Puerto Rico's "right to enact laws that supersede federal maritime law"). For additional discussion of federal laws from which Puerto Rico has been exempted, see DOCUMENTS, *supra* note 2, at 226–29; Chimène I. Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 TEX. INT'L L.J. 1, 25 (2003).

<sup>74</sup> See *Rosario*, 446 U.S. at 651–52 (holding that Puerto Ricans may receive lower benefits than states under federal welfare program); *Torres*, 435 U.S. at 5 (holding that Congress could provide lower SSI benefits to elderly and disabled Puerto Ricans). A 1990 study conducted by the Congressional Budget Office found that if Puerto Rico were treated as a state for these programs, it would have cost the United States \$1.7 billion in 1992 and \$3 billion in 1995. See Aleinikoff, *supra* note 38, at 21. David Helfeld has argued that treating Puerto Ricans differently can result in second-class citizenship. He has criticized the decision in *Torres*, where the Court found that the "right to travel" justified denying SSI benefits to Puerto Ricans. Helfeld asks: "What does the 'virtually unqualified right to travel' mean to an elderly, blind, or handicapped person who must choose to live in Puerto Rico without SSI benefits, or receive the benefits and live on the mainland of the United States?" Helfeld, *supra* note 38, at 461 (quoting *Torres*, 435 U.S. at 5 n.7).

<sup>75</sup> 446 U.S. 651 (1980).

<sup>76</sup> *Id.* at 651–52.

<sup>77</sup> *United States v. Quinones*, 758 F.2d 40, 42 (1st Cir. 1985).

<sup>78</sup> *Id.* at 43 (quoting *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982)).

<sup>79</sup> Keitner & Reisman, *supra* note 67, at 25.

treated Puerto Rico inconsistently in its legislative drafting. In some instances, Puerto Rico has been afforded all the rights of a state,<sup>80</sup> in others it has been treated as a "possession,"<sup>81</sup> and in many cases Congress does not name Puerto Rico at all. As one author notes:

Congress has utilized the great flexibility conceded by the Supreme Court to favor, to disfavor, to exempt, to govern in plenary fashion and to treat Puerto Rico equally as if it were a state. Congress never felt obliged to adopt a policy of uniformity, but rather fashioned a variety of inconsistent policies, following its judgment on the interests it wished to promote in each area of regulation.<sup>82</sup>

As a result, the courts will often be forced to discern Congress's intent in determining whether a statute should be applied to Puerto Rico.<sup>83</sup>

In addition, given Puerto Rico's unique status, it is obvious from a functional point of view that there are some instances where Puerto Rico should be treated as a state, other instances where it should be treated as a territory, and still other instances where it should be treated as the unique entity created by the U.S.-Puerto Rican compact. In 1981, then-Judge Breyer noted 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."<sup>84</sup> Breyer further noted that "not only developing social and economic conditions but also emerging territorial self-government could render general federal law inapplicable."<sup>85</sup>

It should be noted again that the relationship established under Public Law 600 and the PRFRA is unique in our federal system. While the United States has other "possessions," none occupy the same position as Puerto Rico. Puerto Rico was the first of the currently existing U.S. possessions to be removed from the United Nations list of non-self-governing entities.<sup>86</sup> The U.S. Virgin Islands

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<sup>80</sup> See notes 65-68 and accompanying text.

<sup>81</sup> See, e.g., Federal Aviation Act of 1958, Pub. L. No. 85-726, § 101(29), 72 Stat. 731, 739 (1959) (noting that, unless otherwise specified or "manifestly incompatible . . . references in this Act to possessions of the United States shall be treated as also referring to the Commonwealth of Puerto Rico").

<sup>82</sup> Helfeld, *supra* note 38, at 459. In certain cases, such as the White Slave Traffic Act, federal statutes seek to cover intraterritory activities for Puerto Rico but only interstate activities in the rest of the Union. See, e.g., *Crespo v. United States*, 151 F.2d 44, 45 (1st Cir. 1945).

<sup>83</sup> See Helfeld, *supra* note 38, at 469 ("The Supremacy Clause applies to Puerto Rico . . . but after 1952, as before, the Congress has left it to the federal courts to determine which constitutional provisions and which statutes and treaties are applicable.").

<sup>84</sup> *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank*, 649 F.2d 36, 43 (1st Cir. 1981).

<sup>85</sup> *Id.* at 43 n.34.

<sup>86</sup> *Cessation of the Transmission of Information: Communication from the Government of the United States of America Concerning Puerto Rico*, U.N. GAOR Comm. on Info.



and Guam remain territories, over which the United States has maintained absolute and plenary power.<sup>87</sup> The people of American Samoa are U.S. nationals, but not U.S. citizens, and the internal functions of American Samoa are principally under the control of the federal government.<sup>88</sup> Both the Federated States of Micronesia and the Marshall Islands have entered into Compacts of Free Association with the United States.<sup>89</sup> As freely associated states, their residents do not enjoy the rights and privileges of U.S. citizens, but they have additional autonomy and can participate in the international community.<sup>90</sup>

It is worth comparing the status of the Commonwealth of the Northern Mariana Islands (CNMI) with that of Puerto Rico with regard to the application of federal law. In 1976, the United States and the CNMI entered into a covenant of political union, which was intended to establish a "self-governing" commonwealth under the sovereignty of the United States.<sup>91</sup> Exactly what constitutes "self-governing" has been the subject of considerable debate between the CNMI and the United States.<sup>92</sup> Under section 105 of the covenant:

The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands.<sup>93</sup>

Unlike the compact established with Puerto Rico, therefore, the CNMI covenant specifically requires that a federal law be extended to the CNMI before it can be held to apply. This provision has been largely respected by the courts. While the Ninth Circuit did not find that the covenant created an area of "local affairs" immune from federal legislation, the court did embrace a balancing test whereby, in

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from Non-Self-Governing Territories, 4th Sess., Annex II, Agenda Item 10, at 8, U.N. Doc. A/AC.35/L.121 (1953); Press Release, United States Mission to the United Nations, Statement by Mr. Mason Sears, United States Representative in the Committee on Information from Non-Self Governing Territories (Aug. 28, 1953) (on file with the *New York University Law Review*).

<sup>87</sup> Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 493–97 (2002). All of the United States's remaining possessions are considered unincorporated territories. See Van Dyke, *supra* note 46, at 449–50.

<sup>88</sup> Román & Simmons, *supra* note 80, at 498.

<sup>89</sup> *Id.* at 506.

<sup>90</sup> *Id.* at 440, 500–15.

<sup>91</sup> Horey, *supra* note 48, at 181.

<sup>92</sup> See Van Dyke, *supra* note 46, at 480–87 (detailing United States's and CNMI's different interpretations of "self-government").

<sup>93</sup> Act of Mar. 24, 1976, Pub. L. No. 94-241, § 105, 90 Stat. 263, 264 (codified at 48 U.S.C. § 1801 (2000)).

order for a federal law to apply in the CNMI, “the federal interest to be served by the legislation at issue” must be balanced against “the degree of intrusion into the internal affairs of the CNMI.”<sup>94</sup>

As one author notes, this test does not account for a situation where a federal law does not on its face infringe on self-government but, for cultural or other reasons, may be undesirable to the people of the Northern Mariana Islands.<sup>95</sup> Overall, however, this balancing test takes pains to respect the autonomy of the CNMI and the special relationship created under the terms of the covenant. In that sense, the example of the CNMI provides support for the test proposed in this Note.

#### D. *Proposed Model of Statutory Interpretation*

The complexity and confusion created by the U.S.–Puerto Rican legal relationship has historically resulted in Congress and the courts according different treatment to Puerto Rico. Predictably, the standard of review the courts have utilized is inconsistent.<sup>96</sup> This Note proposes that courts should undertake the following model of statutory interpretation: Where the statute on its face is either ambiguous<sup>97</sup> 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.

It is important to note that the test suggested herein is grounded not in principles of judicial review but rather in the language provided by Congress in the PRFRA itself, which suggests the practicality of

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<sup>94</sup> United States *ex rel.* Richards v. De Leon Guerrero, 4 F.3d 749, 755 (9th Cir. 1993); see also A&E Pac. Constr. Co. v. Salipan Stevedore Co., 888 F.2d 68, 71 (9th Cir. 1989) (utilizing similar balancing test).

<sup>95</sup> See Horey, *supra* note 48, at 198.

<sup>96</sup> Eskridge and Frickey note that because statutory interpretation is not a “mechanical operation” it will often involve multiple values and choices on the part of the interpreter, who, though “constrained by the text, the statute’s history, and the circumstances of application” will “depend upon political and other assumptions.” William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 347 (1990).

<sup>97</sup> A statute is ambiguous where “[t]he drafter has produced, whether deliberately or inadvertently, a text which from the grammatical viewpoint is capable, on the facts of the instant case, of bearing either of the opposing constructions put forward by the parties.” F.A.R. BENNION, BENNION ON STATUTE LAW 89 (3d ed. 1990). Given Puerto Rico’s unique status as a commonwealth, there are instances where laws apply to territories in general but it is unclear whether Congress intended the law to apply to Puerto Rico specifically. In addition, there may be instances where certain national minorities or U.S. territories are explicitly excluded from a law’s application (such as Native Americans in the case of the FDPA, see *infra* Part II.B), but Puerto Rico is not mentioned. This once again creates ambiguity.

just such a test.<sup>98</sup> The language of the PRFRA suggests that all statutes not “locally inapplicable” shall be applied to Puerto Rico. Thus, some argue, “laws of the Commonwealth that address important local issues will yield to federal law only where Congress has expressly mandated such a result. Such was the agreement to which the people of Puerto Rico consented.”<sup>99</sup> Furthermore, this model is supported by Congress’s own interpretation of the statutory language. In the Elective Governor’s Act of 1947, Congress stated that where a federal law was silent with respect to Puerto Rico it could be held inapplicable due to local conditions.<sup>100</sup> Recognizing Congress’s power over the island, as provided under the *Insular Cases*, under the test proposed in this Note, a statute would be applicable where Congress purposefully extended the statute to Puerto Rico, whether as a state or a territory. Also, even where there are overriding local interests, the presumption that the law is “locally inapplicable” could be rebutted by evidence of Congress’s intent to apply the statute to Puerto Rico, such as legislative history.

This interpretation of the “locally inapplicable” language and the idea of deferring to “local interests” where a statute is silent or ambiguous comport with the fact that numerous cultural and political differences between Puerto Rico and the rest of the United States have been enshrined in law. While any federal system, to a certain extent, must recognize different “local interests,” Puerto Rico has been

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<sup>98</sup> 48 U.S.C. § 734 (2000) (“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 . . .”).

<sup>99</sup> Brief of Commonwealth, *supra* note 20, at 1.

<sup>100</sup> Elective Governor’s Act, ch. 490, § 6, 61 Stat. 770, 772 (1947); Exec. Order No. 10,005, 13 Fed. Reg. 5854 (Oct. 5, 1948) (establishing presidential commission to examine federal laws potentially inapplicable to Puerto Rico by virtue of local conditions). In addition, the Fernos-Murray Bill to amend Public Law 600 proposed applying subsequent federal laws to Puerto Rico only where the Commonwealth was specifically mentioned. H.R. 5926, 86th Cong. § 4, art. IX (1959). In investigating the possibility of an “Enhanced Commonwealth Status” with Puerto Rico, Congress incorporated some of the very elements of the test proposed in this Note, arguing that a federal law would be applicable to Puerto Rico only if it has the proper regard for the economic, cultural, ecological, geographic, demographic, and other local conditions of Puerto Rico. S. 244, 102d Cong. § 402(a)–(b) (1991). Additionally, the congressional study proposed that Puerto Rico’s legislature be allowed to find that a federal law or provision should not apply to Puerto Rico where there is “no overriding national interest in having such Federal law be applicable to the Commonwealth of Puerto Rico.” *Id.* § 403(a). As one author notes, these “measures may . . . be viewed as modest attempts to remedy what states have but Puerto Rico does not: representation in Congress and votes in the electoral college.” See Aleinikoff, *supra* note 38, at 35.

afforded different treatment from the states.<sup>101</sup> Spanish is the language of the public school system in Puerto Rico, as well as the language in which the local government operates.<sup>102</sup> Puerto Rico's judicial system incorporates the civil law tradition of its Spanish colonial heritage.<sup>103</sup> Many of the differences between Puerto Rico and the United States may seem trivial—for example, Puerto Rico has its own Olympic team,<sup>104</sup> and its own candidate for the Miss Universe pageant.<sup>105</sup> These differences, in some ways, may be tied to Puerto Rico's cultural identification with Latin America and its colonial relationship with the United States.<sup>106</sup> These cultural differences also have been invoked in the status debate by proponents of statehood, enhanced commonwealth, and independence alike.<sup>107</sup>

While the proposed test is derived from the language of the PRFRA, it also finds support from legal theories of statutory interpretation. For example, when interpreting a statute, a court may generally presume, unless the contrary intention appears, that the legislator intended to conform to public policy.<sup>108</sup> Public policy is determined by analyzing a number of factors, including legal doctrine, nonlegal factors such as politics, religion, and economics, as well as old-fashioned common sense.<sup>109</sup> The foundation of all legal policy, however, is the welfare of the people—*salus populi est suprema lex*.<sup>110</sup> The local factors that would be considered under the model proposed here include legal differences, socioeconomic considerations, and the cultural and religious characteristics of the Puerto Rican people. In

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<sup>101</sup> Other national minorities, such as Native Americans, also have been afforded different treatment under federal law. See, e.g., Scott C. Idleman, *Multiculturalism and the Future of Tribal Sovereignty*, 35 COLUM. HUM. RTS. L. REV. 589, 607–20 (2004).

<sup>102</sup> For a discussion of language rights issues in Puerto Rico, see *infra* notes 136–45 and accompanying text.

<sup>103</sup> See, e.g., Colloquium, *Puerto Rico: A Mixed Legal System*, 32 REVISTA JURIDICA DE LA UNIVERSIDAD INTERAMERICANA DE PUERTO RICO 232 (1998).

<sup>104</sup> Puerto Rico Convention Bureau, *Puerto Rico Sports*, at <http://www.meetpuertorico.com/sports/default.asp> (last visited Jan. 11, 2005).

<sup>105</sup> Gil Carrasco et al., *Miss Puerto Rico, Miss Universe Puerto Rico, Miss Puerto Rico Universe Titleholders* (listing all candidates for Miss Universe pageant from Puerto Rico), at <http://www.jimmypageantpage.com/puertorico.html> (last visited Jan. 11, 2005).

<sup>106</sup> See *infra* notes 162–64 and accompanying text.

<sup>107</sup> See, e.g., MALAVET, *supra* note 51, at 11 (“It is the combination of a distinct culture and a [sic] identifiable territory possessed by only the Puerto Ricans on the island that, in my theory, entitles Puerto Ricans to determine their own future.”); see also *infra* notes 181–82 and accompanying text.

<sup>108</sup> See BENNION, *supra* note 90, at 136.

<sup>109</sup> *Id.* at 137.

<sup>110</sup> *Id.* at 137–40 (stating that this principle—“the welfare of the people is the supreme law”—is building block of statutory interpretation). Bennion notes that courts should always “presume that the legislator intended to observe this principle.” *Id.* at 138.

addition, this test is supported by accepted rules of interpretation, including the rule of deference<sup>111</sup> and the clear statement rule.<sup>112</sup>

Overall, the test proposed in this Note ensures that where Congress intends that a statute should apply to Puerto Rico, whether as a state, territory, or commonwealth, it will say so explicitly. The test also provides Congress the opportunity to defer or remain silent in situations where it is either not certain whether a statute should apply to Puerto Rico, or where it would prefer to defer to the local laws of Puerto Rico. In addition, this test reinforces the principle that where Congress has not spoken as to the application of a particular statute to Puerto Rico, the sovereign and local interests of the island should be considered.

## II

### HAS CONGRESS MADE A CLEAR STATEMENT REGARDING THE APPLICATION OF THE FDPA TO PUERTO RICO?

In applying the test proposed in this Note, the first step is to determine whether Congress has been either ambiguous or silent regarding the application of the relevant federal law to Puerto Rico. On its face, the FDPA does not specifically extend to Puerto Rico. However, in *Acosta-Martinez*, the First Circuit argued that this was inconsequential, as the underlying criminal statutes to which the FDPA's procedural changes apply did explicitly extend to Puerto Rico.<sup>113</sup> This argument assumes that the FDPA neither preempted nor impacted federal death penalty law in the United States and should be treated as having made only procedural changes. In fact,

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<sup>111</sup> The test proposed in this Note follows a *Chevron*-like approach. Where Congress is clear, further analysis is unnecessary. However, where Congress is either ambiguous or silent, an additional step of determining whether the law is "locally applicable" is necessary. Whereas in *Chevron* the Court showed a great deal of deference to the agency's interpretation of the statute where Congress was ambiguous or silent, under section 9 of the PRFRA it is local interests that merit special deference. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984); see also Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 562 & n.95 (1985) (listing factors cited by Supreme Court in deciding whether to grant deference to agency interpretation of statute).

<sup>112</sup> The clear statement rule "forbids a court to understand a legislature as directing a departure from a generally prevailing principle or policy of the law unless it does so clearly." HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW*, 1376-77 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Application of the clear statement rule in determining whether federal legislation should apply to Puerto Rico is especially desirable, given the numerous differences between Puerto Rico and the states and the fact that certain statutes may be "locally inapplicable."

<sup>113</sup> 252 F.3d 13, 18-20 (1st Cir. 2001).

the FDPA has had a substantive impact on the application of the federal death penalty and has created numerous mandatory procedures that work in conjunction with the criminal statutes in order for the death penalty to be applied. This Part analyzes the substantive impact of this legislation and argues that Congress was silent regarding the application of the statute to Puerto Rico.

### A. *Impact of the FDPA on Federal Death Penalty Legislation*

When the Supreme Court decided *Furman v. Georgia*,<sup>114</sup> many thought capital punishment would no longer exist in the United States, as the holding essentially rendered all existing death penalty statutes unconstitutional.<sup>115</sup> However, the decision in *Furman* stood only for the proposition that the death penalty was unconstitutional in the way it was applied, rather than unconstitutional per se.<sup>116</sup> Four years later, in *Gregg v. Georgia*,<sup>117</sup> the Court ruled that Georgia and other states could resume capital punishment, so long as they ensured that it would not be carried out in the unequal and arbitrary manner held unconstitutional in *Furman*.<sup>118</sup>

The 1994 FDPA was an attempt to formulate a federal death penalty procedural system in which death sentences for eligible capital crimes would be uniformly imposed and reviewed in a manner consistent with *Furman* and *Gregg*.<sup>119</sup> The FDPA applies to “any [federal] offense for which a sentence of death is provided.”<sup>120</sup> Under the FDPA, specified aggravating and mitigating factors are considered in determining whether a death sentence is justified.<sup>121</sup> If the government chooses to pursue the death penalty, it must provide the defendant with notice of its intent “within a reasonable time before the trial or before acceptance by the court of a plea of guilty.”<sup>122</sup> Should the defendant plead or be found guilty, a separate hearing is held, preferably before the same jury, to determine whether the death penalty will

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<sup>114</sup> 408 U.S. 238 (1972).

<sup>115</sup> John P. Cunningham, Comment, *Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994*, 32 U. RICH. L. REV. 939, 947–48 (1998).

<sup>116</sup> *Id.* at 948.

<sup>117</sup> 428 U.S. 153 (1976).

<sup>118</sup> *Id.* at 206–07.

<sup>119</sup> See Cunningham, *supra* note 108, at 944, 950–52 (noting lack of cohesive federal death penalty statute providing procedural safeguards prior to 1994).

<sup>120</sup> 18 U.S.C. § 3591(a)(2) (2000).

<sup>121</sup> 18 U.S.C. § 3592(c)–(d) (2000 & Supp. 2002); see also Cunningham, *supra* note 108, at 958–60; Alyssa Connell Lareau & Grant Henrichsen Willis, Comment, *Thirty-First Annual Review of Criminal Procedure, Capital Punishment*, 90 GEO. L.J. 1838, 1869–70 & n.2324 (2002).

<sup>122</sup> 18 U.S.C. § 3593(a) (2000); see also Victoria Johnson, Note, *Elemental Facts: Did Ring v. Arizona Redefine Capital Sentencing?*, 16 REGENT U. L. REV. 191, 199 (2003).

be imposed.<sup>123</sup> Currently, there is no mandatory appellate review process, although an appeal may be heard in individual cases.<sup>124</sup>

The FDPA was an unprecedented expansion of the federal death penalty that revived every pre-*Furman* death penalty provision still in existence. In addition, with the passage of the FDPA, sixty federal offenses became eligible for the death penalty.<sup>125</sup> Currently, almost every homicide occurring within federal jurisdiction is death-penalty eligible.<sup>126</sup> Since the passage of the FDPA, both the number of federal prosecutions in which an offense punishable by death is charged and the number of cases where the Attorney General has authorized seeking the death penalty have increased significantly.<sup>127</sup>

In addition, the FDPA provides that a judge may transfer a case, postconviction, to a state that provides for the death penalty.<sup>128</sup> Congress thus recognized that the provisions of the Act could present problems for states that oppose capital punishment.

The FDPA has been found by a number of courts to have preempted any previous legislation regarding the federal death penalty, and to have changed the landscape of federal death penalty application. In *United States v. Fell*,<sup>129</sup> the district court ruled that, although the government claimed that the FDPA was only a sentencing statute, its aggravating and mitigating sentencing factors resemble elements of a separate capital offense.<sup>130</sup> They also expose the defendant to a greater maximum sentence than would otherwise be available. Therefore, while the First Circuit in *Acosta-Martinez* argued that the fact that the FDPA did not extend to Puerto Rico was insignificant, application of the FDPA would preempt previous treatment of the federal death penalty on the island. Congressional silence therefore carries deep significance.

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<sup>123</sup> § 3593(e).

<sup>124</sup> 18 U.S.C. § 3595(a) (2000); see also Sara L. Golden, Comment, *Constitutionality of the Federal Death Penalty Act: Is the Lack of Mandatory Appeal Really Meaningful?*, 74 TEMP. L. REV. 429, 446–49 (2001).

<sup>125</sup> Cunningham, *supra* note 108, at 940.

<sup>126</sup> *Id.* at 953–57 (noting that FDPA expanded federal death-penalty-eligible crimes to include both crimes where dangerous human activity results in death and crimes involving actual physical killing).

<sup>127</sup> See SUBCOMM. ON FED. DEATH PENALTY CASES, JUDICIAL CONFERENCE OF THE U.S., FEDERAL DEATH PENALTY CASES: RECOMMENDATIONS CONCERNING THE COST AND QUALITY OF DEFENSE REPRESENTATION sec. I.A.1 (1998), at <http://www.uscourts.gov/dpenalty/1COVER.htm>.

<sup>128</sup> 18 U.S.C. § 3596(a) (2000) (stating that execution may be transferred where “the law of the State does not provide for implementation of a sentence of death”).

<sup>129</sup> 217 F. Supp. 2d 469 (D. Vt. 2002).

<sup>130</sup> *Id.* at 482; see also *United States v. Quinones*, 205 F. Supp. 2d 256, 268 (S.D.N.Y. 2002) (“[E]xecution under the Federal Death Penalty Act, by cutting off the opportunity for exoneration, denies due process . . .”), *rev’d*, 313 F.3d 49 (2d. Cir. 2002).

*B. The FDPA Is "Silent" on Its Application to Puerto Rico*

Under the first prong of the test proposed in this Note, the threshold question is whether Congress was either silent or ambiguous with respect to its application of the statute in question (here, the FDPA) to Puerto Rico. As Congress did not expressly extend the federal death penalty to the island, the FDPA fails the first prong of the test. As the Government of the Commonwealth of Puerto Rico noted in its amicus brief to the Supreme Court:

The court of appeals based its disregard for the Commonwealth's laws and tradition upon its byzantine interpretation of statutes that in no way evidence a clear congressional intent to overturn Puerto Rico's laws. Th[e] Court should review this case to restore the balance of power that the people of Puerto Rico envisioned when they consented to becoming a commonwealth of the United States.<sup>131</sup>

It is important to note that the FDPA explicitly does not apply to Native American nations.<sup>132</sup> This is significant for two reasons. First, it is an explicit recognition of the sovereignty and cultural autonomy of Native American tribes, as well as their history of mistreatment at the hands of the federal government.<sup>133</sup> The exemption shows that Congress recognized the questions of sovereignty and federalism presented by the statute. Second, it demonstrates that Congress anticipated that this legislation would have a significant impact on federal death penalty application. Otherwise, there would be no need to explicitly exempt the Native American tribes from the FDPA; rather, exemptions could be addressed in the underlying federal crime statutes. While one might apply the canon of *expressio unius* to argue that, given the specific exemption for Native American tribes, Congress's silence with respect to Puerto Rico indicates intent to have the FDPA apply, this Note's model of statutory interpretation posits that unless Congress made its intent clear, local factors should be weighed by the courts.

Having determined that Congress was silent with respect to application of the FDPA to Puerto Rico, a second step in the analysis is necessary to determine whether there is a fundamental local interest that weighs against the application of the FDPA and thus creates a rebuttable presumption that the law is "locally inapplicable."

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<sup>131</sup> Brief of Commonwealth, *supra* note 20, at 2.

<sup>132</sup> 18 U.S.C. § 3598 (2000) ("[N]o person subject to the criminal jurisdiction of an Indian tribal government shall be subject to a capital sentence . . . unless the governing body of the tribe has elected that [the FDPA] have effect over land and persons subject to its criminal jurisdiction.").

<sup>133</sup> See *supra* note 94 and accompanying text.



### III

#### ARE THERE OVERRIDING LOCAL CONCERNS THAT SUGGEST THE FDPA SHOULD NOT BE APPLIED TO PUERTO RICO?

It should be noted at the outset of this Part that there is a great deal of scholarly literature discussing the constitutionality of the death penalty, its discriminatory impact on racial minorities and the poor, and the potential for executing the innocent.<sup>134</sup> These sensitive issues are not specific to any one of the states and territories, and, although they highlight the irrevocable nature of capital punishment, they are not immediately relevant here. Rather, this Part identifies those legal factors and characteristics that make application of the federal death penalty to Puerto Rico distinctly troubling.

##### *A. Puerto Rico's Position in the Federal System*

This Section analyzes those aspects of Puerto Rico's position in the federal system that are problematic with respect to application of the federal death penalty and warrant different treatment than the states with regard to the FDPA. Specifically, this Section looks at Puerto Rico's lack of federal representation and issues regarding peer representation in federal jury trials.

##### *1. Lack of Federal Representation*

Given the irrevocable nature of the death penalty, Puerto Rico's lack of federal representation raises particular concerns. Currently, twelve states have abolished the death penalty.<sup>135</sup> Unlike Puerto Rico, however, the states are fully represented in the federal decision-making process and have some measure of influence over whether there is a federal death penalty and how it should apply to them. With only a nonvoting representative in Congress, Puerto Rico has no such power. As Judge Casellas noted in *Acosta-Martinez*:

It shocks the conscience to impose the ultimate penalty, death, upon American citizens who are denied the right to participate directly or indirectly in the government that enacts and authorizes the imposition of such punishment. It is unconscionable and against the most basic notion of justice to permit the American citizens of Puerto Rico to be subjected to capital punishment for crimes committed

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<sup>134</sup> See generally STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* (2002); HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA* (3d ed. 1982).

<sup>135</sup> See Amnesty Int'l USA, *Facts and Figures: Executions in the USA by State* (noting that Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin have all abolished death penalty), at <http://www.amnestyusa.org/abolish/listbystate.do> (last updated Feb. 20, 2005).

wholly within the boundaries of the Commonwealth, while at the same time denying them a say in the political process of the government that tries them. If the qualitative difference of the death penalty has been sufficient to require more reliable procedures for its imposition, it certainly ought to be sufficient to require that its availability as punishment be grounded, in its origin, on the consent of those whose rights may be affected by its imposition, such consent expressed through their participation in the political process as a manifestation of their free will.<sup>136</sup>

It is interesting to note that in defending its policy on capital punishment before the United Nations, the United States has relied on the very political representation arguments that cut against application of the federal death penalty to Puerto Rico. In response to the 2000 United Nations Sixth Quinquennial Survey, the United States declared:

The sanction of capital punishment continues to be the subject of strongly-held and publicly debated views in the United States. There are and have been, from time to time, legislative, policy, and other initiatives to limit and or [sic] abolish the death penalty. However, a majority of citizens have chosen through their freely elected state and federal officials to provide for the possibility of the death penalty for the most serious and aggravated crimes, under state law in a majority of the states . . . and under federal law . . . . [W]e believe that in democratic societies the criminal justice system—including the punishment prescribed for the most serious and aggravated crimes—should reflect the will of the people freely expressed and appropriately implemented through their *elected representatives*.<sup>137</sup>

The concept of judicial restraint is based on the notion that courts should respect the expressed will of the people as reflected through the lawmaking process.<sup>138</sup> However, the idea that our democracy has a self-correcting ability—that general dissatisfaction with federal legislation will be channeled through the ballot box—does not apply to Puerto Rico. The application of a federal law that violates the will of the Puerto Rican people as expressed through the Puerto Rican Constitution is, therefore, fundamentally different from the application of federal law despite state opposition. This factor becomes even

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<sup>136</sup> 106 F. Supp. 2d 311, 326–27 (D.P.R. 2000).

<sup>137</sup> ROGER HOOD, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 67 (3d ed. 2002) (emphasis added); see also Cunningham, *supra* note 108, at 971–72 (noting that FDPA serves as codification of will of American voters at federal level).

<sup>138</sup> See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 198–222 (1985) (contrasting judicial activism and self-restraint in decisionmaking process).

more significant when the federal law in question concerns a subject matter as controversial as capital punishment.

## 2. *Federal Jury Selection Process in Puerto Rico*

In the context of the federal death penalty, the importance of the jury cannot be overestimated. It is the jury, ultimately, that determines whether the death penalty will be imposed. Given that jury members in capital cases bear this great responsibility, it is critically important to ensure that the jury is comprised of a fair and representative cross-section of the defendant's peers. The application of the federal jury selection process in Puerto Rico raises distinct issues that are not presented by the application of that process in the rest of the United States and weigh against the possibility of a fair jury trial.

A majority of Puerto Ricans are opposed to the death penalty for religious and cultural reasons.<sup>139</sup> The majority of the population is Catholic,<sup>140</sup> and the Roman Catholic Church opposes capital punishment.<sup>141</sup> In addition, due to the island's history of colonization by the United States, many Puerto Ricans view federal imposition of the death penalty with hostility and mistrust. However, this widely shared opposition to the death penalty is not generally represented on federal juries. Jurors who oppose the death penalty for moral reasons constitutionally may be dismissed in a capital punishment trial.<sup>142</sup> In fact, widespread opposition to the death penalty for religious and cultural reasons resulted in a "protracted" jury selection process during the *Acosta-Martinez* trial, during which a large number of potential jurors were dismissed due to their moral objections to the death penalty.<sup>143</sup>

In addition to its concentrated religious composition, Puerto Rico may be distinguished from the states in that Spanish, rather than

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<sup>139</sup> See *infra* Part III.C.

<sup>140</sup> Approximately seven-eighths of Puerto Ricans are Catholic. See Matt Rosenberg, *Puerto Rico: State, Commonwealth, or Country* (Mar. 16, 1998), at <http://geography.about.com/library/weekly/aa031698.htm>.

<sup>141</sup> See *supra* note 7 and accompanying text.

<sup>142</sup> See *Lockhart v. McCree*, 476 U.S. 162, 174–77 (1986) (holding that excluding jurors who are conscientiously opposed to capital punishment does not violate impartiality and fair cross-section requirements of Sixth and Fourteenth Amendments); *Wainwright v. Witt*, 469 U.S. 412, 421–24 (1985) (finding that potential jurors opposed to death penalty may be excluded for cause due to legitimate state interest in administering its capital punishment scheme); *Logan v. United States*, 144 U.S. 263, 298 (1892) (holding that jurors who have "conscientious scruples" that prevent them from objectively considering capital punishment are not "impartial juror[s]"). But cf. *Adams v. Texas*, 448 U.S. 38, 50–51 (1980) (holding that Constitution forbids death sentence imposed by jury from which have been excluded jurors who "might or might not be affected" by their views on capital punishment).

<sup>143</sup> See Liptak, *supra* note 7.

English, is the dominant language.<sup>144</sup> While almost the entire population speaks Spanish, one-half of the population speaks no English at all, and approximately twenty percent have only a limited ability to speak and understand English. At best, about a quarter of the population speaks fluently in English.<sup>145</sup> Rural and poorly educated Puerto Ricans are less likely to speak English fluently, which becomes significant in terms of a representative jury when one considers the fact that most of those convicted of capital crimes are drawn from lower-income populations.<sup>146</sup> This linguistic difference also impacts government and judicial proceedings in Puerto Rico. All proceedings in local Puerto Rican courts are conducted only in Spanish.<sup>147</sup> All local legislative proceedings, executive rulemaking, and adjudicatory hearings also are conducted in Spanish. Local statutes are generally approved in Spanish and only later translated into English. Public education in Puerto Rico is conducted in Spanish, with English taught as a second language requirement.<sup>148</sup>

In recognition of this linguistic difference, the federal government operates differently in Puerto Rico than in the rest of the United States. For instance, Spanish translations of formal agency proceedings are “invariably a fact of life,” particularly for those agencies that interact with the public (such as the Postal Service, the Department of Labor, and the Social Security Administration).<sup>149</sup>

Despite the fact that Spanish is the dominant language on the island and the fact that the local branches of government, as well as

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<sup>144</sup> Bilingualism permeates the Puerto Rican constitution. See, e.g., P.R. CONST. art. III, § 5 (“No person shall be a member of the Legislative Assembly unless he is able to read and write the Spanish or English language . . .”). In 1991, the Puerto Rican Legislature passed a statute establishing Spanish as the official language. Act of Apr. 5, 1991, No. 4, 1991 P.R. LAWS 17. Although this statute was repealed in 1993 (making both Spanish and English official languages), it was regarded by many as an assertion of Puerto Rico’s cultural rights. See Act of Jan. 28, 1993, No. 1, 1993 P.R. LAWS 1. Puerto Rico is the only place in the United States that does not require immigrants to demonstrate proficiency in English in order to gain citizenship. See WILL KYMLICKA, *POLITICS IN THE VERNACULAR: NATIONALISM, MULTICULTURALISM AND CITIZENSHIP* 158–59 (2001). All three major political parties in Puerto Rico, including the pro-statehood party, endorse the continued use of Spanish in Puerto Rico as part of their political platform. See MALAVET, *supra* note 51, at 78–79. For additional information on the cultural and political importance of Spanish in Puerto Rico, see generally Alvarez-González, *supra* note 52.

<sup>145</sup> Alvarez-González, *supra* note 52, at 367.

<sup>146</sup> *Furman v. Georgia*, 408 U.S. 238, 251–52 (1972); INT’L COMM’N OF JURISTS, *ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES: REPORT OF A MISSION* 127 (1996); Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. REV. 699, 732 (2002).

<sup>147</sup> Alvarez-González, *supra* note 52, at 368; see also *People v. Superior Court*, 92 P.R.R. 580 (1965).

<sup>148</sup> Alvarez-González, *supra* note 52, at 369–70.

<sup>149</sup> *Id.* at 373.

some federal agencies, practice in Spanish, the trials in federal district courts are conducted in English in accordance with federal law.<sup>150</sup> During the *Acosta-Martinez* trial, the importance of this factor was noted by the judge, who corrected the translator on more than one occasion during the testimony of the prosecution's key witness, admonishing the translator, "This is an important and sensitive case."<sup>151</sup>

Jurors who speak only Spanish must be disqualified from jury selection, as English proficiency is a requirement for district court jury service.<sup>152</sup> This disqualifies almost seventy-five percent of the population from serving on a jury in a federal capital case. In combination with the fact that many of the remaining potential jurors may be disqualified on account of their moral opposition to the death penalty, it is clear that the jury selection process can hardly result in a cross-section of the defendant's peers. This situation would normally violate the Sixth Amendment. However, Puerto Rico is deemed a special case: "[A] 'jury of his peers' in federal proceedings in Puerto Rico has quite a different meaning from that accorded the term throughout the United States."<sup>153</sup>

Under these circumstances, it is remarkable that the jury in the *Acosta-Martinez* trial acquitted the two defendants of all charges after only three days of deliberation. There is some evidence that the jury was displeased by federal jurisdiction in the case.<sup>154</sup> Certainly, the

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<sup>150</sup> See 28 U.S.C. § 1865(b)(2)–(3) (2000).

<sup>151</sup> Liptak, *supra* note 7.

<sup>152</sup> § 1865(b)(2)–(3); *United States v. Flores-Rivera*, 56 F.3d 319, 326 (1st Cir. 1995) (holding that "English-only" requirement for jury service did not violate defendant's Fifth and Sixth Amendment rights); *United States v. Aponte-Suarez*, 905 F.2d 483, 492 (1st Cir. 1990) (finding that even if jury selection results in "systematic exclusion" of Puerto Rico residents, potential problems outweighed by federal interest served by use of English in U.S. court); *United States v. Benmuhar*, 658 F.2d 14, 18–20 (1st Cir. 1981) (holding that uniformity and national language interests outweighed any potential Sixth Amendment violation). The government's defense against a Sixth Amendment violation in all these cases was based on significant national language interests, *see id.*, but it should be noted that the United States does not have an official language. *See Harris v. Rivera Cruz*, 710 F. Supp. 29, 31 (D.P.R. 1989) ("In the United States, there is no official language, and if prudence and wisdom (and possibly the Constitution) prevail, there never shall be."). *See generally* Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992) (discussing "myth of linguistic homogeneity" in United States).

<sup>153</sup> *See Alvarez-González*, *supra* note 52, at 410.

<sup>154</sup> *See* John-Thor Dahlburg, *Acquittals Quash a U.S. Bid for Death Penalties in Puerto Rico*, L.A. TIMES, Aug. 2, 2003, at A24 (reporting on controversy surrounding legitimacy of federal jurisdiction in case); Elaine Cassel, *Illinois Coalition Against the Death Penalty, A Blow to the Grim Reaper; Ashcroft Loses Big in Puerto Rico* (Aug. 1, 2003) (noting that during deliberations jurors sent out question regarding federal jurisdiction over kidnapping charge), at <http://www.icadp.org/page207.html>.

jury's action effectively put a halt to the federal government's efforts to apply the death penalty to Puerto Rico, at least for the short term.<sup>155</sup>

Thus, Sixth Amendment concerns raised by Puerto Rico's cultural and linguistic differences, as well as overall concerns regarding the application of the death penalty to an island whose members lack federal representation, indicate a heightened need to defer to local interests with respect to the application of the Federal Death Penalty Act.

### B. *The Puerto Rican Constitution*

Another factor a court should consider when determining whether there is an overriding local interest against the application of a federal law is whether the Puerto Rican Constitution speaks to the issue. The Puerto Rican Constitution clearly states that the death penalty "shall not exist" on the island.<sup>156</sup> As noted earlier, the Puerto Rican Constitution was voted on by a majority of the Puerto Rican population, and, unlike state constitutions, ratified by the U.S. Congress.<sup>157</sup> Although Congress made several amendments to the Puerto Rican Constitution prior to its ratification of the document in 1952, it left the ban on the death penalty intact.<sup>158</sup>

Due to the nature of the compact creating Puerto Rico's commonwealth status, many believe that the Puerto Rican Constitution cannot be amended without the bilateral ratification of both the United States and Puerto Rico.<sup>159</sup> As one U.S. official noted:

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<sup>155</sup> Goodnough, *supra* note 7 (quoting lawyer for defendant as saying, "the federal government has been dealt a severe blow in their attempt to nationalize the death penalty"). An August 2003 report noted that, across the United States, juries had rejected the death penalty for twenty of the last twenty-one defendants that had completed trial, and thirty-eight of the last forty-three since 2000. See Death Penalty Info. Ctr., *Federal Death Penalty News and Developments*, at <http://www.deathpenaltyinfo.org/article.php?scid=29&did=854> (last visited Oct. 30, 2004).

<sup>156</sup> P.R. CONST. art. II, § 7.

<sup>157</sup> DOCUMENTS, *supra* note 2, at 223.

<sup>158</sup> See, e.g., Brief of Commonwealth, *supra* note 20, at 4–5 & n.2 (describing amendments made prior to ratification); Brief of Amici Curiae, Comisión de Derechos Civiles de Puerto Rico et al. at 8, *Acosta-Martínez v. United States*, 535 U.S. 906 (2002) (No. 01-7137) [hereinafter Brief of Comisión de Derechos Civiles] (noting that although Congress required Puerto Rico to make several changes to constitution before ratification, Puerto Rico was not required to delete prohibition of death penalty); Leibowitz, *supra* note 45, at 223 & n.19 (noting bilateral ratification process of Puerto Rican Constitution and use of term "compact" to describe new relationship).

<sup>159</sup> *United States v. Quinones*, 758 F.2d 40, 42 (1st Cir. 1985) ("Congress cannot amend the Puerto Rico constitution unilaterally."); *United States v. Acosta Martínez*, 106 F. Supp. 2d 311, 311 (D.P.R. 2000) (noting that it is "well settled point of law" that Puerto Rican Constitution cannot be uniformly amended by Congress).

A most interesting feature of the new constitution is that it was entered into in the nature of a compact between the American and Puerto Rican people. A compact . . . is far stronger than a treaty. A treaty usually can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other.<sup>160</sup>

One could argue that the ratification process, as well as the bilateral nature of the agreement, makes this binding document superior to federal law. In addition, the fact that the U.S. Congress amended and ratified the constitution created a reliance interest on the part of Puerto Ricans that their wishes, as embodied in the constitution, would be upheld. However, the courts have thus far rejected the theory that the Puerto Rican Constitution trumps federal law. The First Circuit has held, on three previous occasions, that the fact that the Puerto Rican Constitution bans wiretapping does not prohibit federal application of Title III of the Omnibus Crime Control and Safe Streets Act of 1968,<sup>161</sup> which allows wiretapping, finding that federal law preempts the Puerto Rican Constitution.<sup>162</sup>

The First Circuit in *Acosta-Martinez* relied on the same line of cases to hold that federal law preempted the abolition of the death penalty in the Puerto Rican Constitution.<sup>163</sup> However, a key distinc-

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<sup>160</sup> Press Release, United States Mission to the United Nations, Statement by Mr. Mason Sears, United States Representative in the Committee on Information from Non-Self Governing Territories 2 (Aug. 28, 1953) (on file with the *New York University Law Review*). Some argue that under the Territorial Clause, Congress could uniformly repeal or revise the Puerto Rican Constitution. See, e.g., *United States v. Sanchez*, 992 F.2d 1143, 1152–53 (11th Cir. 1993) (“Congress may unilaterally repeal the Puerto Rican Constitution . . . and replace [it] with any rules or regulations of its choice.”). Others argue that the Puerto Rican Constitution belongs to the people of Puerto Rico alone. As Chief Judge Magruder of the First Circuit put it in 1956, “the constitution of the Commonwealth is not just another Organic Act of the Congress” but rather “stands as an expression of the will of the Puerto Rican people” and can be amended unilaterally by them “without leave of the Congress.” *Figueroa v. Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956).

<sup>161</sup> Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Tit. III, § 802, 82 Stat. 197, 212 (codified as amended at 18 U.S.C. §§ 2510–2522 (2000)).

<sup>162</sup> See *Camacho v. Autoridad de Teléfonos de Puerto Rico*, 868 F.2d 482, 487–88 (1st Cir. 1989) (holding that question whether federal law applies to Puerto Rico hinges on language of law itself, not on “whether the Commonwealth . . . has enacted legal or constitutional provisions antithetical to it”); *Quinones*, 758 F.2d at 42 (holding that adoption of Puerto Rican Constitution “in no way alter[ed]” applicability of federal law to Commonwealth); *United States v. Gerena*, 649 F. Supp. 1183, 1187 (D. Conn. 1986) (holding that Omnibus Act addressed matters of more than “purely local concern,” thus preempting Puerto Rican Constitution).

<sup>163</sup> *United States v. Acosta-Martinez*, 252 F.3d 13, 20 (1st Cir. 2001), cert. denied, 535 U.S. 906 (2002).

tion between these cases and the present case is that Title III was *specifically extended* to Puerto Rico.<sup>164</sup>

As one author notes, while there is a great deal of case law regarding conflicts between state statutes and federal laws, there are “significantly fewer cases” dealing with conflicts between state constitutional provisions and federal statutes.<sup>165</sup> There is some authority for arguing that greater deference may be justified where the conflict arises from a state constitutional provision rather than a state statutory enactment.<sup>166</sup>

Historically, the Supreme Court has been extremely deferential to decisions of Puerto Rican courts regarding Puerto Rican laws.<sup>167</sup> The Supreme Court has noted that this “rigid rule of deference . . . is particularly appropriate given the unique cultural and legal history of

<sup>164</sup> *Quinones*, 758 F.2d at 41 (noting that 18 U.S.C. § 2511(1)(b)(V) (2000) “specifically makes the [Omnibus Crime Control] Act applicable to Puerto Rico”).

<sup>165</sup> See Sean M. Morton, Comment, *Death Isn't Welcome Here: Evaluating the Federal Death Penalty in the Context of a State Constitutional Objection to Capital Punishment*, 64 ALB. L. REV. 1435, 1453 (2001).

<sup>166</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991) (arguing that federal power to legislate should not completely disregard state's constitutional powers); *Sugarman v. Dougall*, 413 U.S. 634, 648 (1973) (weighing importance of state's “constitutional prerogatives”); see also Joseph T. Walsh, *The Evolving Role of State Constitutional Law in Death Penalty Application*, 59 N.Y.U. ANN. SURV. AM. L. 341, 342 (2003) (arguing that new federalism offers opportunity for state courts applying state constitutional norms to play increasingly active role in death-penalty adjudication). The concept of judicial federalism—that “state supreme courts may interpret their constitutions to give greater protection to their citizens”—seems to indicate that courts are prepared to give deference to state constitutions where they provide greater rights. See Dennis J. Braithwaite, *An Analysis of the “Divergence Factors”: A Misguided Approach to Search and Seizure Jurisprudence Under the New Jersey Constitution*, 33 RUTGERS L.J. 1, 3 (2001); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977); Robert F. Fitzpatrick, Note, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1840 (2004).

<sup>167</sup> See, e.g., *Fornaris v. Ridge & Tool*, 400 U.S. 41, 43 (1970) (arguing that local court's interpretation could be overruled only when found to be “inescapably wrong”); *Bonet v. Tex. Co.*, 308 U.S. 463, 471 (1940) (“To reverse a judgment of a Puerto Rican tribunal on such a local matter as the interpretation of an act of the local legislature . . . the error must be clear or manifest; the interpretation must be inescapably wrong; the decision must be patently erroneous.”); *Romeu v. Todd*, 206 U.S. 358, 368–70 (1907) (finding that local notice provisions trump federal jurisdictional rules); *Perez v. Fernandez*, 202 U.S. 80, 99–100 (1906) (finding federal statutory requirement of jury trials in civil cases in circuit court superseded by Puerto Rico's local civil procedures with regard to damage assessment); see also *Cordova & Simonpietri Ins. Agency Inc. v. Chase Manhattan Bank*, 649 F.2d 36, 39–42 (1st Cir. 1981) (noting that federal government's relations with Puerto Rico are bounded by “United States and Puerto Rico Constitutions”). As Arnold Leibowitz argues: “The establishment of Commonwealth alone should not be sufficient to affect the applicability of federal legislation except where the federal law contravenes the Puerto Rican Constitution. Here, I would argue, after the territorial basis for federal action has been removed, is an area reserved to Puerto Rico alone.” Leibowitz, *supra* note 45, at 234.



Puerto Rico.”<sup>168</sup> The deference traditionally paid to Puerto Rican statutes is indicative of the respect Congress accords local decision-making and interpretation. Considering that the Puerto Rican Constitution was ratified by both Puerto Rico and the U.S. Congress, it follows that it should be accorded heightened deference, especially due to the reliance interest that was created by the clause abolishing the death penalty on the island. In addition, it should be noted that criminal enforcement is an arena of states’ rights that is traditionally accorded deference. In the arena of states’ rights, for example, the Supreme Court has stated, “we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.”<sup>169</sup> Thus, the Puerto Rican Constitution is a factor that should be weighed in determining whether a fundamental local interest is implicated by the application of a federal law.

### C. *Puerto Rican Culture and Identity*

Puerto Rico’s opposition to the death penalty more closely parallels opposition in other parts of Latin America than in many U.S. states. Part of Puerto Rico’s opposition to the death penalty stems from Puerto Ricans’ association of capital punishment with the military government that ruled Puerto Rico in the years following the Spanish-American War. Over two dozen “mostly poor and illiterate” Puerto Ricans were executed under military rule before the death penalty was outlawed in 1927.<sup>170</sup> In this sense, Puerto Rican opposition stems from a fear of “Yanqui” imperialism, reflected throughout U.S.–Latin American relations.<sup>171</sup> One author notes that, as a result of Puerto Rico’s colonial relationship with the United States, there are two Puerto Rican cultures: “one for the island and another for the Puerto Ricans who live outside Puerto Rico.”<sup>172</sup>

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<sup>168</sup> *Posadas v. Tourism Co. of P.R.*, 478 U.S. 328, 339 n.6 (1986).

<sup>169</sup> *United States v. Morrison*, 529 U.S. 598, 618 (2000).

<sup>170</sup> Liptak, *supra* note 7.

<sup>171</sup> See generally THOMAS CAROTHERS, *IN THE NAME OF DEMOCRACY: U.S. POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS* (1991) (discussing U.S. policy of intervention during 1980s); PETER H. SMITH, *TALONS OF THE EAGLE: DYNAMICS OF U.S.–LATIN AMERICAN RELATIONS* (2d ed. 1996) (analyzing historical development of U.S. policy toward region and fluctuation from “gunboat diplomacy” to benevolent neglect depending on U.S. interests in region at time); Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159 (1998) (arguing that Puerto Ricans are colonized people bound together by common historical experience of U.S. imperialism).

<sup>172</sup> MALAVET, *supra* note 51, at 5. See generally ARTURO MORALES CARRIÓN, *PUERTO RICO: A POLITICAL AND CULTURAL HISTORY* (1983) (providing extensive history of Puerto Rico); EFRÉN RIVERA RAMOS, *THE LEGAL CONSTRUCTION OF IDENTITY: THE*

Unfortunately, this fear perhaps has been justified by the discrimination and prejudice that have long plagued U.S.–Puerto Rican relations.<sup>173</sup> One can witness this discrimination even within the context of the Supreme Court jurisprudence regarding the island. In *Balzac v. Porto Rico*,<sup>174</sup> Chief Justice Taft questioned whether Congress intended to “incorporate in the Union these distant ocean communities of a different origin and language from those of our continental people.”<sup>175</sup> As one author notes, “the existence of the Puerto Ricans as a cultural nation in Puerto Rico . . . show[s] the resistance and survival of the Puerto Rican culture in spite of U.S. cultural imperialism.”<sup>176</sup>

This history of discrimination, combined with the island’s colonial relationship with the United States, has heightened Puerto Rican opposition to the federal death penalty. Significantly, the federal death penalty has, if anything, been applied in a more racially discriminatory manner than state death penalties.<sup>177</sup> All but four of the first thirty-seven federal death penalty prosecutions under the Anti–Drug Abuse Act of 1988 were against people of color.<sup>178</sup> Seventy-six percent of federal death penalty cases since 1984 have involved minority defendants.<sup>179</sup> Given the history of capital punishment in Puerto Rico, and subsequent U.S.–Puerto Rican relations, it is hardly sur-

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JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (2001) (examining effect of *Insular Cases* on Puerto Rican culture and society); Sidney W. Mintz, *Puerto Rico: An Essay in the Definition of a National Culture*, in STATUS OF PUERTO RICO: SELECTED BACKGROUND STUDIES 339 (U.S.–P.R. Comm’n on the Status of P.R. ed., 1966) (assessing sociological and anthropological writings on Puerto Rico and noting “social, economic, and ideological complexity” of island culture); Ediberto Román, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1 (1998) (discussing historical roots and consequences of “anomalous status of the residents of Puerto Rico”).

<sup>173</sup> Until 1932, Puerto Rico was referred to as “Porto Rico” in statutes and case law as a result of the purposeful misspelling of the island’s name in the Treaty of Paris. See Cabranes, *supra* note 27, at 392 n.1 (1978). This misspelling did lead to congressional debate regarding whether this was disrespectful. See, e.g., 33 CONG. REC. 233 (1900). Rep. William A. Jones noted that “there does not even exist the pretext of changing the name to Americanize it, since porto is not an English but a Portuguese word.” *Id.* Congress finally changed the island’s official name to its native one in 1932 by joint resolution. S. CON. RES. 36, 72d Cong., 47 Stat. 158 (1932).

<sup>174</sup> 258 U.S. 298 (1922).

<sup>175</sup> *Id.* at 311.

<sup>176</sup> See MALAVET, *supra* note 51, at 11.

<sup>177</sup> See INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT 3, 16–17 (William A. Schabas ed., 1997) (providing breakdown of victims and defendants by race in capital punishment cases).

<sup>178</sup> *Id.* at 17.

<sup>179</sup> See Román, *supra* note 6.

prising that Puerto Ricans distrust federal application of the death penalty.

*D. Local and Federal Interests in the Application  
of the Federal Death Penalty*

Puerto Rico's status in the federal system, the Puerto Rican constitutional ban on the death penalty, and aspects of Puerto Rico's culture create a presumption under the proposed test that the FDPA should not be applied to the island. This presumption could be overcome by legislative history or other evidence indicating that Congress intended the statute to apply to Puerto Rico. However, the sparse legislative history accompanying the FDPA shows that Congress never considered the issue.<sup>180</sup>

Arguably, even the Department of Justice's own guidelines weigh against the application of the FDPA, especially under the fact pattern presented in *Acosta-Martinez*. Under the FDPA, a majority of the conduct made punishable by the death penalty is simultaneously a violation of both federal and state law.<sup>181</sup> The Department's guidelines state that in cases of concurrent jurisdiction, the federal interest in prosecution must be "more substantial" than the state or local interest in order to merit federal capital prosecution.<sup>182</sup> U.S. Attorneys are instructed to consider "any factor that reasonably bears on the relative interests" of the federal and local governments, including but not limited to the strength of the local interest in prosecution (whether due to the nature of the offense, the identity of the victim or defendant, or the investigatory work done by the local government), the degree to which the crime extended beyond the local jurisdiction, and the likelihood of effective prosecution by both local and federal authorities.<sup>183</sup>

The local U.S. Attorney's recommendation on federal capital prosecution is reviewed by a federal committee, which consults with both the U.S. Attorney and defense counsel before making its own

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<sup>180</sup> See H.R. CONF. REP. NO. 103-711 (1994), *reprinted in* 1994 U.S.C.C.A.N. 1839, 1856; H.R. CONF. REP. NO. 103-694 (1994); H.R. REP. NO. 103-324 (1993), *reprinted in* 1994 U.S.C.C.A.N. 1802.

<sup>181</sup> See Morton, *supra* note 157, at 1440.

<sup>182</sup> See U.S. DEP'T OF JUSTICE, 3 THE DEPARTMENT OF JUSTICE MANUAL § 9-10.070 (2d ed. 2003).

<sup>183</sup> *Id.* Under the Clinton Administration the guidelines took account of local opposition to the death penalty, but the changes made by the current administration do not encourage this deference. See Liptak, *supra* note 7 ("Legal experts say [the change in the guidelines] implies that parts of the country that forbid the death penalty locally are more likely to have it sought for federal crimes.").

recommendation. The final decision whether to seek the death penalty is made by the Attorney General.<sup>184</sup>

The Justice Department has been criticized recently for ignoring the recommendations of local U.S. Attorneys and promoting a more uniform application of the federal death penalty across the nation.<sup>185</sup> Attorney General Ashcroft has overruled local U.S. Attorneys in at least thirty-one instances, a number of these times in the twelve states that currently outlaw capital punishment.<sup>186</sup> Statistically, the Attorney General has sought the death penalty in almost half of the eligible cases.<sup>187</sup> As U.S. District Judge John Gleeson notes:

In a federal system that rightly accords great deference to states' prerogatives, the federalization of the death penalty should be limited to cases in which there is a heightened and demonstrable federal interest, one that justifies the imposition of a capital prosecution on communities that refuse to permit them in their own courts.<sup>188</sup>

Puerto Rico's unique situation within the federal system should require *at least* such a heightened and compelling federal interest.

Under a requirement of a "heightened" federal interest, the *Acosta-Martinez* case would never have been federally prosecuted. The district court and local officials noted that the only federal interest in this case seemed to be related to a "Memorandum of Understanding" that had been signed between local and federal offi-

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<sup>184</sup> See Rory K. Little, *The Federal Death Penalty: History and Some Thoughts About the Department of Justice's Role*, 26 FORDHAM URB. L.J. 347, 411-14 (outlining process of review and recommendation of federal capital charges).

<sup>185</sup> See William Glaberson, *Death Penalty Trial Begins in an Alleged Gang Murder*, N.Y. TIMES, Nov. 6, 2003, at B2; David Hechler, *U.S. Death Penalty in Wake of Ashcroft*, NAT'L L.J., Nov. 29, 2004, at 1; Liptak, *supra* note 7; *Steamroller Ashcroft*, ECONOMIST, May 3, 2003, at 56 ("[Attorney General Ashcroft] has repeatedly tried to bully local federal prosecutors into seeking the death penalty, despite a long tradition of local discretion in death-penalty cases."). See generally John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697 (2003) (discussing reasons to defer to expertise of local U.S. Attorneys and potential costs of seeking death penalty, such as spending scarce enforcement resources on forcing cases to trial when defendants would otherwise be willing to plead guilty).

<sup>186</sup> BRENNAN CTR. FOR JUSTICE, IT'S NOT ABOUT FEDERALISM #10: THE DEATH PENALTY (2003), available at <http://www.brennancenter.org/programs/downloads/inaf/inaf10.pdf>. Attorney General Ashcroft's Director of Public Affairs, Barbara Comstock, claims the "process is designed to ensure consistency and fairness in the application of the death penalty in all U.S. Attorney Districts throughout the country." Gina Barton, *Feds May Pull Rank on Death Penalty*, MILWAUKEE J. SENTINEL, May 27, 2003, at 1A.

<sup>187</sup> Dan Eggen, *Ashcroft Aggressively Pursues the Death Penalty*, WASH. POST, July 1, 2002, at A1.

<sup>188</sup> Gleeson, *supra* note 176, at 1716.

cials regarding federal prosecution of violent crime.<sup>189</sup> The weight given to the federal interest in this case is troubling, given the strong local interest in protecting the island's inhabitants from the death penalty. Local U.S. Attorneys who are on the ground are in the best position to evaluate the relative local and federal interests in prosecuting capital cases. This is particularly true in the context of Puerto Rico, given its cultural, linguistic, and religious differences. Therefore, even when weighing the federal interest against the local interest, which is not required by the model proposed in this Note, the application of the FDPA in *Acosta-Martinez* would be barred by the local interests at stake.

### CONCLUSION

The issues raised by cases like *Acosta-Martinez* make Puerto Ricans worry that they will have to change Puerto Rico's status in the federal system in order to preserve their cultural autonomy.<sup>190</sup> As Governor Sila Calderón noted, "This is a good example of those federal laws that apply to Puerto Rico that infringe on our culture, our laws and our customs. It should be one of the aspects that must be improved when the development of commonwealth is under way."<sup>191</sup> To many Puerto Ricans, this is yet another situation in which their

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<sup>189</sup> See *United States v. Acosta Martinez*, 106 F. Supp. 2d 311, 312 n.1 (D.P.R. 2000).

<sup>190</sup> See, e.g., Burnett & Marshall, *supra* note 16, at 20. The three major political parties in Puerto Rico—organized according to their views on the status issue—all support a strong "national" culture and some kind of change to the current status. See José Julián Álvarez-González, *Law, Language, and Statehood: The Role of English in the Great State of Puerto Rico*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 16, at 289, 291 ("Even supporters of statehood . . . argue that the Spanish language and Puerto Rican culture are not negotiable and refer to 'jíbaro statehood,' evoking the erstwhile Puerto Rican peasant."); Ángel Ricardo Oquendo, *Puerto Rican National Identity and United States Pluralism*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 16, at 315, 316–19. Were it to become a state, Puerto Rico would be the twenty-third most populous state in the United States, so its congressional representation would not be insignificant politically. See Rosenberg, *supra* note 132. For further information regarding the status debate in Puerto Rico, see generally RONALD FERNANDEZ, *THE DISENCHANTED ISLAND: PUERTO RICO AND THE UNITED STATES IN THE TWENTIETH CENTURY* (2d ed. 1996), claiming that, after decades of political turmoil, Puerto Rico essentially remains a colony of the United States; GREGORIO IGARTUA, *U.S. DEMOCRACY FOR PUERTO RICO* (1996), noting hypocrisy of the United States's advocacy of democracy abroad while denying Puerto Ricans the right to vote in presidential elections; Dorian A. Shaw, Note, *The Status of Puerto Rico Revisited: Does the Current U.S.-Puerto Rican Relationship Uphold International Law?*, 17 *FORDHAM INT'L L.J.* 1006 (1994), arguing that the establishment of Puerto Rico as a commonwealth fails to meet the requirements of a "free associated territory" as defined by the United Nations.

<sup>191</sup> See Román, *supra* note 4.

autonomy and rights are being abused.<sup>192</sup> According to the Supreme Court, Puerto Rico's relationship with the United States "has no parallel in our history."<sup>193</sup> Given that unique position, notions of democracy and representative government demand that the rights of Puerto Ricans particularly be protected.

The model proposed in this Note is based on the constitutional development of U.S.-Puerto Rican relations. This test acknowledges the Supreme Court's finding in the *Insular Cases* that Congress ultimately has the power to determine whether a statute or constitutional provision should be applied to Puerto Rico. It is Congress, with the agreement of the people of Puerto Rico, that determines how Puerto Rico is governed, what type of constitution it has in place, and what its relationship with the United States will be. Historically, however, the constitutional development of U.S.-Puerto Rican relations also has respected and recognized the legal and cultural differences between Puerto Rico and the United States. The compact Puerto Rico entered into with the United States was based on a mutuality of respect and recognized that certain laws would be "locally inapplicable."

The test proposed in this Note attempts to resolve some of the issues and inconsistencies that have arisen within the U.S.-Puerto Rican legal relationship. First, this test recognizes the democratic-process concerns raised by Puerto Rico's lack of full federal representation in all branches of government. Further, it recognizes the inconsistency and confusion that has resulted from the application of the "locally inapplicable" standard of section 9 of the PRFRA. Finally, it is important to note that this test is actually derived from and supported by the language of the agreement entered into by the United States and Puerto Rico—namely, that only laws that are not "locally inapplicable" should be applied to the island.

The first prong of the test asks whether the statute is either silent or ambiguous with respect to its application to Puerto Rico. An examination of the FDPA reveals that it is silent with respect to Puerto Rico. Thus, one must look to see if there are local factors that would make the FDPA "locally inapplicable."

The purpose of the second prong of the test is to examine the numerous considerations that differentiate Puerto Rico from the rest of the United States. When one looks at the various complexities, unique factors, and fairness considerations that are raised both by the

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<sup>192</sup> Many view this as the most problematic issue in the status debate since the cessation of U.S. Naval bombing in Vieques. For a history of the Vieques dispute, see L.L. CRIPPS, *HUMAN RIGHTS IN A UNITED STATES COLONY* 115 (1982).

<sup>193</sup> *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 594-96 (1976).

application of the federal death penalty and by U.S.–Puerto Rican relations, it becomes clear that application of the FDPA in Puerto Rico not only implicates fundamental local interests, but would result in a miscarriage of justice. Under the test, this creates a rebuttable presumption that the FDPA should not apply to the island. Finally, since there is no legislative history indicating that Congress considered whether the FDPA should apply to Puerto Rico,<sup>194</sup> the presumption stands, and courts should find that the FDPA is “locally inapplicable” under section 9 of the PRFRA.

Due to the escalating violent crime rates in Puerto Rico,<sup>195</sup> this issue will have continuing significance, both for the people of Puerto Rico and for relations between Puerto Rico and the United States. Puerto Rico has submitted the greatest number of potential death penalty cases in the federal system, and already has a high number of pending capital crime cases.<sup>196</sup>

The outcome in *Acosta-Martinez* provides further support for the necessity of this test. Popular resentment over the First Circuit’s decision speaks to Puerto Ricans’ frustration with these legal predicaments. The jury’s acquittal of the defendants in *Acosta-Martinez* is neither an ideal nor permanent resolution to the question of federal capital punishment in Puerto Rico. Further, the *Acosta-Martinez* decision and the potential for similar outcomes threaten the existing legal relationship between Puerto Rico and the United States:

If the First Circuit’s decision is allowed to stand, the Constitution, law, and conditions of Puerto Rico will be rendered irrelevant to the decision of whether a federal statute applies to Puerto Rico. This result will have a serious adverse effect on the relationship between the United States and Puerto Rico, and on the rights of the people of Puerto Rico.<sup>197</sup>

The model proposed in this Note is advantageous for a number of reasons. On one hand, it ensures that where the federal interest is compelling, Congress will make a clear statement as to the application of a federal statute to Puerto Rico. On the other hand, the test also allows Congress to defer to local interests without making a special exception for Puerto Rico. Under this test, Congress will know that where it is either silent or ambiguous, there will be a rebuttable presumption that, should local interests be compelling, the statute will be

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<sup>194</sup> See *supra* note 171 and accompanying text.

<sup>195</sup> Taina Rosa, *With the Highest Murder Rate in the U.S., Puerto Rico Needs Immediate Solutions*, CARIBBEAN BUS., Jan. 20, 2005, <http://www.puertorico-herald.org/issues2/2005/vol09n03/CBWithHiMrdr.shtml>.

<sup>196</sup> See *supra* note 12 and accompanying text.

<sup>197</sup> Brief of Comisión de Derechos Civiles, *supra* note 150, at 1.

held “locally inapplicable.” The unique position that Puerto Rico occupies within the federal system is based on the respect that the United States has extended to Puerto Rico’s cultural and legal autonomy. The model this Note proposes allows courts to incorporate this principle of mutual respect underlying U.S.–Puerto Rican relations into judicial review of the application of federal statutes to Puerto Rico.



