CHAPTER FOUR

GUAM AND THE CASE FOR FEDERAL DEFERENCE

The legal relationship between the United States territories and the federal government is contradictory and complex. It was born in large part out of colonial impulses, the vestiges of which can still be seen in circuit and Supreme Court precedent today: Not all Bill of Rights provisions apply in the U.S. territories.[1] Not all residents of U.S. territories are U.S. citizens.[2] And those who hold citizen status do so only through congressional grace, rather than constitutional right.[3]

This awkward relationship grows, in part, out of a series of much-maligned cases handed down at the very beginning of the twentieth century.[4] Collectively known as the *Insular Cases*, they held that the Constitution does not apply by its own force to every U.S. possession. Instead, it applies in full only to "incorporated" territories, or those on their way to statehood, and applies just in part to the unincorporated territories.[5] These decisions were partially based on an assessment of native peoples as members of "alien races," to whom the application of "Anglo-Saxon principles" might "for a time be impossible."[6] These troubling precedents have been deconstructed and eviscerated in the literature.[7] It is not this Chapter's task to retread that work.

Instead, this Chapter concentrates on a modest and somewhat brighter goal. Focusing on federal court deference to territorial tribunals on matters of purely local concern, this Chapter argues that the rationale for such deference logically extends to Guam and its quasi constitution.

Since the late nineteenth century, federal courts have reviewed decisions by territorial courts on matters of purely local concern for "clear or manifest error" as a matter of judicial policy.[8] A federal court may disturb them only if they are "inescapably wrong" or "patently erroneous."[9] Such deference derives from the very impulses that motivate federal courts to defer in a host of other contexts: questions of au-

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[1] *See supra* ch. III, p. 1699 n.165.

[2] *See supra* ch. III, pp. 1680–81.

[3] *See supra* ch. III, p. 1682.

[4] *See* Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 459–63 (2002).

[5] *See id.* at 461.

[6] Downes v. Bidwell, 182 U.S. 244, 287 (1901).

[7] *See, e.g.*, RECONSIDERING THE INSULAR CASES (Gerald L. Neuman & Tomiko Brown-Nagin eds., 2015); JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 40–62 (1985).

[8] Bonet v. Yabucoa Sugar Co., 306 U.S. 505, 510 (1939).

[9] Bonet v. Tex. Co. (P.R.), Inc., 308 U.S. 463, 471 (1940).

thority, expertise, and self-determination. In particular, the Supreme Court has focused on the unique background and heritage of the U.S. territories to conclude that territorial judges are better situated than federal ones to make correct decisions on matters of purely local concern.[10] In something of a break from many of the cases at the time, this understanding was originally used not to subject those territories to a less-than status, but instead to lift them up to a near-equal position with states. And that motivation seems to have grown only more prominent through the years. Thus, especially when viewed through a modern lens, this policy of judicial deference is a powerful tool for courts to empower the U.S. territories and promote their self-governance, even in the face of pejorative case law and congressional gridlock.

This approach largely jibes with the Court's treatment of states and agencies. Federal courts give states complete deference with respect to their interpretations of state statutory and constitutional law.[11] This deference has, for example, allowed states to adopt expansive understandings of their free exercise clauses — even where the state and federal free exercise rights come from identical text.[12] Agencies likewise receive deference with respect to their regulations and the organic statutes they administer.[13] In contrast to the long history of poor treatment of U.S. territories by the Supreme Court, this doctrine of deference also allows courts to empower territories.

Even so, the promise of that deference to territorial supreme court decisions has fallen short. Take Guam as a case study. Guam is governed not by a formal constitution but by an Organic Act,[14] a statute passed by Congress in 1950.[15] Guam's Organic Act functions like a constitution, though. It includes classic provisions establishing the executive, legislature, and judiciary, as well as a bill of rights for the territory.[16] Yet the Supreme Court and lower courts have denied Guam's courts deference with respect to this protoconstitution on the grounds

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[10] *See infra* section B.1, pp. 1708–10.

[11] *See, e.g.*, Thornton v. Duffy, 254 U.S. 361, 368 (1920). Some scholars might not consider this "deference" at all because federal courts lack the authority to adopt different constructions of state law. *Cf.* Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1075 (2008) (discussing the concept of "obedience" when, for example, a lower court is required to follow the "binding authority of a higher court"). However, this Chapter, as discussed in section C.1, *infra* p. 1715–16, considers this authority-based deference.

[12] *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 280–81 (Alaska 1994).

[13] *See* 2 ALEXA L. ASHWORTH ET AL., FEDERAL PROCEDURE, LAWYER'S EDITION §§ 2:389–90, 392 (2016).

[14] 48 U.S.C. §§ 1421–24b (2012).

[15] Guam v. Guerrero, 290 F.3d 1210, 1214 (9th Cir. 2002).

[16] *See* 48 U.S.C. §§ 1421a–b.

that it is federal in character and can implicate nonlocal concerns[17] — even though in other instances the Supreme Court has sent mixed messages about what it means to be a matter of purely local concern.

These rulings have prevented Guam from interpreting its own free exercise clause,[18] necessitated careful review of its standard pocket vetoes,[19] and prevented it from issuing bonds in the face of financial crisis.[20] These opinions, moreover, have failed to fully engage with the principles that justified deference to territorial courts in the first place — authority, expertise, and self-determination. Viewed in today's light — given our rejection of colonialism and promotion of individual identity — federal courts owe territorial institutions more as a matter of judicial policy. Deference is due.

This Chapter proceeds in three sections. Section A lays out the development of Guam's territorial courts. Section B explores the doctrine of deference on matters of purely local concern — both the doctrine's theoretical justifications and how courts have come to define matters of purely local concern. Section C explores core deference principles from across Supreme Court case law, and argues that such principles justify extending deference to Guam's interpretation of its Organic Act.

A. Guam's Territorial Courts

Today, Guam has a local, territorial supreme court and local courts of first instance. Three judges serve on the supreme court.[21] They are appointed by the governor, confirmed by the local legislature, and subject to retention elections every ten years.[22] Like ten states and the District of Columbia,[23] Guam lacks an intermediate appellate court.[24]

Most of the background on the development of Guam's territorial courts is outside the scope of this Chapter. But it is worth reviewing briefly to show how deference to these courts has changed over time.

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[17] *See, e.g.*, *Guerrero*, 290 F.3d at 1214; *see also* Limtiaco v. Camacho, 549 U.S. 483, 491–92 (2007) (discussing how the Organic Act's status as federal law affects judicial review).

[18] *See Guerrero*, 290 F.3d at 1216–18.

[19] *See* Gutierrez v. Pangelinan, 276 F.3d 539, 543, 547–49 (9th Cir. 2002).

[20] *See Limtiaco*, 549 U.S. at 485–86.

[21] *See Supreme Court of Guam — Justices*, UNIFIED CTS. GUAM, http://www.guamcourts.org/Justices/justices.html [https://perma.cc/NL4S-APHY].

[22] *See* CIA, *Guam*, *in* THE WORLD FACTBOOK (2017), https://www.cia.gov/library/publications/the-world-factbook/geos/gq.html [https://perma.cc/P2UQ-FLV8].

[23] *See* JOHN P. DOERNER & CHRISTINE A. MARKMAN, THE ROLE OF STATE INTERMEDIATE APPELLATE COURTS 3 & n.4 (2012).

[24] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08–655, AMERICAN SAMOA: ISSUES ASSOCIATED WITH POTENTIAL CHANGES TO THE CURRENT SYSTEM FOR ADJUDICATING MATTERS OF FEDERAL LAW 91–92 (2008) [hereinafter GAO].

The United States initially acquired Guam in 1898 from Spain following the Spanish-American War.[25] From 1898 to 1949, the U.S. Navy ran the island and staffed the courts.[26] In 1950, after demands from the Guamanian people for self-governance, Guam's Organic Act was passed.[27] That Act established Guam's legislature and empowered it to create local courts and write local laws.[28]

From the 1960s to the late 1980s, appeals in Guam were taken from the local courts of first instance to the Appellate Division — which utilized a local district court judge who could appoint two other judges from the district, with a maximum of one Guamanian judge — and in turn heard by the Ninth Circuit under a certiorari-style system.[29] During this time, the Appellate Division of the Guam District Court was given clear error deference in its determinations of local law.[30] The logic in favor of deference was simple: "local needs, customs and legal systems may differ from those with which [federal courts] are more familiar."[31] Therefore, local courts were given deference as to the construction of local law.[32]

The Ninth Circuit, sitting en banc, overturned this system of deference in 1988.[33] Because, according to the court, there was "no basis for assuming that visiting judges — even when from the nearby Northern Mariana Islands — [had] any greater familiarity with local Guam law and/or custom than do the judges of [the Ninth Circuit]," deference was not warranted.[34] Instead, Guam had to establish a wholly Guamanian appellate court to receive deference, which it did in 1996.[35] The Guam Supreme Court then received deference from the Ninth Circuit.[36]

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[25] Paul Lansing & Peter Hipolito, *Guam's Quest for Commonwealth Status*, 5 UCLA ASIAN PAC. AM. L.J. 1, 2 (1998).

[26] *See* Román & Simmons, *supra* note 4, at 493–94; Stephen L. Wasby, *Judging and Administration for Far-Off Places: Trial, Appellate, and Committee Work in the South Pacific*, 45 GOLDEN GATE U. L. REV. 193, 201 (2015).

[27] *See* Lizabeth A. McKibben, *The Political Relationship Between the United States and Pacific Islands Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam*, 31 HARV. INT'L L.J. 257, 287–88 (1990); Román & Simmons, *supra* note 4, at 493–94.

[28] Organic Act of Guam, Pub. L. No. 81-630, §§ 10–11, 22(a), 64 Stat. 384, 387–88 (1950) (codified at 48 U.S.C. §§ 1423–23a (2012)).

[29] *See, e.g.*, Haeuser v. Dep't of Law, 368 F.3d 1091, 1099 (9th Cir. 2004).

[30] *See, e.g.*, Schenck v. Guam, 609 F.2d 387, 390 (9th Cir. 1979); Gumataotao v. Guam, 322 F.2d 580, 582 (9th Cir. 1963).

[31] *Gumataotao*, 322 F.2d at 582.

[32] *See id.*

[33] *See* Guam v. Yang, 850 F.2d 507, 511 (9th Cir. 1988) (en banc), *overruled by* United States v. Keys, 133 F.3d 1282 (9th Cir. 1998) (en banc).

[34] *Id.* at 510.

[35] GAO, *supra* note 24, at 96.

[36] Haeuser v. Dep't of Law, 368 F.3d 1091, 1099 (9th Cir. 2004).

Originally the Ninth Circuit's review of the Guam Supreme Court had been set to expire fifteen years from its founding.[37] However, that review ended early, in 2004, by congressional statute.[38] The U.S. Virgin Islands followed a similar pattern even more recently, establishing its supreme court in 2004.[39] That supreme court was reviewed by the Third Circuit until 2012.[40]

Now, Guam territorial court decisions are appealable only to the U.S. Supreme Court and are "governed by the laws of the United States pertaining to the relations between the courts of the United States, including the Supreme Court of the United States, and the courts of the several States."[41] This arrangement has positioned Guam's supreme court, already a stand-in for a state supreme court, on a path of increasingly parallel footing with its state counterparts.

B. Deference on Matters of Purely Local Concern

1. The Theory in the Case Law. — Since at least 1874, the U.S. Supreme Court has deferred to the U.S. territories on matters of peculiarly local concern.[42] Originally, this doctrine was applied to the Western territories we now know as states like Montana and Utah.[43] It was applied with little theoretical discussion, even though such deference was a matter of judicial policy rather than legal obligation.[44]

Around the time of the infamous *Insular Cases*, this doctrine was also applied to territorial possessions, insular and noninsular.[45] However, the application of this doctrine to the noninsular territories — treated as lesser in the *Insular Cases* — prompted the development of a more robust, and distinct, set of theoretical justifications.

The Court found these justifications in a surprisingly progressive source: a recognition of the unique legal background and customs of

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[37] GAO, *supra* note 24, at 96.

[38] *Id.* at 97.

[39] *History of the Court*, SUP. CT. U.S. V.I., http://www.visupremecourt.org/Know_Your_Court/History_of_the_Court/index.asp [https://perma.cc/9ABM-DZGE].

[40] Kendall v. Daily News Publ'g Co., 716 F.3d 82, 86 (3d Cir. 2013).

[41] 48 U.S.C. § 1424-2 (2012).

[42] *See* Sweeney v. Lomme, 89 U.S. (22 Wall.) 208, 213 (1874).

[43] Fox v. Haarstick, 156 U.S. 674, 679 (1895) (Utah); *Sweeney*, 89 U.S. (22 Wall.) at 213 (Montana).

[44] *See, e.g.*, *Fox*, 156 U.S. at 679 ("It is true that this ruling of the Supreme Court of the Territory does not, even in a question of practice arising under the local law, preclude this court from reviewing it, as would a decision of a state Supreme Court in similar circumstances . . . ."); *Sweeney*, 89 U.S. (22 Wall.) at 213 ("Without expressing any opinion of our own on the question, we hold that as it is one which arises under their own code of practice, we should, in this conflict of authority, adopt the ruling of the Supreme Court of Montana in the consideration of it. This assignment of error is, therefore, not well taken.").

[45] *See, e.g.*, Nadal v. May, 233 U.S. 447, 454 (1914) (Puerto Rico); Phoenix Ry. Co. v. Landis, 231 U.S. 578, 579 (1913) (Arizona); Ker & Co. v. Couden, 223 U.S. 268, 279 (1912) (Philippines).

the United States' new territorial possessions,[46] and the need to encourage those territories' self-determination. In the 1923 case of *Diaz v. Gonzalez*,[47] for example, the Supreme Court confronted an appeal from the Supreme Court of Puerto Rico on a question of nullifying the sale of land by then-minors under the territory's civil code.[48] Puerto Rico, a former Spanish possession, had a long civil law heritage implicated in the case. In deferring to the territorial court and upholding its decision, Justice Holmes wrote:

> When we contemplate such a [civil law] system from the outside it seems like a wall of stone, every part even with all the others, except so far as our own local education may lead us to see subordinations to which we are accustomed. But to one brought up within it, varying emphasis, tacit assumptions, unwritten practices, a thousand influences gained only from life, may give to the different parts wholly new values that logic and grammar never could have got from the books.[49]

According to Justice Holmes, the Court's "appellate jurisdiction [was] not given for the purpose of remodelling the Spanish[-]American law according to common law conceptions."[50] In other words, domestic definition of law remained of paramount importance, and institutional expertise was likewise critical. Therefore, according to the Court, it was obligated to give "deference . . . to the understanding of the local courts upon matters of purely local concern."[51]

These themes were echoed in later opinions. In *Bonet v. Yabucoa Sugar Co.*,[52] for example, the Supreme Court of Puerto Rico had based its tax law decision on Anglo-American separation of powers principles, rather than on Puerto Rico's civil law heritage. The U.S. Supreme Court nevertheless afforded deference.[53] In making its decision, the Court looked not just to Puerto Rico's past, but also to its present and future. In examining the legislative acts that established Puerto Rico home rule, the Court noted that "[b]oth enactments mani-

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[46] *See* Waialua Agric. Co. v. Christian, 305 U.S. 91, 107–08 (1938) ("Isolated until the day of electrical communication and aerial transportation from continuous contact with other peoples, and inhabited by diverse stocks of Oceanica, Asia, Europe and America, it developed, as an independent kingdom, a jurisprudence adapted to its needs. . . . This judicial tradition gives present substance to the rule of this Court that deference will be paid the understanding of territorial courts on matters of local concern.").

[47] 261 U.S. 102 (1923).

[48] *See id.* at 103.

[49] *Id.* at 106.

[50] *Id.*

[51] *Id.* at 105.

[52] 306 U.S. 505 (1939). This case is also known as *Sancho v. Yabucoa Sugar Co.*

[53] *See id.* at 510 ("The judgments of the Puerto Rican courts in this case are not unsupported by logic or reason. They embody a recognition of our constitutional division of powers between the legislative and judicial branches of government."); *see also* Recent Case, Sancho v. Tex. Co. (P.R.), Inc., *308 U.S. 463 (1940)*, 53 HARV. L. REV. 1048, 1049 (1940).

fest a congressional purpose to preserve — consistently with our system of government — the then existing governmental practices."[54] Further, in defense of deference, the Court highlighted the value of the "[o]rderly development of the government of Puerto Rico as an integral part of our governmental system," which would be "well served by a careful and consistent adherence to the legislative and judicial policy of deferring to the local procedure and tribunals of the Island."[55] Put differently, institutions need breathing room to develop and grow, and providing that breathing room often requires refraining from overruling or superseding their authority at every turn. Such understandings have likewise motivated the extension of clear error deference to territories modeled in the Anglo-American style, such as the U.S. Virgin Islands and Guam.[56]

It is worth acknowledging a few counterarguments. First, one might argue that Justice Holmes, who penned *Diaz*, had a reputation for aggressive deference, and that his reasoning in *Diaz* thus should be given limited weight. But *Bonet* was authored by archformalist and textualist Justice Black,[57] and *Bonet* was perhaps even more generous than *Diaz* in its insistence that Puerto Rico's courts be allowed to develop independently.

Second, the reasoning advanced in *Diaz* and *Bonet* can be understood in an exoticist and patronizing way. As noted above, these opinions were issued in the decades following the *Insular Cases*. There is a way of reading these two cases, and *Diaz* in particular, as arising from the same font of ethnocentric superiority that motivated *Downes v. Bidwell*.[58] In *Downes*, the Supreme Court held that the U.S. Constitution did not apply in the same manner to the territories as it did to the states because "'Anglo-Saxon principles' of government and justice would be virtually impossible to apply to 'alien races' differing in 'religion, custom[], . . . and modes of thought.'"[59] *Diaz*, too, turned to the unique civil law modes of thought in Puerto Rico to justify its decision.[60] Under that frame, then, not only are federal courts in a poor position relative to territorial ones to understand issues of purely

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[54] *Bonet*, 306 U.S. at 509.

[55] *Id.* at 510.

[56] *See, e.g.*, Pichardo v. V.I. Comm'r of Labor, 613 F.3d 87, 94–97 (3d Cir. 2010) (Virgin Islands); Haeuser v. Dep't of Law, 368 F.3d 1091, 1098–99 (9th Cir. 2004) (Guam).

[57] *See generally* Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25 (1994).

[58] 182 U.S. 244 (1901).

[59] Anthony (T.J.) F. Quan, *"Respeta I Taotao Tano": The Recognition and Establishment of the Self-Determination and Sovereign Rights of the Indigenous Chamorros of Guam Under International, Federal, and Local Law*, 3 ASIAN-PAC. L. & POL'Y J., no. 1, 2002, at 56, 67 (quoting *Downes*, 182 U.S. at 287).

[60] *See* Diaz v. Gonzalez, 261 U.S. 102, 106 (1923).

territorial concern, as was the case in *Diaz*, but territorial courts — given their lack of familiarity with "Anglo-Saxon principles" — are also in a poor position to interpret laws passed by Congress.

This Chapter, however, operates from a more optimistic understanding of *Diaz* and *Bonet*. First, *Diaz* and *Bonet*, standing alone, warrant optimism. They used historical and cultural differences to justify treating local courts with respect, rather than to justify subjugation. Further, *Diaz* and *Bonet* have shown themselves amenable to progressive readings by the courts.[61] This Chapter takes these lessons about *Diaz* and *Bonet*, and bolsters them with the broader academic thought and case law on deference.[62]

2. Defining Purely Local Concern. — The vast majority of cases involving matters of purely local concern involve laws passed by the local legislature or local common law. For example, the Puerto Rico cases from the first half of the twentieth century involved interpretations of local territorial tax law[63] and the civil code pertaining to the sale of real property.[64] More recent cases have involved interpretations of local employment law in the U.S. Virgin Islands and Guam, for example.[65] This doctrine of deference largely resembles a promise fulfilled when it comes to such matters of local law. Courts repeatedly defer even though they would have preferred a different outcome. In fact, federal courts now perform an Erie guess — making their best prediction about how a territory's "highest court would rule" on an undecided issue.[66]

Nevertheless, Supreme Court case law on matters of "purely local concern" is murky. Perhaps the clearest discussion comes from *Pernell v. Southall Realty*.[67] The case involved the local Washington, D.C. appellate court's interpretation of whether Congress's District of Columbia Court Reform and Criminal Procedure Act preserved the

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[61] In *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863 (2016), for example, Justice Breyer, in dissent, cited *Diaz* as part of his argument that Public Law 600 might have granted the Commonwealth of Puerto Rico autonomy with respect to local criminal law, *id.* at 1884 (Breyer, J., dissenting). In *Tracy v. Baker*, 282 F.2d 431 (9th Cir. 1960), the Ninth Circuit upheld the Supreme Court of Hawaii's assessment of when an appeal was properly before it and cited to the powerful admonition in *Bonet* that the "[o]rderly development of [territorial government] . . . is well served by a careful and consistent adherence to the legislative and judicial policy of defer[ence]," *id.* at 434 (quoting Bonet v. Yabucoa Sugar Co., 306 U.S. 505, 510 (1939)).

[62] *See infra* section C, pp. 1714-1727.

[63] *Bonet*, 306 U.S. at 510.

[64] *Diaz*, 261 U.S. at 103–04 (1923).

[65] *See* Defoe v. Phillip, 702 F.3d 735, 737 (3d Cir. 2012); Pichardo v. V.I. Comm'r of Labor, 613 F.3d 87, 89 (3d Cir. 2010); Haeuser v. Dep't of Law, 368 F.3d 1091, 1093 (9th Cir. 2004).

[66] *See, e.g.*, Edwards v. HOVENSA, LLC, 497 F.3d 355, 360–61 (3d Cir. 2007) (quoting Mosley v. Wilson, 102 F.3d 85, 92 (3d Cir. 1996)) (stating this rule).

[67] 416 U.S. 363 (1974).

right to a jury trial in cases involving the recovery of real property.[68] As the Supreme Court described it, the courts have long been hesitant to review "matters of peculiarly local concern, absent a constitutional claim or a problem of *general federal law of nationwide application*."[69] "[T]he same deference" was owed to "interpretation[s] of Acts of Congress directed toward the local jurisdiction" as was afforded to matters of, for example, local common law.[70]

On this understanding, organic acts and territorial constitutions should be covered. After all, what is less a law of "nationwide application" and more "directed toward the local jurisdiction" than the law that directly creates a territory's governance structure? Guam's Organic Act provides for the election of its governor and creation of the legislature and courts.[71] It defines the scope of these three branches' authorities, obligating the governor to create public health services[72] and an adequate public education system,[73] and authorizing the legislature to create a public housing authority.[74]

However, the import of *Pernell*'s guidance for territorial courts has not always been obvious. For one, that case involved Washington, D.C., a district, and not the U.S. territories. For another, language in cases that preceded *Pernell* suggested that federal law should be treated differently. In *De Castro v. Board of Commissioners*,[75] for example, the Court explained that in cases "[w]here the Constitution or statutes of the United States [are] *not* involved, great deference must be paid to local decisions."[76] Where federal law was involved, and the Supreme Court of the Philippines interpreted that law as affording less protection than the Federal Bill of Rights, the Supreme Court overruled those determinations.[77] The Court declined to defer to the D.C. Court of Appeals's interpretation of a local law, which had provided less protection than that guaranteed by the Double Jeopardy Clause.[78]

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[68] *Id.* at 365–66.

[69] *Id.* at 366 (emphasis added).

[70] *Id.* at 367. In prior opinions, the Court has held that the administration of criminal law is a peculiarly local concern. *See* Fisher v. United States, 328 U.S. 463, 476 (1946). In a number of other circumstances, the Supreme Court has also defined matters of peculiarly local concern to include the provision of foodstuffs and the construction of public streets, among other issues. *See, e.g.*, Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 144 (1963) (foodstuffs); Atchison, Topeka & Santa Fe Ry. Co. v. Pub. Utils. Comm'n, 346 U.S. 346, 355 (1953) (public streets).

[71] 48 U.S.C. § 1421–1424c (2012).

[72] *Id.* § 1421g(a).

[73] *Id.* § 1421g(b).

[74] *Id.* § 1425a.

[75] 322 U.S. 451 (1944).

[76] *Id.* at 457–58 (emphasis added).

[77] *See* Weems v. United States, 217 U.S. 349, 367 (1910); Kepner v. United States, 195 U.S. 100, 123–24 (1904).

[78] *See* Whalen v. United States, 445 U.S. 684, 687–90 (1980).

The Supreme Court has addressed deference on matters of purely local concern only occasionally since. Most recently, the Supreme Court addressed such deference, albeit briefly, in the 2007 case of *Limtiaco v. Camacho*.[79] In *Limtiaco*, the Guam Supreme Court had ruled that the Governor's issuance of bonds would not violate the Guam Organic Act's debt limitation, but the U.S. Supreme Court disagreed.[80] Citing to *Pernell*, the Court acknowledged that it owed deference to territorial courts over matters of purely local concern.[81] But it declined to defer to the Guam Supreme Court because, according to the Court, the issuance of bonds implicated external concerns as well: "The debt-limitation provision protects both Guamanians and the United States from the potential consequences of territorial insolvency."[82] But the Court did not stop there, also noting that it was "bound to construe" the Organic Act, as a federal statute, by its terms.[83] In other words, the Court seemed to consider relevant, though not necessarily dispositive, both the federal character of the statute and the nature of the interests at stake. However, it is notable that the Court chose to cite *Pernell*, rather than another opinion specifically regarding the U.S. territories, such as *De Castro*. This suggests that some of *Pernell*'s broader solicitude for local interpretation might live on.

Lower courts have drawn an even harder line than *Limtiaco*, however. They have repeatedly declined to give deference to the Guam Supreme Court regarding its interpretations of Guam's Organic Act because it was passed by Congress and thus is not local law for deference purposes.[84] But the line between territorial and federal statutes is blurrier than one might think. On the one hand, all territorial law is, in some sense, of a federal character: the Guamanian legislature, for example, cannot pass laws by virtue of its independent sovereign authority, but rather under a congressional delegation of the right to do so. On the other hand, organic acts, popularly enacted constitutions, and certainly local territorial laws do not resemble traditional federal enactments. Organic acts can look, function, and feel like constitutions. In Guam's case, for example, the Organic Act contains a bill of rights and structures Guam's government.

Moreover, these kinds of documents sometimes do trigger deference. The First Circuit, for example, deferred to the Puerto Rico supreme court's interpretation of Puerto Rico's popularly approved con-

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[79] 549 U.S. 483 (2007).
[80] *Id.* at 486, 490–92.
[81] *Id.* at 491 (citing Pernell v. Southall Realty, 416 U.S. 363, 366 (1974)).
[82] *Id.* at 491–92.
[83] *Id.* at 492.
[84] *See, e.g.*, Gutierrez v. Pangelinan, 276 F.3d 539, 546–47 (9th Cir. 2002).

stitution, viewing it as distinct from an organic act.[85] It did so despite the fact that Puerto Rico's authority to pass its own constitution came from Congress's enactment of Public Law 600, and despite the fact that Congress retained veto power over the constitution prior to its adoption, making meaningful changes to the document before giving its final approval.[86]

Organic acts and even the Constitution of the Commonwealth of Puerto Rico — fundamentally documents of self-determination — thus have a complicated relationship to deference. And *Pernell* demonstrates that the definition of purely local concern need not, on principle, exclude Guam's Organic Act. The fundamental flaw of *Limtiaco* and many federal appellate court opinions is that they fail to fully engage with the questions that *Diaz* and *Bonet* ask: Which court has authority to decide the case? Which court, as a descriptive matter of expertise, would be better at deciding the case? And which court, as a normative matter of legitimacy and self-governance, should decide the case? Doing so, as section C shows, leads to the conclusion that the Guam Supreme Court should receive deference with respect to its understanding of its constitution.

C. Reasons to Defer

Roughly defined, deference entails "a decisionmaker following a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently."[87] As a concept, it cuts across legal doctrine. It arises in constitutional law,[88] administrative law,[89] international law,[90] and civil procedure, to name a few. Courts defer to the legislature,[91] the President,[92] agencies,[93] various government institutions (including universities,[94] prison authorities,[95] and the military[96]), and even to one another.[97]

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[85] Figueroa v. Puerto Rico, 232 F.2d 615, 620 (1st Cir. 1956).

[86] *Id.*; *see also* Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1868–69 (2016).

[87] *See* Horwitz, *supra* note 11, at 1072.

[88] *See generally* Eric Berger, *In Search of a Theory of Deference: The Eighth Amendment, Democratic Pedigree, and Constitutional Decision Making*, 88 WASH. U. L. REV. 1 (2010); Horwitz, *supra* note 11.

[89] *See* Horwitz, *supra* note 11, at 1072–73.

[90] *See generally* DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS (Lukasz Gruszczynski & Wouter Werner eds., 2014).

[91] *See* Horwitz, *supra* note 11, at 1097.

[92] *See id.*

[93] *See id.* at 1086.

[94] *See* Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 495–97 (2005).

[95] Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 450–55 (1999); Daniel J. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 479–84 (1996).

Separately, the literature in each of these contexts is well developed. Yet across these diverse institutions and bodies of case law, there is no one unifying theory of deference.[98] There are, however, several common justifications. One is authority-based deference. A court will defer to another actor because the court's legal authority to do otherwise is limited.[99] Another is expertise. A court will defer to another actor because that actor knows more about the issue, and is more likely to answer the question correctly, than the court.[100] A third is democratic legitimacy and its cousin self-determination. A court will defer to another actor because that actor is "more closely tied to the mechanisms of political accountability that legitimize and constrain the policy choices they make" than the court.[101]

These concepts of deference are reflected in *Diaz* and *Bonet*, the opinions discussed in section B.2. In *Bonet*, the Court acknowledged that it was deferring as a matter of policy and not due to a formal lack of authority, but it nevertheless drew on Congress's intent to preserve Puerto Rico's existing government practices to justify its position.[102] In *Diaz*, the Court specifically discussed how Puerto Rico's courts were better suited to understand matters of civil law.[103] And both opinions drew on ideas of self-determination.[104] The following discussion takes each justification in turn and explores how it applies to Guam in particular.

1. Authority: Who Can Decide? — Before a court can even defer in a technical sense, it must first have the authority to decide the matter.[105] Federal courts are bound by a state's highest court's construction of state common law, statutory law, and constitutional law.[106] This principle can be traced to the 1798 case Calder v. Bull.[107] And subsequent cases have made it clear that federal courts are bound

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[96] *See* Chemerinsky, *supra* note 95, at 443–49.

[97] *See* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 652–53 (2015).

[98] *See, e.g.*, Horwitz, *supra* note 11, at 1066 ("What is surprising is how underexamined deference is as a transsubstantive tool of constitutional law." (emphasis omitted)).

[99] *See id.* at 1079–82.

[100] *See id.* at 1085–86.

[101] *Id.* at 1083.

[102] *See* Bonet v. Yabucoa Sugar Co., 306 U.S. 505, 510–11 (1939).

[103] *See* Diaz v. Gonzalez, 261 U.S. 102, 105–06 (1923).

[104] *See Bonet*, 306 U.S. at 510; *Diaz*, 261 U.S. at 106.

[105] *See* Horwitz, *supra* note 11, at 1075–76 (referring to this concept by distinguishing "deference" from "obedience," *id.* at 1075).

[106] 2A BARBARA J. VAN ARSDALE ET AL., FEDERAL PROCEDURE, LAWYER'S EDITION § 3:822 (2016); *see also* Leffingwell v. Warren, 67 U.S. 599, 603 (1862) ("The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text.").

[107] 3 U.S. (3 Dall.) 386, 392 (1798).

by state constructions because federal courts lack the legal authority to review them.[108]

This conception of authority does not apply to the Guam Supreme Court's interpretations of its Organic Act because Guam, unlike a state, is not an independent, quasi-sovereign entity.[109] However, a looser understanding of authority should still apply.

Since the seminal decision *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[110] federal courts have given agencies deference to their interpretations of the acts they apply — also known as their organic acts.[111] If a particular provision of the statute is ambiguous, "the court does not simply impose its own construction on the statute."[112] Instead, the court will defer to the agency if that agency's interpretation of the statute is reasonable.[113] This rule is subject to a few exceptions. For example, while a formal adjudication (which involves notice, opportunity for an oral evidentiary hearing, and attorney representation[114]) is generally entitled to *Chevron* deference, an informal adjudication (which can include almost no process) is afforded deference only on a case-by-case basis.[115]

One of the leading rationales for such deference is delegation: "[T]he presumption that Congress delegates interpretive authority to administrative agencies when it commits regulatory statutes to agency administration."[116] Under this theory, agency decisions "necessarily require[] the formulation of policy and the making of rules to fill any gap left . . . by Congress."[117] Therefore, while the courts have retained authority to decide matters of law, they view Congress as having cabined that authority and directed them to defer.

The same can be said for the many decisions by the Guam legislature, executive, and courts under Guam's Organic Act. In making decisions about how to conduct their daily business, the branches of

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108 *See* Thornton v. Duffy, 254 U.S. 361, 366 (1920) ("The various acts of legislation of the State were sustained by the courts of the State and hence their validity under the constitution of the State is removed from the controversy, and our inquiry is confined to the effect upon them of the Constitution of the United States."); *see also* Fox v. Haarstick, 156 U.S. 674, 679 (1895).

109 *See* Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 867–68 (1990) (discussing how territorial governments "derive all their powers from federal law," *id.* at 867).

110 467 U.S. 837 (1984).

111 *See id.* at 843.

112 *Id.*

113 *See id.* at 845.

114 *See* 13 ROBERT A. LONG, JR., BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 139:17 (4th ed. 2016).

115 *See* United States v. Mead Corp., 533 U.S. 218, 231 (2001) (declining to afford *Chevron* deference in the absence of "any . . . circumstances reasonably suggesting that Congress ever" anticipated such deference).

116 Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1284 (2008).

117 *Id.* (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974)).

Guam's government must constantly answer legal questions that Guam's Organic Act left open. In fact, confusion about the political branches' legal authority prompted the Guamanian legislature to enact section 4104 of the Guam Code. Section 4104 provides opportunities for the Guam Supreme Court to pass on the legality of actions by both the legislature and executive, as well as to interpret "any law, federal *or* local, lying within the jurisdiction of the courts of Guam."[118]

While agencies are very different from territorial governments, the analogy is not as tenuous as one might think. According to the U.S. Supreme Court in *United States v. Wheeler*,[119] territorial governments are effectively "instrumentalities" of the federal government.[120] So too are federal agencies.[121] Some case law has even referred to territorial governments as "agenc[ies]" directly.[122] Interestingly, Guam's Organic Act does not explicitly give jurisdiction to the Guam Supreme Court to interpret the Organic Act. However, it certainly leaves the door open for Guam to do so,[123] and the Guam courts do.

This lack of explicit delegation should be no obstacle to deference in the agency context. In *Chevron*, the Supreme Court embraced the idea of a presumption of implicit delegation by Congress to agencies. As the Court wrote: "Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit."[124] With explicit delegations, there is usually a provision in the agency's organic act (or other law that the agency is charged with executing) that directs the agency to promulgate regulations implementing a specific section of that act.[125] Implicit delegations, by contrast, cover a broader swath of authority — any ambiguity in the agency's organic act, with

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[118] 7 GUAM CODE ANN. § 4104 (2008); *see also In re* Mina' Trentai Dos Na Liheslaturan Guåhan, 2014 Guam 15 (judging "whether the Legislature's enactment of Chapters 50 and 51 is a valid exercise of its powers set forth in the Organic Act . . . [and] whether the Governor may . . . withdraw payments from the Trust Fund," *id.* ¶ 17). *But see* 7 GUAM CODE ANN. § 4104 ("The declaratory judgments may be issued only where it is a matter of great public interest and the normal process of law would cause undue delay.").

[119] 435 U.S. 313 (1978).

[120] *Id.* at 320–21 (quoting Reynolds v. Sims, 377 U.S. 533, 575 (1964)); *see also* Lawson, *supra* note 109, at 864.

[121] *See* Lawson, *supra* note 109, at 864.

[122] *See Wheeler*, 435 U.S. at 321 (quoting Domenech v. Nat'l City Bank, 294 U.S. 199, 204 (1935)).

[123] *See* 7 GUAM CODE ANN. § 4104 1985 cmt. ("Several states permit the governor, and Massachusetts permits the Governor, Legislature and Council, to seek opinions from their respective Supreme Courts on matters respecting the duties of the Governor and Legislature. It has been this drafter's experience that such a grant of jurisdiction would have solved many serious questions which have arisen, but which have lacked a forum for decision.").

[124] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

[125] *See, e.g.*, United States v. Morton, 467 U.S. 822, 834 (1984); Schweiker v. Gray Panthers, 453 U.S. 34, 43 (1981).

some notable exceptions.[126] And in administrative law, this delegation is presumed rather than determined by a case-by-case assessment of the statute's legislative history.[127]

A skeptic might try to confine this presumed delegation to the agency context. As the argument goes, Congress has evidenced a sort of metaintent to delegate general interpretive authority to agencies as a unique class, and thus the presumption of delegation should not extend beyond them. However, congressional action does not back up this argument. Congress has a frequent "practice of enacting specific delegations of interpretative authority[,] suggest[ing] that Congress understands that no such general authority exists."[128] In fact, the language of the Administrative Procedure Act contradicts the implicit delegation presumption entirely: it instructs courts, not agencies, to "decide all relevant questions of law."[129] Nevertheless, in *Chevron* the Court allowed the EPA to define a specific term in the Clean Air Act in a new and flexible way.[130] In fact, *Chevron* deference has allowed agencies to weigh in on the very scope of their authority under the laws they implement.[131] In other words, congressional intent alone does not furnish a reason to deny to territories the deference already extended to agencies.

Guam's Organic Act can be, and to some degree already has been, understood as operating as this kind of implicit delegation. For example, even when federal courts have declined to give clear error deference to Guam, they have recognized the relevance of Congress's decision to delegate authority to Guam's institutions. In *Gutierrez v. Pangelinan*,[132] the Ninth Circuit reviewed an interpretation of Guam's Organic Act de novo, but "consider[ed] fully the Guam Supreme Court's explication of legal issues of unique concern to Guam."[133] "[T]he congressional promise of independent institutions of government," the court noted, "would be an empty one if we did not recognize the importance of the Guam Supreme Court's role in shaping the interpretation and application of the Organic Act."[134] Since *Gutierrez*, this commitment to independent institutions has only grown stronger, as Congress has removed Ninth Circuit review authority and directed

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126 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000).

127 *See* Cass R. Sunstein, *Beyond* Marbury*: The Executive's Power to Say What the Law Is*, 115 YALE L.J. 2580, 2589–90 (2006).

128 Criddle, *supra* note 116, at 1285 (quoting Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 995 (1992)).

129 5 U.S.C. § 706 (2012).

130 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984)..

131 *See* Okla. Nat. Gas Co. v. FERC, 28 F.3d 1281, 1284 (D.C. Cir. 1994).

132 276 F.3d 539 (9th Cir. 2002).

133 *Id.* at 546–47.

134 *Id.* at 547.

the U.S. Supreme Court to treat Guam territorial courts like state ones.[135]

The Court's precedent on implicit delegation demonstrates that such delegations can be subtle, and potentially rendered broader than what Congress might have anticipated in the moment of passing legislation. The promise of independent Guamanian institutions means little if the Guam Supreme Court's decisions regarding those institutions' authority can be cast aside by any federal court that prefers a different outcome.

2. Expertise and Institutional Competency: Who Is Better at Deciding? — Another core justification for deference is expertise. In constitutional contexts, courts defer to military authorities on issues involving "restrictions on free speech, freedom of religion, and equal protection" because of the "judiciary's perceived lack of competence in the complexities of military affairs."[136] The same proficiency rationale underpins deference to administrators of prisons and higher education institutions.[137]

Expertise is also a classic justification for deference to agencies. This rationale emerged squarely in *Skidmore v. Swift & Co.*[138] The Department of Labor (DOL), according to *Skidmore*, had access to information that the typical federal court did not, and its interpretations were based on "specialized experience."[139] While the Court found it inappropriate to give *binding* deference to decisions by DOL, it concluded that persuasive deference might be warranted depending on "the thoroughness evident in [the agency's] consideration," among other things.[140] Importantly, the Court did not base deference on a view that the agency was an expert in construing federal statutes generally. Instead the Court afforded deference because of the agency's experience in the particular issue area at play.

Local territorial judges are experts in their own area. U.S. territories have heritages and legal histories that give voice to values outsid-

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[135] 48 U.S.C. § 1424-2 (2012).

[136] Richard T. McCarty, Note, Winter v. NRDC*: The Navy, Submarines, Active Sonar, and Whales — An Analysis of the Ninth Circuit Review and the Roberts Court Extension of the Military Deference Doctrine*, 47 HOUS. L. REV. 489, 507–08 (2010); *see also* John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000). Other considerations include "separation of powers between the political branches and the judiciary" and "the existence of the military as a 'separate community' with its own unique culture, laws, traditions, and norms." McCarty, *supra*, at 508.

[137] *See* Chemerinsky, *supra* note 95, at 450–51 (prisons); Horwitz, *supra* note 11, at 1088–89 (higher education).

[138] 323 U.S. 134 (1944).

[139] *Id.* at 139.

[140] *Id.* at 140.

ers cannot fully understand,[141] as the Supreme Court acknowledged in *Diaz*. The Guam Organic Act contains a bill of rights. And the explication of the values found in any bill of rights — territorial, state, or federal — is invariably bound up with the sorts of judgments for which a judge's Guamanian background is invaluable.[142] Individual religious freedom rights are a classic example. Guam's Organic Act also establishes the structure and limits of its political branches. An astute understanding of Guam's political and economic environment is likewise critical to the informed adjudication of these disputes.

(a) Religion. — One of the most difficult and divisive issues in modern Supreme Court jurisprudence is how to balance the dual interests of separating government and religion,[143] and nevertheless allowing the free exercise of religion by individual citizens. Supreme Court Establishment Clause doctrine, for example, asks whether a particular symbol on public property or prayer at the beginning of a government activity appears to the objective observer to be an endorsement of religion. Justices come out differently on these issues, and even define their "observer" differently. Justice Kagan, dissenting in *Town of Greece v. Galloway*,[144] seemed to define her reasonable observer (or at least the best lens through which to assess whether an "endorsement" had occurred) as a member of a minority religion listening to a religious prayer.[145] Justice Kennedy, by contrast, presumed that the reasonable observer is one who is informed about the historical importance of certain religious practices.[146] Other Justices have rejected this reasonable-observer test outright, instead asking whether the viewer or listener is subject to coercion.[147]

These judgments (about whether the test is met and which test to use in the first place) are value laden and can depend substantially on

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[141] Two of the three Justices on the Guam Supreme Court were born on the island. *See Hon. F. Philip Carbullido*, UNIFIED COURTS OF GUAM, http://www.guamcourts.org/Justices/carbullido.html [https://perma.cc/PR3Q-NZUW]; *Hon. Robert J. Torres, Jr.*, UNIFIED COURTS OF GUAM, http://www.guamcourts.org/Justices/torres.html [https://perma.cc/R4Q5-EE86]. The third has lived in Guam since 1977. *See Hon. Katherine A. Maraman*, UNIFIED COURTS OF GUAM, http://www.guamcourts.org/Justices/kam.html [https://perma.cc/SG9N-9MK7].

[142] "Constitutional discourse is . . . an effort to articulate those values that stand behind a rule of law — equality, liberty, and due process — and, in part, an effort to understand the institutional structure of a polity . . . ." Paul W. Kahn, Commentary, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1160 (1993). The articulation of equality, for example, is impossible "without drawing on a wealth of experiences, arguments, and values that range across local, national, and even international communities." *Id.* at 1161.

[143] *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

[144] 134 S. Ct. 1811 (2014).

[145] *See id.* at 1842–45 (Kagan, J., dissenting).

[146] *Id.* at 1825 (plurality opinion).

[147] *See id.* at 1837 (Thomas, J., concurring).

context.[148] Take a few simple examples: Whether a member of a minority religion will feel alienated by a particular display depends on the religious makeup of the community in which it is displayed, as well as how that minority religion has been treated in the past. Additionally, whether coercion is defined as anything less than full "legal" coercion will depend on similar factors. And whether courts should expect a reasonable observer to understand the historical significance of a religious display will depend on the symbol's use over time.

Free Exercise Clause cases also ask highly subjective questions about what constitutes a burden on religion, and about the level of scrutiny that should be applied to those burdens. In 1990, the Supreme Court decided *Employment Division v. Smith*.[149] *Smith* held that a law of general applicability can constitutionally burden an individual's exercise of religion as long as the law is rationally related to a legitimate government end.[150] It effectively overruled the strict scrutiny standard announced in *Sherbert v. Verner*,[151] which required a compelling state interest to prevent someone from exercising their sincere religious belief.[152] *Smith*'s holding prompted immediate backlash, and some state courts have interpreted their own constitutions to afford *Sherbert*-level protection.

In coming to these conclusions, state courts have drawn on numerous sources of law, including the text of their bills of rights, the historical background of their state, and broader public policy concerns.[153] For example, when embracing strict scrutiny in 1990, the Minnesota Supreme Court looked to the religious intolerance endured by early settlers of the state, among other things.[154] Washington's supreme court adopted strict scrutiny in 1992 based on its tradition of protecting minority free exercise rights against the tyranny of the majority.[155] And New York's highest court balanced a host of factors in adopting heightened scrutiny in 2006, including the court's desire to defer to the legislature and its preference for efficient government.[156]

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148 These types of judgments contain both doctrinal and factual elements. One way of thinking about them is the "value-based facts" framing. *See* William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878, 897–98 (2013); *see also* DAVID L. FAIGMAN, CONSTITUTIONAL FICTIONS: A UNIFIED THEORY OF CONSTITUTIONAL FACTS 46–56 (2008) (discussing a similar concept of "doctrinal facts").

149 494 U.S. 872 (1990).

150 *Id.* at 885.

151 374 U.S. 398 (1963).

152 *Smith*, 494 U.S. at 876–85.

153 *See* Michael D. Currie, Note, *Scrutiny Mutiny: Why the Iowa Supreme Court Should Reject* Employment Division v. Smith *and Adopt a Strict Scrutiny Standard for Free-Exercise Claims Arising Under the Iowa Constitution*, 99 IOWA L. REV. 1363, 1378 (2014).

154 *See* State v. Hershberger, 462 N.W.2d 393, 398 (Minn. 1990).

155 *See* First Covenant Church v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992).

156 Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 467 (N.Y. 2006).

In spite of this case law,[157] in *Guam v. Guerrero*,[158] the Ninth Circuit denied Guam the opportunity to interpret its own constitution in a robust and distinct way. Refusing to defer to the Guam Supreme Court's interpretation of "federal" law,[159] the panel held that Congress merely intended to incorporate parts of the U.S. Constitution's Bill of Rights when passing Guam's Organic Act.[160] The fact that Guam's Bill of Rights explicitly incorporated the First Amendment to Guam in one section — creating, the respondent argued, a floor above which other provisions could raise higher protections — did not justify interpreting its separate inclusion of a free exercise clause in another section as an independent guarantee of free exercise.[161] While the door is arguably open for different interpretations of some elements of Guam's constitution,[162] *Guerrero* makes clear that Guam's supreme court is not entitled to deference under existing precedent.

This opinion is difficult to swallow because of Guam's unique religious background. Guam has centuries of distinct Catholic heritage, and that heritage has been woven into the identity of the native population, the Chamorros (a people who receive distinct preference under Guam's Organic Statute).[163] Today, eighty-five percent of Guam's residents are Roman Catholic.[164] But that faith is also a product of evangelism by Spanish padres, complicating its legacy.[165] It is simply difficult for an outsider to appreciate in a comprehensive way the consequences and burdens of restricting the exercise of that faith, or limiting its involvement in the public sphere.

(b) Governance. — Smart judicial decisionmaking requires an understanding and consideration of the practical context and consequences of opinions, especially when resolving cases that implicate core governance and related public issues. When adjudicating difficult matters like what constitutes a pocket veto or whether bonds can be issued, an appreciation for current challenges and the politics of the moment — something judges hundreds of miles away are unlikely to fully grasp — is critical.

In *Gutierrez v. Pangelinan*,[166] the Ninth Circuit sided with the Guam Supreme Court, affirming its view that the Governor's failure

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157 Notably, *Guam v. Guerrero* preceded *Catholic Charities*.

158 290 F.3d 1210 (9th Cir. 2002).

159 *See id.* at 1213–14.

160 *Id.* at 1216–17.

161 *See id.*

162 *See* People v. Moses, 2016 Guam 17 ¶ 21.

163 *See* Vicente M. Diaz, *Simply Chamorro: Telling Tales of Demise and Survival in Guam*, 6 CONTEMP. PAC. 29, 48–49 (1994).

164 CIA, *supra* note 22.

165 *See* Diaz, *supra* note 163, at 47–49.

166 276 F.3d 539 (9th Cir. 2002).

to act during legislative adjournment constituted a pocket veto.[167] In so ruling, the Guam Supreme Court was forced to wade into a sticky legal issue and determine whether the bill had been vetoed or ratified.[168] The Ninth Circuit sided with the Guam Supreme Court but refused to give deference.[169] Thus the Ninth Circuit could well, at some point in the future, substitute its view for the Guam Supreme Court's on another salient political issue.

Gutierrez and other decisions like it are political minefields, and if the courts are not savvy, their opinions could exacerbate political conflict and prompt backlash. Recent Supreme Court case law involving interbranch conflict supports this assessment. In *National Labor Relations Board v. Noel Canning*,[170] for example, the Court considered whether President Obama's recess appointments while the Senate was holding pro forma sessions could pass constitutional muster.[171] The Court drew on historical practice to reject the President's appointments.[172] However, in so ruling, the Court failed to fully consider the modern state of congressional gridlock and the innovative nature of the President's approach as a means of restoring, rather than undermining, separation of powers.[173] Professor Gillian Metzger, a scholar of constitutional and administrative law, criticized this failed reasoning as potentially exacerbating one of the very issues that pushed the President to take the contested step in the first place: congressional gridlock.[174] Since *Noel Canning*, congressional norms have further eroded: the filibuster has been eliminated for all but Supreme Court appointments,[175] while the Supreme Court's ninth seat has sat empty for over a year.[176] When courts fail to engage with current political realities, they can end up making things worse, as the Supreme Court may have with *Noel Canning*.

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167 *See id.* at 549.

168 *Id.* at 544.

169 *Id.* at 546.

170 134 S. Ct. 2550 (2014).

171 *Id.* at 2556–57.

172 *Id.* at 2559–60, 2578.

173 *See* Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607, 1617–19 (2015).

174 *See id.* at 1636–37.

175 *See, e.g.*, Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/do65cfe8-52b6-11e3-9feo-fd2ca728e67c_story.html [https://perma.cc/7RQU-HE7D].

176 *See, e.g.*, Mark Sherman, *Supreme Court in Holding Pattern, Awaiting Ninth Justice*, ASSOCIATED PRESS (Oct. 1, 2016, 2:47 PM), http://bigstory.ap.org/article/1434263f8c2e4758a5e63eoe4f7oeb31/supreme-court-holding-pattern-awaiting-ninth-justice [https://perma.cc/UV43-M3H7].

In *Limtiaco v. Camacho*,[177] the Court considered whether to give deference to a decision by the Guam Supreme Court on an even more salient issue: Guam's debt crisis. While the policy merits behind the initial plan to issue debt are debatable, it's worth reflecting on the fact that the Supreme Court struck down an important effort by Guam's government to address the issue. In so doing, the Court justified its failure to give deference by highlighting, in a sentence, the "consequences" that both the United States and Guam would face in a situation of "territorial insolvency."[178] But this reasoning is faulty. It completely ignores the fact that companies in the United States face the consequences of Guam local law (matters of peculiarly local concern) all the time. Moreover, the consequences of a debt crisis inevitably fall on the local population at a magnitude and with a profoundness that far outstrips any effect it has on the fifty states.

As a point of comparison, Puerto Rico's debt crisis has been dramatically exacerbated by a recent Supreme Court decision that invalidated the island's plan to restructure its obligations.[179] The case turned on national bankruptcy law and thus deference would not have been appropriate. And, true, the impact of the Puerto Rican debt crisis has been felt within the United States. But the crisis has been a boon for at least some in the fifty states,[180] while the political and human cost of the crisis has devastated the people of Puerto Rico.[181] Supreme Court Justices, who will never feel the financial pinch of that decision, seem poorly situated to consider and resolve it — especially relative to those judges who can see the effects of their decisions daily.

The line between policy, politics, and law has been carefully, and rightly, guarded by the Court. But while the law is not politics or policy, it is properly informed and shaped by them. In the immortal words of Justice Holmes: "The life of the law has not been logic: it has been experience. . . . The law embodies the story of a nation's development . . . and it cannot be dealt with as if it contained only the axi-

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177 549 U.S. 483 (2007).

178 *Id.* at 491–92 ("The debt-limitation provision protects both Guamanians and the United States from the potential consequences of territorial insolvency.").

179 *See* Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1942 (2016); *cf. Limtiaco*, 549 U.S. at 495 (Souter, J., concurring in part and dissenting in part) ("The statute itself makes clear that what Congress meant to provide was a practical guarantee against crushing debt on the shoulders of future generations, and insolvency with the inevitable call for a bailout by Congress.").

180 *See, e.g.*, Rupert Neate, *Puerto Rico Woos US Investors with Huge Tax Breaks as Locals Fund Debt Crisis*, THE GUARDIAN (Feb. 14, 2016, 8:38 AM), https://www.theguardian.com/world/2016/feb/14/puerto-rico-woos-us-investors-with-huge-tax-breaks-as-locals-fund-debt-crisis [https://perma.cc/7V2Z-UDY2].

181 *See, e.g.*, Luis Trelles & Michel Martin, *Severe Budget Cuts Loom as Puerto Rico's Debt Crisis Continues*, NPR (Dec. 17, 2016, 5:02 PM), http://www.npr.org/2016/12/17/505996778/severe-budget-cuts-loom-as-puerto-ricos-debt-crisis-continues [https://perma.cc/2XYH-5VJX].

oms and corollaries of a book of mathematics."[182] Not only is Guam's supreme court likely to be better acquainted with Guam's Organic Act compared to the average Ninth Circuit judge or Supreme Court Justice, but the Guam Supreme Court is also institutionally better suited than federal courts to leverage the experience to which Justice Holmes refers.[183] This too is a good reason for deference.

3. Accountability and Self-Determination: Who Should Decide? — Another core reason that courts defer to the assessments of other institutions is democratic legitimacy. Some decisions, for example, are simply thought to be better left to the political branches than to judges. And some decisions are thought to be especially problematic for unelected and unaccountable judges to make.

These rationales play out in a variety of contexts. First, take the review of factfinding by the legislature. Case law admonishes courts to defer to congressional factfinding[184] rather than impose their own judgments about the correct policy.[185] To be sure, the application of this deference is inconsistent at best.[186] But it is grounded in ideas about institutional legitimacy. Robust review can remove decisions about policy from the rightful hands of those elected by the people — who ought to be determining how the people are governed as a general matter — and place that authority in the hands of judges who have no such mandate.[187] Second, in the agency context, deference to agency decisionmaking is often justified on the grounds that while agency heads are not as directly accountable as legislators, they are at least arguably more accountable than federal judges.[188] Agency heads usually change with each administration, and thus are more likely to represent the public will than a random cross section of the federal bench.

The self-determination principles articulated in *Diaz* and *Bonet* are slightly different than those in legislative or agency cases. They have

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[182] OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

[183] One should not worry too much, moreover, that these judges have strong incentives to make purely political decisions. They face reelection only every ten years. The longest-serving judge on the Guam Supreme Court has been there since 2000, *see Hon. F. Philip Carbullido*, *supra* note 141, and the shortest-serving judge has been there since 2008, *see Hon. Katherine A. Maraman*, *supra* note 141.

[184] *See* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997).

[185] *Id.* at 212.

[186] *See* Note, *Judicial Review of Congressional Factfinding*, 122 HARV. L. REV. 767, 769–72 (2008).

[187] *See Turner Broad.*, 520 U.S. at 195–96.

[188] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984) ("While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . . . [F]ederal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do."); *see also* Criddle, *supra* note 116, at 1288–89; Bradley Lipton, Note, *Accountability, Deference, and the* Skidmore *Doctrine*, 119 YALE L.J. 2096, 2098–100 (2010).

more of a federalism flavor to them — or even a sovereignty- or autonomy-based flavor. By contrast, deference to the legislature, and to a lesser degree to agencies, is often animated by separation of powers and responsiveness concerns.[189]

Nevertheless, these conceptions are all grounded in the same fundamental recognition: Robust federal court review (or limited deference) inhibits the ability of the institutions subject to review to make their own choices. Enhanced deference (or more limited review) empowers those reviewed institutions to develop independently.

Under either conception, the Guam Supreme Court does better than federal courts. Guam's supreme court justices are appointed by the governor, who is elected by the people of Guam.[190] And those justices are subject to retention elections, again by the Guamanian people.[191] Meanwhile, federal judges are appointed by the President,[192] whom the Guamanian people cannot vote for while they are on the island.[193] And those judges have life tenure.[194] Guam's justices, in short, are far more accountable to the people of Guam than are federal district or circuit court judges or U.S. Supreme Court Justices.

A rejoinder to this argument is that it focuses on the wrong "public" or "people." Congress passed the Guam Organic Act, so the question is actually the courts' relative connections to the fifty-state voting public. But this argument requires an embrace of a fundamentally colonialist perspective — that Americans in the fifty states deserve more of a say in the governance of Guam than do the Guamanian people.

This type of colonialist thinking is contrary to the modern American psyche and its view of the United States as a noncolonial power.[195] At least when it comes to the Guam Supreme Court's as-

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189 *See* Note, *supra* note 186, at 767–68.

190 *See* CIA, *supra* note 22.

191 *Id.*

192 U.S. CONST. art. II, § 2, cl. 2.

193 *See* Quan, *supra* note 59, at 71.

194 U.S. CONST. art. III, § 1.

195 *See* Román & Simmons, *supra* note 4, at 440. Some of the actions that the Guam Supreme Court took are arguably acts of self-determination under international law principles. *See* Elizabeth Myers, Note, *International Law in United States Courts: Why the Ninth Circuit Should Have Considered Self-Determination When Deciding* Guam v. Guerrero, 37 U.C. DAVIS L. REV. 1359, 1370–74 & n.124 (2004). And while self-determination is not typically effected through judicial deference, at least one author has argued that it should be with respect to Guam. *See id.* at 1381–82. Other even clearer opportunities for self-determination may be coming down the line, such as a controversial referendum on Guam's political status. *See Guam to Seek Vote on Its Political Status This Year*, RADIO N.Z. (Apr. 2, 2016, 6:26 PM), http://www.radionz.co.nz/international/pacific-news/300507/guam-to-seek-vote-on-its-political-status-this-year [https://perma.cc/8WSQ-TMWT]; Shawn Raymundo, *Hagåtña Residents Discuss Decolonization Efforts*, PAC. DAILY NEWS (Sept. 5, 2016, 10:30 PM), http://www.guampdn.com/story/news/2016/09/05/hagt-residents-discuss-decolonization-efforts/89878252 [https://perma.cc/TNG3-5RNF].

sessment of its own Organic Act, federal courts should extend deference.

D. Conclusion

"[I]t is a constitution we are expounding."[196] Chief Justice Marshall's famed, somewhat cryptic sentiment captures the long-held view that a constitution is special.[197] It embodies the "fundamental values" of the polity and sets up the means by which the people govern themselves.[198] Constitutions reflect the unique histories, geographies, and cultures of the peoples that created them, and should be understood and interpreted based on this unique heritage.

By failing to afford the Guam Supreme Court deference with respect to its interpretations of its Organic Act, the federal courts have elevated form over substance, authority over expertise, and federal control over self-determination. Such an outcome runs contrary to the promise of deference on matters of local concern, and contrary to the deference principles that crisscross modern Supreme Court jurisprudence. Future courts should rectify this error.

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[196] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis omitted).

[197] *See, e.g.*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 814 (1992).

[198] *Id.* at 814–15.