Deference, Adrift

JEFFREY T. FASTOW*

For more than a century, the federal courts have improvised their way through the overseas territories—sometimes treating them as states, sometimes as colonies, and often as something in between. This Note argues that this uncertainty is not merely historical but structural. Territorial courts, grounded under Article IV rather than Article III, require a distinct mode of judicial review: one bounded by political-question restraint and informed by administrative deference, rather than by analogy to state sovereignty. In particular, when territorial courts interpret their own organic acts or territorial statutes, such disputes should be understood as political questions textually committed to Congress under the Territory Clause and lacking judicially manageable standards. And even when courts believe review is appropriate, judges should afford territorial interpretations Skidmore*-style respect—measured by expertise, consistency, and reasoned judgment—much as they once did to agency interpretations of delegated authority. The result is an account of Article IV-modulated review that preserves* Marbury*'s core commitments, while insulating the territories from the ad hoc interventions that have long characterized America's law of expansionism.*

---

* Editor-in-Chief, Colum. J.L. & Soc. Probs., 2025–2026. J.D. Candidate 2026, Columbia Law School. The author thanks his Note advisor, Professor Christina Ponsa-Kraus, for her generous feedback, Anthony Ciolli, James Campbell, and the *Columbia Journal of Law & Social Problems* staff for their exceptional editorial work. Any remaining errors are the author's.

CONTENTS

INTRODUCTION

The federal courts have never quite known what to do with the U.S. territories.[1] They are not domestic, yet they are not foreign.[2] They fall within the sovereign jurisdiction of the United States, but outside the tidy architecture of Article III.[3] Since the late 19th century, courts have improvised—through equivocation as much as reasoning—sometimes treating territorial governments as states, other times as colonies, and at moments as something in between.[4] The result is a jurisprudence of hesitation, an empire of law still waiting for a law of empire.

---

1. *See, e.g.*, 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, 7 (Christina Duffy Burnett & Burke Marshall eds., 2001) (describing the judicial improvisation and lack of coherence in the Supreme Court's territorial jurisprudence).

2. *See* Balzac v. Porto Rico, 258 U.S. 298, 304 (1922) (holding that Puerto Rico is foreign to the United States in a domestic sense); Downes v. Bidwell, 182 U.S. 244, 341–42 (1901) (White, J., concurring) (introducing the doctrine of territorial incorporation, whereby territories are "foreign to the United States in a domestic sense" but not fully part of the Union).

3. *See* Nguyen v. United States, 539 U.S. 69, 72–73 (2003) (noting that the Ninth Circuit panel included an Article IV territorial judge and explaining that territorial courts are "not . . . Article III court[s] but . . . Article IV territorial court[s]"); Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828) (Marshall, C.J.) (holding that territorial courts "are not constitutional courts . . . in which the judicial power conferred by the Constitution on the general government can be deposited").

4. *See* Puerto Rico v. Sanchez Valle, 579 U.S. 59, 76 (2016) (holding that Puerto Rico's power to prosecute derives from Congress, not from original sovereignty); Examining Bd. of

That uneasy status still reverberates in live disputes. In *Moylan v. Guerrero* (2023), Guam's highest court—acting on the governor's request for a declaratory ruling—held that the territory's 1990 total-abortion ban, long enjoined under *Roe*,[5] had been impliedly repealed by later local enactments.[6] Reading Guam's federal Organic Act alongside its own statutes, the court found the ban defunct.[7] When Attorney General Douglas Moylan petitioned the Supreme Court after *Dobbs*[8] to resurrect the law, the Court denied certiorari, leaving intact Guam's ruling—and its quiet assertion of interpretive autonomy.[9]

Press coverage cast *Moylan*[10] as a post-*Dobbs* skirmish over abortion rights.[11] But beneath that surface ran a deeper institutional question: who has the last word on Guam's law?[12] In the incorporated states, the answer is clear—courts possess final authority over their constitutions.[13] Do territorial courts enjoy the same authority over their organic acts and statutes? Or must their

---

Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 597 (1976) (treating Puerto Rico like a state for purposes of equal protection); *Nguyen*, 539 U.S. at 75 (invalidating a decision issued by a territorial judge sitting by designation on an Article III panel); Madsen v. Kinsella, 343 U.S. 341, 346–47 (1952) (treating a military government in occupied territory as an arm of U.S. sovereignty).

5. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (recognizing a constitutional right of privacy encompassing a woman's decision whether or not to terminate her pregnancy).

6. *See generally In re* Leon Guerrero, 2023 Guam 11 ¶ 3 (Guam Oct. 31, 2023), *cert. denied sub nom.* Moylan v. Guerrero, 145 S.Ct. 136 (2024).

7. *See id.*; *see also* 48 U.S.C. § 1424(a)(1) (outlining the jurisdiction of the Guam Supreme Court).

8. *See* Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022) (holding that the Constitution does not confer a right to abortion and overruling *Roe* and *Casey*).

9. *Guerrero*, 2023 Guam at ¶ 7. The Ninth Circuit soon after dismissed as moot the AG's separate appeal to dissolve the old federal injunction.

10. *See, e.g.*, Kalvis Golde, *Guam Governor, Attorney General Face Off Over Decades-Old Abortion Ban*, SCOTUSBLOG (May 15, 2024), https://www.scotusblog.com/2024/05/guam-governor-attorney-general-face-off-over-decades-old-abortion-ban/ [https://perma.cc/6VD2-GL5T].

11. *See, e.g.*, *U.S. Supreme Declines to Hear Appeal from Guam Supreme Court Ruling in Abortion Case*, ACLU (Oct. 14, 2024), https://www.aclu.org/press-releases/u-s-supreme-declines-to-hear-appeal-from-guam-supreme-court-ruling-in-abortion-case [https://perma.cc/N3ST-54PW].

12. Territorial courts are not courts of federal jurisdiction. *See* Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828) (holding that territorial courts are legislative courts established under Congress's Article IV powers, not Article III courts).

13. *See, e.g.*, People v. Adriatico, 2024 Guam 7, ¶¶ 2–4, 25–27 (Guam Dec. 13, 2024) (holding that Guam's Organic Act Bill of Rights is not interpreted "in lockstep" with federal doctrine and that the Guam Supreme Court, as the court of last resort, may depart from Ninth Circuit precedent when construing Organic Act rights); Balboni v. Ranger Am. of the V.I., Inc., 2019 VI 17, ¶¶ 10–12, 61 (V.I. 2019), *cert. denied*, No. 19-304 (U.S. Dec. 9, 2019) (similar, holding the Virgin Islands Bill of Rights has independent meaning and may be construed by the USVI Supreme Court apart from federal interpretations).

rulings remain—unlike state interpretations of state constitutions—perpetually subject to federal revision?[14]

The question is not parochial. Territorial governments, after all, perform the work of states: they administer criminal justice, regulate economies, and shape the daily social order for millions of residents.[15] Whether territorial courts have final say over their own laws or governing statutes determines who has power over land rights in American Samoa,[16] taxation policies in Puerto Rico,[17] and economic development in Guam.[18] These are not arcane questions of jurisdiction but contests over political and economic self-determination.

Anticipating renewed Supreme Court interest in territorial status,[19] this Note advances a two-pronged framework for Article III deference to territorial courts. First, it argues that traditional doctrines of Article III justiciability—specifically, the Political Question Doctrine (PQD)—preclude Article III courts from

14. *See, e.g.*, Limtiaco v. Camacho, 549 U.S. 483, 492 (2007) (emphasizing that the Organic Act is a federal statute, while not foreclosing local high courts' independent interpretive authority over local-law questions).

15. *See infra* Part III.C.

16. Land rights in American Samoa depend on territorial courts' ability to uphold communal land ownership laws rooted in fa'a Samoa (the Samoan way of life), which restrict land ownership to individuals of Samoan ancestry. *See generally* Craddick v. Territorial Registrar, 1 Am. Samoa 2d 10, 12 (Am. Sam. App. Div. 1980) (holding that American Samoa's government has a compelling interest in preserving the lands of American Samoa for Samoans); *see also* Wabol v. Villacrusis, 958 F.2d 1450, 1462 (9th Cir. 1990) (noting that applying U.S. constitutional restrictions to American Samoa's land laws "would be both impractical and anomalous").

17. Puerto Rico's economic governance has been constrained by federal oversight, particularly through the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), which placed the island's financial decisions under a federally appointed board. 48 U.S.C. §§ 2101–2241 (2016). Puerto Rican courts have sought to assert local control over fiscal policy but have been repeatedly overruled by federal courts. *See generally* Peaje Investments LLC v. García-Padilla, 845 F.3d 505 (1st Cir. 2017) (reaffirming federal supremacy in enforcing PROMESA's fiscal restrictions).

18. In Guam v. United States, the Supreme Court reinforced federal control over environmental cleanup disputes, limiting Guam's ability to regulate key infrastructure projects. 593 U.S. 310 (2021).

19. There is a growing trend of territorial sovereignty disputes reaching the circuit courts, underscoring the increasing prominence of such issues. *See, e.g.*, Ernest Scheyder, *Indigenous Group Takes Fight Against Rio Tinto Arizona Copper Mine To U.S. Supreme Court*, REUTERS (Sep. 11, 2024), https://www.reuters.com/legal/indigenous-group-asks-us-supreme-court-block-rio-tintos-arizona-copper-project-2024-09-11 [https://perma.cc/G3QJ-ZUNP] (describing Apache Stronghold's pending appeal to prevent the destruction of sacred indigenous land); Nate Raymond, *U.S. Supreme Court Rejects Utah's Challenge to Federal Land Control*, REUTERS (Jan. 14, 2025), https://www.reuters.com/legal/government/us-supreme-court-rejects-utah-challenge-federal-land-control-2025-01-13 [https://perma.cc/4L84-AGVU] (reporting on Utah's failed attempt to challenge federal control over 18.5 million acres of public land).

reviewing territorial court rulings on territorial statutes and organic acts.[20] Second, even absent that jurisdictional bar, Article III courts should extend a form of administrative-law deference to territorial rulings on local law.[21] The aim is not to equate territories with states, but to explore an analogy with federal agencies—instrumentalities of federal governance whose expertise warrants respect. Treating the territories as formal instrumentalities of federal policy is a more modest proposal than a whole-cloth push toward full independence or statehood. But it offers one path forward that helps insulate territorial courts from unequal federal court treatment.

This framework does not categorically exclude all territorial laws from federal oversight; instead, it structures the analysis to distinguish when federal courts should defer and when they should intervene. In doing so, it seeks to place the territories firmly within the constitutional structure—as components of the federal system rather than, in Chief Justice Fuller's words, "disembodied shade[s], in an intermediate state of ambiguous existence for an indefinite period."[22]

Part I recounts the shifting "law of the territories," tracing the uneven evolution of federal judicial review. Part II contends that, under the PQD, territorial court rulings concerning their own organic acts should be nonjusticiable by federal courts. Part III reinforces this framework of territorial judicial insulation by arguing that territories are doctrinally analogous to federal administrative agencies and, therefore, deserve a systematic appraisal of judicial deference. In its two-pronged attack on federal court interference with the territorial courts, this Note rejects the doctrinal patchwork characterizing the past century of

---

20. In other words, to adjudicate issues that are explicitly (i.e., constitutionally) delegated to a coordinate branch is to render an opinion *advisory* in "its most obnoxious form"—that is, to violate the separation of powers. Chicago & S. Air Lines v. Waterman S. S. Corp., 333 U.S. 103, 113 (1948). Note, however, that if a coordinate branch is acting ultra vires (that is, outside of their textually demonstrated power), the Court has ruled that the case or controversy is prima facie justiciable. *See generally* Powell v. McCormack, 395 U.S. 486 (1969) (holding that the House acted beyond its Constitutional text).

21. Note that in the wake of Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024), federal courts are more likely to afford deference to administrative agencies only when the court finds that the "single best meaning" of the agency's organic act explicitly authorizes the agency to exercise such discretion. Under the prior *Chevron* regime, permissible constructions of governing statutes were generally granted deference by federal courts. *Id.* at 379–80.

22. Downes v. Bidwell, 182 U.S. 244, 372 (1901).

territorial law and instead outlines a principled approach to territorial autonomy.[23]

I. TERRITORIAL AUTONOMY AFTER THE *INSULAR CASES* AND ARTICLE III REVIEWING POWER

A. THE TRADITIONAL DEBATE: THE *INSULAR CASES* AND SEMI-INCORPORATION

Today, the United States' overseas territories consist of Puerto Rico, Guam, the U.S. Virgin Islands, the Northern Mariana Islands, and American Samoa.[24] The legal relationship between these territories and the federal government is often-inscrutable and largely unsettled.[25] This is due, in large part, to the *Insular Cases*—a series of opinions issued at the height of the "imperialist" period in U.S. history, starting at the turn of the twentieth century.[26] These cases collectively held that the former Spanish colonies annexed by the United States in 1898—Puerto Rico, the Philippines, and Guam—"belong[ed] to the United States, but [were] not a part of the United States."[27] The conventional account of this line of doctrine holds that while the "whole" Constitution applies within the United States (i.e., the states, D.C., and the "incorporated" territories), only its "fundamental limits" apply to the overseas, or "unincorporated," territories.[28]

---

23. *See generally id.* (plurality opinion distinguishing incorporated from unincorporated territories and rejecting full constitutional application in the latter, inaugurating a doctrinally unstable and uneven framework for territorial governance); Boumediene v. Bush, 553 U.S. 723 (2008) (extending the Suspension Clause to Guantánamo Bay and emphasizing functional, case-by-case analysis of constitutional reach); Limtiaco v. Camacho, 549 U.S. 483 (2007) (interpreting Guam's debt ceiling in a manner that departed from prior federal executive guidance, illustrating the uncertain interpretive authority of local versus federal actors in territorial governance); 130 HARV. L. REV. 1704: *Guam and the Case for Federal Deference* [hereinafter *Guam and the Case for Federal Deference*] (surveying divergent approaches to federal judicial deference toward territorial courts and legislation, and documenting the doctrinal incoherence that has emerged from inconsistent treatment of the territories as quasi-sovereign entities); Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 B.U. L. REV. 907 (1998) (arguing that formalist constitutional reasoning has failed to account for the sui generis status of the territories, leading to a fragmented and contradictory legal regime).

24. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO/HRD-91-18, U.S. INSULAR AREAS: APPLICABILITY OF RELEVANT PROVISIONS OF THE U.S. CONSTITUTION 43–52 (1991).

25. *See supra* note 19 and accompanying text.

26. *See supra* note 1.

27. *Downes*, 182 U.S. at 287.

28. *See* Downes v. Bidwell, 182 U.S. 244, 268 (1901) (holding that only "fundamental limitations" of the Constitution apply in unincorporated territories but failing to define the

B. BEYOND INCORPORATION: JUDICIAL FEDERALISM AND ARTICLE III REVIEW

1. *Traditional Article III Review of Territorial Court Rulings*

The bulk of legal commentary on the *Insular Cases* (and the overseas territories in general) has focused on the substantive right-based controversies springing from this model of semi-incorporation.[29] Less attention, however, has been paid to the role of the *Insular Cases* in establishing the judiciary's place in this dizzying firmament. The debate, in other words, is as much institutional as it is substantive: not simply which rights travel to the territories, but which courts possess final interpretive authority. Answering that question requires returning to first principles about Article III jurisdiction and the status of territorial organic acts as federal law. From there, the contrast with the state-federal model of judicial federalism—and its historical departures in the territories—comes into focus.

Article III of the Constitution vests the "judicial power of the United States" in the federal courts, and gives those courts jurisdiction to exercise their judicial power in cases involving "laws of the United States."[30] Territorial organic acts are federal

---

scope of this category). Over time, courts have inconsistently applied the fundamental rights doctrine, sometimes treating fundamental rights as synonymous with those protected by the Due Process Clause, *see* Boumediene v. Bush, 553 U.S. 723, 758 (2008) (stating that at least some constitutional protections apply to territories and Guantanamo Bay, but declining to provide a clear framework). Other times, courts rely on a more flexible, case-by-case determination. *Compare* Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922) (holding that the Sixth Amendment right to a jury trial does not apply in Puerto Rico), *with* Torres v. Puerto Rico, 442 U.S. 465, 474 (1979) (applying the Fourth Amendment to Puerto Rico and rejecting the argument that only "fundamental" rights apply). This distinction between incorporated and unincorporated territories is an arbitrary legal fiction which justifies indefinite colonial governance and allows the United States to retain overseas possessions while sidestepping the constitutional commitments required by full incorporation. *See* Christina Duffy Ponsa-Kraus, *Political Wine in a Judicial Bottle: Justice Sotomayor's Surprising Concurrence in* Aurelius, 130 YALE L.J. F. 101, 109–12 (2020).

29. Traditional discourse and scant law school curricula surrounding the overseas territories and the *Insular Cases* has chiefly revolved around the question of Constitutional incorporation (what Maggie Blackhawk and James Campbell have artfully referred to as the "law of the territories"). For select writing on this subject, see Maggie Blackhawk, *Foreword: The Constitution of American Colonialism*, 137 HARV. L. REV. 1, 6–7 (2023); James Campbell, Note, *Island Judges*, 129 YALE L.J. 1888, 1903–04 (2020).

30. U.S. CONST. art. III, §§ 1–2; *see* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 818 (1824) (interpreting Article III to confirm that federal courts have jurisdiction over cases arising under federal law).

statutes, passed by Congress, and published in the U.S. Code.[31] Because such acts are creatures of federal law, controversies turning on their interpretation presumptively present federal questions within the judicial power of Article III courts.[32] Contrast this presumptive federal court jurisdiction over territories with the relationship between federal and state courts: federal courts generally do not have independent jurisdiction to review state courts' interpretations of their own state's common law, statutory law, and constitutional law.[33] Despite recent Supreme Court cases selectively analogizing the evolution of territorial courts to Article III courts,[34] the current model of judicial federalism delineating the relationship between state and federal courts remains exclusively a feature of the incorporated states.[35]

Disparate governmental treatment toward territorial courts, meanwhile, is deeply rooted in our nation's history. Even among the original territories, Congress exercised its plenary power to create bespoke forms of judiciaries—most notably in the Northwest Territory's court system.[36] At the time, in fact, the

---

31. *See, e.g.*, 48 U.S.C. § 1541 (the organic act for the Virgin Islands).

32. 28 U.S.C. § 1331 (conferring original jurisdiction on federal district courts for all civil actions "arising under the Constitution, laws, or treaties of the United States").

33. Federal courts generally lack authority to review state courts' interpretations of state law—whether common law, statutory, or constitutional—because such questions fall outside the scope of Article III "federal question" jurisdiction and are not reviewable even by the U.S. Supreme Court unless they implicate a federal issue. *See, e.g.*, Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 632–33 (1875) (holding that the Supreme Court lacks jurisdiction to review a judgment of a state court based exclusively on the construction of the constitution and laws of the state); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) (holding that in diversity cases, federal courts must apply state substantive law, including state courts' interpretations of it). Even when a case is properly before the Supreme Court on a federal question, the Court will not disturb a state court judgment that rests on "adequate and independent state grounds." *See* Michigan v. Long, 463 U.S. 1032, 1041–42 (1983) (emphasizing that this principle is based, in part, on "the limitations of [Article III] jurisdiction"). This principle extends to state constitutional provisions as well; although they may resemble federal guarantees, they are a matter of state law and thus insulated from federal review absent a true federal conflict. *See, e.g.*, Minnesota v. Nat'l Tea Co., 309 U.S. 551, 557 (1940) (holding that the construction of the state statute by the highest court of the state is typically binding upon the Supreme Court).

34. *See* Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 590 U.S. 448 (2020).

35. *See, e.g.*, James T. Campbell, Aurelius*'s Article III Revisionism: Reimagining Judicial Engagement with the* Insular Cases *and "The Law of the Territories,"* 131 YALE L.J. 2542, 2573 (2022) ("In the wake of the *Insular Cases*, the fabric of American territorial courts has increasingly mimicked the structures of constitutional federalism at the surface, but without the same structural guarantees and without any immediate prospect of accession to political rights.").

36. U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]"). For further discussion of the creation of the judiciary of

Northwest Territory's courts enjoyed even *more* independence from federal oversight than comparable state courts.[37] When Congress established a territorial court system via the Northwest Ordinance, it declined to pass legislation that explicitly granted the Supreme Court jurisdiction to review final judgments of the Northwest Territory's highest courts.[38] Territorial courts, therefore, retained *greater* power to enforce local, non-federal laws and customs than state courts at the time; residents of the Territory, in causes of action implicating "local laws," were effectively unable "to escape the reach of the territorial court system by commencing an action in federal court."[39] This "antifederalist" judiciary in the Territory stood in contrast to the traditional appellate pathways in the states.[40]

Upon the U.S. government's decision to begin overseas conquest and annexation, however, Congress was faced with the decision of whether to replicate analogous judicial systems in the unincorporated territories through each organic act.[41] In Puerto Rico, for example, Congress created an independent judiciary through the Foraker Act and later provided for direct review in the First Circuit.[42] In contrast, American Samoa remains the only inhabited U.S. territory without either a federal district court or a congressionally established mechanism for routine federal review; federal cases arising there must be heard in the District of

---

the Northwest Territory, see Gregory Ablavsky, *Administrative Constitutionalism and the Northwest Ordinance*, 167 U. PA. L. REV. 1631 (2019).

37. *See* Campbell, *supra* note 29, at 1903–04 (discussing how Congress did not establish federal courts in the Northwest Territory).

38. *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 710 (2004) ("The local nature of the territorial docket . . . fueled the perception that Article III courts had no proper business in the territories."); *see also* Ablavsky, *supra* note 36, at 1631; *see also* Clarke v. Bazadone, 5 U.S. (1 Cranch) 212, 214 (1803) (ruling that the Supreme Court could not take a case from the Northwest Territory because an "act of congress had not authorized an appeal or writ of error").

39. Anthony M. Ciolli, *Judicial Antifederalism*, 91 FORDHAM L. REV. 1695, 1705 (2023).

40. *Id.*

41. *See* Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797, 812–15 (2005) (explaining how Congress confronted the question of whether to extend traditional territorial governance structures, including judicial systems, to newly annexed overseas territories).

42. Foraker Act, Pub. L. No. 56-191, 31 Stat. 77 (1900); *see also* Ngiraingas v. Sanchez, 495 U.S. 182, 203–04 (1990) (Brennan, J., dissenting) (noting that Puerto Rico's territorial courts were created by Congress pursuant to its Article IV power).

Hawaii.[43] As with the organic acts that formed the continental territories, these pieces of federal legislation—bolstered by the constitutionally delegated ability of Congress to exercise plenary power in the territories through the Territory Clause[44]—provided Congress with enormous flexibility to adjust the substance and structure of territorial governments as their populations grew over time.[45] The structure of appellate review from territorial courts to federal courts has, accordingly, evolved via various Congressional acts.[46] Despite divergent institutional paths, the unincorporated territories share one trait: they lack the "two-track" model of judicial independence that state courts enjoy. Where state courts have the last word on state law and federal courts police federal law, Article III courts have retained—and exercised—reviewing power in the unincorporated territories.[47]

There are two existing and intuitive approaches *rejecting* this presumption that Article III courts possess complete original and appellate jurisdiction over all matters arising under territorial law—what this Note calls the "Categorical Approach" and the "Prudential Approach." The Categorical Approach challenges the foundational premise that organic acts, and the downstream territorial statutes enacted by the legislatures they establish, constitute "laws of the United States," for purposes of Article III.[48]

---

43. *See* United States v. Lee, 159 F. Supp. 2d 1241 (D. Haw. 2001) (noting that federal criminal prosecutions arising in American Samoa are heard in the District of Hawaii because no federal court has been established in the Territory of American Samoa).

44. *See* U.S. CONST. art. IV, § 3, cl. 2.

45. Congress would initially provide for presidentially appointed territorial governors and legislative councils, then replace the latter with elected legislatures once the territorial population reached a certain size. *See* Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828) ("Congress [may] exercise[ ] the combined powers of the general, and of a state government.").

46. For example, two years after the United States annexed Puerto Rico in 1898, Congress passed the Foraker Act, establishing both a territorial court system and a single federal district court, unified under one appellate hierarchy. The Puerto Rican territorial courts operated beneath the U.S. District Court for the District of Puerto Rico, which exercised appellate jurisdiction over all Supreme Court of Puerto Rico decisions. This unimodal structure changed in 1925, when Congress stripped the district court of its appellate role and redirected appeals from Puerto Rico's Supreme Court to the First Circuit, as of right. Guam initially followed a different model, as Congress did not create a territorial appellate court, meaning appeals from Guamanian trial courts went directly to the District Court of Guam. That federal oversight remained in place until 1996, when the district court relinquished its supervisory role. The U.S. Virgin Islands' judicial system followed a similar trajectory, with its federal district court initially serving as the appellate body for territorial courts until Congress later shifted appellate jurisdiction. For more in-depth discussion, see Campbell, *supra* note 29, at 1903–04.

47. *See id.* at 1896–99.

48. See *infra* Part I.B.2.

If territorial legislation is not "federal" in nature, then cases arising under those laws that do not present federal questions may fall outside the scope of Article III jurisdiction altogether. Courts taking up the Prudential Approach, on the other hand, have not subscribed to this kind of stark jurisdictional reasoning, but they have afforded a degree of deference to territorial court determinations when they concern matters of "purely local concern."[49] Both approaches have worked piecemeal to semi-insulate territorial courts from Article III jurisdiction, but neither are as systematic and forceful as this Note's proposed solution.

2. *The Categorical Approach: Territorial Laws Are Not "Laws of the United States"*

A limited line of cases suggests that statutes enacted through territorial organic acts do not automatically implicate Article III jurisdiction. There are two flavors to this doctrine. The first reasons that Congress—when legislating for a territory—operates in a local surrogate capacity. This view finds purchase most prominently in *United States v. Pridgeon*, wherein the Court treated a criminal prohibition contained in the Oklahoma Organic Act as territorial rather than federal law.[50] Reasoning that Congress had legislated in a territorial-legislative capacity, the Court held that original jurisdiction lay in a territorial court. Although Congress enacted the statute prohibiting the offense as part of the Oklahoma Organic Act,[51] it did so while standing in the place of the territorial legislature.[52] The statute was therefore "territorial" in nature, and the offense was classified as a crime against the territory—not the United States.[53]

While this first flavor of the Categorical Approach argues that territorial laws themselves are comparable to state laws, since Congress functionally acted as the territorial government, the second flavor is discretionary. In *Rubert Hermanos, Inc. v. Puerto*

---

49. See *infra* Part I.B.3.

50. 153 U.S. 48, 57–58 (1894).

51. *See* Act of May 2, 1890, ch. 182, 26 Stat. 81 (establishing the Territory of Oklahoma and providing for its governance).

52. *See, e.g.*, McAllister v. United States, 141 U.S. 174, 184–85 (1891) (holding that Congress, when establishing territorial courts, acts in a transitional role akin to a state sovereign that has yet to emerge).

53. *See id.*

Rico,[54] the Supreme Court held that Section 39 of the Organic Act of Puerto Rico (a Congressional statute), which prohibited agricultural corporations from owning more than 500 acres of land, did not constitute a "law of the United States" because Section 39 was "peculiarly concerned with local policy"—and thus called for local enforcement.[55] Justice Frankfurter, writing for the majority, noted that while Congress enacted Section 39, its primary focus was on local governance specific to Puerto Rico's history and traditions, rather than on establishing a federal legislative agenda.[56] The enforcement of such provisions, therefore, was deemed appropriate for local authorities, and original jurisdiction—at least in the first instance—lay in the local courts.[57]

Taken together, these cases show that federal courts have sometimes declined original Article III jurisdiction over particular territorial laws (and, in *Rubert Hermanos*, a particular provision of the Organic Act itself) on the ground that the specific regulation functions as "local" law. When a provision is classified this way, the federal-question hook drops out at the trial level and, absent any distinct federal claim, there is likewise no statutory path to appellate review.[58] The result is that territorial courts may have both original and final authority over disputes turning solely on such local provisions—not because the case "lacks a federal question" in the state-court sense, but because the threshold classification removes the provision from the set of "laws of the United States" that can sustain federal jurisdiction in the first place.[59] In the state paradigm, state courts are final on state law,

---

54. 309 U.S. 543 (1940).

55. *Id.* at 549 (holding that the statute in question did not fall within the scope of laws of the United States for purposes of federal jurisdiction).

56. *See id.* at 549 (holding that § 39 of the Organic Act, which limited corporate landholdings in Puerto Rico, was not a "law of the United States" for purposes of federal-question jurisdiction because it reflected a local policy judgment directed at Puerto Rico's unique conditions).

57. *See id.* at 550.

58. This distinction is grounded in the theory that Congress, when legislating under the Territory Clause, may act in a dual capacity—as a national legislature or as a local surrogate. *See* Binns v. United States, 194 U.S. 486, 491 (1904) (noting that certain territorial taxes imposed by congressional act were "to be regarded as local taxes, imposed for the purpose of raising funds to support the administration of local government in Alaska"). As a result, even though an organic act as a whole is a federal enactment, federal courts have historically parsed its provisions to determine whether a particular section creates a federal right or merely implements local policy, thereby affecting the scope of federal jurisdiction.

59. Puerto Rico v. Russell & Co., 288 U.S. 476, 482–85 (1933) (holding that a suit to collect insular taxes did not "arise under" federal law even though the right to sue derived

yet any embedded federal question remains reviewable under § 1257;[60] in the territorial paradigm, a dispute resolved solely as territorial law presents no federal question to review.[61] What emerges is a de facto judicial autonomy produced by upstream classification decisions, rather than by a coherent, consistently applied doctrinal framework.

This statutory "local concerns" classification has a constitutional analogue in the Court's treatment of territorial courts themselves. In *American Insurance Co. v. Canter*, Chief Justice Marshall described territorial tribunals as "legislative courts" created under Article IV rather than Article III, meaning that their decisions were not embedded within Article III's mandatory appellate structure, but were instead reviewable only insofar as Congress provided.[62] In this respect—much like the Alaska territorial judges removable at will[63]—territorial adjudication was deliberately insulated from Article III oversight, reflecting Congress's authority to structure judicial power in the territories outside the constitutional model. Subsequent reclassification episodes largely involved non-territorial tribunals (for example, restoring Article III status to the Court of Claims and the Court of Customs and Patent Appeals in *Glidden Co. v. Zdanok*, and treating key District of Columbia courts as Article III in *O'Donoghue v. United States*).[64] But these moves underscore the

---

from an Act of Congress because "[t]he federal nature of the right to be established is decisive—not the source of the authority to establish it").

60. 28 U.S.C. § 1257 provides that final judgments of state high courts may be reviewed by the U.S. Supreme Court when the validity of a U.S. statute or treaty is drawn in question, or "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of the United States."

61. *See* Territory of Guam v. Olsen, 431 U.S. 195, 201–02 (1977) (explaining that federal appellate jurisdiction over territorial court decisions exists only to the extent Congress affirmatively provides, and that purely local law disputes are not reviewable absent such a grant).

62. 26 U.S. (1 Pet.) 511, 546 (1828) (holding that courts of the Florida Territory were "legislative courts" created under Congress's Article IV power to "make all needful Rules and Regulations" respecting territories).

63. *See* McAllister v. United States, 141 U.S. 174, 186–87 (1891) (holding that a territorial judge—there, of Alaska—appointed for a term of years is removable by the President before the term expires).

64. In Glidden v. Zdanok, the Court restored Article III status to the Court of Claims and the Court of Customs and Patent Appeals, a move Congress partly reversed two decades later by creating the Article III Federal Circuit while reconstituting the trial forum as the Article I Court of Federal Claims. A similar dynamic played out in the District of Columbia: in O'Donoghue v. United States the Court had treated D.C. courts as Article III, but in *Palmore* it sustained Congress's creation of purely local Article I courts for the District. These shifts underscore the pragmatic, label-driven way Congress and the Court have

Court's pragmatic use of institutional labels rather than a settled theory.[65] Read together with the "local law" line of cases, they show how both the law being applied *and* the forum applying it can be recast, producing shifting uncertainty about the scope of federal oversight.

3. *The Prudential Approach: Federal Court Deference to Matters of "Purely Local Concern"*

Instead of declaring certain territorial laws—or provisions of the Organic Acts passed by Congress—categorically non-federal (and thus outside Article III jurisdiction altogether), federal courts have sometimes adopted a prudential approach, deferring to territorial rulings on matters deemed "purely local."[66]

The origins of this prudential practice can be traced to early cases concerning the governance of former Spanish colonies, particularly Puerto Rico. In *Díaz v. González*, the Supreme Court reviewed a dispute over property rights under Puerto Rican civil law and declined to disturb the Supreme Court of Puerto Rico's ruling, holding that appellate jurisdiction was "not given for the purpose of remodeling the Spanish-American law according to [American] common law conceptions."[67] Framing the dispute as involving Spanish-American law, the Court signaled that its deference was contingent on the perceived *foreignness* of the legal

---

handled non-territorial tribunals, while leaving intact the core proposition from *Canter* that territorial courts remain Article IV bodies whose oversight is statutory rather than constitutional. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 544–45 (1962) (plurality opinion) (reclassifying the Court of Claims and the Court of Customs and Patent Appeals as Article III courts after decades of treating them as legislative courts); O'Donoghue v. United States, 289 U.S. 516, 531–33 (1933) (holding that the Supreme Court of the District of Columbia was an Article III court, notwithstanding earlier dicta suggesting otherwise).

65. *See, e.g.*, *Guam and the Case for Federal Deference*, *supra* note 23, at 1705–06 ("Take Guam as a case study. Guam is governed not by a formal constitution but by an Organic Act, a statute passed by Congress in 1950. 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. Yet the Supreme Court and lower courts have denied Guam's courts deference with respect to this protoconstitution on the grounds that it is federal in character and can implicate nonlocal concerns—even though in other instances the Supreme Court has sent mixed messages about what it means to be a matter of purely local concern.").

66. *Id.* at 1704 ("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. A federal court may disturb them only if they are 'inescapably wrong' or 'patently erroneous.'") (quoting Bonet v. Yabucoa Sugar Co., 306 U.S. 505, 510 (1939) and Bonet v. Tex. Co. (P.R.), Inc., 308 U.S. 463, 471 (1940)).

67. 261 U.S. 102, 105 (1923).

tradition at issue—an approach suggesting deference was granted only as a matter of comity, rather than as a matter of right.[68] In *Bonet v. Yabucoa Sugar Co.*, the Court likewise declined to overturn the Puerto Rico Supreme Court's judgment in a local tax dispute, but there it acknowledged that the territorial court's reasoning drew upon Anglo-American separation of powers principles rather than Puerto Rico's civil law tradition.[69] The Court grounded its deference not in the "foreignness" of the legal method but in Congress's intent to preserve the then-existing governmental practices of the island.[70] While, in both cases, the Court relied on some type of "local concerns" principle to insulate the territory from federal jurisdiction, the contrast between *Díaz* and *Bonet* illustrates how the Court's willingness to defer has rested on shifting prudential considerations rather than some stable, sovereignty-based principle.

Looking at other territories for guidance to try to make sense of this territorial doctrine is not fruitful. The dispute in *Limtiaco v. Camacho*, for example, concerned the interpretation of the statutory term "assessed value" in Guam's debt-limitation provision under the Guam Organic Act of 1950.[71] The Court ruled in favor of the Governor's interpretation, but it did not frame this decision as an act of deference to territorial statutory interpretation—nor did it suggest that territorial governance in fiscal matters was a question insulated from federal oversight.[72] To the contrary, the Court emphasized that Guam's fiscal governance implicated *national* interests: as the debt-limitation provision "protects both Guamanians and the United States from the potential consequences of territorial insolvency."[73] In doing so, the Court explicitly rejected the argument that Guam's debt ceiling was a matter of "purely local concern," suggesting that judicial deference in the territorial context is entirely contingent upon the

68. *Id.*

69. *See* 306 U.S. at 511–12 (1939) ("Orderly development of the government of Porto Rico as an integral part of our governmental system is 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.").

70. *Id.* at 510 (explaining that the Foraker Act was intended to preserve the then-existing governmental practices of Puerto Rico).

71. 549 U.S. 483 (2007). The Attorney General of Guam argued that "assessed value" should be understood to mean market value, while the Governor contended that it referred to tax roll value. *Id.* at 489.

72. *Id.*

73. *Id.* at 490.

federal judiciary's framing of what qualifies as a "national interest."[74]

Similarly—although D.C. is not a state and lacks the degree of political autonomy granted to the territories[75]—the Court has in several cases afforded even *greater* deference to D.C. courts and lawmakers than it has to territorial counterparts. *Pernell v. Southall Realty* provides a striking example.[76] The case concerned a landlord-tenant dispute in the D.C. Superior Court, where the issue was whether the Seventh Amendment jury trial right applied. The Supreme Court rejected the argument that Congress's authority over D.C. under the Seat of Government Clause meant that federal law *alone* dictated whether jury trials applied. Instead, it looked to state court practices to determine whether a jury trial was historically required for landlord-tenant disputes—treating D.C. law as it would a state's common law tradition.[77] In doing so, the Court implicitly affirmed the role of D.C. courts as the primary interpreters of local landlord-tenant law, avoiding any suggestion that their authority derived solely from congressional oversight.[78]

---

74. The "purely local concern" test is reminiscent of several areas of constitutional law where the Court's analysis appears highly dependent on framing—and has been criticized as pretextual. Take Commerce Clause doctrine, for example. In United States v. Lopez, 514 U.S. 549 (1995), the Court struck down the Gun-Free School Zones Act because possessing a gun in a school zone was framed as a non-economic, criminal act rather than part of a broader economic regulatory scheme. Conversely, in Gonzales v. Raich, 545 U.S. 1 (2005), the Court upheld federal regulation of homegrown marijuana for personal use by reframing the issue as part of a larger economic market for marijuana, making it subject to federal commerce regulation.

75. Judges of the District of Columbia Court of Appeals and the Superior Court of the District of Columbia continue to be nominated by the President of the United States and confirmed by the United States Senate, without the approval of the mayor or other locally elected leaders. D.C. CODE § 11-1501(a) (2025); *see* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1127–35 (2007) (detailing categories developed by courts to determine issues that qualify as purely local). *Cf.* D.C. home rule, which—although not rooted in state constitutional autonomy—has generated a parallel body of literature and case law addressing the scope of local self-government in the District. *See, e.g.*, Jacob Durling, *The District of Columbia and Article III*, 107 GEO. L.J. 1205 (2019) (discussing modern scholarly treatment of D.C. courts' constitutional status). Ironically, in several cases, the Supreme Court has extended greater interpretive and institutional deference to D.C. courts and lawmakers than it has to territorial counterparts. *See generally* Palmore v. United States, 411 U.S. 389 (1973) (upholding the constitutionality of D.C. local courts created by Congress and staffed by non-Article III judges).

76. 416 U.S. 363 (1974).

77. *See id.* at 374–76.

78. *See id.* at 369 ("Since the right to recover possession of real property was a right ascertained and protected at common law, the Seventh Amendment . . . entitles either party to demand a jury trial in an action to recover possession of real property in the Superior Court for the District of Columbia . . . .").

These early cases collectively stop short of articulating a standardized or binding doctrine requiring federal courts to respect territorial judicial autonomy. For territorial courts to exercise meaningful judicial independence, one would expect a more categorical rule of federal noninterference in certain domains of local governance. Instead, deference has been prudential and context-specific, lacking the clarity or consistency typically associated with formal jurisdictional limits.[79]

This doctrinal uncertainty stands in marked contrast to the robust jurisprudence that defines relationships between state governments and their local subdivisions. The concept of "purely local concern," for instance, has been extensively litigated and clarified within state law, resulting in detailed judicial tests and established categories distinguishing between state-wide and municipal interests.[80] Many state constitutions explicitly enshrine principles of local autonomy, formally delineating the powers of state legislatures relative to local governments through home rule provisions.[81] These constitutional clauses frequently limit state legislative authority by reserving certain policy domains exclusively for municipalities.[82] Courts interpreting these directives have, over decades, established rigorous doctrinal frameworks to determine which issues—such as zoning regulations, local elections, or management of public utilities—qualify as genuinely "local," thereby insulating them from state-level interference.[83] Consequently, the federal courts' approach to

79. *See* Diaz v. Gonzalez, 261 U.S. 102, 105–06 (1923) (basing deference on the perceived foreignness of Puerto Rican civil law rather than on any jurisdictional mandate); *see also* Sancho v. Yabucoa Sugar Co., 306 U.S. 505, 510–12 (1939) (grounding deference in Congress's intent to preserve Puerto Rico's existing governmental practices, even where the reasoning employed Anglo-American legal principles).

80. *See, e.g.*, City of La Grande v. Pub. Emp. Ret. Bd., 586 P.2d 765, 767–69 (Or. 1978) (articulating a balancing test distinguishing matters of local versus statewide concern under Oregon law); City & Cnty. of Denver v. State, 788 P.2d 764, 767–68 (Colo. 1990) (outlining Colorado's approach to distinguishing purely local from statewide concerns).

81. *See, e.g.*, Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10–11 (1990) (describing constitutional home rule provisions as core elements preserving local autonomy); *see also* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2277–79 (2003) (explaining how home rule provisions formally separate state and municipal authority).

82. *See, e.g.*, CAL. CONST. art. XI, § 5(a) ("City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith[.]"); ILL. CONST. art. VII, § 6(a) (providing local governments broad home rule powers to govern internal municipal matters).

83. *See, e.g.*, Johnson v. Bradley, 841 P.2d 990, 995–96 (Cal. 1992) (holding local election regulations to be a matter of purely municipal concern insulated from state law interference); State Bldg. & Constr. Trades Council v. City of Vista, 279 P.3d 1022, 1027–

territorial autonomy, characterized by arbitrary and prudential reasoning, is significantly underdeveloped.

Federal court deference to territorial courts is ad hoc and unprincipled—granted to preserve tradition in some cases, but denied in favor of federal supremacy in others—leaving territorial autonomy at the mercy of judicial discretion. Unlike more established judicial frameworks of general applicability—such as erstwhile *Chevron* deference,[84] *Pullman* abstention,[85] or the *Erie* doctrine[86]—deference to territorial matters of "purely local concern" operates without *any* structured set of guiding principles.

II. TERRITORIAL COURT RULINGS AS POLITICAL QUESTIONS

This Note has so far laid out (i) the framework of constitutional exceptionalism established by the *Insular Cases*; (ii) the presumption of Article III review over territorial laws and court rulings; (iii) two existing doctrinal approaches that challenge that presumption; and (iv) the limits of those approaches. This Part advances the first of two alternative frameworks for insulating territorial courts from federal judicial intrusion. It contends that when territorial courts interpret their own organic acts or adjudicate questions of territorial law, those disputes present political questions beyond the reach of Article III review.

This framework draws from the Political Question Doctrine (PQD). *Marbury v. Madison* teaches that the interpretation of a statute—including an organic act—is in principle, "justiciable" by Article III courts.[87] Yet *Marbury* also recognizes that some matters

---

28 (Cal. 2012) (discussing the "municipal affairs" doctrine and its insulating effect in the context of local contracting practices); *see generally* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1127–35 (2007) (detailing categories developed by courts to determine issues that qualify as purely local).

84. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (establishing a two-step framework for judicial deference to agency interpretations of ambiguous statutes). Even so, the recent overruling of *Chevron* deference in Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024), further underscores the precariousness of doctrines based on judicial discretion rather than firm constitutional grounding.

85. *Pullman* abstention is a judicial doctrine that allows federal courts to decline to decide constitutional questions when a case involves an unsettled issue of state law that could potentially resolve the dispute. The doctrine originates from R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

86. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) (mandating that federal courts defer to state courts on matters of state law, creating a stable and predictable doctrine of deference).

87. *See supra* Part I.B; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (establishing that it is "emphatically the province and duty of the judicial department to

are "not fit for judicial determination."[88] This Note does not propose a novel theory of judicial abstention. Rather, it refines and applies these constitutional justifications for judicial restraint to territorial cases. Federal courts have long invoked the PQD to avoid matters committed to the political branches, yet in the territorial sphere their approach has been erratic—treating governance as a political question in some cases while engaging in fulsome review in others.[89] This Note argues for a more principled and consistent application of the PQD, grounding it firmly in the textually committed authority of Congress over territorial governance.

A. THE CURRENT CONCEPTION OF THE POLITICAL QUESTION DOCTRINE

Baker v. Carr established the modern framework for the PQD, identifying six factors that may render an issue non-justiciable.[90] There, the Court was tasked with determining whether an equal protection challenge to Tennessee's legislative apportionment scheme presented a political question.[91] The Court articulated six factors that characterize a political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department, (2) a lack of judicially discoverable and manageable standards for resolving it, (3) the impossibility of

---

say what the law is," thereby affirming judicial review over federal statutes, including territorial organic acts).

88. *See Marbury*, 5 U.S. at 170 (1803) ("Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."). The Supreme Court has also recognized that certain issues are better suited for resolution outside the federal judiciary. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (establishing that the political question doctrine applies where there exists "a textually demonstrable constitutional commitment of the issue to a coordinate political department" or where judicial intervention would require an "initial policy determination of a kind clearly for nonjudicial discretion").

89. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 228–29 (1993) (noting that the absence of "judicially discoverable and manageable standards" as outlined by *Baker*, 369 U.S. at 217, warrants dismissal under the political question doctrine, a rationale the Court has invoked in certain territorial governance disputes); Guam v. Guerrero, 290 F.3d 1210, 1221–22 (9th Cir. 2002) (treating the allocation of legislative power in Guam as a political question committed to Congress under the Territorial Clause); *cf.* People of Saipan v. U.S. Dep't of Interior, 502 F.2d 90, 9799 (9th Cir. 1974) (rejecting political question arguments and holding that challenges to the legality of the Covenant establishing the Northern Mariana Islands' government were justiciable).

90. 369 U.S. at 186.

91. *Id.* at 193–94 (describing the plaintiffs' challenge to Tennessee's legislative districting scheme).

deciding the issue without making an initial policy determination that is beyond judicial discretion, (4) the impossibility of a court undertaking independent resolution without expressing a lack of respect for the coordinate branches, (5) an unusual need for unquestioning adherence to a political decision already made, and (6) the potential for embarrassment due to conflicting pronouncements by various branches on one question.[92]

Of these six, the first two factors have traditionally been regarded as authoritative, or "classical," limitations on judicial review, whereas the latter four are considered prudential.[93] The distinction between these two perspectives is evident in subsequent applications of *Baker*. In *Nixon v. United States*, the Court refused to review the Senate's impeachment trial procedures on the grounds that the Constitution's Impeachment Clause textually committed such matters to the Senate.[94] The Court reasoned that the word "sole" in the Impeachment Clause gave the Senate exclusive discretion over impeachment procedures, rendering judicial review incompatible with the Constitution's structural commitment of the issue to a political branch.[95] By contrast, *Zivotofsky v. Clinton* involved a question of *statutory* interpretation (versus that of a Constitutional provision) concerning the Foreign Relations Authorization Act,[96] which permitted U.S. citizens born in Jerusalem to list "Israel" as their place of birth on passports.[97] The executive branch refused to enforce the statute, arguing it interfered with the President's exclusive authority over foreign relations, particularly regarding the recognition of Jerusalem's sovereignty.[98] Although the case

92. *Id.* at 217.

93. WILLIAM BAUDE ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEMS 303–05 (8th ed. 2025) (describing the authoritative versus prudential distinction in *Baker*). The classical approach, championed perhaps most famously by Herbert Wechsler, holds that the political question doctrine is best understood as a product of constitutional interpretation—i.e., that certain issues are textually and structurally committed to another branch of government, making judicial intervention Constitutionally inappropriate. *Id.* at 304. In contrast, Alexander Bickel's "prudential" approach argues that the doctrine—and in particular, factors 3–6—is rooted in concerns about judicial legitimacy and institutional capacity. *Id.*

94. 506 U.S. 224, 228–29 (1993) (holding that the Constitution textually commits impeachment trial procedures to the Senate).

95. *Id.*

96. Foreign Relations Authorization Act of 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002).

97. 566 U.S. 189, 196 (2012).

98. *Id.* at 192.

touched on foreign affairs, a traditionally "political" domain, the Supreme Court held the case was nonetheless justiciable and did not present a political question because neither of the first two *Baker* factors were implicated.[99] The Court reasoned that courts frequently interpret statutes with foreign policy implications and that resolving a dispute about what the statute required did not amount to making a foreign policy decision.[100]

This distinction between statutory interpretation questions and disputes arising from Constitutional provisions with explicit textual commitments to political branches helps clarify the proper scope of the PQD. Cases like *Nixon* demonstrate that the Court is reluctant to interfere in matters where the Constitution itself assigns authority exclusively to a political branch, aligning with Wechsler's "classical" interpretation of the PQD.[101] Cases like *Zivotofsky*, meanwhile, illustrate that the Court is willing to intervene where a case turns on statutory interpretation, even when the broader context involves politically sensitive issues (like foreign affairs), sounding in the prudential approach.[102]

B. A HISTORY OF UNCERTAINTY: EARLY JUDICIAL ACKNOWLEDGEMENTS OF TERRITORIES AS NON-JUSTICIABLE "POLITICAL QUESTIONS"

Although the Supreme Court has never articulated a principled framework placing the territories entirely outside the scope of Article III, it has, in dicta, suggested that certain questions concerning the territories are "in their nature political"[103] and thus not amenable to judicial resolution.[104] Pointedly, the Supreme Court in *Jones v. United States* declared that "who is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political

99. *Id.* at 191.

100. *Id.* at 201–02 (stating that courts often interpret statutes affecting foreign policy and that doing so does not constitute a foreign policy decision itself).

101. See *infra* Part II.C.1.

102. *Zivotofsky*, 566 U.S. at 196 (2012).

103. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803).

104. *See* Downes v. Bidwell, 182 U.S. 244, 286–87 (1901) (characterizing the desirability of territorial acquisition as "solely a political question"); Balzac v. Porto Rico, 258 U.S. 298, 306 (1922) (emphasizing that incorporation—and thus the extension of specific constitutional guarantees—to Puerto Rico is for Congress, not the courts). Because neither case dismissed the underlying action on political-question grounds, these observations are dicta, but they illustrate the Court's willingness to treat certain questions about territorial status and constitutional reach as non-justiciable.

question," and that the determination made by the political branches "conclusively binds the judges."[105] After the Spanish-American War—as the United States acquired Puerto Rico, Guam, and the Philippines—the courts took notice of the political branches' colonial aggression and refused to treat the designation of "territorial sovereignty" as a justiciable controversy.[106]

The *Insular Cases*[107] themselves illustrate the federal judiciary's cautious engagement with territorial governance issues fraught with political implications.[108] Although the Supreme Court decided the *Insular Cases* on their merits, contemporary observers have noted that the "gravity of the issues at stake" in governing the Philippines and Puerto Rico gave rise to an "impression that the question . . . is not properly a question of law" at all.[109] The Court's unintuitive step in these cases of converting highly charged political issues into justiciable questions was likely influenced by a "consent and certify" dynamic—whereby political actors invited judicial resolution to legitimize controversial governance decisions.[110]

Nonetheless, even as the Court found itself fit to decide the *Insular Cases*, it acknowledged that the merits were entwined with questions of national expansion that, under ordinary circumstances, might have been left to the political process.[111] Justice White's influential concurrence in *Downes v. Bidwell* stressed Congress's "plenary" power under the Territory Clause and implied that the incorporation of a territory was for Congress to determine, not the courts.[112] The upshot was a perverse form of judicial minimalism: the Court set broad contours (e.g.,

105. 137 U.S. 202, 212 (1890).

106. During the Philippine-American War (1899–1902), for example, U.S. forces fought Filipino insurgents seeking independence; the State Department estimates more than 4,200 American and up to 200,000 Filipino civilian deaths. *See* Pearcy v. Stranahan, 205 U.S. 257, 265 (1907) (quoting *Jones*, 137 U.S. at 212, and confirming that the Court must accept the political branches' determination of which islands were ceded by Spain).

107. See *supra* Part I.A.

108. *Downes*, 182 U.S. at 289.

109. Krishanti Vignarajah, *The Political Roots of Judicial Legitimacy: Explaining the Enduring Validity of the* Insular Cases, 77 U. CHI. L. REV. 781, 803 (2010) (quoting CARMAN F. RANDOLPH, NOTES ON THE LAW OF TERRITORIAL EXPANSION WITH ESPECIAL REFERENCE TO THE PHILIPPINES 7 (De Vinne 1900) (submitted to the S. Comm. on the Judiciary, Mar. 16, 1900)).

110. *Id.* at 781–82 (describing a "consent and certify" process in which political actors disavowed their own authority, invited the Court's intervention, and thereby legitimated judicial resolution of politically charged questions).

111. *Id.*

112. Downes v. Bidwell, 182 U.S. 244, 289 (1901) (White, J., concurring).

fundamental rights apply everywhere, other rights only upon "incorporation"), but it left the ultimate status and treatment of the territories to Congress's discretion.[113]

In a limited strain of 20th century cases, a handful of lower courts have taken the opposite approach and invoked a form of political question doctrine "analysis" to decline jurisdiction—without saying quite as much. The Ninth Circuit in *People of Saipan v. Department of Interior*, for example, refused to adjudicate certain claims by the inhabitants of Micronesia regarding their governance.[114] There, residents of the Trust Territory of the Pacific Islands challenged federal land lease decisions and alleged violations of the U.N. Trusteeship Agreement.[115] The Ninth Circuit affirmed dismissal, holding that enforcement of the U.N. Charter was not judicially cognizable and that territorial administration was constitutionally and internationally committed to the political branches.[116] Framing the matter as a separation of powers issue, the court declined to second-guess how the United States fulfilled its obligations to a non-self-governing territory—treating the question as a non-justiciable political one.[117]

Similarly, federal courts have declined to adjudicate pleas for greater political rights in U.S. territories when such issues implicated constitutional design and policy judgments reserved to Congress. In *Igartúa De La Rosa v. United States* (Igartúa II), residents of Puerto Rico argued that denying their ability to vote for U.S. president violated the Constitution.[118] The First Circuit, however, dismissed the claim, noting that only state citizens may vote for President and that altering this arrangement falls outside judicial authority.[119] The court noted that any extension of presidential voting rights to Puerto Rico would effectively require treating Puerto Rico as a state or amending the Constitution—steps that are committed to Congress under Article IV and

113. *Id.*
114. People of Saipan v. U.S. Dep't of Interior, 502 F.2d 90, 97 (9th Cir. 1974).
115. *Id.* The court held that the Trust Territory Government was not a "federal agency subject to judicial review under the . . . APA . . . or . . . NEPA," and that the Trusteeship Agreement did not create individual rights enforceable in U.S. courts—thus finding jurisdiction lacking. *Id.* at 93.
116. *Id.*
117. *Id.* at 96.
118. 229 F.3d 80, 82 (1st Cir. 2000).
119. *Id.* at 84.

Article V.[120] As the First Circuit later held en banc, "the road to statehood—if that is what Puerto Rico's citizens want—runs through Congress," not the courts.[121] Likewise, in *Ballentine v. United States*, citizens in the Virgin Islands challenged their lack of voting representation in federal elections, only to have their case dismissed on jurisdictional grounds that reflected similar reasoning.[122] The Third Circuit underscored that the Virgin Islands remained an unincorporated territory and that granting franchise or state-like status was beyond judicial power, resting instead with Congress's territorial governance authority.[123]

As dissenting judges have passionately noted, even when fundamental rights are at stake and plaintiffs "lack[ ] any other avenue of relief," the majority of lower courts have been reluctant to step in, concluding that the remedy must come from Congress or constitutional amendment rather than judicial decree.[124] For instance, Judge Torruella, dissenting in the First Circuit's en banc decision in *Igartúa III*, argued that denying four million U.S. citizens in Puerto Rico the right to vote was a grave injustice that courts should address, not dodge under a "guise" of the PQD.[125] He warned that relying on the doctrine abdicated the judiciary's role of protecting politically powerless minorities.[126] Nonetheless, most federal courts have heeded arch-formalist separation of powers boundaries: absent clear judicial standards or constitutional directives, questions of territorial self-governance, rights, and sovereignty are left to the political processes.[127]

---

120. *Id.*

121. Igartúa De La Rosa v. United States (Igartúa III), 417 F.3d 145, 151 (1st Cir. 2005) (en banc) (per curiam).

122. 486 F.3d 806, 812–13 (3d Cir. 2007).

123. *Id.* at 815.

124. *Igartúa III*, 417 F.3d at 147–48.

125. *Id.* at 159 (Torruella, J., dissenting).

126. *Id.* ("[T]he majority seeks to avoid what I believe is its paramount duty over and above these stated goals: to do justice to the civil rights of the four million U.S. citizens who reside in Puerto Rico."). *See also* Fitisemanu v. United States, 20 F.4th 1325, 1325 (10th Cir. 2021) (mem.) (Bacharach, J., dissenting from denial of rehearing en banc) (arguing that the Citizenship Clause's text and contemporaneous evidence show the territories are "in the United States," and that courts—not the *Insular Cases*' prudential framework—should resolve the constitutional question).

127. *See, e.g.*, Igartúa De La Rosa v. United States (Igartúa I), 32 F.3d 8, 10–11 (1st Cir. 1994) (declining to extend presidential voting rights to Puerto Rico residents absent constitutional amendment); Ballentine v. United States, 486 F.3d 806, 812–13 (3d Cir. 2007) (rejecting challenge to lack of voting representation for U.S. Virgin Islands residents, noting that the issue is committed to Congress).

Notwithstanding this informal invocation of the political question doctrine in select cases, courts lack a structured, doctrinally grounded approach to determining when territorial governance issues are beyond judicial review. A more systematic, high-level application of the *Baker* factors is necessary to clarify prima facie constitutional limits of federal court intervention in territorial affairs—building consistency into the judiciary's justiciability analysis.

C. THE *BAKER* FACTORS

1. *Textual Commitment of Territorial Governance to Congress*

The first and most authoritative Baker factor—the existence of a "textually demonstrable constitutional commitment of the issue to a coordinate political department"—is directly applicable to disputes involving territorial governance.[128] The Constitution's Territory Clause explicitly states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[129] The Supreme Court has interpreted this provision as conferring complete and exclusive authority over territorial governance upon Congress.[130] The Territory Clause stands out not merely because it grants broad authority,[131] but because it also specifically grants Congress plenary power over territorial administration, an inherently political subject matter. This matter directly involves questions of national sovereignty, diplomacy, and governance, areas traditionally recognized as unsuitable for judicial determination.[132] Unlike other

128. Baker v. Carr, 369 U.S. 186, 217 (1962).

129. U.S. CONST. art. IV, § 3, cl. 2.

130. *See* Binns v. United States, 194 U.S. 486, 491 (1904) ("It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution.").

131. Congress's legislative authority or the President's executive power can also be extensive. *See* Immigr. & Nat. Serv. v. Chadha, 462 U.S. 919, 951 (1983).

132. *See, e.g.*, Jones v. United States, 137 U.S. 202, 212 (1890) (holding that "who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political question," and that the political branches' determination "conclusively binds the judges") (italics in original); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302–03 (1918) (explaining that conduct of foreign relations is committed to the political branches and courts will not sit in judgment on acts of a foreign sovereign within its own territory); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423 (1964) (grounding the act-of-state doctrine in separation of powers and the primacy of the political departments in foreign affairs).

constitutional grants of power—such as the Commerce Clause, which is regularly litigated under clear doctrinal standards[133]—the Territory Clause sets forth no discernible criteria or benchmarks for courts to apply in reviewing congressional choices. This strongly suggests non-justiciability.[134]

Supreme Court precedent underscores that structuring territorial governance is committed to Congress, not the judiciary: Congress's power over the territories is "general and plenary," and it may "abrogate" territorial laws, "legislate directly" for territorial governments, and even render "a valid act void"; questions of who is sovereign in a territory are "political," and the political branches' determination "conclusively binds the judges."[135] In *Dorr v. United States*, for example, the Court upheld Congress's decision not to extend jury trials to the Philippines, explicitly stating that the judiciary should not second-guess which constitutional rights Congress chooses to apply within a territory.[136] Likewise, *Gilligan v. Morgan* held that National Guard training and structure were non-justiciable due to textual commitments and a lack of judicially manageable standards, reinforcing the notion that structural governance questions typically reside outside judicial purview.[137] More recently, *Puerto Rico v. Sanchez Valle* reaffirmed territories' lack of inherent sovereignty, clarifying that Puerto Rico's governance structure arises exclusively from congressional delegation.[138] The Court emphasized that the Puerto Rican Constitution "does not break the chain" of authority originating

133. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 16–17 (2005) (applying the "substantial effects" test to uphold federal regulation of intrastate marijuana cultivation as part of a comprehensive regulatory scheme).

134. *See, e.g.*, Nixon v. United States, 506 U.S. 224, 228–29 (1993) ("These two concepts are not completely separate; the lack of judicially manageable standards may strengthen the conclusion that there is a textually demonstrable commitment to a coordinate branch.").

135. *See, e.g.*, Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890) ("The power of Congress over the Territories of the United States is general and plenary . . . ."); Nat'l Bank v. County of Yankton, 101 U.S. 129, 133–34 (1879) ("Congress may not only abrogate the laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void."); Jones v. United States, 137 U.S. 202, 212 (1890) ("Who is the sovereign, *de jure* or *de facto*, of a territory, is not a judicial, but a political question, the determination of which by the legislative and executive departments . . . conclusively binds the judges.") (emphasis in original).

136. 195 U.S. 138, 148–49 (1904) (holding that jury trial rights were not constitutionally required to extend to the Philippines and emphasizing Congress' discretion).

137. 413 U.S. 1, 10–11 (1973) (holding military training and organizational decisions non-justiciable because they are committed exclusively to political branches).

138. 579 U.S. 59, 73–75 (2016) (clarifying that territories derive governance solely from congressional delegation).

from Congress, underscoring the exclusively political—and thus non-justiciable—nature of these structural decisions.[139] These concerns are not merely prudential—withholding exercise of the judicial power in these cases is constitutionally compelled by the structure and text of the Constitution itself.

2. *Lack of Judicially Manageable Standards*

The second *Baker* factor asks whether a case presents "judicially discoverable and manageable standards" for resolving the dispute.[140] In the territorial context, the Supreme Court has articulated no such standards. Its decisions oscillate between portraying territorial governments as exercising primarily local authority and as wielding federal power—an inconsistency with direct consequences for whether territorial laws are treated as federal statutes subject to Article III review.[141] This instability stems in large part from the *Insular Cases*, which adopted the doctrine of territorial incorporation: newly acquired territories would receive only those constitutional rights deemed "fundamental" by their own force, with all others applying solely at Congress's discretion.[142] Yet the Court has never set out a principled test for identifying which rights are "fundamental,"[143] nor has it provided clear guidance on how to classify territorial courts and their organic acts for purposes of federal review.[144]

This lack of standardization creates an obscured and varied jurisprudential patchwork as the Court vacillates between treating territorial governments as possessing independent

---

139. *Id.* at 76 (stating explicitly that Puerto Rico's constitutional governance structure remains tethered to congressional authority).

140. Baker v. Carr, 369 U.S. 186, 217 (1962).

141. The Supreme Court expressly relied on decades of inconsistent and unpredictable rulings on partisan gerrymandering to declare such disputes non-justiciable. The Court reasoned that the absence of coherent, predictable standards demonstrated a lack of judicially manageable criteria. *See, e.g.*, Rucho v. Common Cause, 588 U.S. 684, 704–08 (2019) (emphasizing prior inconsistent rulings in the partisan gerrymandering context as evidence of no manageable standards).

142. Downes v. Bidwell, 182 U.S. 244, 287 (1901).

143. *See* Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922) (holding the Sixth Amendment jury trial right not "fundamental" in unincorporated territories without defining the category); *cf.* Boumediene v. Bush, 553 U.S. 723, 757–59 (2008) (rejecting a rigid incorporation framework in favor of a functional, case-specific analysis).

144. *See* Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546 (1828) (treating territorial courts as "legislative" courts created under Article IV); Ngiraingas v. Sanchez, 495 U.S. 182, 187–94 (1990) (treating certain territorial statutes as federal law for purposes of 42 U.S.C. § 1983).

legislative authority (which limits federal judicial review) and as mere extensions of Congress (which reinforces federal oversight). For instance, in *Puerto Rico v. Sánchez Valle*, the Court held that Puerto Rico lacked separate sovereignty for double jeopardy purposes because its power derived from Congress—not from an independent constitutional source.[145] Yet, just four days later in *Puerto Rico v. Franklin California Tax-Free Trust*, the Court treated Puerto Rico's bankruptcy law as a state-like exercise of sovereign authority, denying Congress the ability to modify its restructuring powers absent an explicit statutory repeal.[146] Similarly, in *Igartúa IV*, the First Circuit rejected Puerto Rican citizens' claim to voting rights, deeming it a political issue best left to Congress.[147] In *Torres v. Puerto Rico*, however, the Supreme Court struck down a Puerto Rican search-and-seizure law on Fourth Amendment grounds, implying the territory's courts were subject to federal constitutional norms.[148]

Unlike in state-federal disputes, where clear constitutional principles define the balance of power, territorial jurisprudence is shaped by ad hoc, prudential reasoning that varies depending on political and legal exigencies.[149] Just as the Court in *Rucho v. Common Cause* recognized that no "judicially discernible and manageable" standard existed for adjudicating partisan gerrymandering claims, the same is true for territorial governance: absent a stable legal framework, judicial intervention risks contradicting precedent and undermining congressional authority.[150] When courts oscillate between deference and intervention without a clear doctrinal anchor, they create the very instability the PQD is meant to prevent.[151]

---

145. 579 U.S. 59, 76–78 (2016).

146. 579 U.S. 115, 129 (2016).

147. 626 F.3d 592, 603 (1st Cir. 2010) (en banc) (Igartua IV).

148. 442 U.S. 465, 470 (1979).

149. *See, e.g.*, Younger v. Harris, 401 U.S. 37, 44 (1971) (explaining that "the notion of 'comity'" includes "a proper respect for state functions" grounded in federalism); Arizona v. United States, 567 U.S. 387, 399–400 (2012) (applying the Supremacy Clause to preempt conflicting state law in an area of exclusive federal authority); Alden v. Maine, 527 U.S. 706, 713–14 (1999) (holding that the constitutional structure preserves the States' immunity from private suits, reflecting the balance between state and federal power).

150. Rucho v. Common Cause, 588 U.S. 684, 710 (2019) ("[N]one provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.").

151. *See* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1963–64 (2015) (explaining that the "judicially discoverable and manageable

3. *Prudential Considerations: The Remaining* Baker *Factors*

The prudential *Baker* factors—considerations that counsel against judicial intervention due to practical and institutional concerns—provide a broader, more structural rationale for why federal courts should avoid adjudicating disputes over territorial organic acts and territorial statutes. Judicial intervention in territorial governance is institutionally destabilizing and pragmatically unworkable. Instead of merely reinforcing a doctrine of judicial passivity, these prudential factors expose the extent to which territorial governance is structured through an iterative political process, not a fixed constitutional framework. Thus, any judicial incursion into this process not only disrespects the political branches but also distorts the organic evolution of territorial governance itself.

a. *Inherent Institutional Mismatch: Courts Lack the Competence to Intervene*

The third and fourth *Baker* factors (the need for an initial policy determination beyond judicial expertise and respect for coordinate branches) collectively underscore that judicial intervention in territorial governance would be more than just overreach—it would be destabilizing.[152] Unlike constitutional provisions that establish clear substantive or procedural rights, territorial organic acts are political instruments crafted in response to shifting political imperatives, economic realities, and historical contingencies. Attempts to judicialize these issues always risk producing inconsistent and unpredictable results, as courts would be forced to craft ad hoc standards to assess whether, for example, Congress has provided "sufficient" self-government to a

---

standards" prong has been invoked to avoid adjudication where courts perceive a high risk of inconsistent or politically charged decision making).

152. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 184 (1962), quoted in BAUDE ET. AL., *supra* note 93, at 304 ("Such is the foundation, in both intellect and instinct, of the political-question doctrine: the Court's sense of lack of capacity, compounded in unequal parts of (a) the strangeness of the issue and its intractability to principled resolution; (b) the sheer momentousness of it, which tends to unbalance judicial judgment; (c) the anxiety, not so much that the judicial judgment will be ignored, as that perhaps it should but will not be; (d) finally ('in a mature democracy'), the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from.").

territory.[153] The impracticality of judicial oversight is evident in cases where courts have struggled to balance democratic participation with territorial status.[154]

Legal scholars have echoed this concern, warning that judicial intervention in territorial governance risks judicializing inherently political questions without offering enforceable solutions.[155] As Judge José A. Cabranes has observed, for example, territorial disputes raise "questions of political structure that courts are ill-suited to resolve," given their entanglement with historical, economic, and geopolitical considerations beyond the reach of judicial remedies.[156] Professor Ponsa-Kraus likewise emphasizes that the *Insular Cases* generated "nothing less than a crisis of political legitimacy" in the territories, warning that efforts to repurpose them "will prolong the crisis" and that, so long as they remain good law, "the Court's imprimatur will remain on permanent colonialism."[157] This critique invokes questions of institutional settlement: judicial review in the territorial context tends not to challenge congressional supremacy, but rather to entrench it under the guise of constitutional adjudication.

Congress's authority over territories is not just a matter of legal doctrine—it is an entrenched structural reality of U.S. governance. Any attempt by the judiciary to impose a different legal framework on territorial governance risks contradicting established congressional authority and destabilizing carefully negotiated territorial arrangements. Puerto Rico's transition to Commonwealth status illustrates the point. That shift resulted from a political process between Congress and Puerto Rican

153. *See* Puerto Rico v. Sánchez Valle, 579 U.S. 59, 84 (2016) (acknowledging that Puerto Rico's status is a product of legislative, not judicial, determinations).

154. *See* Davis v. Guam, 932 F.3d 822, 839 (9th Cir. 2019) (invalidating Guam's plebiscite law while recognizing the complex political and historical issues surrounding self-determination).

155. *See* Burnett & Marshall, *supra* note 1, at 8–9 (arguing that courts lack the institutional capacity to resolve the core political questions embedded in territorial status disputes).

156. 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, 399 (1978).

157. *See* Christina Duffy Ponsa-Kraus, *The* Insular Cases *Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 YALE L.J. 2449, 2467 (2022) ("The *Insular Cases* gave rise to nothing less than a crisis of political legitimacy in the unincorporated territories, and no amount of repurposing, no matter how well-intentioned—or even successful—can change that fact. On the contrary: repurposing the *Insular Cases* will prolong the crisis. So long as the *Insular Cases* remain alive, the Court's imprimatur will remain on permanent colonialism.").

leadership, not a judicial mandate, and was designed to balance local self-government with continued federal oversight.[158] In subsequent litigation, courts have repeatedly declined to revisit or second-guess this framework, expressly warning that altering Puerto Rico's political status through judicial decree would intrude upon Congress's constitutionally committed role and upset a delicate political compromise.[159] In other words, the judiciary itself has recognized that self-governance in the territories is a fluid political arrangement, not a judicially enforceable constitutional entitlement.

b. *Judicial Overreach and the Danger of Conflicting Legal Pronouncements*

The final *Baker* factors—the need to avoid contradicting past political decisions and the risk of conflicting governmental pronouncements—highlight a broader concern: judicial rulings on territorial governance could create greater legal uncertainty rather than resolve disputes. For example, if a court were to rule that a territorial organic act was being improperly applied, this could lead to direct contradictions between judicial, legislative, and executive interpretations of territorial governance.

Such conflicts have already arisen in the past, most notably in cases concerning Puerto Rico's sovereignty status.[160] The

158. *See* Puerto Rico Federal Relations Act, Pub. L. No. 81-600, 64 Stat. 319 (1950) (authorizing Puerto Rico "in the nature of a compact" to organize a republican form of self-government and draft its own constitution, subject to congressional approval). Puerto Rican voters ratified the statute in a referendum on June 4, 1951; a locally elected constitutional convention then produced a draft constitution that was approved by popular vote on March 3, 1952. Congress accepted the document—with several amendments—by Joint Resolution, ch. 567, 66 Stat. 327 (July 3, 1952), and the Commonwealth Constitution took effect on July 25, 1952. For a concise overview of this sequence, see Rafael Cox Alomar, *The Puerto Rico Constitution: A Unique Territorial Framework*, STATE COURT REPORT (June 30, 2025), https://statecourtreport.org/our-work/analysis-opinion/puerto-rico-constitution-unique-territorial-framework [https://perma.cc/598G-PB5W].

159. *See* Puerto Rico v. Sánchez Valle, 579 U.S. 59, 72–74 (2016) (describing the creation of Puerto Rico's constitution as a "compact" between the island and Congress, rejecting the argument that the Commonwealth arrangement divested Congress of ultimate authority); Harris v. Rosario, 446 U.S. 651, 651–52 (1980) (per curiam) (holding that Congress "may treat Puerto Rico differently" from the States "so long as there is a rational basis").

160. Other territorial disputes likewise illustrate tension between congressional authority and local self-government, albeit with stakes short of PROMESA's island-wide fiscal takeover. *See, e.g.*, Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115 (2016) (invalidating Puerto Rico's Recovery Act as preempted by Chapter 9 of the Bankruptcy Code); Commonwealth of the N. Mariana Islands v. United States, 670 F. Supp. 2d 65, 70 (D.D.C. 2009) (upholding federalization of the Northern Marina Island's immigration

PROMESA Act, which established a fiscal oversight board for Puerto Rico, raised serious questions about whether Puerto Rico's government retained meaningful autonomy over its financial affairs.[161] In *Financial Oversight & Mgmt. Bd. v. Aurelius*, the Supreme Court upheld the oversight board's authority, but in doing so revealed the fragility of the legal framework surrounding territorial governance: even minor shifts in judicial interpretation could destabilize the existing political equilibrium.[162]

Similarly, courts have been reluctant to wade into disputes over territorial representation for fear of *contradicting* the political branches. In *Tuaua v. United States*, the D.C. Circuit invoked the PQD in refusing to extend birthright citizenship to American Samoans, emphasizing that this issue was a policy determination, not a judicial question.[163] A contrary ruling would have directly overridden Congress's longstanding policy of distinguishing between state and territorial citizenship, forcing the judiciary to dictate national policy in an area the Constitution explicitly entrusts to the political branches.

Applying the PQD as a mechanism of establishing a more consistent model of judicial decision making is not merely a potential mechanism for judicial restraint, but a reflection of the structural reality that territorial governance is an evolving, contingent, and politically determined system. The judiciary's historical deference in this domain is not a passive abdication of responsibility, but an acknowledgment that territorial self-governance evolves through ongoing negotiations between Congress, territorial governments, and the executive branch. This

---

despite local opposition); Tuaua v. United States, 788 F.3d 300 (D.C. Cir. 2015), *cert. denied*, 579 U.S. 902 (2016) (rejecting the claim that persons born in American Samoa are entitled to birth-right citizenship); Fitisemanu v. United States, 1 F.4th 862 (10th Cir. 2021), *cert. denied*, 143 S.Ct. 362 (2022) (holding that persons born in American Samoa are not U.S. citizens under the Fourteenth Amendment's Citizenship Clause, and declining to extend birthright citizenship absent congressional action). While each case raised significant questions about territorial status and constitutional rights, none produced a statutory framework as sweeping as the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), 48 U.S.C. §§ 2101–2241.

161. *See* Fin. Oversight & Mgmt. Bd. v. Aurelius Inv., LLC, 590 U.S. 464–65 (2020).

162. *See id.* at 465 (holding that members of the board are territorial officers not subject to the Appointments Clause and noting that Congress created the board to address a fiscal emergency under its Territory Clause authority, thereby reaffirming Congress's ultimate control over Puerto Rico's governance).

163. 788 F.3d at 308.

iterative process defies judicially manageable standards and resists the imposition of rigid constitutional categories.[164]

D. COUNTERARGUMENT: SOME ORGANIC ACT ISSUES HAVE ALREADY BEEN LITIGATED

Courts have previously adjudicated cases involving territorial organic acts without invoking the PQD, instead applying ordinary tools of statutory interpretation.[165] If some organic act issues have already been deemed reviewable, then a blanket rule treating all territorial issues as political questions may be impractical.[166]

However, the justiciability of statutory disputes likely depends on the nature of the challenge. While courts have intervened in some territorial disputes and declined to adjudicate others, they have rarely articulated a coherent rule distinguishing justiciable from nonjusticiable cases. The case law reflects an ad hoc pragmatism rather than a principled doctrine. Although courts have inconsistently applied the PQD in territorial cases, one plausible limiting principle is that claims involving statutory interpretation or discrete rights violations are more judicially manageable than those challenging the *foundational structure of territorial governance*.[167]

---

164. *See* Puerto Rico v. Sanchez Valle, 579 U.S. 59, 72 (2016) ("Congress would cast the dispositive vote: The constitution, Public Law 600 declared, would become effective only '[u]pon approval by the Congress.'"); *id.* at 76–77 ("Put simply, Congress conferred the authority to create the Puerto Rico Constitution, which in turn confers the authority to bring criminal charges. . . . It has no capacity. . . to erase or otherwise rewrite its own foundational role in conferring political authority. Or otherwise said, the delegator cannot make itself any less so—no matter how much authority it opts to hand over."). Sanchez Valle underscores that Puerto Rico's self-governance framework is a product of congressional delegation and subject to congressional change. *Id.*

165. *See, e.g.*, Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero, 426 U.S. 572, 601 (1976) (striking down a Puerto Rican law restricting bar admission to U.S. citizens under the Equal Protection Clause); Limtiaco v. Camacho, 549 U.S. 483, 490 (2007) (interpreting the Guam Organic Act's debt limitation provision as a statutory question); Puerto Rico v. Franklin Cal. Tax-Free Tr., 579 U.S. 115, 125 (2016) (holding that the Puerto Rico Public Corporation Debt Enforcement and Recovery Act was preempted by the federal Bankruptcy Code); United States v. Wheeler, 435 U.S. 313, 320 (1978) (interpreting the Navajo Tribe's governing authority under federal law).

166. *See* Zivotofsky v. Clinton, 566 U.S. 189, 201 (2012) (holding that not all foreign policy-related disputes are political questions and distinguishing statutory interpretation from policy-based determinations).

167. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (emphasizing that cases requiring an "initial policy determination" are political questions).

For example, in *Flores de Otero*, the Court addressed an equal protection challenge to a specific local law,[168] and *Limtiaco* involved a narrow question of statutory interpretation regarding the meaning of "assessed value" in Guam's fiscal governance framework, rather than a constitutional challenge to Congress's authority over Guam.[169] By contrast, cases like *Commonwealth of the Northern Mariana Islands v. Atalig*[170] and *King v. Morton*[171] implicated core questions of territorial self-governance, prompting judicial restraint. While the courts have not clearly articulated this distinction, it maps onto a more coherent analytic framework—one that understands territorial governments as exercising delegated congressional authority, much like federal agencies. This reframing suggests that organic acts, like agency enabling statutes, may be subject to judicial review in ways familiar to administrative law, without collapsing into unmanageable political questions.

III. TERRITORIES AS FEDERAL "INSTRUMENTALITIES"

Congress has long governed the territories through delegation.[172] Yet few accounts[173] have traced the implications of that fact: that the territories, in their structure and operation, resemble not states but administrative entities.[174] This analogy invites a reframing. If territorial organic acts, like agency enabling statutes, are exercises of delegated congressional power, should territorial governance be interpreted through an administrative law lens rather than a constitutional one? And if so, what would

168. 426 U.S. at 597–99.

169. 549 U.S. at 490.

170. 723 F.2d 682, 688–89 (9th Cir. 1984).

171. 520 F.2d 1140, 1147–49 (D.C. Cir. 1975).

172. *See, e.g.*, Downes v. Bidwell, 182 U.S. 244, 305 (1901) (White, J., concurring) ("The power to govern territory . . . arises not from the Constitution, but from the right of the United States to acquire territory, and the duty of maintaining and governing it."); *see also* Binns v. United States, 194 U.S. 486, 491–92 (1904) (recognizing Congress's plenary authority to "make all needful rules and regulations" for territories).

173. With the exception of *Guam and the Case for Federal Deference*, *supra* note 23, at 1705–06.

174. *See, e.g.*, Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1, 249–52 (2002) (tracing the legal evolution of territorial status and the ways courts have struggled to define the constitutional relationship between territories and the federal government).

that mean for judicial review, congressional oversight, and the normative project of self-determination?

The legitimacy of the administrative state has always turned on a precarious balance between expertise and accountability. The same balance defines the territory. The logic that once justified judicial deference to agency interpretation—to preserve flexibility, encourage specialization, and respect institutional competence—applies with particular force to the territories, which must mediate between local conditions and national policy under the shadow of congressional plenary power. Historically, the territories have been cast in a rotating vocabulary of exception—sui generis entities, quasi-states, dependencies—but the vocabulary of administration may offer a more precise description of what they have always been: instruments of delegated governance.[175]

This claim here is not that all territorial laws should be beyond federal reach, but that federal courts should adopt a structured framework of deference—analogous to that of administrative law's graduated doctrines—to decide when intervention is warranted. Courts need not view territorial courts as fully sovereign judicial bodies to recognize that, like agencies, they exercise delegated congressional authority and develop specialized expertise in their respective domains. Even where questions of territorial governance are justiciable, their resolution should be informed by the humility that defines judicial review of agency action.

At a structural level, the resemblance runs deep. Both territorial governments and administrative agencies derive their power from statutory delegation; both operate largely outside the Article III judiciary; and both engage in policy formation and adjudication within bounded statutory frameworks. But the relevant question is whether territorial courts warrant the same kind of interpretive deference that federal courts have historically afforded to administrative agencies under doctrines such as *Skidmore v. Swift & Co.*[176] This section develops that analogy along three dimensions.

---

175. *Cf.* Corporación Insular de Seguros v. García, 680 F. Supp. 476, 482 (D.P.R. 1988) (describing Puerto Rico's sui generis judicial status); Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 600–07 (1982) (recognizing Puerto Rico's quasi-sovereign interests for parens patriae standing); Nat'l Bank v. Cnty. of Yankton, 101 U.S. 129, 133 (1880) (calling the Territories "political subdivisions of the outlying dominion of the United States").

176. 323 U.S. 134 (1944).

1. A Functional History of Federal Experimentation: both territories and administrative agencies have historically served as experimental jurisdictions for governance, allowing Congress to test regulatory, economic, and political frameworks before broader implementation.
2. A Judicial Recognition of Territories as Federal Instrumentalities: courts have long acknowledged that territorial governments exist only by virtue of congressional authorization, reinforcing their dependency on federal oversight.
3. A Shared Structural Basis of Congressional Delegation: both territories and agencies derive their governing authority from Congress' delegation of power, rather than from inherent sovereignty.

Finally, this section considers the post-*Loper Bright* landscape, arguing that the demise of *Chevron* does not foreclose judicial deference to territorial adjudication. Unlike agencies, territories are not extensions of the executive branch and thus do not present the same separation of powers concerns that animated the Court's recent rejection of *Chevron* deference.

A. THE HISTORICAL ANALOGY: SHARED STRUCTURAL BASES FOR DEFERENCE

Congress has historically structured both territorial governance and federal administrative agencies using delegated power—granting authority to non-state entities while retaining ultimate federal control.[177] This model of delegation is most evident in the organic acts of U.S. territories, which define the legislative, executive, and judicial powers of territorial governments—much as agency-enabling statutes establish the authority and limitations of federal regulatory bodies. From the earliest days of the Republic, Congress delegated governance to territorial entities to manage geographically distinct areas under

177. *See, e.g.*, United States v. Grimaud, 220 U.S. 506 (1911) (upholding Congress's authority to delegate rulemaking power to executive officials so long as Congress supplies the governing framework); Jonathan H. Adler, *The Delegation Doctrine*, HARV. J. L. & PUB. POL'Y PER CURIAM (June 20, 2024), https://journals.law.harvard.edu/jlpp/the-delegation-doctrine-jonathan-h-adler/ [https://perma.cc/7N6B-NQF4] (emphasizing how courts conceptualize the legitimacy constraints on Congress's delegation to administrative agencies and drawing analogies to governance frameworks constrained by institutional separation of powers).

its plenary power.[178] Similarly, the rise of the administrative state in the twentieth century reflected Congress's reliance on agencies to regulate specialized domains beyond its direct capacity.[179] Both territories and agencies have always exercised "derivative" Congressional authority, subject to federal oversight.[180]

Territorial governance as a model of formal Congressional "delegation" arose most famously with the constitution of the Northwest Ordinance of 1787.[181] The Ordinance created a system of federally appointed governors and judges to administer laws and laid out a pathway to statehood, with provisions explicitly subordinating territorial laws to federal authority.[182] Indeed, the Ordinance declared that "[t]he governor shall have power to approve or reject all laws passed by the legislative assembly" and that territorial actions must conform to the overarching principles of federal governance.[183] By the late nineteenth and early twentieth centuries, Congress structured the governance of non-contiguous territories such as Puerto Rico, Guam, and the Philippines through organic acts that mirrored enabling statutes for federal agencies.[184] The Guam Organic Act of 1950, for example, granted Guam a locally elected legislature but required that all territorial laws conform broadly with U.S. statutes and treaties.[185] Just as agencies today derive their power from statutes and are constrained by their terms, territories' legislative,

178. *See, e.g.*, Nat'l Bank v. Cnty. of Yankton, 101 U.S. 129, 133 (1880) ("All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress. The Territories are but political subdivisions of the outlying dominion of the United States . . . and Congress may legislate for them as a State does for its municipal organizations.").

179. *See generally* Gary S. Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

180. "Derivative" here refers to the source of the territories' and administrative agencies' powers—both are subject to delegations of authority Congress passes via federal statutes.

181. *See* ARNOLD H. LEIBOWITZ, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS 6 (Martinus Nijhoff Publishers 1989) ("[T]he Northwest Ordinance was either implicitly accepted as the governing statute for the newly acquired territories by the courts or was followed as the model in other governing legislation.").

182. *Id.*

183. An Ordinance for the Government of the Territory of the United States, North-West of the River Ohio, ch. 8, 1 Stat. 50 (1789) (codified at 1 U.S.C., at XLV–LXXV) (stating that the governor may make laws "not repugnant to the principles and articles in this ordinance established and declared," and "all bills . . . shall be referred to the governor for his assent; but no bill, or legislative act whatever, shall be of any force without his assent").

184. *See, e.g.*, Organic Act of Guam, Pub. L. No. 81-630, 64 Stat. 384 (1950) (codified as amended at 48 U.S.C. §§ 1421–1428).

185. *Id.* at § 1423a.

executive, and judicial powers were initially bound by their constitutive statutes.[186]

The evolution of administrative agencies in the twentieth century reflects a similar reliance on delegation to address specialized issues of national importance. Agencies were created to regulate complex areas such as labor, environment, and public health, with Congress enacting enabling statutes to delineate their scope of authority.[187] The Administrative Procedure Act of 1946 (APA) established procedural safeguards to ensure transparency and accountability in agency rulemaking and adjudication.[188] While the applicability of the APA to territorial governments is not explicitly addressed within the statute, its language and underlying purpose suggest that territorial actions may fall within its purview—and its procedural framework mirrors the oversight mechanisms Congress has historically imposed on territories.[189]

---

186. For territories like Puerto Rico and the Northern Mariana Islands (NMI), which have adopted their own constitutions, their authority remains rooted in congressional approval and subject to the overarching supremacy of federal law. While Puerto Rico's constitution establishes a structure of self-governance, Congress retains ultimate authority under the Territorial Clause. *See* Commonwealth of N. Mariana Islands v. Atalig, 723 F.2d 682, 684–85 (9th Cir. 1984) (describing NMI's constitution as deriving from the Covenant ratified by Congress). The Northern Mariana Islands adopted a constitution under its 1976 Covenant with the United States, which grants a level of self-governance but explicitly preserves federal supremacy in key areas, such as defense and immigration. *See* Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, § 103, 90 Stat. 263, 264 (1976) (preserving U.S. authority over defense and immigration). The Covenant is a bilateral agreement between the NMI and the U.S., ratified by Congress, and functions similarly to an organic act with additional constitutional provisions. Courts have interpreted the Covenant as being amendable only with mutual consent, adding a unique layer of complexity. *See* Saipan Stevedore Co. v. Dir. of Emp. Sec., 133 F.3d 717, 721 (9th Cir. 1998). Guam, the U.S. Virgin Islands, and American Samoa do not have constitutions separate from their organic acts. Their legislative, executive, and judicial powers are entirely dictated by Congress through these acts. American Samoa stands apart as it does not even have a formal organic act. Instead, it is governed under executive orders and local laws, making it the most agency-like in its structural relationship with the federal government. *See* Tuaua v. United States, 788 F.3d 300, 302–03 (D.C. Cir. 2015) (describing American Samoa's governance under executive orders and local laws rather than a congressionally enacted organic act).

187. *See generally* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256 (2006).

188. 5 U.S.C. § 551.

189. *See generally* Lawson, *supra* note 23.

B. THE PRECEDENTIAL ANALOGY: JUDICIAL RECOGNITION OF TERRITORY-AGENCY PARALLELS

Federal courts have long recognized that territorial governments lack independent sovereignty and instead function as instrumentalities of Congress, reinforcing their similarity to federal agencies. As early as *United States v. More*[190]—and later in *Clinton v. Englebrecht*[191]—the Supreme Court functionally described territorial courts as agents of Congress, rather than independent judicial bodies. In *Sakamoto v. Duty Free Shoppers, Ltd.*, the Ninth Circuit went even further, noting that "[s]ince Guam is an unincorporated territory enjoying only such powers as may be delegated to it by the Congress in the Organic Act of Guam . . . the Government of Guam is in essence an *instrumentality* of the federal government."[192] The Court even makes a comparison between Guam and an incorporated state:

> As we have seen, the government of Guam is an instrumentality of the federal government over which the federal government exercises plenary control. Congress has granted it far fewer powers of self government than the State of Colorado has granted the City of Boulder.[193]

The Supreme Court's modern double-jeopardy decision in *Puerto Rico v. Sánchez Valle* also underscores that territorial authority ultimately "owes" to Congress.[194] The Court rejected the argument that Puerto Rico, despite its self-governing structure, exercised any inherent constitutional authority; rather, its powers were entirely derivative of Congress's plenary authority under the Territory Clause.[195] Even where Congress has conferred a greater

---

190. 7 U.S. (3 Cranch) 159, 172 (1805).

191. 80 U.S. (13 Wall.) 434, 447–48 (1871).

192. 764 F.2d 1285, 1286 (9th Cir. 1985) (emphasis added); *see also* Domenech v. Nat'l City Bank, 294 U.S. 199, 204 (1935) ("Puerto Rico, an island possession, like a territory, is an agency of the federal government, having no independent sovereignty comparable to that of a state in virtue of which taxes may be levied. Authority to tax must be derived from the United States.").

193. *Sakamoto*, 764 F.2d at 1288–89.

194. 579 U.S. 59, 74 (2016) ("Because the ultimate source of Puerto Rico's prosecutorial power is the Federal Government—because when we trace that authority all the way back, we arrive at the doorstep of the U.S. Capitol—the Commonwealth and the United States are not separate sovereigns.").

195. *Id.*

degree of local autonomy—such as through the establishment of elected territorial legislatures—this delegation of power remains subject to revocation, modification, or restriction at congressional discretion.[196]

Courts have not only recognized territorial governments as congressional instrumentalities but have also treated territorial adjudication in a manner *structurally* akin to agency adjudication. Territorial courts—which are Article I courts—exercise jurisdiction that stems from delegation rather than from Article III judicial power.[197] This structure closely resembles administrative tribunals, which also operate outside of Article III and adjudicate disputes within statutorily defined domains, subject to federal oversight.[198] In *Palmore v. United States*, the Supreme Court examined Congress' power to structure non-Article III courts in the District of Columbia, holding that Congress has broad discretion to create courts and delegate judicial functions to legislative bodies.[199] Although *Palmore* primarily addressed the District of Columbia, its reasoning extends to territorial governance because Congress exercises identical plenary power over both entities.[200] Because the Constitution expressly authorizes Congress to "exercise exclusive Legislation" over the District and to "make all needful Rules and Regulations" for the territories, the Court has treated Congress's authority in both spheres as general and plenary, and has approved non-Article III courts in each.

This judicial characterization naturally invites comparison to administrative adjudication, where agency tribunals—such as the Board of Immigration Appeals (BIA) or Administrative Law Judges within the Securities and Exchange Commission or National Labor Relations Board—resolve disputes within their statutory frameworks, subject to federal court oversight.[201]

---

196. *See* Binns v. United States, 194 U.S. 486, 491 (1904).

197. *See supra* Part II.B.

198. *See* Palmore v. United States, 411 U.S. 389, 402–03 (1973).

199. *Id.* at 410.

200. *See Binns*, 194 U.S. at 491 (1904) (equating Congress's plenary authority over "the Territories" and "the District of Columbia"); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64–70 (1982) (plurality) (collecting the historical "legislative courts" and identifying both territorial courts (Art. IV) and District of Columbia courts (Art. I, § 8, cl. 17)).

201. *See* Dickinson v. Zurko, 527 U.S. 150, 152–53 (1999) (confirming that federal courts review agency adjudications under the APA and emphasizing that agency fact-finding is subject to judicial oversight); Bowen v. Mich. Acad. of Fam. Physicians, 476 U.S. 667, 670 (1986) (affirming that federal courts generally have jurisdiction to review agency decisions unless explicitly precluded by statute); *cf.* Sec. & Exch. Comm'n v. Jarkesy, 603 U.S. 109,

C. THE FUNCTIONAL ANALOGY: TERRITORIES AS LABORATORIES OF FEDERAL EXPERIMENTATION

Both territorial governments and federal administrative agencies exercise authority delegated by Congress, operate within statutory limits, and have been used as proving grounds for new governance models. A less tread-upon feature they share is their role as experimental jurisdictions where Congress tests governance strategies before extending them to the broader federal framework.[202] While agencies pilot regulatory approaches in specialized domains, territories have historically functioned as laboratories for U.S. expansion, administration, and political integration.[203] Their status as federal instrumentalities has made them ideal sites for experimenting with legal, economic, and administrative policies that, if successful, might later be codified into national law or applied in other jurisdictions. But unlike agencies—whose experimentalism is largely technocratic—territorial experimentation has always been deeply entangled with sovereignty, self-governance, and the legacies of colonialism. This distinction makes the analogy both compelling and fraught.

1. *The Philippines: A Test Case for Colonial Administration and Governance*

Congress structured the Philippine civil government as a provisional, staged regime. From 1898 to 1946, the Philippines functioned as both a training ground for future states (such as Alaska and Hawaii) and as a model for managing non-contiguous,

120–141 (2024) (holding that when the SEC seeks civil penalties for securities fraud, the Seventh Amendment entitles the defendant to a jury trial, thereby limiting agencies' ability to use in-house adjudication for such penalties).

202. *Cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

203. *See generally* Juan R. Torruella, *A Reply to the Notion of "Territorial Federalism,"* 131 HARV. L. REV. F. 65, 68–69, 89–90 (2018) (condemning the use of Puerto Rico as a venue for governance experiments: "the promotion of one more experiment regarding Puerto Rico's place within the constitutional and political polis of the United States . . . is not an acceptable solution," and "further experimentation . . . by substituting one unequal framework for another . . . is no more acceptable" than *Plessy*; criticizing PROMESA as "a fourth regime that in many ways replicates the first attempt at colonial governance under the Foraker Act—the first experiment").

culturally distinct territories.[204] The Philippine Organic Act of 1902, for instance, delegated significant legislative authority to the Philippine Assembly while retaining executive power in the United States-appointed Philippine Commission.[205] The Act also *conditioned* fuller self-government on concrete gatekeeping events (cessation of insurrection, a national census, and two years of "general and complete peace") before authorizing an elected Assembly, confirming that local autonomy would expand only after specified benchmarks were met.[206] This framework was not merely a functional governance structure; it was a deliberate policy experiment designed to test the viability of balancing local legislative autonomy with centralized federal oversight.[207]

This statutory scheme sat atop the transitional Spooner Amendment, which had vested "all military, civil, and judicial powers" in the President "until otherwise provided by Congress"—a delegation the Supreme Court later cited in explaining the "completeness and flexibility" of national power over the Islands.[208] Read together—with President McKinley's contemporaneous instructions emphasizing an administration designed "not for our satisfaction" but for the "happiness, peace, and prosperity" of Filipinos—the enacted text, executive guidance, and judicial exposition depict an experiment in supervised self-rule implemented by statute and deliberately kept adjustable by Congress.[209]

This experimental approach extended to fiscal policy. The United States implemented various taxation, tariff, and revenue-

---

204. *See, e.g.*, Organic Act of the Philippines, ch. 1369, 32 Stat. 691 (1902), § 86 ("Congress . . . hereby reserves the power and authority right to annul [all laws passed by the government of the Philippine Islands].").

205. *See generally id.* § 7.

206. *Id.* at § 7.

207. STANLEY KARNOW, IN OUR IMAGE: AMERICA'S EMPIRE IN THE PHILIPPINES 176–80 (1989) (describing the Act as part of a conscious U.S. policy to "test" limited self-government under continued American sovereignty).

208. Hooven & Allison Co. v. Evatt, 324 U.S. 652, 674–75 (1945) ("[A]ll military, civil, and judicial powers necessary to govern the Philippine Islands . . . shall, until otherwise provided by Congress, be vested in such person and persons and shall be exercised in such manner as the President of the United States shall direct.") (citing the Army Appropriations Act of 1901 (Spooner Amendment), ch. 803, § 1, 31 Stat. 895, 910 (1901)); Cincinnati Soap Co. v. United States, 301 U.S. 308, 318–19 (1937) ("This brief resume demonstrates both the completeness and flexibility of the national power over the Philippines . . . ").

209. WILLIAM MCKINLEY, INSTRUCTIONS TO THE PHILIPPINE COMMISSION 8 (Gov't Printing Office 1900) ("[T]he government which they are establishing is designed not for our satisfaction, or for the expression of our theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands.").

sharing models in the Philippines, treating the archipelago as a laboratory for economic integration strategies that would later inform fiscal policymaking in Puerto Rico and other territories.[210] Legal scholars have argued that the Philippines served as a "training" ground for American colonial administrators, refining governance strategies that would eventually be deployed in other unincorporated territories.[211] Some expansionist legislators even framed the project in explicitly experimental terms during debate; for example, Senator Henry Cabot Lodge described the Philippines as an opportunity to develop methods of colonial governance.[212] But the evidence of experimentation does not depend on any single member's views; it is built into the enacted framework and contemporaneous executive guidance. In essence, Congress sought to develop a playbook for managing subject populations under U.S. rule—a playbook that would later influence the treatment of Puerto Rico, Guam, and the Virgin Islands.[213]

2. *The Administrative State as a Modern Parallel*

The logic of delegated experimentalism finds a modern parallel in the evolution of administrative agencies, which were established to pilot regulatory and policy innovations in domains ranging from environmental protection to public health and digital governance.[214] The modern administrative state did not emerge fully formed; rather, many of the most influential federal agencies were initially designed as experimental bodies to test new governance models in specialized domains before their policies were scaled nationwide.[215] The Environmental Protection Agency (EPA), for example, was established in 1970 amid growing concerns over pollution, but its mandate was not merely to enforce

---

210. *See generally* Diane Lourdes Dick, *U.S. Tax Imperialism in Puerto Rico*, 65 AM. U. L. REV. 1, 9 (2015).

211. Julian Go, *The Provinciality of American Empire: "Liberal Exceptionalism" and U.S. Colonial Rule, 1898–1912*, 49 COMPAR. STUD. SOC. & HIST. 74, 80 (2007).

212. *See* HENRY CABOT LODGE, THE RETENTION OF THE PHILIPPINE ISLANDS 18 (U.S. Gov't Printing Off. 1900) ("Free government, as we know it, is no child's play to be learned in a moment. . . . We are so accustomed to it that we do not remember that it is the result not merely of centuries of struggle, but, what is far more important, of a training and a mental habit . . . .").

213. *See generally* Burnett & Marshall, *supra* note 1.

214. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005).

215. *See* Gillian Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1848 (2015).

existing environmental laws—it was to pioneer new regulatory frameworks, including emissions trading and cap-and-trade mechanisms, that would later become the foundation of global climate policy.[216] Likewise, the Food and Drug Administration (FDA) began as an experimental response to public health crises, evolving from early food safety regulations into a regulatory powerhouse that piloted drug approval processes like the Accelerated Approval Program—an innovation that has since become standard in pharmaceutical regulation, particularly for high-need treatments.[217]

In each of these cases, agencies were not simply administrative appendages of Congress, but rather laboratories of governance—charged with testing regulatory models, balancing competing policy priorities, and refining their approaches before embedding them into the broader legal order.[218] This experimental function, central to the development of the administrative state, mirrors the role that territories have historically played in the federal system.[219] While agencies experiment with regulatory frameworks that can be iteratively adjusted, however, territorial governance experiments have frequently entailed more profound, irreversible determinations about political status, self-determination, and federal integration.[220] This distinction underscores why territories, much like agencies, warrant deference in their decision-making—if not for their technocratic expertise, then for their embedded role in shaping the evolving structure of federal governance.

---

216. *See The Origins of the EPA*, U.S. ENV'T. PROT. AGENCY (May 28, 2025), https://www.epa.gov/history/origins-epa [https://perma.cc/2568-YAVT] (discussing the agency's formation and its evolving mandate to pioneer environmental regulations).

217. *See FDA's Origin*, U.S. FOOD & DRUG ADMIN. (Feb. 1, 2018), https://www.fda.gov/about-fda/changes-science-law-and-regulatory-authorities/fdas-origin [https://perma.cc/J9BE-J8EN] (detailing the FDA's evolution from early food safety regulations to a comprehensive public health agency).

218. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1144 (2012) (describing federal agencies as "laboratories of policy ideas" that experiment with regulatory tools before broader adoption) (citation omitted).

219. Ponsa-Kraus, *supra* note 28, at 112.

220. *Guam and the Case for Federal Deference*, *supra* note 23, at 1708–12, 1719–22 (describing how organic acts and congressional frameworks set foundational, long-term arrangements for territorial governance, unlike ordinary agency rulemaking).

3. *The Implications of Territorial Experimentalism*

The analogy between territories and administrative agencies—though imperfect—yields insight into the judicial role in reviewing territorial governance. Territorial governments have often been tasked with experimenting at the outer edge of American constitutionalism—testing the bounds of federalism, the malleability of citizenship, the scope of constitutional rights, and the limits of self-rule under U.S. sovereignty. That kind of experimentation is qualitatively different from agency innovation; it is more existential, more contested, and more likely to implicate questions of identity, culture, and long-term political status.

This duality—territories as both delegated instruments and contested spaces—complicates their place in federal judicial review. On one hand, their delegated status supports the idea that courts should review their actions using tools developed in administrative law: deciding whether territorial officials act within statutory bounds, whether their decisions are procedurally regular, and whether Congress has supplied judicially manageable standards.[221] On the other hand, their experimental and contingent nature suggests that many structural decisions about territorial governance—especially those reflecting negotiated political settlements or evolving institutional frameworks—should be treated with deference by courts, much like courts defer to the political branches on questions of agency design, removal, or reorganization. In this light, the PQD should not be used as a blunt instrument to bar all litigation involving territories. Rather, it can be reconceptualized as a doctrine of judicial restraint grounded in structural humility—an acknowledgment that courts are not always institutionally suited to second-guess evolving experiments in federal design.

D. COUNTERARGUMENT: *LOPER BRIGHT* AND THE END OF PRESUMPTIVE DELEGATION

The Supreme Court's decision in *Loper Bright* presents a timely challenge to the territory-agency analogy.[222] In *Loper Bright*, the

221. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001) (upholding delegation where Congress supplied an "intelligible principle" to guide agency action); Gundy v. United States, 588 U.S. 128, 135–36 (2019) (plurality opinion) (same).

222. Loper Bright Enters. v. Raimondo, 603 U.S. 369, 380 (2024).

Court overruled *Chevron* deference, rejecting the idea that courts should defer to agencies' interpretations of ambiguous statutes.[223] The Court held that under the APA, judges must "exercise independent judgment" in interpreting statutes, effectively instructing that ambiguity should no longer be resolved by deferring to agency views.[224] This landmark shift suggests a more skeptical judicial attitude toward delegations of law-interpreting power. By extension, if courts are retreating from agency deference, deference to territorial authorities may also warrant skepticism. After *Loper Bright*, the judicial trend leans toward stricter scrutiny of delegated power and a reassertion of judicial authority to say "what the law is."[225] In other words, the analogy might be anachronistic in a post-*Chevron* world: tying arguments for territorial deference to a doctrine that the Supreme Court has now disapproved could be seen as hitching the wagon to a fallen star.

1. *Territorial Court Deference Does Not Implicate the Separation of Powers*

Territorial courts and administrative adjudicatory bodies operate within distinct constitutional frameworks, reflecting the different sources of congressional authority that justify their creation and operation. Territorial courts are Article I courts because they are legislative creations that do not derive their authority from Article III's vesting of judicial power in life-tenured judges; instead, their existence stems from Congress's plenary power under the Territory Clause in Article IV, which allows Congress to establish governing institutions in U.S. territories.[226] Because territorial courts adjudicate both local and federal matters, they occupy a hybrid role: while they operate outside of Article III's separation of powers constraints, they nonetheless

223. *Id.*

224. *Id.* at 394.

225. *Id.* at 385, 392 ("Under the [APA], it thus remains the responsibility of the court to decide whether the law means what the agency says.") (quoting Perez v. Mortgage Bankers Ass'n., 575 U.S. 92, 109 (2015) (Scalia, J., concurring)); Institutional S'holder Servs., Inc. v. Sec. & Exch. Comm'n, 142 F.4th 757, 766 (D.C. Cir. 2025) ("In considering whether an agency's interpretation of its governing statute is contrary to law, we must 'exercise independent judgment in determining the meaning of statutory provisions.'") (quoting *Loper*, 603 U.S. at 394).

226. *See* U.S. CONST. art. IV, § 3, cl. 2 (granting Congress the power to regulate and dispose of U.S. territories and other property).

exercise functions that resemble state courts in their enforcement of local law and federal district courts in their adjudication of federal claims.[227]

By contrast, administrative adjudicatory bodies are generally understood as Article I tribunals, functioning within the executive branch to resolve disputes pursuant to agency regulations and statutory frameworks.[228] The constitutional basis for their adjudicatory authority derives from Congress's power to create regulatory schemes under Article I, § 8 and its authority to structure the executive branch under Article II.[229] Unlike territorial courts, administrative courts do not possess general jurisdiction over statutory or common law matters, but are instead limited to resolving disputes within the substantive scope of their enabling statutes.[230] This structural difference means that administrative courts operate with a narrower jurisdictional scope, functioning more like specialized tribunals, whereas territorial courts—despite their Article I status—often exercise general jurisdiction akin to state courts.[231]

This distinction between (i) territorial courts as Article I entities under Article IV authority and (ii) administrative courts as Article I entities under Article I and Article II authority suggests that—while both derive their power from congressional delegation—territorial courts warrant greater deference in adjudicating matters of local concern because they function as the primary judiciary for their jurisdictions. Administrative courts, by contrast, are structurally subordinate to federal agencies, meaning

---

227. *See* Palmore v. United States, 411 U.S. 389, 402 (1973).

228. *See, e.g.*, Lucia v. Sec. & Exch. Comm'n, 585 U.S. 237, 245–47 (2018) (holding that SEC ALJs are executive branch "Officers" who conduct adversarial hearings pursuant to statute and agency rules).

229. *See* Atlas Roofing Co. v. Occupational Safety & Health Rev. Comm'n, 430 U.S. 442, 450 (1977) (holding that Congress may assign adjudication of newly created public-rights claims to administrative tribunals without Seventh Amendment juries); Buckley v. Valeo, 424 U.S. 1, 137–41 (1976) (per curiam) (locating agencies and their officers within Article II's appointment/oversight framework).

230. *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power . . . is limited to the authority delegated by Congress.").

231. 5 U.S.C. §§ 554, 556–57 (providing that APA formal adjudication governs only where "required by statute"); *cf.* Palmore v. United States, 411 U.S. 389, 392–93, 408–10 (1973) (upholding Congress's creation of non-Article III D.C. local courts of general jurisdiction).

their rulings are subject to executive oversight and review rather than existing as final adjudications of law.[232]

However, there are strong reasons why deference to territorial governance can—and should—survive the demise of *Chevron*. First, the concerns animating *Loper Bright* are not perfectly congruent in the territorial context.[233] The *Loper Bright* majority was concerned with separation of powers in the administrative state, pushing back against executive agencies accumulating too much interpretive authority at the expense of the judiciary and Congress.[234] Territorial governments, by contrast, do not sit in the executive branch.[235] Respecting a territorial government's decisions thus does not aggrandize the executive, nor does it raise non-delegation concerns that were attendant in *Loper Bright*'s reasoning.

It similarly does not undermine Congress's role. In fact, when Article III courts show modest deference to a territorial government's policy choices, they are arguably *honoring* congressional intent, since Congress deliberately granted a measure of autonomy to that local government.[236] This is more

---

232. *See* 5 U.S.C. § 706 (providing for judicial review of "final agency action" and directing courts to "hold unlawful and set aside agency action" that is arbitrary, capricious, or contrary to law).

233. *Cf.* Morrison v. Olson, 487 U.S. 654, 703–15 (1988) (Scalia, J., dissenting) (warning that the Court had adopted a "new system of standardless judicial allocation of powers" by upholding an independent counsel insulated from both the Executive and the Judiciary). Territorial courts do not raise such concerns: they rest squarely on Congress's Article IV power, function as generalist judiciaries for their communities, and leave Article III courts' interpretive authority intact. *Accord* Seila Law LLC v. Consumer Fin. Prot. Bureau, 591 U.S. 197 , 223–38 (2020) (highlighting separation-of-powers concerns focused on executive-branch aggrandizement—concerns that are not implicated when Congress structures Article IV courts and federal courts apply only persuasive (*Skidmore*) weight to territorial interpretations).

234. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 416 (2024) (Thomas, J., concurring) ("*Chevron* was thus a fundamental disruption of our separation of powers. It improperly strips courts of judicial power by simultaneously increasing the power of executive agencies. By overruling *Chevron*, we restore this aspect of our separation of powers.").

235. Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 546–47 (1828) (holding that territorial tribunals are "legislative Courts" created under the Territory Clause, not Article III); *cf.* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492–98 (2010) (confirming executive control over administrative officers).

236. Ponsa-Kraus, *supra* note 28, at 109–12 (explaining that Congress has deliberately granted limited self-government to territorial institutions and that judicial treatment should respect Congress's allocation of authority—so that modest deference to territorial policy choices can be understood as honoring congressional design rather than recognizing independent territorial sovereignty).

akin to respecting some form of local federalism or home rule than ceding interpretive power to a sprawling executive bureaucracy.

Second, the nature of *what* is deferred to in the territorial context can be distinguished from *Chevron*-style statutory interpretation. Often, the issue with territorial decisions is one of policy deference or respect for local judgments on local matters, rather than interpretation of complex federal statutes. For example, if a territorial legislature enacts a law pursuant to its organic act, the question for a reviewing federal court is typically whether that law violates some overriding federal limitation; the court need not micromanage the territory's policy wisdom any more than necessary. Even after *Loper Bright*, courts still routinely apply rational-basis review to legislation and defer to political branches on policy choices—that aspect of judicial restraint was not disturbed.[237] Territorial legislation and executive actions should be afforded similar leeway, so long as they stay within constitutional and statutory bounds.

Finally, *Chevron* was premised on an idea of presumed delegation—that when Congress enacted ambiguous statutes, it implicitly entrusted executive agencies with the power to resolve the gaps. *Loper Bright* rejected that premise, holding that such implicit delegation lacked firm constitutional grounding and risked upsetting the balance of power among the branches.[238] The territorial context, however, is fundamentally different. Territorial governments are the product of *express* delegation: Congress has deliberately created legislatures, executives, and courts in the territories through organic acts, and it has vested them with authority over local matters.[239] When Article III courts

237. *See, e.g.*, Lawyers for Fair Reciprocal Admission v. United States, 141 F.4th 1056, 1067 (9th Cir. 2025) (rejecting an equal protection challenge under rational basis review); Loper Bright Enters. v. Raimondo, 603 U.S. 369, 394 (2024) (affirming "independent judgment" in statutory interpretation but reaffirming respect for policy-based judgments rooted in congressional delegation).

238. *See* Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 145 S. Ct. 1497, 1511 (2025) (recognizing that *express* statutory delegation warrants judicial deference to agency decision making).

239. Adrian Vermeule, among others, has made this point regarding express delegations in administrative agencies' organic statutes. *See* Adrian Vermeule, Chevron *by Any Other Name*, THE NEW DIGEST (July 1, 2024), https://thenewdigest.substack.com/p/chevron-by-any-other-name [https://perma.cc/W9EB-CWXX] ("It should be obvious that a *Chevron* approach to this statutory problem can proceed almost exactly as before, just with different labeling. Interpreting the statute independently, the judges will now say that the best reading itself is that Congress has (in the majority's terms) 'authorized the agency to exercise a degree of discretion' in giving necessary specification and concretization to

extend a measure of deference to territorial institutions, they are not indulging in judge-made fiction, but instead honoring Congress's explicit command. Deference here is not an abdication of judicial duty; it is the constitutional recognition that Congress itself has chosen to entrust self-government to the territories.

In sum, the *Loper Bright* revolution in administrative law does not doom the territory-agency analogy, as the justification for territorial deference rests on distinct foundations: congressional delegation of *local* lawmaking power, political accountability of territorial institutions, and practical competencies developed by those institutions in governing their communities.

2. Skidmore*, Undisturbed*

Even in the wake of *Loper Bright*, courts continue to apply deference in contexts where institutional expertise, reasoned judgment, and historical consistency warrant it.[240] *Skidmore v. Swift & Co.* provides a flexible framework for judicial deference based on an entity's expertise, the thoroughness of its reasoning, and the persuasiveness of its interpretation[241]—unlike *Chevron*, which mandated judicial deference to agencies' reasonable interpretations of ambiguous statutes.[242] This model is particularly relevant in the territorial context, where courts routinely adjudicate matters that implicate deeply embedded local legal traditions, cultural frameworks, and policy concerns with which federal judges lack familiarity.[243]

Federal courts have, in practice, already extended a form of expertise-driven deference to territorial governance. In *People of Saipan*, the Ninth Circuit affirmed dismissal but emphasized

---

'substantial restoration,' and so forth. Put differently, in the terms familiar under the pre-existing and now defunct *Chevron* regime, all *Chevron* step two cases could always have been re-labeled as *Chevron* step one cases—er [sic], I mean, *Loper Bright* delegation cases. That is, cases that used to be labeled as 'deference to reasonable agency interpretations of ambiguous statutes' will now be called 'independent judicial interpretation that identifies a single best answer, an answer that consists of a delegation of discretionary authority to agencies within a given range.' But that relabeling changes rather little.").

240. *See Loper*, 603 U.S. at 369 (holding that *Chevron* deference is no longer applicable but not invalidating all forms of deference).

241. 323 U.S. 134, 140 (1944) (noting that the "weight" given to an interpretation depends on "its thoroughness . . ., validity . . ., and consistency").

242. *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

243. *See* People of Saipan v. U.S. Dep't of Interior, 502 F.2d 90, 99 (9th Cir. 1974) (recognizing the unique political and legal structures of the Trust Territory of the Pacific Islands and deferring to local governance).

comity and directed that such claims be brought in the Trust Territory's High Court in the first instance.[244] This approach mirrors *Skidmore*'s logic: where territorial decisionmakers can demonstrate historical expertise, policy coherence, and reasoned judgment, federal courts have been willing—albeit implicitly—to accord their interpretations persuasive weight.

Moreover, *Skidmore* deference remains viable post-*Loper Bright* because it does not rely on the presumption of delegation.[245] *Loper Bright* rejected the idea that ambiguity alone implies delegation, but *Skidmore* does not depend on such a presumption—it simply directs courts to consider the weight of an interpretation based on practical indicators of reliability.[246] This distinction ensures that deference to territorial courts remains doctrinally sound, even as deference to federal agencies writ-large might diminish.

This model is fully compatible with *Marbury*'s foundational principle that it is "emphatically the province and duty of the judicial department to say what the law is."[247] When a federal court reviews territorial action, it does not abdicate that responsibility by considering local interpretations; rather, it exercises proper judgment in determining what weight to assign them. Under *Skidmore*, the court retains ultimate interpretive authority, but acknowledges that reasoned views grounded in institutional experience—particularly in matters Congress has delegated to local control—may inform that judgment.[248] This holding remains federal law; the territorial view is simply evidence, weighted according to its expertise and logic.[249] In that

244. *See id.* at 98 (recognizing enforceable treaty-based rights but channeling initial review to the territorial High Court on comity grounds; holding that the judiciary should not interfere with matters of local political determination).

245. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 402 (2024) ("And although an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.' . . . Such expertise has always been one of the factors which may give an Executive Branch interpretation particular 'power to persuade, if lacking power to control.'") (citing Bureau of Alcohol, Tobacco and Firearms v. FLRA, 464 U.S. 89, 98 n.8 (1938), and Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)).

246. *See* 323 U.S. at 140 (holding that deference depends on the persuasiveness of an interpretation, not statutory ambiguity).

247. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

248. 323 U.S. at 140 (noting that agency views "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance").

249. *See* United States v. Mead Corp., 533 U.S. 218, 228 (2001) ("The fair measure of deference to an agency administering its own statute has been understood to vary with circumstances.") (citing *Skidmore*, 323 U.S. at 139–40).

way, the court's role is not compromised—it is fulfilled with appropriate humility.

Yet, the level of *Skidmore* deference may not be uniform across all territories. The nature of the organic act or governing framework influences how much interpretive weight a territorial court's decision should receive.[250] For instance, Puerto Rico's unique commonwealth status, with its history of negotiated self-governance, might justify a higher degree of judicial deference compared to Guam or the Northern Mariana Islands, where federal oversight is more direct.[251] Courts already recognize these distinctions in different contexts—such as in *Sanchez Valle*, where the Court treated Puerto Rico's sovereignty claims differently than those of other unincorporated territories.[252] These variations suggest that *Skidmore* deference should be calibrated based on the level of statutory autonomy Congress has granted each territory.

Importantly, this model would not rely on judicial intuition or case-specific expediency. Instead, calibration would be guided by objective, publicly articulable factors—(i) the degree of statutory autonomy in the territory's organic act or governing covenant, (ii) the presence of a distinct and longstanding local legal tradition, and (iii) the scope and history of congressional oversight in the relevant policy domain. Federal courts would apply these factors uniformly, much as they do in personal jurisdiction or *forum non conveniens* analysis, ensuring consistency across cases.[253] Where Congress retains close supervisory control over a domain—such as by reserving approval authority or prescribing detailed substantive rules—there is less room for territorially grounded expertise to operate. In such contexts, the interpretive act is more an application of federal policy than the exercise of localized judgment informed by unique cultural or institutional knowledge.

A *Skidmore*-like model for territorial deference also avoids the structural pitfalls that doomed *Chevron*. But these concerns are less pressing in the territorial context. Unlike federal agencies,

---

250. *See* Puerto Rico v. Sánchez Valle, 579 U.S. 59, 74 (2016) (holding that Puerto Rico's sovereignty claims differ from those of unincorporated territories due to its unique commonwealth status).

251. *See id.* at 75 (recognizing that Puerto Rico has a distinct governance structure compared to other territories).

252. *Id.* at 76 (explaining that Puerto Rico's self-government derives from a compact with Congress, rather than direct delegation).

253. *Cf.* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–78 (1985) (explaining personal jurisdiction reasonableness factors—burden on defendant, forum's interest, plaintiff's interest, interstate interests, and shared policy interests).

territorial governments do not exist within the executive branch; they are legislative creations operating with *express* congressional authorization. A reviewing court does not cede authority to a co-equal branch of government, but rather acknowledges Congress's delegation of local governance power. In this way, territorial deference is akin to deference to state courts interpreting their own laws—a practice firmly entrenched in federalism jurisprudence.[254]

CONCLUSION

The federal judiciary's treatment of the territories has been marked by contradiction—at times recognizing them as quasi-sovereign entities, at other times as mere extensions of congressional authority. This Note advances Article IV-modulated review: most structural disputes over territorial governance are nonjusticiable under *Baker*, and when review is proper, federal courts should apply *Skidmore*-weighted deference to territorial interpretations within their delegated sphere, preserving *Marbury* while respecting Congress's Article IV design. The argument for judicial minimalism in territorial governance is not about judicial abdication; it is about institutional humility. The judiciary's role in territorial governance should not be one of unchecked intervention or passive acquiescence, but of principled restraint—recognizing that the balance between federal oversight and territorial autonomy is not a judicial puzzle to solve, but a political reality that Congress alone must shape.

254. *See, e.g.*, West v. Am. Tel. & Tel. Co., 311 U.S. 223, 236–37 (1940) ("[T]he highest court of the state is the final arbiter of what is state law."); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law . . . ."); Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78–80 (1938) (holding that federal courts must apply state substantive law, rejecting a federal general common law).