TOO BIG TO FAIL: *BANKS* AND THE RECEPTION OF THE COMMON LAW IN THE U.S. VIRGIN ISLANDS

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> The story of the extent to which the common law of England has been received and applied in the United States, is one of the most interesting and important chapters in American legal history. However, many courts and writers have shown a tendency simply to say that our colonial forefathers brought the common law of England with them, and there has often been little or no inclination to look further into the question.[1]

I. INTRODUCTION

The one-hundredth anniversary of Transfer Day—the name by which the 31st of March is known in the U.S. Virgin Islands and also a legal holiday in the Territory[2]—will occur in 2017. The

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 Appellate and Complex Litigation Law Clerk/Law Librarian, Superior Court of the Virgin Islands, District of St. Croix. I am indebted to the Virgin Islands for the knowledge, insights, and training gained over the past six years clerking initially for the Honorable Darryl Dean Donohue, Sr. (retired), former Presiding Judge of the Superior Court of the Virgin Islands; then the Honorable Maria M. Cabret, Associate Justice of the Supreme Court of the Virgin Islands; and presently for the Honorable Harold W.L. Willocks, Administrative Judge of the Superior Court of the Virgin Islands, as well as the Honorable Douglas A. Brady, the Honorable Denise Hinds Roach, and the Honorable Robert A. Molloy, Judges of the Superior Court of the Virgin Islands. My appreciation also extends to Kristen David Adams, Professor of Law, Stetson University College of Law, for inviting me to participate in this Symposium and to the *Stetson Law Review* editorial staff. And, no small thanks are due to my family as well as my colleagues—Dwyer S. Arce, Anthony Ciolli, Alice Kuo, Karabo Molyneaux-Molloy, Jesse L. Reiblich, and Alisha Udwani—for their patience, insight, and support. This Article began to form for a panel presentation at the Virgin Islands Bar Association's 2015 annual meeting and expanded with remarks given on Friday, March 18, 2016 at Stetson University College of Law at the Symposium. The opinions in this Article are the Author's alone and do not reflect the views of the Supreme Court of the Virgin Islands, the Superior Court of the Virgin Islands, or any judge or justice of the Virgin Islands judiciary.

1. Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791, 791 (1951).

2. V.I. CODE ANN., tit. 1, § 171(a) (1995 ed.) ("The following days are legal holidays in the Virgin Islands . . . March 31 (Transfer Day)."). Although no "Virgin Islands Code" as

United States of America had agreed to purchase the Danish West Indies from the Kingdom of Denmark on August 4, 1916.[3] On March 31, 1917, the islands of St. Thomas, St. John, St. Croix (and the adjacent cays) formally changed sovereignty when Robert Lansing, Secretary of State of the United States, tendered payment (twenty-five million dollars in gold coin) to Constantin Brun, extraordinary envoy and minister plenipotentiary of the King of Denmark, in Washington D.C.[4] A century later: commemorations for the centennial event are underway.[5] And, while many of the events will feature the food, art, and cultures of the United States Virgin Islands on one hand,[6] and the accomplishments of Virgin Islanders on the other,[7] it does not

such exists—only the version of the code as annotated and published presently by LexisNexis—subsequent citations to the laws codified in the Virgin Islands Code will be abbreviated as "V.I.C.". *Cf.* 1 V.I.C. § 1(b) ("This Code may be cited by the abbreviation 'V.I.C.' preceded by the number of the title and followed by the number of the section, chapter, or part in the title."). However, where historical or other editorial information from the code is cited, such citations will refer to the annotated version of the code.

3. Convention Between the United States and Denmark, U.S.-Den., Aug. 4, 1916, 39 Stat. 1706.

4. *See* James Scott Brown, *The Purchase of the Danish West Indies by the United States of America*, 4 AM. J. INT'L L. 853, 853 (1916) ("On August 4, 1916, the Secretary of State, the Honorable Robert Lansing, and the Danish Minister, the Honorable Constantin Brun, signed a treaty, by the terms of which the United States agreed to purchase and Denmark to sell the Danish West Indies for the sum of [twenty-five million dollars].").

5. *See, e.g.*, 3 V.I.C. § 338 (2010) (establishing the "Centennial Commission of the Virgin Islands"). *See also* Virgin Islands of the United States Centennial Commission Act, H.R. 2615, 114th Cong. 2015 (last action, agreed to without objection by the House on April 26, 2016; received by the Senate on April 27, 2016; and referred to the Committee on Energy and Natural Resources).

6. *See, e.g.*, U.S. Dep't of Interior, Office of Insular Affairs, News Release: *Interior Provides $500,000 to Help U.S. Virgin Islands Prepare for Centennial Celebrations in 2017* 1–2 (July 21, 2015), *available at* https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/07212015-USVI-Centennial.pdf:

> Official events on St. Thomas, St. Croix, and St. John will range from parades, sporting events, concerts, and multi-cultural celebrations to exhibitions and festivals featuring local art, dance and food. The program and activities are organized to highlight the continuum of historical events from the Pre-Columbian Period and Indigenous Inhabitants to Columbus and Early European Arrival, Settlement of the Danish West Indies, Forced Migration of Africans, and the Transfer to the United States, leading to the present day where the U.S. Virgin Islands are proud to be a U.S. territory and her people citizens of the United States.

See also Centennial Celebrations Receive $500,000 Grant, ST. JOHN SOURCE (July 22, 2015), http://stjohnsource.com/content/news/local-news/2015/07/22/centennial-celebrations-receive-500000-grant.

7. *See* Report of the USVI Transfer Centennial Commission to the Committee on Culture, Historic Preservation, Youth and Recreation of the 31st Legislature of the Virgin Islands, at 3–4 (June 29, 2015), *available at* http://www.legvi.org/CommiteeMeetings/

appear (at least not at present) that any planning is underway to tell the story of the hundred years of law in the Virgin Islands. But this story should be told. This Article only attempts an overview and, at that, only as to the reception of the common law in the Virgin Islands over the past hundred years.

The Virgin Islands first received English common law in 1921 when the Colonial Council of St. Thomas and St. John and the Colonial Council of St. Croix each adopted a statute to receive it.[8] Approximately thirty years later, when the Legislature of the Virgin Islands adopted a unified code to govern the entire territory, the two statutes were merged and reenacted. But the statute was also amended to declare that the restatements of the law as promulgated by the American Law Institute would supply the Territory's common law.[9] Nearly sixty years after that, and after a local court of last resort had been established, the Supreme Court of the Virgin Islands held in *Banks v.*

31st%20Legislature%20Committees/COMMITTEE%20OF%20CULTURE,%20HISTORIC%20PRESERVATION,%20YOUTH%20&%20RECREATION/6-29-15/6-29-15%202017%20Centennial/6-29-15%20Testimony%20-%20Transfer%20Centennial%20Commission%20-%20Eugene%20Petersen.pdf ("[T]he Transfer Centennial is not only about putting on events and recording history, it is especially about the people: who we are today and who we wish to become. . . . The Transfer Centennial provides us an opportunity to laud the many accomplishments of the last [one hundred] years." (written testimony submitted by Dr. Eugene Petersen)); *see also* Jaime Ward, *Transfer Day Commemoration Looks Toward Centennial Anniversary*, ST. CROIX SOURCE (Apr. 1, 2014), *available at* http://stcroixsource.com/content/news/local-news/2014/04/01/transfer-day-commemoration-looks-toward-centennial-anniversary ("Malone said the territory deserved full votes in Congress and a fair share in federal benefits and the presidential vote. . . . 'Unless we are treated equally then the transfer really isn't complete, but that's a subject for a different day,' he said." (quoting former Virgin Islands senator Shawn Michael Malone)).

8. *See* Code of Laws for the Mun. of St. Thomas & St. Jan [sic], tit. IV, ch. 13, § 6 (1921) ("The common law of England as adopted and understood in the United States shall be in force in this District, except as modified by this ordinance."); *see also* Code of Laws for the Mun. of St. Croix, tit. IV, ch. 13, § 6 (St. Croix 1921) (same). Both codes are generally referred to as the "1921 Codes." *See, e.g.*, Der Weer v. Hess Oil V.I. Corp., No. SX-05-cv-274, 2016 WL 1644948, at *2 (V.I. Super. Ct. Apr. 25, 2016) (noting that the codes are "commonly referred to as the 1921 Codes"); *see also* Mun. of St. Croix v. Stakemann & Robinson, 1 V.I. 60, 64–65 (D.V.I. 1924) (same usage). This Article will do the same.

9. *See* 1 V.I.C. § 4 (1995) ("The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary."), *repealed by* 4 V.I.C. § 21 (2005).

International Rental & Leasing Corp.[10] that—by establishing a Supreme Court vested with the inherent authority to shape the common law—the Legislature had "implicitly repealed" the Virgin Islands' common law reception statute.[11]

The impact of *Banks* was not immediately apparent. The Virgin Islands was not unique in 1921 when the territory adopted the common law by statute; nearly every state and territory had formally received the common law by statute (some by constitution).[12] But the situation changed when the restatements became the Territory's "default common law."[13] And the sea-change that has followed in the wake of *Banks* has shown the remarkable impact of *Banks*. The Supreme Court of the Virgin Islands is the only court in the nation to have invalidated a reception statute in its entirety, leaving only judicial precedent in its place. No court of an American colony, state, or territory has ever done this.

Yet, *Banks* has now become too big to fail.[14] While I believe that *Banks* was correctly decided (particularly when juxtaposed with the state of the common law of the Virgin Islands at the time), unintended consequences and subsequent extensions of *Banks* give reason to pause. American courts have long

10. 55 V.I. 967 (V.I. 2011). Although the Virgin Islands Supreme Court did not hold in *Banks* that the Virgin Islands' reception statute, 1 V.I.C. § 4, was repealed, but rather superseded, *see id.* at 979, in later decisions the court recharacterized its holding. *See, e.g.*, Simon v. Joseph, 59 V.I. 611, 622 (V.I. 2013) (citing *Banks* and explaining parenthetically that *Banks* "recognize[ed] that the statute vesting the Virgin Islands Supreme Court with 'supreme judicial power' implicitly repealed contrary provisions of 1 V.I.C. § 4").

11. Simon v. Joseph, 59 V.I. 611, 623 (V.I. 2013) (citing *Banks*, 55 V.I. at 974–80).

12. *See infra* notes 33–35 (detailing the adoption of the common law of England in several states).

13. Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movemen*t, 33 HOFSTRA L. REV. 423, 424 (2004).

14. Though rooted in past economic downturns, the phrase "too big to fail" became well-known during the Great Recession that began in 2008 as a catch phrase for international and multinational banks and corporations that could not be allowed to collapse because of how intertwined they had become in national and international economies. *See, e.g.*, Eric Dash, *If It's Too Big to Fail, Is It Too Big to Exist?*, N.Y. TIMES, at WK3 (June 30, 2009) ("Today, amid the wreckage of the gravest financial crisis since the Great Depression, bigness is one of our biggest problems. Major banks, the Detroit automakers, the financial basket case that is the American International Group—the only reason these giant, sclerotic companies are still standing is that they have been deemed 'too big to fail.'"); *cf.* Daimler AG v. Bauman, 134 S. Ct. 746, 764 (2014) (Sotomayor, J., concurring) ("In recent years, Americans have grown accustomed to the concept of multinational corporations that are supposedly 'too big to fail.'"). *Banks*, then, by analogy, is rapidly becoming too big, and too important, a part of the Virgin Islands common law to fail.

understood "that the whole body of the common law, existing in England at the date of the settlement of the colonies, was not transplanted, but only so much as was applicable to the colonists in their new relations and conditions."[15] So, the Supreme Court of the Virgin Islands, by analogy, should take the opportunity in an appropriate case to clarify *Banks*. Striking down the statute by which the common law is received leaves nothing in its place but precedent—precedent can always be overruled.

Part II of this Article gives some of the history of how other jurisdictions received the common law.[16] Although many scholars and historians have extensively researched and chronicled how the colonies and then the states (and later the territories before becoming states) received the common law, almost no research of similar depth has been conducted for the overseas territories:[17] Puerto Rico, Guam, the Virgin Islands, the Northern Mariana Islands, and American Samoa (and perhaps the former territories of the Philippines and the Canal Zone as well).[18] Part III traces

15. Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 554 (1882).

16. This broader history is given only to place the Virgin Islands within the national context.

17. *Cf.* William Wirt Blume & Elizabeth Gaspar Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions: Part II: Influences Tending to Unify Territorial Law*, 61 MICH. L. REV. 467, 518 (1963) (surveying the law (statutory and common) of all territories that became states but passing on the insular territories) ("To give in any detail the sources of law prescribed for the unincorporated territories (Philippines, Puerto Rico, Guam, Samoa, Canal Zone, and Trust Territory in the Pacific) would extend too far this already tedious recital."). *But cf.* Ray F. Bowman, III, Note, *English Common Law and Indiana Jurisprudence*, 30 IND. L. REV. 409 (1997) (citing the Virgin Islands as an example of how a jurisdiction could take another approach).

> Instead of incorporating the common law of England, the Indiana Territory could have adopted a civil law system derived from non-British sources, such as the Napoleonic Code or Roman Law. Early Hoosier lawmakers could have taken an entirely different approach and allowed the courts to find their own common law in the Indiana wilderness. It was not a forgone conclusion that Indiana would adopt the English common law. The Virgin Islands provides an interesting example. The Virgin Islands were a Danish Territory until 1917. Under Danish sovereignty, the Virgin Islands received Danish statutory and common law. After cession to the United States, Danish law continued until 1921, when the Islands adopted a statute receiving the English common law. . . . Danish law still survives to some extent, particularly in the area of property relationships.

Id. at 411 (footnotes omitted).

18. While both the Canal Zone and the Philippines (as former U.S. Territories) are outside the scope of this Article, they too wrestled with how and whether to receive the common law. *See, e.g.*, John O. Collins, *Canal Zone Changes to Common Law System—*

the origins of the reception statute that the Virgin Islands adopted in the 1921 Codes, how it changed in the 1957 reception statute, and how courts construed both statutes. This background leads into *Banks* and its invalidation of the Virgin Islands' reception statute. Parts IV and V discuss *Banks* and subsequent cases. Part VI briefly discusses some of the responses to *Banks* and Part VII concludes the discussion and offers two suggestions.

II. RECEIVING THE COMMON LAW

The common law means different things to different people in different contexts,[19] but especially so in the context of how American states and territories received the common law. Most often, the common law is understood as the decisions issued by English and then American courts. Seen in this light, the common law is akin to a library—it sits on shelves, bound in volumes, waiting to be discovered. To find the common law one need only thumb through the right books and locate an

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Long Effort to Fit Civil Law Code into American System Ends, 20 A.B.A. L.J. 233, 233 (1934):

> The twenty-eight year effort to fit a Civil Law code into an American law system ended on the Canal Zone October 1, 1933, when a new code of civil relations based on that of California went into effect. Legislation is now pending before the Congress to supplement the new codes; and when this is effected, the Canal Zone will become in fact a 'Common Law' jurisdiction, as distinguished from a jurisdiction in which the Civil Law and the Common Law were badly mixed.

See also Eugene A. Gilmore, *Philippine Jurisprudence—Common Law or Civil Law?*, 16 A.B.A. L.J. 89, 90 (1930):

> There can be no doubt that Philippine jurisprudence has undergone a profound change since the establishment of American sovereignty over the Islands, and that this change is still going on. Whether the transformation has been so great that one can say that this jurisprudence is now based on the English Common Law depends, however, in large measure upon the sense in which the word is used. The basis of a thing is usually understood to be the foundation upon which it rests. It is not apparent at first sight that the present system of Philippine law rests upon a Common Law foundation.

19. *Cf.* Comment, *Maine's Reception of the Common Law*, 30 ME. L. REV. 274 (1978).

> Common law has several meanings, depending upon the context in which it is used. It sometimes refers to judge-made as distinct from statute law. It may also connote the law historically administered by the royal common law courts of England (King's Bench, Common Pleas, and Exchequer), rather than the equity courts (the Court of Chancery and the prerogative courts). The term is occasionally used as well in contradistinction to civil or canon law.

Id. at 274 n.3 (quotation marks omitted).

appropriate opinion. But the common law is also understood in another way—as a process, as a means by which problems are worked through.[20] Seen in this way, the common law is less rote and more engaging. Past decisions are relevant, not because they must be applied unquestionably and uncritically, but because they can help resolve issues raised in a given case. What the common law means is especially relevant for statutes that receive the common law.

A reception statute[21] is a statute that purports to receive the common law[22] and to authorize courts to apply it. I say "purport" because even though courts have examined the scope of reception statutes and also considered the extent of the common law that was received, courts have not directly addressed whether reception statutes are proper or even constitutional.[23] That is, if

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20. *See infra* notes 128–30 and accompanying text (detailing the adoption of the common law of England in several states).

21. *See* Walter V. Schaefer, *Precedent and Policy*, 34 U. CHI. L. REV. 3, 5 (1966) (noting that one purpose of "a 'reception' statute . . . is to adopt at a single stroke the common law of England, except . . . those portions which are repugnant to our customs and institutions"); *see also* Hall, *supra* note 1, at 801–05 (referring to such statutes generally as "reception statutes" but without defining them).

22. While it is beyond the scope of this Article, it should still be pointed out that some jurisdictions define the common law to include English statutes. Hall explained this concern as follows:

> The various American jurisdictions may be divided into two main groups so far as their treatment of English statutory law is concerned. First, twenty states have enacted no specific provision dealing with the question and thus have left it to the courts to determine what acts of Parliament, if any at all, are to be recognized as part of the common law received. Second, most of the remaining states have specifically directed the courts to recognize as in force English statutes of a general nature passed before a specified date, usually 1607 or 1776.
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> As might be expected, the jurisdictions which have left it to their courts to determine the binding effect of English statutory law, have reached all sorts of results. A few courts have declared that no English statutes were received as part of the common law; some take a middle view by saying that only those English statutes are recognized which have become so incorporated into the common law so as to become a part and parcel of the system[.]

Hall, *supra* note 1, at 816–17 (footnotes omitted).

23. Some scholars contend that reception statutes were a kind of placeholder legislation intended only for tort law. *See* Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Tort Reform Past, Present, and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 WM. MITCHELL L. REV. 237, 253 (2000):

> Early state legislatures delegated the task of developing tort law to state judiciaries, because the legislatures did not have the time (or perhaps the inclination) to formulate an extensive 'tort code.' They faced more extensive and pressing tasks, including the formulation of the basic principles for a 'new

the common law is more so the "fundamental principles and modes of reasoning"[24] rather than a "body of governing principles . . . expounded by the common-law courts of England,"[25] then codifying a method of reasoning seems redundant, certainly for jurisdictions whose courts already follow this mode of reasoning.[26]

Yet, reception statutes of a sort were included in each charter England granted to its colonies.[27] And both before and after the

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> society,' such as a criminal code. As many 'reception statutes' made clear, however, what the legislature delegated, it could *retrieve* at any time.

While this view of the purpose of reception statutes is a practical one, it assumes too much: that early state legislatures could delegate lawmaking to their courts, that legislatures were too busy codifying other laws and lacked the time for tort law, and most importantly that statutes to receive the common law were (and presumably still are) limited to tort law. And other than their own *ipse dixit* the authors cite no support for claiming that reception statutes delegated law-making *to* courts, rather than authorized or adopted law-making *by* courts, or show where the text of any reception statute made it clear that legislatures could 'take back" the common law. It is true that the colonial legislatures did initially begin to codify their laws. *See* Hall, *supra* note 1, at 795:

> At an early date there seems to have prevailed in every settlement a popular demand for codification of the law. . . . This desire on the part of the people for certainty in the law led to the early codification in every colony except Maryland of the legal principles most essential to the settlement of disputes in the social and economic system which existed at the time. Thus, it was the local code to which colonial judges referred as the primary source of law, and because of the scarcity of law reports the common-law decisions of English courts could not have been to any great extent the secondary source of law in the [seventeenth] century.

(footnotes omitted). So, if nearly all of the early colonies undertook to promulgate their own codes—and were less dependent on the reported decisions of English courts—it begs the question why the same legislatures, after becoming states united, thought it proper to delegate making tort law to their courts. Instead, their argument seems more tailored for modern times, a point seemingly made by the very next paragraph. *See* Schwartz et al., *supra*, at 253:

> Because legislatures are the best equipped to decide complex public policy issues, activist judges should not believe that they 'know best' and substitute their own ideas of how things should be. Civil justice reform laws were instituted after much careful study and debate by legislators. They should not be overturned just because judges disagree with their public policy underpinnings.

24. Dale, *supra* note 15, at 560 (quotation marks and citation omitted).

25. William B. Stoebuck, *Reception of English Common Law in the American Colonies*, 10 WM. & MARY L. REV. 393, 393 (1968).

26. *See* Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 26 (2001) (explaining that "the newly independent states . . . simply did not equate 'the common law of England' with judicial decisions (whether pre- or postrevolutionary)").

27. *See* Hall, *supra* note 1, at 791:

American Revolution,[28] most of the States by statute[29] or in their constitutions,[30] and some of the current Territories by statute,[31]

> It is apparent that it was contemplated by the British authorities at the beginning of the American colonial period that English law should in the main be transplanted to the American colonies. Every colonial charter granted by the Crown contained a provision authorizing the governing authorities of each plantation to prescribe ordinances, laws, statutes, etc., but invariably the qualification was added: '. . . *soe as such Lawes and Ordinances be not contrarie or repugnant to the Lawes and Status of this our Realme of England*,' or words of like import.

(footnote and citation omitted) (emphasis added). *See also* Schwartz et al., *supra* note 23, at 252:

> More than [two-hundred] years ago, when colonies and territories became states, one of the first acts of state legislatures was to 'receive' the Common Law of England as of a certain date so it could be used as a basis for a state's tort law. In the same legislation, called a 'reception statute,' state legislators *delegated* to state courts the authority to develop the English Common Law in accordance with the 'public policy' of the state. These long-forgotten statutes were the basic vehicle through which legislative power was vested in state judiciaries.

28. *See* Hall, *supra* note 1, at 797–800 (discussing the colonial charters and the approaches taken by the newly-independent colonies following the Declaration of Independence).

29. *E.g.*, ALA. CODE § 1-3-1 (2016); ALASKA STAT. § 01.10.010 (2015); ARIZ. REV. STAT. ANN. § 1-201 (2016); ARK. CODE ANN. § 1-2-119 (2016); CAL. CIV. CODE § 22.2 (West 2007); COLO. REV. STAT. § 2-4-211 (2015); FLA. STAT. § 2.01 (2014); GA. CODE ANN. § 1-1-10(c)(1) (2016); HAW. REV. STAT. § 1-1 (2016); IDAHO CODE ANN. § 73-116 (2016); 5 ILL. COMP. STAT. ANN. 50/1 (2016); IND. CODE § 1-1-2-1 (2016); KAN. STAT. ANN. § 77-109 (2016); MO. REV. STAT. § 1.010(1) (2016); MONT. CODE ANN. § 1-1-109 (2016); NEB. REV. STAT. § 49-101 (2016); NEV. REV. STAT. § 1.030 (2016); N.M. STAT. ANN. § 38-1-3 (2016); N.C. GEN. STAT. § 4-1 (2016); OKLA. STAT. TIT. 12, § 2 (2016); R.I. GEN LAWS § 43-3-1 (2016); S.C. CODE ANN. § 14-1-50 (2016); S.D. CODIFIED LAWS § 1-1-24 (2016); TEX. CIV. PRAC. & REM. CODE ANN. § 5.001 (West 2002); UTAH CODE § 68-3-1 (2016); VT. STAT. ANN. TIT. 1, § 271 (2016); VA. CODE ANN. § 1-200 (2011); WASH. REV. CODE § 4.04.010 (2016); W. VA. CODE § 2-1-1 (2016); WYO. STAT. ANN. § 8-1-101 (2016). Oregon's statutory reception of the common law is discussed further below. *Infra* notes 52–56.

30. States receiving the common law through their constitutions include: Delaware (*see* DEL. CONST. § 18 (1897)); *see also* Steele v. State, 151 A.2d 127, 130 (Del. 1959):

> Except as insofar as it has been found to be inconsistent with our statutory law, the common law of England is a part of the law of this state. It was first adopted in the Constitution of 1776, Article 25. The same section was re-enacted in each of the three succeeding constitutions: Constitution of 1792, Article VIII, Section 10; Constitution of 1831, Article VII, Section 9; and in our present Constitution of 1897, Schedule, § 18.

Kentucky (*see* KY. CONST. § 233; Hilen v. Hays, 673 S.W.2d 713, 715 (Ky. 1984) (explaining that section 233 of the Kentucky Constitution "had the effect of adopting . . . the common law of England that was part of the law of the State of Virginia at the time")); Maine (*see*, Comment, *supra* note 19, at 274 (explaining that "Article 10, section 3" of the Maine Constitution "read in tandem with Section 6 of the Act of Separation [between Maine and Massachusetts], has served as the conduit for the 'reception' or 'incorporation'

had laws expressly receiving the common law.[32] But not all States explicitly received the common law by statute or constitution.[33]

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of more than [six-hundred] years of English common law doctrine into Maine law" (footnotes omitted))); *cf.* McGarvey v. Whittredge, 28 A.3d 620, 630 (Me. 2011) ("When Maine achieved statehood in 1820, the Act of Separation and the Maine Constitution incorporated Massachusetts common law into Maine law."); Maryland (*see* MD. CONST., Decl. of Rights, art. 5(a)(1) *reprinted in* MD CODE ANN., CONST. (Michie 2003 ed. & 2012 Supp.)); Massachusetts (*see* MASS. CONST., Part II, Ch. VI, art. VI (continuing in force all laws "usually practised [sic] on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature")); Michigan (*see* MICH. CONST. art. III § 7); NEW JERSEY CONST., art. XI, § 1, ¶ 3 (continuing all prior laws in force); *see also* State v. Young, 390 A.2d 556, 558 (N.J. 1978) (per curiam) (quoting Colloy v. Newark Eye & Ear Infirmary, 141 A.2d 276, 287–88 (N.J. 1958) (Heher, J., dissenting)); New York (*see* N.Y. CONST. art. I, § 14); Pennsylvania (*see* PA. CONST., Sch. 1, § 2 (continuing all prior laws in force)); Wisconsin (*see* WIS. CONST., art. XIV, § 13 (continuing common law in force in territory of Wisconsin)).

31. District of Columbia (*see* D.C. CODE § 45-401(a) (2012)); the Commonwealth of the Northern Mariana Islands (*see* 7 N.M.I. CODE § 3401); Virgin Islands (*see* 1 V.I.C. § 4, *impliedly repealed by* 4 V.I.C. § 21). Guam does not have a reception statute as such, but Guam's code embraces the common law. *E.g.*, 1 GUAM CODE ANN. § 700; 6 GUAM CODE ANN. § 4205. Puerto Rico remains a civil law jurisdiction. *See Powell on Real Property* § 4.61:

> The Spanish civil-law mode of thought, its manner of expression, and its substance have survived in the present law of Puerto Rico, to a greater extent than in any portion of the United States. . . . Substantial similarities do, however, exist between the laws of Louisiana, derived largely from French civil law, and the laws of Puerto Rico with roots in the Spanish civil law.

But cf. Pierluisi v. E.R. Squibb & Sons, Inc., 440 F. Supp. 691, 694 (D.P.R. 1977) ("Even though common law precedents are not obligatory on Puerto Rico courts the Supreme Court of Puerto Rico has repeatedly held that such common law can be utilized by Commonwealth courts when it is found to be useful and persuasive." (citing cases)). It is questionable how accurate this section of *Powell* is since it also discusses the Virgin Islands, but cites only to the 1921 Codes. That is, the discussion regarding the Virgin Islands has not been updated for over sixty years.

32. Seminole Tribe v. Florida, 517 U.S. 44, 161 n.55 (1996) (Souter, J., dissenting). *See also Powell on Real Property* § 4.19 ("Connecticut enacted neither a constitutional nor a statutory adoption of the common law," but instead "has the common law by 'practical adoption,' made by its courts.").

33. Louisiana is not a common law state, but instead retained the civil law received from France. *See, e.g.*, *Powell on Real Property* § 4.46 (Michael Allen Wolf ed., 2014). Ohio's constitution continued prior laws in force, (which included the common law received by the Northwest Territory) but then in 1805 the state legislature repealed all former law. "This attempt to wipe the slate clean of specific receptions of the judicial and legislative guidance of England . . . freed Ohio from the shackles of blind conformity, but left Ohio with . . . unavoidable consequences." *Id.* § 4.36; *see also* Cleveland, Columbus, & Cincinnati R.R. Co. v. Keary, 3 Ohio St. 201, 205 (1854):

> We profess to administer the common law of England, in so far as its principles are not inconsistent with the genius and spirit of our own institutions, or opposed to the settled habits, customs, and policy of the people of this State. . . . It has not been adopted by express legislative enactment, but brought to the old States by our fathers, and constantly claimed as their birthright. Its introduction here by their descendants was almost a matter of

Initially, "Michigan and Minnesota," for example, "did not have explicit statutes adopting the common law as the rule of decision"; yet their "courts soon declared that the common law had been inherited and that no express adoption by the territorial or state legislatures was essential to affirm the authority of the

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> course, and its terms and foundation principles have been so interwoven with our constitution and laws, so blended with the remedies we afford, and so constantly enforced by our courts, that its implied recognition by the government and the people, may be fairly assumed; and if it cannot be said to be in force as the common law of England, it may not inaptly be termed the common law of Ohio.

Iowa traces its reception of the common law back to the 1787 Northwest Ordinance. *Powell on Real Property* § 4.57. Tennessee modeled its first constitution "on the then constitution of North Carolina," which "continued in force all laws and ordinances" including North Carolina's reception of the common law. *Id.* § 4.42 (citation and quotation marks omitted). Mississippi received the common law when Congress extended the 1787 Northwest Ordinance to the Territory of Mississippi, which later became the states of Alabama and Mississippi. *See, e.g.*, Blume & Brown, *supra* note 17, at 482–83 (detailing the history of the reception of the common law through the 1798 organic act for the Mississippi Territory). But unlike the State of Alabama, which adopted a statute in 1907 to receive the common law, the State of Mississippi has not. *Id.* Instead, Mississippi, through its constitution, continued the prior laws in force and courts apply the common law through this provision. *See id.* at 483:

> In 1849 the Supreme Court of the State of Mississippi observed: 'When the Mississippi territory was organized, the ordinance secured the inhabitants in the enjoyment of judicial proceedings, according to the course of the common law. . . . This, together with the provision in the constitution [continuing in force territorial laws], has been considered to exclude all English statutes, and to adopt only the common law, and the statutes of our own government.

(alteration in original) (second ellipsis omitted) (quoting Boarman v. Catlett, 21 Miss. 149, 152 (1849)). New Hampshire inherited the common law when it was formed from land that was part of the Massachusetts Bay Colony. *See, e.g.*, State v. Rollins, 8 N.H. 550, 560–61 (1837):

> The common law, so far as it was applicable to the state and condition of the people and the circumstances of the country, was certainly introduced here for the regulation of the courts of justice on the organization of the province of New-Hampshire as a separate government; with a right, however, in the legislative power, to make provision for peace and good government, subject to a negative on the part of the crown.

North Dakota's claim to the common law is traced back to the laws formerly governing the Dakota Territory that were continued in force. *See Powell on Real Property* § 4.59:

> On the 1889 split of the Territory of Dakota into the States of North and South Dakota, the Constitution of North Dakota contained the usual clause continuing in force the prior territorial laws. . . . The existence of the common law as the basic background of the jurisprudence of North Dakota has been judicially declared.

(footnotes omitted).

common law."[34] Similarly, Connecticut "adopted the common law by judicial decision" but only "insofar as it was appropriate for local conditions" in that State.[35] Most reception statutes are still in force; some have even been amended recently.[36]

Generally, reception statutes are of two types. Professor Ford W. Hall[37] conducted a detailed study of how the common law was received in America and noted two types of statutes the colonies adopted before the American Revolution.

> At an early date following the Declaration of Independence a general convention of representatives from various counties and municipalities in Virginia adopted an ordinance which, among other things, was designed to enable the present magistrates and officers to continue with administration of justice, and for settling the general mode of proceedings in criminal and other cases till the same can be more amply provided for. This ordinance is an extremely important piece of legislation in American law inasmuch as it contained the following provision which was later to be copied in statutory enactments of many other states:
>
> And be it further ordained, that the common law of England, all statutes or acts of parliament made in aid of the common law prior to the fourth year of the reign of king James the first, and which are of a general nature, not local to that

34. Hall, *supra* note 1, at 802–03. Professor Hall notes that an argument could be made that Michigan and Minnesota received the common law by statute because they were both part of the Northwest Territory. *See id.* at 802 ("Michigan and Minnesota did not have explicit statutes adopting the common law as the rule of decision, unless it be considered that the Northwest Ordinance or the 1795 Act by the governor and judges of the Northwest Territory extended the common law to those jurisdictions."). "When Minnesota was created as a territory, it received the laws of Wisconsin, including the common law, but later, repealed the laws of Wisconsin in favor of its own law." Schwartz et al., *supra* note 23, at 252 n.87 (citing Cashman v. Hedberg, 10 N.W.2d 388, 390 (Minn. 1943)). Michigan later adopted the common law in its constitution. *See supra* note 30 (Mich. Const. art. III § 7).

35. *Seminole Tribe*, 517 U.S. at 161 n.55 (Souter, J., dissenting) (citations omitted).

36. *See, e.g.*, Mo. Sen. Bill 239, § A (May 7, 2015), *codified at* Mo. Rev. Stat. § 1.010(2):

> The general assembly expressly excludes from this section the common law of England as it relates to claims arising out of the rendering of or failure to render health care services by a health care provider, it being the intent of the general assembly to replace those claims with statutory causes of action.

37. Although Hall's article does not reference his position, his obituary explains that at the time his article was published, Hall had been an associate professor of law first with the University of Mississippi and later the University of Texas before returning to private practice. *See* Dallas Morning News, Obituaries, Nov. 6, 2003. Out of respect, I refer to him as professor.

> kingdom, together with the several acts of the general assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations and resolutions of the general convention, shall be the rule of decision, and shall be considered in full force, until the same shall be altered by the legislative power of the colony.
>
> . . .
>
> A majority of the original thirteen states used another method in determining what law their judicial tribunals should apply, which is illustrated by the following quotation from the New Jersey Constitution of 1776: "the common law of England, as well as so much of the statute law, as have been heretofore practiced in this colony, shall still remain in force, until they shall be altered by a future law." Similar approaches to the problem were made by Delaware, Maryland, Massachusetts, New Hampshire, New York, North Carolina and Pennsylvania.[38]

Professor Hall then traces the reception of the common law as the nation expanded south and west, noting that the Northwest Territory borrowed Virginia's reception statute in 1795[39] and that many midwestern and western territories and states followed, by adopting statutes patterned in large part on Virginia's.[40] And even when the common law reached those states where "the civil law was at one time in effect (although often somewhat feebly), and [where] Spanish and French influences are still felt today especially," namely Florida, Texas, New Mexico, Arizona, and California,[41] these states—with the exception of Louisiana, which remains a civil law jurisdiction—blended

38. Hall, *supra* note 1, at 798–800 (internal footnotes and ellipses omitted).
39. *Id.* at 801. *See also* Bowman, *supra* note 17, at 409:

> More than two hundred years ago, the Northwest Territory, which was comprised of present day Indiana, Wisconsin, Illinois, Ohio, and parts of Michigan and Minnesota, adopted a reception statute which brought elements of the English common law into the decisional case law of the Territory. This statute was substantially similar to a provision passed by the General Convention of Virginia Representatives and Delegates in 1776, which adopted portions of the English common law as well as statutes passed prior to 1607 in furtherance of the common law.

(footnotes omitted).
40. Hall, *supra* note 1, at 804.
41. *Id.*

"concepts derived from the civil law, as for example the community property system" with the common law they received.[42] But the most relevant jurisdiction for this Article is Oregon—how Oregon received the common law contributes to the story of the Virgin Islands' reception of the common law.

"The Oregon territory was for many years the subject of controversy between Great Britain and the United States,"[43] which was eventually settled in 1846.[44] By at least 1838, American settlers had been living in what would later become the Oregon Territory.[45] Yet, "Oregon had no government and no laws in 1841,"[46] and would not for two more years until the settlers organized themselves and, on July 5, 1843, adopted what essentially was the first organic act for a provisional government.[47] In addition to dividing the land into separate districts, the July 5, 1843 Act also "adopt[ed] as law the [t]hirty-seven [a]cts taken verbatim from the laws of Iowa Territory enacted at the first session of its territorial legislature in 1839."[48] And though the Territory of Iowa had been following the common law, albeit not by statute,[49] the July 5, 1843 Act nevertheless

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42. *Id.*

43. Lawrence T. Harris, *History of the Oregon Code*, 1 OR. L. REV. 129, 130 (1922).

44. *Id.*

45. *Id.* at 131.

46. Frederic E. Brown, *The Sources of the Alaska and Oregon Codes: Part I. New York and Oregon*, 2 UCLA–ALASKA L. REV. 15, 24 (1972).

47. *See* Harris, *supra* note 43, at 134 (detailing the development of Oregon law and government).

48. Brown, *supra* note 46, at 25 (ellipsis, footnote, indentation, and citations omitted).

49. *See* Holmes, Brown & Co. v. Mallet, 1 Morris 111, 113 (Iowa 1840):

> We have searched the acts of our territorial legislature, and can find none. It is common law derived from different sources, if not from the principle that emigrants carry with them the common law of the country from which they emigrated, at least from the ordinance of 1787, through the medium of the organic acts of Wisconsin and Iowa.

See also O'Ferrall v. Simplot, 4 Iowa 381, 399–400 (Iowa 1857):

> [A]ll our laws, back to the beginning of the territory, recognize—assume the common law. They would many of them, be unmeaning, senseless, without it. All the proceedings of the courts would be so, and not a judgment heretofore recovered would be valid, nor a title under it. But the ordinance of 1787, for the government of the Northwest Territory, made it the law of that country; and that was extended over Wisconsin, and then the laws of Wisconsin, over Iowa. And although the statutes of Michigan and Wisconsin were repealed in 1840, the ordinance of 1787 was *not* affected, but remained in full vigor as before.

The Ordinance of 1787 had provided that "[t]he inhabitants of the said territory, shall always be entitled to . . . judicial proceedings according to the course of the common law."

directed that "where no statute of Iowa territory applies, the principles of common law and equity shall govern."[50] Then, less than a year later, on June 27, 1844, "the provisional government . . . enacted the rest of the Iowa Code of 1839 that was not of a local character, and not incompatible with the conditions and circumstances of this country."[51] The June 27, 1844 Act expressly declared that "the common law of England and principles of equity, not modified by the statutes of Iowa or of this government, and not incompatible with its principles, shall constitute a part of the law of this land."[52] So, by 1844 Oregon had received the common law arguably through Iowa precedent, but certainly by statute. Yet, when the provisional government met again the next year, "for the framing and adoption of a constitution for Oregon,"[53] the legislature, on July 26, 1845, adopted a new organic act, declaring "that the inhabitants of the territory shall always be entitled to the benefits . . . of judicial proceedings, according to the course of common law."[54] A month later, on August 12, 1845, Oregon's provisional government reenacted its 1843 laws (unless otherwise repealed) and again "provided that the common law of England should govern in all cases where no statute law had been made or adopted."[55] A little more than a week later, on August 23, 1845, Oregon reenacted its 1844 laws, so far as they were "not incompatible with the original organic laws and not repealed by the house of representatives of 1845."[56]

Why Oregon's provisional government successively enacted and reenacted the laws it had previously adopted from Iowa is unclear. But Congress complicated matters three years later by providing an organic act and formally creating the Territory of

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See An Act to Provide for the Government of the Territory Northwest of the River Ohio, 1 Stat. 50, 52 n.(a) (May 26, 1790) (reprinting 1787 ordinance) (detailing the history of the common law).

50. Harris, *supra* note 43, at 135 (citation omitted). Interestingly, Justice Harris notes that Samuel A. Clarke, in his book Pioneer Days of Oregon History, claimed that "the laws of Iowa were adopted for the reason that 'there chanced to be an Iowa code in the country.'" *Id.* at 137 (quoting 2 S.A. CLARKE, PIONEER DAYS OF OREGON HISTORY 663 (1905)).

51. Brown, *supra* note 46, at 25 (quotation marks omitted).

52. Harris, *supra* note 43, at 138 (quotation marks and citation omitted).

53. *Id.* (quotation marks omitted).

54. *Id.* at 139 (quotation marks omitted). Note this language mirrored the Ordinance of 1787 for the Northwest Territory.

55. *Id.* at 140 (footnote omitted).

56. *Id.*

Oregon. "The Oregon Organic Act passed by Congress in 1848 organized the territory and recognized the validity of the laws passed by the provisional government."[57] Of course, Congress did not address which laws remained in force; and once the territory was established, Oregon's "first Territorial Legislature adopted Iowa statutes again, and began one of the most amusing controversies in American legal history."[58]

The laws adopted by the provisional government—as distinguished from the territorial government—were known as the "Little Blue Book" because the laws borrowed from Iowa's 1839 statutes "were bound in a volume sided with blue boards."[59] In contrast, the laws adopted by the territorial government—again from Iowa but from its 1843 revised code—were known as the "Big Blue Book."[60] "The War of the Blue Books became quite celebrated, indeed far out of proportion to the actual differences between the two codes,"[61] and the controversy was not resolved

57. Brown, *supra* note 46, at 26. *See also* Lawrence T. Harris, *History of the Oregon Code: The Controversy About the Seat of Government and Blue Books*, 1 OR. L. REV. 184, 184 (1922) (hereinafter Harris II) ("The act of congress of August 14, 1848, organizing the territory of Oregon continued and preserved the laws of the provisional government until altered or repealed by the legislative assembly of the territory of Oregon.").

58. Brown, *supra* note 46, at 26.

59. *Id.* at 25.

60. *Id.* at 26.

61. *Id.* Brown notes one effect of the controversy. "The Blue Book controversy," he explains, "is a famous one, which may well explain the notion existing in some quarters today that the present laws of Oregon derive from Iowa." *Id.* "This is demonstrably untrue," he argues, because "the modern laws of Oregon and Alaska are the descendants of the Statutes of Oregon (1854), most of which were copied from the Revised Statutes of New York (1829, 1836, 1846–1848, 1852)." *Id.* at 26–27. The source of Oregon's laws has been relevant to the Virgin Islands in the past. *See, e.g.*, Foreign Commerce v. Tonn, 789 F.2d 221, 228–29 & n.6 (3d Cir. 1986) (Hunter, C.J., dissenting) (noting Alaska, Oregon, and Iowa as possible origins of Virgin Islands' usury statute and taking issue with the majority's failure to follow Berkeley v. West Indies Enters., Inc., 480 F.2d 1088 (3d Cir. 1973), which held that borrowed statutes should be construed according to the meaning given by the highest court before adoption). *See also* Bermudez v. V.I. Tel. Corp., 54 V.I. 174, 190 n.12 (V.I. Super. Ct. 2011):

> As Territorial Alaska's law was modeled almost exclusively on that of Oregon . . . [t]he Court therefore acknowledges the possibility that review of Oregon case law might further illuminate Alaska's private nuisance statute, and therefore the Virgin Islands statute as well. But Oregon was also once a territory and its laws were also borrowed from elsewhere. . . . As Territorial Alaskan courts had occasion to weigh Oregonian jurisprudence on their private nuisance statute, this Court declines to reach through Alaska to Oregon, and perhaps further back in time, in seeking further illumination of the private nuisance statute borrowed by the U.S. Virgin Islands.

(internal citation omitted).

until 1853 when the territorial legislature scrapped Iowa and went almost entirely with New York.[62]

> After a flirtation with the statutes of Iowa, territorial Oregon settled upon a code copied in large measure from the Revised Statutes of New York, originally codified by the "Butler" New York Law Revision Commission of 1826–1828. The major borrowing took place in Oregon in 1853–1854, when a commission headed by J. K. Kelly adopted much of the New York statutory law for the new territory, retaining of the older Oregon law only the laws relating to wills that had been taken from the Missouri statutes by the 1859 Oregon Legislative Assembly, and a few provisions of a local character. Oregon's celebrated Judge Matthew P. Deady and others reworked the Oregon law in 1862–1864, using as their major sources the 1854 codes and the draft codes prepared for New York by a commission headed by David Dudley Field. The Field commission had also relied heavily on the older New York statutes originating with Butler's commission in 1826–1828.[63]

This history is relevant to the Virgin Islands because Alaska later borrowed Oregon's laws, and the Virgin Islands, in large part, borrowed Alaska's laws.[64]

"Congress brought laws based upon Oregon's to Alaska in slow and stuttering stages between 1884 and 1900, after a neglectful period following the purchase of Alaska from Imperial Russia."[65] And as had occurred with Oregon and many later territories, Congress largely forgot about the Territory of Alaska. In fact, "for the first seventeen years under the American flag, no provision was made for any sort of civil government for Alaska."[66] Then, in 1884 Congress passed the Alaska Government Act,[67] which provided in part "[t]hat the general laws of the State of Oregon[68] now in force are hereby declared to be the law in said

62. Brown, *supra* note 46, at 27.

63. Frederic E. Brown, *The Sources of the Alaska and Oregon Codes: Part II: The Codes and Alaska*, *1867–1901*, 2 UCLA–ALASKA L. REV. 87, 87 (1973) (hereinafter Brown II).

64. *See infra* note 82, at 779 (detailing the U.S. Virgin Islands' adoption of the Alaskan code).

65. Brown II*, supra* note 63, at 88.

66. *Id.*

67. *Id.* at 90.

68. Brown notes that Congress's choice of Oregon was not deliberate. *See id.* at 91:

district, so far as the same may be applicable and *not in conflict* with the provisions of this act or the laws of the United States."[69]

> However, what law was "applicable" and what was not? The Attorney General of the United States made it clear to the new governors that he could not decide the question, so the new Alaskan officials had to decide as best they could until their authority might be challenged in a federal court case.[70]

The situation did not change until gold was found in the Klondike, increasing Alaska's population drastically.[71] "The new Alaskans felt they needed a more effective civil government, and a more realistic body of law."[72] Not surprisingly, the first laws considered were criminal laws.

In 1897, Congress authorized a commission "to revise and codify the criminal and penal laws of the United States."[73] "[T]he Commission . . . [began] their work with a penal code and a code of criminal procedure for Alaska."[74] Their efforts saw proponents of common law pleading square off against proponents of code pleading.[75] Debate turned to whether "definitions . . . in the substantive law of crimes"[76] should be included. Within this debate, the question arose whether the common law even applied to the Territory of Alaska. One congressman moved to strike the criminal definitions from the proposed bill; another objected. The following debate took place:

> Even the choice of Oregon law seems to have been fairly arbitrary. The Senate sponsor of the 1884 Act admitted in a colloquy on the Senate floor that the reporting committee had not 'made any careful study of the laws either of the state of Oregon or of the Territory of Washington,' but had assumed the Oregon Code to be preferable because the Senators supposed that it was 'in a more mature and satisfactory shape.' Senator Beck of Kentucky had thought that the laws of the Territory of Washington would have been more applicable, but his view did not prevail.

(citation and footnote omitted).

69. An Act Providing a Civil Government for Alaska § 7, 23 Stat. 24, 25–26 (May 17, 1884).

70. Brown II, *supra* note 63, at 90.

71. *Id.* at 92.

72. *Id.*

73. *Id.* (quotation marks omitted).

74. *Id.*

75. *Id.* at 97.

76. *Id.*

> Mr. WARNER. Mr. Speaker, Alaska has never been under the common law, and unless we have these definitions or some definitions of these words they will have none to be governed by. These definitions are taken from the Oregon code and have been used and applied in Alaska since 1884, and I am of the opinion that they should remain.
>
> Mr. PAYNE. You mean that the common law has not been applied by statute?
>
> Mr. WARNER. It has not been applied by statute, and there is nothing in this code law applying the common law. If we strike this out, we shall have to insert another section having the common law apply where not otherwise provided.
>
> Mr. UNDERWOOD. The gentleman from Illinois does not contend that the common law does not apply to Alaska and has not applied to Alaska at all times since the Territory was taken in?
>
> Mr. WARNER. I understand that it does not apply to acquired territory, or did not at the time this was acquired in 1867.
>
> Mr. MOODY. Where the code uses words known to the common law it would be easy to resort to that source of authority for a definition instead of indicating one which might be incomplete.
>
> Mr. WARNER. These sections defining the meaning of these words have been in force since the Oregon code was placed in force there.
>
> Mr. GIBSON. Mr. Speaker, I suggest that in lieu of section 216 and these other sections we adopt the following: "The common law of England, as adopted and understood in the United States, shall be in force in said district, except as modified by this act."
>
> Mr. WARNER. That will do.[77]

The language Representative Gibson offered was adopted and became the reception statute for the Territory of Alaska, but only for Alaska's criminal code. Congress later adopted a second,

77. *Id.* at 98 (quoting 32 Cong. Rec. 508 (1899)).

more general reception statute for Alaska's civil code: "So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by the Congress is adopted and declared to be law within the district of Alaska."[78] But it was Alaska's criminal reception statute that found its way to the Virgin Islands.

III. RECEPTION OF THE COMMON LAW IN THE VIRGIN ISLANDS

One of the first statutes Congress enacted after the United States purchased the Danish West Indies from the Kingdom of Denmark provided:

> [U]ntil Congress shall otherwise provide, in so far as compatible with the changed sovereignty . . . the other local laws, in force and effect in said islands on the seventeenth day of January, nineteen hundred and seventeen, shall remain in force and effect in said islands, and the same shall be administered by the civil officials and through the local judicial tribunals established in said islands, respectively; and the orders, judgments, and decrees of said judicial tribunals shall be duly enforced. With the approval of the President, or under such rules and regulations as the President may prescribe, any of said laws may be repealed, altered, or amended by the colonial council having jurisdiction.[79]

The laws in effect in 1917 were Danish laws, which included "[t]he Common and Statute Law of Denmark."[80] But what Danish

78. McFarland v. Alaska Perseverance Mining Co., 3 Alaska 308, 322 (D. Alaska 1907) (quoting Alaska Civ. Code § 367 (1900)). This is substantially the same version Alaska carried forward after becoming a state. *See* ALASKA STAT. § 01.10.010 ("So much of the common law not inconsistent with the Constitution of the State of Alaska or the Constitution of the United States or with any law passed by the legislature of the State of Alaska is the rule of decision in this state.").

79. Act of Mar. 3, 1917 § 2, 39 Stat. 1132, 1132–33, *codified as amended at* 48 U.S.C. § 1392 (2012).

80. Colonial Law of Apr. 6, 1906, § 67, *reprinted in* V.I. CODE ANN. (historical documents preceding tit. 1) (1995). As provided by the 1917 Act, President Woodrow Wilson issued two executive orders, both nearly identical, respecting the Colonial Councils' right to amend local laws. Both orders provided:

> Repeals, Alterations and Amendments of local laws of Virgin Islands of United States by Colonial Council having jurisdiction, shall be effective and enforced when, and to the extent, said Repeals, Alterations and Amendments are approved by the Governor of said islands, the Governor to state specifically in each case whether his approval is in whole or in part, and if in part only, what

common law encompassed at the time was and is still unclear. Danish law does recognize that judicial precedent has relevance.[81] Yet, whether decisions of higher courts in 1917 were binding on lower courts is not clear. What is clear, however, is that the Colonial Councils, once sovereignty changed, exercised the authority Congress gave them to repeal, alter, and amend their laws. As John D. Merwin, former Governor of the Virgin Islands, explained:

> Inasmuch as the islands lacked a formal system of laws at the time of the transfer in 1917, it was decided by the early colonial councils . . . that separate codes of laws should be drawn up for the two municipalities—one for the Municipality of St. Thomas and St. John, and another for the Municipality of St. Croix. These codes were developed by two young lawyers, Leslie Curry and Denzil Noll, both of whom had come to the U.S. Virgin Islands from the Territory of Alaska soon after 1917.
>
> Taking as their lodestar the Alaska Code which, in turn, was derived from the Oregon Code, these two young lawyers compiled two separate codes—one for each municipality. These codes closely paralleled each other and presented a creditable basis for the administration of justice in the early government. They were adopted by the separate Colonial Councils during the year 1921.[82]

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part is approved and what part not approved. The President reserves the right to disapprove and set aside any enactments of the Colonial Council.

Exec. Order 2619 (Aug. 24, 1917); *see also* Exec. Order 2777 (Dec. 26, 1917) (same). The Governor of the Virgin Islands on March 17, 1921, had approved chapters one, two, and three of title I, except section 1 of chapter 5 of title 1 because the President had "set aside this section of the St. Croix Code on the ground that it appeared to him unnecessary to appoint, to support, and to maintain two judges, when as is actually the case in this instance, there are only approximately 26,000 people within the jurisdiction of the Court." 1921 Codes, tit. 1, ch. 3, p. 7 (approval note by J.W. Oman). Governor Oman also approved titles II, III, IV, and V on the same day. *Id.* at 406. Whether President Wilson took further action following the approval by the governor—or whether any subsequent presidents did—is unknown.

81. *See* JOSEPH LOOKOFSKY, PRECEDENT AND THE LAW IN DENMARK (Ewound Hondius ed., 2006) (detailing Danish common law).

82. John D. Merwin, *The U.S. Virgins Come of Age: A Saga of Progress in the Law*, 47 ABA J. 778, 779 (Aug. 1961). Governor Merwin's claim that the Territory lacked a formal system of laws is questionable. *But cf.* Report of Joint Commission on the Conditions of the Virgin Islands 16, H. Rpt. 734 (Jan. 1920):

Whether the Colonial Councils, in adopting Alaska's reception statute along with the other laws borrowed from the then-Territory of Alaska, intended to abrogate whatever aspects of Danish common law that remained in force in the Virgin Islands law,[83] or whether the Councils, instead, intended only to allow the newly-created Virgin Islands courts system to apply both English common law and Danish customary laws[84] is unknown. What Denzil Noll and John Leslie Curry had in mind while drafting the 1921 Codes (and, by extension, what legislative intent was in adopting these "Noll-Curry" codes) is unclear. Governor Merwin implied that Noll and Curry drafted both codes entirely, perhaps as a sort of "code commission," and then delivered the draft codes to the respective councils for approval.[85]

> The laws in the Virgin Islands date back three centuries and to a large extent are inapplicable to our form of government. The laws are made by colonial councils. St. Thomas and St. John comprise one council district with fifteen members, four of whom are appointed by the governor and the others elected. St. Croix has a council of eighteen members, five of whom are appointed by the governor and the balance elected. The laws are antiquated Danish laws. There are men occupying positions in the council of the Virgin Islands who took advantage of the act to retain Danish citizenship under the provisions of the treaty between Denmark and the United States. This should not be permitted; it is un-American. The judge of the court is police master, a member of the colonial tax commission, a member of the colonial council, also is in charge of deeds and mortgages of record. As police master he institutes cases which are tried before him. This is an un-American policy. There is a great need of an entire new code of laws. This has been prepared and we trust soon may be adopted.

83. *Cf.* Callwood v. Kean, 2 V.I. 526, 542 (3d Cir. 1951):

> The Danish law in force when the island was one of the Danish West Indies remained in force, after the change of sovereignty, until July 1, 1921 when it was superseded by the Code of Laws of the Municipality of St. Thomas and St. John which substituted for the Danish law rules of law based upon the common law of England as understood in the United States.

(footnote omitted).

84. *But cf. id.* at 542 n.6

> Rights to property in St. Thomas which vested under the Danish law in force in that island prior to July 1, 1921 were not affected by the change of sovereignty or by the substitution on that date of the rules of the common law. Accordingly the rules of the Danish law in force when such rights to property vested define those rights today. As to the Virgin Islands those Danish rules are *domestic*, not foreign, law.

(internal citations omitted).

85. Merwin, *supra* note 82, at 779–80. Governor Merwin's article notes that he "was born in St. Croix, Virgin Islands, in 1921," so his characterizations of the situation in 1917 were not from personal knowledge. *Id.* at 780.

This had occurred in other jurisdictions,[86] and could have occurred in the Virgin Islands as well.[87] Yet, although it is beyond the scope of this Article to undertake a study like those that examined the sources of Alaska's codes and Oregon's codes, for example, it cannot be overemphasized that the 1921 Codes were not based entirely on the laws of the Territory of Alaska.[88] In fact, the 1921 Codes were more of a compilation of laws from multiple jurisdictions (including the Danish West Indies),[89] rather than a wholesale copy of the laws of the Territory of Alaska, which undermines claims that Noll and Curry drafted the 1921 Codes on their own,[90] and perhaps without any help from the Colonial

86. *See, e.g.*, Brown II, *supra* note 63, at 195–96 (explaining that the Blue Book controversy "was terminated by a resolution passed by the legislature in January, 1853, providing for the selection of three commissioners to prepare a code of laws to be submitted to the succeeding legislative assembly").

87. *See* Report of Joint Commission on the Conditions of the Virgin Islands 8, H. Rpt. 734 (Jan. 1920) ("Some time ago a commission to revise the laws was appointed. This commission has practically completed the work, which is in every way creditable and which will bring about a thorough Americanization of the laws, if adopted.").

88. *See, e.g.*, People v. Simmonds, 58 V.I. 3, 17–18 (V.I. Super. Ct. 2012):

> But the 1921 Codes did not merely duplicate the Alaskan codes. Some laws were modified before being incorporated in the 1921 Codes, presumably to adapt those laws to this jurisdiction. In one instance, Danish law was retained and merged with Alaskan law. Even where a Virgin Islands statute mirrored Alaskan law, Alaska, itself, may have borrowed its statute from another jurisdiction. Thus, while the 1921 Codes were borrowed largely from the Territory of Alaska, Alaska is not the only jurisdiction the Virgin Islands borrowed from. Statutes were taken from other jurisdictions such as Montana, Iowa, New York, and as further discussed below, Puerto Rico.

(footnotes omitted); *see also* People v. Charles, 1 V.I. 201, 211 (D.V.I. 1929) (noting that "a large part of this code (1921) was actually, though indirectly, taken" from "New York, a code state").

89. See Brown, *supra* note 46, at 52, 79 (and cases cited therein) for the different jurisdictions the 1921 Codes were borrowed from. *See also* Granville-Smith v. Granville-Smith, 349 U.S. 1, 9 (1955) ("The Virgin Islands divorce law, with the exception of substantive grounds drawn from Danish law, copied that of Alaska." (internal citations omitted)).

90. *Cf.* Herman E. Moore, *The Virgin Islands and Its Judicial System*, 3 NAT'L BAR J. 349, 354 (1945):

> The first comprehensive local Codes of Laws for the people of the Virgin Islands were authorized and enacted in 1920 and 1921 by the respective municipal councils. . . . These Codes were, for the most part, similar; but they were not identical and they have since, by amendments, shown many differences. They were largely copied from the Code of Alaska. The lawyer *commissioned to draw them* for legislative enactment had just come to the Virgin Islands from an assistant district attorneyship in Alaska, and he embodied in them practically all the provisions of the Alaskan Code with which he was familiar and which he had brought with him.

Councils or local Virgin Islands attorneys. But the most important statute (for purposes of this Article) that *was* taken verbatim from Alaska was the reception statute Congress enacted for that Territory.

The first reception statutes for the Virgin Islands both provided: "The common law of England as adopted and understood in the United States shall be in force in this District, except as modified by this ordinance."[91] Only one change was made: Alaska's reception statute concluded with the word "Act." And whatever the intent of the Councils may have been, once the reception statutes took effect, Virgin Islands courts rejected Danish law for "'the common law of England as adopted and understood in the United States,'"[92] particularly in criminal cases. In civil cases, Virgin Islands courts did not ignore Danish common law outright at first. For example, in a 1923 St. Croix decision, *Fleming v. Hageman*,[93] the District Court of the Virgin Islands,[94] in rejecting the defendant's argument that lost profits could not be recovered through a breach of contract action, looked to the law of the Lesser Antilles generally as well as British and American law.[95] Similarly, in a 1924 St. Croix case, *Stakemann v. Olsen*,[96] the District Court of the Virgin Islands again tried to harmonize "[t]he law of Denmark and the Virgin Islands" with English and American common law concerning public auctions.[97]

(emphasis added).

91. 1921 Codes, tit. IV, ch. 13, § 6.

92. People v. Charles, 1 V.I. 236, 238 (D.V.I. 1929) (quoting 1921 Codes tit. III, ch. 13, § 6). *See also In re* Gibbons, 1 V.I. 57, 59–60 (D.V.I. 1924) (granting writ of habeas corpus and vacating judgment of the local police court because the conviction was obtained in violation of the defendants' right not to be compelled to be witness against himself).

93. 1 V.I. 32 (D.V.I. 1923).

94. The District Court of the Virgin Islands was the court of general jurisdiction when the 1921 Codes were in effect.

95. *See Fleming*, 1 V.I. at 37–38:

> Wherever damages have been caused by breach of contract, and are such as may reasonable be supposed to have entered into the contemplation of the parties, the delinquent party is liable therefor. This may fairly be stated to be the law of all of the Lesser Antilles, for it is a principle laid down in the Code Napoleon, which is the law of the French and Dutch colonies; as well as in the leading English case of *Hadley v. Baxendale* . . . which is law in England and in the British colonies where English law obtains. In addition, it is law in most, if not all, American jurisdictions. The principle of *Hadley* . . . is also found in the decisions of the civil law jurisdiction of Louisiana.

(internal citations and paragraph indentation omitted).

96. 1 V.I. 47 (D.V.I. 1924).

97. *Id.* at 50.

In contrast, a year later, in a 1925 St. Croix case, *Morton v. Latimer*,[98] the court never referenced which Danish law governed the spread of fire, and instead acknowledged the general rule at common law, which was akin to strict liability, and which had been modified by England's Parliament. Although the court concluded that the "general principle of both America and England" now limits liability to negligence in starting the fire or failing to prevent it from spreading.[99]

So, whereas the court in *Fleming* and *Stakemann* attempted to determine what the local, Virgin Islands rule might have been before considering the American or English common law rules, the court in *Morton* did not. In fact, *Morton* went beyond the common law (if limited to caselaw), and followed decisions that had recognized that the Parliament of Great Britain had modified the common law in 1707.[100] Yet, *Morton* did not consider whether

98. 1 V.I. 96 (D.V.I. 1925).

99. *Id.* at 100.

100. *See id.* ("While at common law if a person's house or field was burned by fire coming from his neighbor's property, the neighbor would be responsible therefor albeit the fire was occasioned by accident, such is not the law in America. The English Parliament recognized the hardship of this rule and finally modified it." (citing Cincinnati, N.O. & T.P. Ry. Co. v. S. Fork Coal Co., 139 F. 528 (6th Cir. 1905) (additional citations omitted))). Notably, the *Cincinnati* case cited in *Morton* had explained that the common law rule was modified "by the statute of 6 Anne." *See Cincinnati*, 139 F. at 531:

> By the ancient common law every man was obliged to keep his fire safe, and if one was started upon his premises by the act of himself or any one for whom he was responsible, and spread and injured his neighbor, except by some inevitable accident which could not have been foreseen, he was responsible without regard to the question of negligent origin. . . . But . . . by the statute of 6 Anne, c. 31, it was provided the action should not lie if accidentally begun. This statute of Anne constitutes a part of the common law of most of the states, and thus, when the matter is not the subject of regulation by state statute, the liability at common law is confined to a fire which was started through culpable negligence, which spreads and destroys property adjacent.

(citations omitted). But the parliament that passed this act in 1707, preventing the accidental spread of fire, was the Parliament of Great Britain, not the English Parliament. American courts have acknowledged the difference between the Parliaments of England and of Great Britain and rejected the incorporation of British statutes into the English common law by America. *See, e.g.*, Hall, *supra* note 1, at 821–22:

> The Iowa court has adopted a unique approach in interpreting its territorial act. In an 1857 case the Iowa court distinguished 'Great Britain' from 'England' and declared that Great Britain did not come into existence until 1707 when Scotland was united with England; thus, the territorial act was construed to eliminate only acts of Parliament enacted since 1707.

(citing O'Ferrall v. Simplot, 4 Iowa 381 (1857) and Pierson v. Lane, 14 N.W. 90 (Iowa 1882) (footnotes omitted)).

the 1921 reception statutes allowed for the reception of English (or more accurately British) statutes into Virgin Islands common law, whether directly or indirectly, through Alaska precedent.

Perhaps the most interesting decision issued while the 1921 Codes were in effect, though one that did not concern the reception statute directly, was a 1936 St. Croix case, *People v. Francis*.[101] Joel Francis, charged with second-degree murder, moved to dismiss the charge, claiming the 1921 Code for St. Croix was invalid.[102] He raised a direct attack on the entire Code itself, arguing that it was void because the military governor of the Virgin Islands at the time, Rear Admiral Joseph W. Oman, had appointed some of the members of the Colonial Council of St. Croix.[103] Two questions arose as a result: whether a governor had authority to appoint members of a legislature and, if not, whether the laws the legislature passed were invalid.[104] Remarkably, the *Francis* court grounded its reasoning solidly in American values:

> At the outset it is to be accepted that this is an American Territory. This is an American Possession. It is not a Danish Possession. Not Danish but American principles of law are to be followed. However much it may have been the intention of Congress to continue the system which was in force at the time when the Territory was taken over, it still remains true that an American system of administration and American system of laws was actually brought here to the Virgin Islands when the Act of March 3, 1917 . . . was enacted.
>
> It must not be forgotten that the principles of government of the United States are different from those which obtain in Denmark. The latter are monarchal; the former are democratic. The latter provide for a Chief Executive who is supreme over the Legislature and the Judiciary. The former is a government of divided powers. The Executive, the Legislative and the Judiciary are coordinate and equal in regards to each other. One may not encroach on the functions of the others. All three are subject to the Constitution of the United States and the principles of government which that Constitution contains.

101. 1 V.I. 359 (D.V.I. 1936).
102. *Id.* at 364.
103. *Id.* at 365.
104. *Id.*

> Congress intended . . . to continue so much of the former Danish laws as was compatible with the changed sovereignty. That means the continuance of such laws as were compatible with the ideals and ideas of American government. It has always been the American principle to keep the three great departments of government separate and apart. In the federal government the President does not appoint members of Congress. In no State does the Governor appoint members of that State Legislature. In no other territory or possession of the United States does the Governor appoint the local legislative assembly. The entire history *of our country* shows that the intention of *our people* has always been to keep the legislative branch of the government as far as possible from executive control. There is no reason to believe that Congress did not intend to place the principle of the separation of powers into the legal system enacted for the Virgin Islands. Only an express and unmistakable statement of Congress that *our historic tradition* should be departed from can lead us to believe that the American doctrine of the separation of the powers of government is not in force and effect in the Virgin Islands.[105]

Against this backdrop, and after consulting all possible sources, the court concluded that Governor Oman had exceeded his authority when he appointed members of the Colonial Council of St. Croix.[106] Yet, despite all of the rah-rah for America, it was Danish law (albeit statutory) that saved the 1921 Codes.[107] Because Congress had continued in force the Danish laws in effect, the Colonial Law of 1906 remained in force. And the court turned to this law in *Francis* to save the 1921 Codes. The Colonial Law had provided that "[n]o resolution can be adopted by any of the Colonial Councils, when less than half of its members are present."[108] And since "resolution" in Danish means "decision or to decide," the court concluded that the St. Croix Colonial Council's decision to adopt the 1921 Code—even though some of its members were illegally appointed by the governor—was still valid because all of the councilmembers "properly

105. *Id.* at 365–66 (emphasis added) (internal citations omitted).

106. *Id.* at 381 ("[W]e must, and we do, hold that the Governor of the Virgin Islands did not have the power to appoint members to the Colonial Council which enacted Titles 2, 3, 4 and 5 (II, III, IV and V) of the Code of Laws for the Municipality of St. Croix on May 17, 1920 (published in 1921).").

107. *See id.* at 384 (extending its holding to include the 1921 Code of St. Thomas).

108. *Id.* at 383 (quotation marks and citation omitted).

elected and duly qualified" had voted in favor.[109] So, in the end, Danish law saved the 1921 Codes, including the Virgin Islands' first statutes receiving English common law.

Questions about the influence of Danish law continued for some time after the 1921 Codes were enacted, almost always occurring in civil cases, including probate proceedings, and mostly in reference to real property.[110] But over time, except when a statute was traced back to Danish statutory law,[111] courts either lost interest in, or no longer found it necessary to,[112] (or

109. *Id.* at 383–84.

110. *See, e.g.*, Harris v. Mun. of St. Thomas & St. John, 3 V.I. 502 (3d Cir. 1954) (questions concerning tort liability and government immunity); Callwood v. Kean, 2 V.I. 526, 542–55 (3d Cir. 1951) (questions concerning community property and surviving spouse); *see also id.* at 549–50

> [U]nder the Danish law a husband who by his will conferred upon his surviving wife the right to possession of the community property had also the right to stipulate that she could dispose of that property only with the consent of an individual who in Danish is called a 'Tilsynsvaerge' which may perhaps best be rendered in English as 'guardian'. This concept of a guardian to advise a widow in the management of her property is very ancient in the Danish law, and the concept developed in more recent times to the point that a husband was empowered to name such a guardian in his will if by that instrument he authorized his widow to retain possession of their joint estate.

(footnote omitted); Williams v. Scrawder, 2 V.I. 241, 243 (D.V.I. 1952) (questions concerning fencing of land) ("The old Danish ordinance of 1886 on 'Fencing' refers to the duty of adjoining landowners to defray 'conjointly' the expenses of erecting a fence on the boundary line and has other provisions for forcing contributions by landowners to the cost of fences erected by one owner . . . ."); *In re* Estate of Dyer, 2 V.I. 375 (D.V.I. 1945) (questions concerning inheritance tax); *In re* Estate of Sebastian, 2 V.I. 38, 41 (D.V.I. 1942) (questions concerning community property).

111. *See, e.g.*, Gov't of the V.I. v. Torres, 3 V.I. 333 (D.V.I. 1958) (construing criminal statutes carried forward from Danish laws); Hendry v. Hendry, 14 V.I. 610, 613–18 (V.I. Terr. Ct. 1978) (construing divorce statute but also discussing different historical traditions in Danish law (incompatibility) and English law (fault) for granting a divorce).

112. To be clear, such sentiments throughout this Article should not be taken as—and are certainly not intended as—disrespect for the Virgin Islands judiciary or any of its current or past members. That said, many of the members of the Virgin Islands judiciary (especially in the early years after 1917) were not (and some still are not) Virgin Islanders. Because "Virgin Islander" can be a politically-loaded term locally, I mean it broadly in the sense of persons born in or living in the Virgin Islands and also committed to and concerned about its growth and prosperity. *Cf.* Jonathan G. Cedarbaum, *The Proposed Virgin Islands Constitution from the Fifth Constitutional Convention*, Statement to Subcomm. on Insular Affairs, Oceans and Wildlife (2010) ("[S]everal provisions of the proposed constitution give special advantages to 'Native Virgin Islanders' and 'Ancestral Virgin Islanders.' These provisions raise serious concerns under the equal protection guarantee of the U.S. Constitution, which has been made applicable to the USVI by the Revised Organic Act." (internal citations omitted)). Putting aside the question of who qualifies to be called a Virgin Islander, who decided and developed Virgin Islands precedent is still relevant largely because the lion's share fell to the District Court of the Virgin Islands to develop, first in its former capacity as the court of general jurisdiction for

the Territory, and later in its appellate capacity over the Territorial (now Superior) Court of the Virgin Islands. And since all federal judges—including federal judges in territories of the United States—are appointed by the President of the United States and confirmed by the United States Senate, it also meant that federal judges presided over Virgin Islands divorce cases, guardianship and child custody cases, probate proceedings, as well as civil litigation and nearly all serious criminal cases as the trial court. Even after the Legislature of the Virgin Islands vested jurisdiction over all local civil and almost all criminal cases in the Territorial and later Superior Courts, the District Court of the Virgin Islands, in its appellate capacity, still determined whether local judges got it right. Quite often, many of those judges were also not Virgin Islanders. Often, intentionally or unintentionally, federally-appointed judges brought national politics with them. For example, two months after Judge Albert Levitt decided *Francis*, *supra* note 101, President Franklin D. Roosevelt directed him to submit his resignation. *See Judge Levitt is Shifted in Virgin Islands Fight*, DAILY NEWS (St. Thomas, V.I.), Aug. 15, 1936, at 1 ("Judge Levitt submitted his resignation to the President a month ago, charging 'interference' with his court by Governor Lawrence W. Cramer and Interior officials. Officials were silent on Leavitt's request to President Roosevelt for an investigation of his charges against Cramer and other officials."). *See also* Diane Russell, *Some Ethical Considerations of Judicial Vacancies: A Case Study of the Federal Court System in the United States Virgin Islands*, 5 GEO. J. LEGAL ETHICS 697, 699–701 (1992) (discussing problems the Virgin Islands experienced in the 1980s when national party politics stalled President Reagan's judicial nominations at a time when the District Court still had jurisdiction over most Virgin Islands cases).

> Since 1988, the U.S. Court of Appeals for the Third Circuit has been forced to shuttle judges to the Virgin Islands from all over the country to handle the court load in the territory. The judicial caseload has grown to monstrous proportions. Because of the number of criminal cases which require disposition under the Speedy Trial Act, there is a significant backlog of civil cases. There are two new judges an average of every four weeks. Naturally, this high turnover of judges, coupled with an incredible backlog of civil cases, has caused severe problems in the Virgin Islands legal community. The federal government is spending thousands of dollars every month for hotels, travel and support staff for the judges. The unstable nature of the judiciary makes for inefficient trials, no continuity and scheduling nightmares. Attorneys complain of inconsistent judicial styles, temperaments and procedures. The public is in an uproar because cases are being tried by off-island judges who are unfamiliar with the Virgin Islands lifestyle and culture. Virgin Islanders demand native judges or at the very least, judges who are familiar with the Virgin Islands culture.

Id. As an example, consider the simple, comical, but telling anecdote of the federal revolving courthouse door:

> For example, an attorney recalls the unusual style of a visiting judge. When the jury was leaving for deliberations, all of the attorneys stood, which is the usual practice in the Virgin Islands. However, the judge demanded that the attorneys sit in "her court." Shortly after her visit, a new visiting judge presided over the court and the attorneys sat when the jury left for deliberations. The new judge chastised the attorneys for sitting while the jury left. Virgin Islands Attorney Joel Holt states, "We don't know when to sit or stand."

Id. at 701 n.21 (citation omitted). It was not until 1969 that the first person from the Virgin Islands, Almeric L. Christian, was appointed to be a judge on the District Court of the Virgin Islands, more than fifty years after the United States had acquired the

perhaps lacked the resources to[113]), harmonize former Danish West Indian customs with American common law to develop the

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Territory and (of note for this Article) twelve years after the 1957 reception statute took effect. *See Judge Almeric L. Christian Dies*, ST. THOMAS SOURCE (Sept. 1, 1999), http://stthomassource.com/content/news/local-news/1999/09/01/judge-almeric-l-christian-dies. ("Judge Almeric Leander Christian . . . a native of St. Croix, was the first Virgin Islander to be appointed to the federal District Court of the Virgin Islands.").

113. For example, the recognition given by the United States Court of Appeals for the Third Circuit in Callwood v. Kean, 2 V.I. 526, 543 n.8 (3d Cir. 1951), thanking Temple University professors and persons at the Library of Congress. Virgin Islanders, not to mention their courts, did not have the same access to resources and materials as a federal appellate court sitting in Philadelphia. Complicating matters, Danish officials repatriated much of the original records of the Danish West Indies to Denmark shortly after the transfer. *See* Jeannette Allis Bastian, *A Question of Custody: The Colonial Archives of the United States Virgin Islands*, 64 AM. ARCHIVIST 96, 96–97 (2011):

> On March 31, 1917, a small group of islands in the Caribbean began losing its memory. On that day, the three islands of the Danish West Indies . . . were transferred from Denmark to the United States and renamed the United States Virgin Islands. The transfer initiated a series of archival events in which competing custodial claims for the archival records of the islands resulted in the loss of access to them by the community in which they were created.

The Treaty between Denmark and the United States includes the following clause:

> In this session shall also be included any government archives, records, papers or documents which relate to the cession or the rights and property of the inhabitants of the Islands ceded, and which may now be existing either in the Islands ceded or in Denmark. Such archives and records shall be carefully preserved, and authenticated copies thereof, as may be required shall be at all times given to the United States Government or the Danish Government, as the case may be, or to such properly authorized persons as may apply for them.

Convention Between the United States and Denmark, U.S.-Den., art. I., Aug. 4, 1916, 39 Stat. 1706. Bastian notes the contradictory ways both Denmark and the United States understood this clause. Bastian, *supra*, at 103–04. Both sides read the treaty as giving themselves the right to the original records. Denmark maintains this position today. *See, e.g.*, Danish National Archives, *West Indian Local Archives*, VIRGIN ISLANDS HISTORY, http://www.virgin-islands-history.dk/eng/a_wila.asp (last visited Feb. 26, 2017) (listing archive contents from 1755 to 1917 and explaining that "[t]hese West Indian local archives were brought home to Denmark from the islands around 1900—the major part in the years immediately after the sale of the islands in 1917—as *expressly provided* by the treaty transferring the islands to the United States" (emphasis added)). *See also* Bastian, *supra*, at 122:

> The Danish government proceeded to remove records to Denmark on the assumption that the records, created by Danes executing Danish policy in Danish officers which functioned as extensions of the colonial officers in the Mother country, belonged to Denmark. Denmark's position is clear in the consistent references to 'bringing the records home' by Danish archivists, both past and present, in official finding aids, reports, and articles on the disposition of the records.

(footnote omitted). Though Denmark is working to digitize many of the colonial records in time for the centennial, digital copies are not the same. Since both governments claim the

common law of the Virgin Islands.[114] And then came the Restatement, effectively halting any development of Virgin Islands common law for more than half a century.[115]

In 1936, Congress passed an Organic Act for the Virgin Islands and provided a civil government for the Territory and a basic charter of rights.[116] But Congress also retained the former colonial separation, creating municipalities and Municipal Councils in place of the Colonial Councils.[117] Congress also created the Legislative Assembly of the Virgin Islands, which could convene "to enact legislation applicable to the Virgin Islands as a whole."[118] Twelve years later, after the system proved unworkable, Congress revised the Organic Act and, among other changes, abolished the Legislative Assembly and merged the Municipal Councils into a unicameral body designated the Legislature of the Virgin Islands with authority "to amend, alter, modify, or repeal any local law or ordinance."[119] Congress also authorized "the preparation, at Federal expense, of a code of laws of the Virgin Islands, to be entitled the 'Virgin Islands Code', which shall be a consolidation, codification and revision of the local laws and ordinances in force in the Virgin Islands."[120] "As a result, the laws of the Virgin Islands were overhauled with the

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right to the originals, with Virgin Islanders caught in the middle, perhaps resort could be had to another clause in the treaty. *See* Convention Between the United States and Denmark, *supra*, at 1714 ("In the case of differences of opinion arising between the High Contracting Parties in regard to the interpretation or application of this convention, such differences, if they cannot be regulated through diplomatic negotiations, shall be submitted for arbitration to the permanent Court of Arbitration at the Hague.").

114. When questions concerning rights to land and real property were at issue, courts still looked to Danish law. *See, e.g.*, Smith v. Defreitas, 4 V.I. 525 (3d Cir. 1964) (examining Danish law concerning creation and abandonment of private easements); Malloy v. Reyes, 61 V.I. 163 (V.I. 2014) (examining Danish law and custom to address questions concerning creation and abandonment of public roads).

115. Remarkably, the first reported opinion that used the phrase the "common law of the Virgin Islands" was decided by the United States Court of Appeals for the First Circuit, Weston v. Stuckert, 4 V.I. 539, 542 (1st Cir. 1964), applying Virgin Islands law to a suit filed in Puerto Rico, and then only to state that the Restatements are the Virgin Islands' common law. The first Virgin Islands opinion to use the phrase was Horsford v. Romeo, 7 V.I. 18, 20 (3d Cir. 1969), and there the United States Court of Appeals for the Third Circuit used the phrase only in passing to remark that "the common law of Antigua, a common law jurisdiction, was the same . . . as the common law of the Virgin Islands."

116. Organic Act of 1936, Pub. L. No. 74-749, 48 Stat. 1807 (superseded 1954).

117. *Id.* §§ 2, 5–6, 48 Stat. at 1807–08.

118. *Id.* § 7, 48 Stat. at 1808–09.

119. Revised Organic Act of 1954, Pub. L. No. 83-517, § 8(c), 68 Stat. 497, 501 (codified as 48 U.S.C. §§ 1571(a), 1574(c)).

120. Revised Organic Act § 8(e).

passage of the 1954 Revised Organic Act and with enactment of the Virgin Islands Code by the Legislature in 1957."[121]

"All available laws, including the 1921 Codes . . . were classified according to subject matter, carefully edited, and arranged into [thirty-four] titles."[122] Among the laws carried over from the 1921 Codes into the 1957 Virgin Islands Code was the Virgin Islands' reception statute. But, while the 1921 reception statute had provided: "The common law of England as adopted and understood in the United States shall be in force in this District, except as modified by this ordinance,"[123] the 1957 reception statute differed, providing:

> The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.[124]

The editors of the Virgin Islands Code, in an annotation, explained that the 1957 statute was "[b]ased on" the 1921 statutes.[125] But the code itself directs that such notes do not comprise Virgin Islands law.[126] Whether the 1957 statute was merely a rephrasing of the 1921 statute or whether it was an entirely new statute is critical to understanding where the Virgin Islands now finds itself.

To explain, the 1921 reception statutes directed courts to look to English common law as "adopted and understood" in the United States. But American courts have always understood and adopted English common law differently—some believe that English common law includes English statutes,[127] others do not.[128]

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121. Der Weer v. Hess Oil Virgin Islands Corp., No. SX-05-cv-274, 2016 WL 1644948, at *3 (V.I. Super. Ct. Apr. 25, 2016) (internal footnotes, quotation marks, and ellipses omitted).

122. V.I. CODE ANN. at ix (reprinting first edition preface) (1995).

123. 1921 Codes, tit. IV, ch. 13, § 6.

124. 1 V.I.C. § 4.

125. V.I. CODE ANN. tit. 1, § 4 (1995 ed.) (historical source note).

126. *See* 1 V.I.C. § 45(b) ("Revision notes and other notes set out in this Code are included for the purpose of convenient reference, and do not constitute part of the law.").

127. *See*, *e.g.*, Blume & Brown, *supra* note 17, at 521 ("While it was obvious that no British statute could have the force of a statute in an American territory after the change of sovereignty, the view that applicable British statutes were made territorial statutes by legislative adoption was widely held."). *See also* Hall, *supra* note 1, at 817–18:

Some think of the common law as a mode of reasoning,[129] while others disagree.[130] And while nearly every court in the United

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> [D]ecisions rejecting a part of English law represent somewhat exceptional instances, inasmuch there are a good many more cases which accept acts of Parliament as part of American law. Examples of English statutes which have been recognized are the Habeas Corpus Act of 1679, early English statutes dealing with the authority of officials who act as conservators of the peace, the statute of uses, statutes passed in the [seventeenth] century providing for forfeiture in common-law courts of various illegally used articles, acts of Parliament limiting early common-law strict liability for the escape of fire, an early (1381) statute on forcible entry making the use of force in obtaining possession of land a criminal offense, and numerous others.

(footnotes omitted).

128. *Cf.* Nelson, *supra* note 26, at 27 ("As Virginia Chancellor Creed Taylor confirmed, 'it was the common law we adopted, and not English decisions.'" (quoting Marks v. Morris, 14 Va. 463, 463 (1809))). *But cf.* Hall, *supra* note 1, at 821 ("The territorial legislature of both Wisconsin and Iowa declared that none of the statutes of Great Britain shall be considered the law of the respective territories. Nevertheless, this territorial act has since become ineffective in Wisconsin inasmuch as a good many later decisions explicitly recognize as in-force various British statutes." (quotation marks and footnotes omitted)).

129. *See, e.g.*, Dale, *supra* note 15, at 560:

> When it is said that we have in this country adopted the common law of England, it is not meant that we have adopted any mere formal rules or any written code, or the mere verbiage in which the common law is expressed. It is aptly termed the unwritten law of England, and we have adopted it as a constantly improving science, as an art or a system of legal logic, rather than as a code of rules. In short, in adopting the common law, we have adopted its fundamental principles and modes of reasoning, and the substance of its rules as illustrated by the reasons on which they are based, rather than by the mere words in which they are expressed.

(quoting Morgan v. King, 30 Barb. 9, 14–15 (N.Y. Sup. Ct. 1858); Harry W. Jones, *Our Uncommon Common Law*, 42 TENN. L. REV. 443, 444 (1975):

> The common law is not merely, or even essentially, a body of rules of more or less ancient judicial origin. It must be thought of also as a mode of reasoning, a way of using legal sources to analyze problems and to reach and justify decisions in disputed cases. The common law, we might say, is both product and process, the rules courts have laid down in past decisions and the ways in which courts draw on this past recorded experience as a source of guidance for future action.

(footnote omitted); Schaefer, *supra* note 21, at 6 ("[T]he common law which the reception statutes adopted was not just that heterogeneous group of cases which happen to have been decided in England before 1607 but rather the common law as a system, the outstanding characteristics of which are its capacity for growth and its ability to slough off outmoded precedent."); *see also* Adams, *supra* note 13, at 446 (discussing how "the common law naturally (1) develops organically over time, (2) responds to contemporary local mores and needs, and (3) seeks to incorporate the lessons of experience").

130. *See, e.g.*, Stoebuck, *supra* note 25, at 393:

> So that we may start in cadence, some definitions are due. Common law refers to that body of governing principles, mainly substantive, expounded by the common-law courts of England in deciding cases before them. Reception means

States that has considered the common law in the abstract has found that it embraces local customs and traditions,[131] no jurisdictions other than Alaska—and then the Virgin Islands by way of Alaska—received the English common law through a statute that encompassed the common law of the whole of the United States. Professors William Wirt Blume and Elizabeth Gaspar Brown explained that the statute Congress adopted for the Territory of Alaska

> was the only one in which Congress indicated what "common law" was intended, and this was accompanied by a more general provision. For Congress to have been specific it would have been necessary to designate the common law of some particular jurisdiction as of a particular time. Each territory

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> adoption of the common law as the basis for colonial judicial decisions. We are not concerned, as an end in itself, with colonial court systems or with the mechanics of decision making . . . .

(quotation marks omitted).

131. *See, e.g.*, Peery v. Fletcher, 182 P. 143, 146–47 (Or. 1919):

> The common law, as it existed in England at the time of the settlement of the American colonies, has never been in force in all of its provisions in any colony or state of the United States. It has been adopted so far only as its general principles were suited to the habits and conditions of the colonies, and in harmony with the genius, spirit and objects of American institutions. Different geographical conditions may justify modifications, and whether common law rules will be followed strictly in the United States will, necessarily, where no vested rights are actually concerned, depend upon the extent to which they are reasonable and in consonance with public policy and sentiment. What may be the common law in one state is not necessarily so considered in another. In many jurisdictions in the United States the rules of the common law of England have been held by the courts to be in full force so far as the same are applicable and of a general nature, and are not in conflict with the Constitution or special enactments of the Legislature. This is the rule in Oregon. In some of the states all statutes and acts of the British parliament which were passed prior to the fourth year of James the First are declared to be a part of the law of the state. The common law with all the statutes amending it prior to a certain time was adopted excluding statutes passed afterwards unless expressly adopted. In applying the general rule to a state which, like ours, had no political existence before the Revolution, it must in harmony with reason be held that when our territorial legislature and the framers of our Constitution and our courts recognized the existence here of the common law, they must have had reference to that law as it existed, modified and amended by the English statutes passed prior to the Revolution.

(internal citations omitted); Territory v. Gay, 31 Haw. 376, 395 (1930) ("Our system of water rights is based upon and is the outgrowth of ancient Hawaiian customs and the methods of Hawaiians in dealing with the subject of water. No modifications of that system have been engrafted upon it by the application of any principles of the common law of England.").

> was open to settlement by persons from all existing states and territories, and it was early recognized that the laws of no one state should be imposed.[132]

So, in other words, reception statutes in all of the other states and territories referred broadly to the common law, not to any specific jurisdiction's common law. But not for Alaska—at least not for Alaska's criminal code—or for the Virgin Islands when it borrowed Alaska's "criminal" reception statute. And though courts have read limitations into their jurisdiction's reception statutes, often based on the unique history or circumstances of the jurisdiction,[133] courts in the Virgin Islands were either unaware of, or unsure of, reception statutes nationally because the reported decisions did not address any of the kinds of questions other courts had to grapple with when receiving the common law. Such questions for the Virgin Islands would have included: whether the Colonial Councils—by adopting Alaska's "criminal" reception statute, by not adopting Alaska's "civil" reception statute, and by enacting reception statutes only within each district's criminal code—intended to adopt English common law only insofar as it was understood and applied in the United States to criminal law; whether the Colonial Councils—if they intended for English common law to apply to both civil and criminal law—also intended to make English statutes part of the common law of Virgin Islands; and lastly, whether the Colonial Councils intended to replace, entirely, "the Common and Statute Law of Denmark . . . as more accurately defined by the Laws and Ordinances of the Colonies"[134] with the common and statutory law of England, or intended instead to just adopt English common law as the method of reasoning for the courts and leave the courts to determine what portion of Danish common law as understood and applied in the Danish West Indies remained part of the Virgin Islands' common law.

Whatever the Colonial Councils may have intended, courts in the Virgin Islands applied English common law through the 1921

132. Blume & Brown, *supra* note 17, at 519.

133. *Cf.* Koos v. Roth, 652 P.2d 1255, 1263 (Or. 1982) (determining whether negligence or strict liability governed Oregon common law regarding the spread of fire). "It is an interesting question what the 'common law of England' was in 1843, when this was adopted as the law in Oregon." *Id.*

134. *In re* Manbodh Asbestos Litig. Series, 47 V.I. 215, 229 (V.I. Super. Ct. 2005) (brackets, citation, and quotation marks omitted).

reception statutes in nearly all of the cases to which it could apply. But this too had its problems.[135] Virgin Islands courts struggled applying a reception statute with such broad reach. Because the 1921 reception statutes lacked any

> hierarchy or any sort of direction for determining which jurisdiction or jurisdictions to consider when applying the common law. . . . [A]ttorneys sought to sway courts with the legal authorities that bolstered their positions. Without binding precedent to employ, early Virgin Islands courts had to consider competing approaches from numerous jurisdictions and then choose the legal authority they thought best applied to the cases before them. Outcomes differed depending on the judge and the authorities cited. To further complicate matters, the Virgin Islands did not have an official reporter for its court decisions until 1959.[136]

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135. *See, e.g.*, Tebbs v. Alcoa S.S. Co., 3 V.I. 186, 193–94 (D.V.I. 1956):

> The defendant has cited the case of J. C. Penny Co. v. Robison, 1934, 128 Ohio St. 626, 193 N.E. 401, 100 A.L.R. 705, and has shown the application of that doctrine down through numerous citations. The plaintiff has cited the case of Bury v. F. W. Woolworth Co., 1930, 129 Kan. 514, 283 P. 917, and has shown the application of its doctrine down through numerous citations. The well written briefs on both sides show an impressive array of cases for each.

(cited in Hartzog v. United Corp., 59 V.I. 58, 70 n.5 (V.I. Super. Ct. 2011)).

136. *Hartzog*, 59 V.I. at 70 (footnotes omitted). *Hartzog* also referenced "[a]dditional difficulties [that] arose due to the lack of resources made available to the Virgin Islands" and quoted the following background from Governor Merwin's article:

> Legal research was hit or miss, with the winning lawyer often hitting the loser with what he had missed in his search. Many lawyers went into court convinced that they knew the current status of the law only to be confronted with a slip of paper on which was printed an amendment to the law of which they had no knowledge. To make matters even more confusing, there was no system for maintaining a record of legal decisions rendered by either the District Court or the police courts or of making them available to members of the legal profession or to the public. Most lawyers were obliged to rely on their own briefs and records of cases for precedents. As a result, the legal profession found it necessary to lean heavily on precedents from states and other territories where records of legal decisions were maintained.

Id. at 70–71 & n.6 (quoting Merwin, *supra* note 82, at 779) (indentation omitted). Governor Merwin had explained these difficulties while also informing the American Bar Association that the Virgin Islands had authorized "the preparation and the first publication of legal decisions affecting the Virgin Islands." Merwin, *supra* note 82, at 780. The first volume of the Virgin Islands Reports "covers decided cases from 1917 up to and including 1939," he explained. *Id.* Thus, nearly twenty years of Virgin Islands precedent—arguably the most important years given the vast changes in the new American territory—was distilled to just one volume. It is possible (perhaps likely) that important decisions (perhaps only in hindsight) were omitted since the Legislature had authorized

Four years earlier, the United States Court of Appeals for the Third Circuit, in *Callwood v. Virgin Islands National Bank*,[137] had tried to provide some guidance, directing that, when applying the 1921 reception statute, courts should look to the Restatements as a reasonable source of American common law.[138]

> Writing for the United States Court of Appeal for the Third Circuit, Judge Albert B. Maris reasoned that since "the Virgin Islands have adopted the rules of the common law of England as followed and understood in the United States . . . we think that the district court in applying those rules is justified in

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the Governor to "contract with a qualified law publisher for the editing and publication, in book and pamphlet form, of the past and future decisions" of the District Court of the Virgin Islands, and the Third Circuit and the Supreme Court of the United States "rendered on appeals from cases originating in the Virgin Islands," as well as "such other judicial decisions, rendered locally, which, in the judgment of the Governor would be helpful in the administration of justice in the Virgin Islands." 4 V.I.C. § 551. Who decided what decisions prior to 1957 should be published is unclear. The Legislature, in 2004 following the establishment of the Supreme Court of the Virgin Islands, amended section 551 to require publication of the Supreme Court's decisions as well. Act No. 6687, § 11, 2004 V.I. Sess. L. 179, 190 (Oct. 29, 2004). While at present the courts of the Virgin Islands decide (for the most part) whether to designate their opinions for publication, *but cf.* Rennie v. Hess Oil V.I. Corp., 62 V.I. 529, 539 n.7 (V.I. 2015), an interesting question arises what the Legislature understood by "decisions" and—if by decision it understood opinion (as opposed to order, judgment, decree, and so forth)—whether the Legislature also abrogated any discretion courts may have to choose what "opinions" should be published. *Cf.* David R. Cleveland, *Overturning the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 J. APP. PRAC. & PROCESS 61, 63 (2009) ("In the mid-1970s, the members of the judiciary fundamentally changed the nature of precedent in the federal courts. They did so relatively quickly and quietly: first, by issuing decisions not designated for publication and not citeable, and then, by denying these decisions precedential status."); *see also id.* at 68–69:

> > There is an inherent human desire for stability and continuity in decisionmaking. Looking to the past for guidance and direction is thus inherent in an institutionalized justice system. Whether explicitly binding or not, decisions of the past have a powerful impact on judges' decisions, for 'out of self-doubt, humility, or respect for prior generations, judges throughout history have often sought guidance from those who came before them.' Ancient civilizations had some signs of this respect for what had come before, but it is in twelfth-century England that the roots of our modern conception of precedent, publication, and common law can be found. This tradition of common law, though not identical to that which we use today, was understood by the founding generation to include unfettered citation and precedent.

(footnotes omitted).

137. 3 V.I. 540 (3d Cir. 1955).

138. *See Hartzog*, 59 V.I. at 71 (citing Callwood v. V.I. Nat'l Bank, 3 V.I. 540 (3d Cir. 1955)). *But cf. Manbodh*, 47 V.I. at 229 ("[T]he source note highlights a rule of decision, *Callwood v. V.I. National Bank*, where the court adopted *a particular section* of the Restatement, as a logical extension of the 1921 Codes' reliance on United States common law." (citation omitted) (emphasis added)).

> following the well considered expressions of them which the American Law Institute has incorporated in its Restatements of the Law." Judge Maris sought to make the Restatements mandatory through *stare decisis*. But *Callwood* applied only to the 1921 Codes. Two-years after *Callwood*, however, the Legislature made the restatements mandatory by statute when it enacted Section 4.[139]

If this is correct, then the Legislature's intent in 1957 was not to replace English common law as adopted and understood in the United States with the common law as adopted and understood by the American Law Institute. That is, the Legislature of the Virgin Islands might have only intended to codify the *Callwood* decision. Because the 1957 reception statute removed references to the common law of England, and as adopted and understood in America, and replaced it with the common law as expressed by the American Law Institute, it is reasonable to conclude that the Legislature wanted only to eliminate the confusion and uncertainty the 1921 reception statutes had caused and provide courts (and Virgin Islanders) with a common source, not to elevate the restatements to the status of a quasi-common law code.[140]

If this was the Legislature's intent, courts again were either unaware of it or failed to follow it because once the Legislature adopted the 1957 statute, Virgin Islands courts effectively abandoned any development of the common law of the Virgin Islands and blindly followed the American Law Institute.[141] To be

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139. *Hartzog*, 59 V.I. at 71 (quoting *Callwood*, 3 V.I. at 551) (internal citation omitted).

140. *See also* Adams, *supra* note 13, at 432:

> In enacting the new statute, the Senate expanded *Callwood* in an important respect. In *Callwood*, the court had acted as many other United States courts have in adopting a single provision of a single Restatement, having determined that provision to represent accurately the common law of the United States. Indeed . . . this is how common-law courts historically have made law, moving slowly and incrementally, one case at a time. The Virgin Islands Senate followed the *Callwood* court's incremental, ordinary step with a sweeping, extraordinary measure by declaring that all provisions of all Restatements were to be considered as being representative of United States common law.

(footnotes omitted).

141. *Cf. Manbodh*, 47 V.I. at 233 ("[C]ourts frequently apply a Restatement in a cursory, rubber-stamp fashion without considering the prevalence of the particular provisions.").

sure, there was scattered pushback against the Restatement,[142] but real resistance was futile without a local court of last resort. Congress had authorized the Territory in 1984 to create a supreme court,[143] but it had also, in the interim, established an appellate division within the District Court of the Virgin Islands,[144] comprised of three judges,[145] who heard appeals from local Virgin Islands courts. Rather than act on that authority immediately, the Legislature waited another twenty years, until 2004, to establish a local court of last resort for the Territory. And around the same time, cracks in the Restatements' armor began to surface.

In 2004, Professor Kristen David Adams foreshadowed the sea-change to come, considering "the way in which the Restatements have been employed in the Virgin Islands and the manner in which this decision has affected the natural development of the Islands' common law."[146] Her article observed that even though the 1957 reception statute, as of 2004, had

> been applied in over two hundred reported cases, its language has never expressly been interpreted.[147] Therefore, the statute remains unclear as to whether the language "as expressed" means that Virgin Islands courts are expected to undertake an independent analysis of whether the Restatements express United States common law, or whether the courts are to assume that, when the Restatements have

142. *See, e.g.*, Murray v. Beloit Power Sys., Inc., 450 F. Supp. 1145, 1447 (D.V.I 1978), *aff'd sub nom.*, Murray v. Fairbanks Morse, 16 V.I. 647 (3d Cir. 1979):

> I realize that today's decision appears to run counter to the position adopted by the American Law Institute, particularly as to the ramifications of a finding by the trier of fact that an injured plaintiff unreasonably exposed himself to an appreciable and known risk. I do not feel, however, that 1 V.I.C. § 4 transformed the A.L.I. approved restatements into a civil code.

143. *See* Act of Oct. 5, 1984, tit. VII, § 702, 98 Stat. 1732, 1737, codified at 48 U.S.C. § 1611(a) (amending the Revised Organic Code to authorize the creation of an appellate court of last resort).

144. *Id.* § 705, 98 Stat. at 1739, codified at 48 U.S.C. § 1613a(a)–(b).

145. The 1984 amendments to the Revised Organic Act also allowed no more than one of three judges sitting as an appellate court to be designated from a local court of record, *see id.* §, *codified a*t 48 U.S.C. § 1613a(b), and which from 1976 to 2004 was known as the Territorial Court of the Virgin Islands, and then the Superior Court of the Virgin Islands from 2004 to the present.

146. Adams, *supra* note 13, at 425.

147. *Contra* Dunn v. HOVIC, 28 V.I. 467, 501–02 (3d Cir. 1993) (en banc) (Alito, J., concurring) (interpreting the language of 1 V.I.C. § 4).

> purported to express common law, they have done so accurately.[148]

Adams then discussed the original purpose of the American Law Institute, its history, and how its goals started to change over time.[149] After discussing concerns that courts and other legal scholars have raised about the influence of lobbyists and politics on the American Law Institute (critically in the area of tort reform), she argued that the Virgin Islands' 1957 reception statute could be seen as a derogation of duty.[150] And though her observations were couched in terms of a Virgin Islands Legislature's duty to enact law, the very same argument could have been volleyed at the Virgin Islands judiciary.

The most significant rejection of the restatements came in 1978 in a decision the District Court of the Virgin Islands issued in *Murray v. Beloit Power Systems, Inc.*[151] There, the Court explained that it would "deviate" from the *Restatement (Second) of Torts* and extend comparative negligence principles to strict product liability cases, but not because the Court had inherent authority to develop the common law. Justifying its decision, the Court wrote:

> I realize that today's decision appears to run counter to the position adopted by the American Law Institute, particularly as to the ramifications of a finding by the trier of fact that an injured plaintiff unreasonably exposed himself to an appreciable and known risk. I do not feel, however, that 1 V.I.C. § 4 transformed the American Law Institute approved restatements into a civil code. As stated by the Third Circuit Court of Appeals in *Varlack v. SWC Caribbean, Inc.*, 550 F.2d 171 (1977), the restatements constitute the rules of decision in the Virgin Islands only to the extent that they accurately express prevailing rules of common law. More importantly, the prevailing rules of common law constitute no more than rules of decision, and though binding as such on foreign jurisdictions seeking to apply Virgin Islands law, are binding on local courts only in the absence of local case law or statutory law to

148. Adams, *supra* note 13, at 426 (footnote omitted).

149. *Id.* at 432–42.

150. *See id.* at 450 ("[T]o the extent that adoption of the Restatements has chilled the perceived need for legislation, it could be argued that the Virgin Islands Senate has derogated its duties with regard to the creation of the law.").

151. 450 F. Supp. 1145 (D.V.I 1978), *aff'd sub nom.*, Murray v. Fairbanks Morse, 16 V.I. 647 (3d Cir. 1979).

> the contrary. As implicitly acknowledged by the Third Circuit in *Co-Build Companies, Inc. v. Virgin Islands Refinery Corp.*, 570 F.2d 492 (filed February 13, 1978) this Court has the power to deviate from prevailing rules of common law to create "local laws to the contrary" within the meaning of 1 V.I.C. § 4.[152]

While the Court did question the reach of the 1957 reception statute, its concern was not for the inherent authority of the Virgin Islands judiciary. Rather, the Court sought to balance Virgin Islands public policy with the common law. The Legislature adopted a statute requiring that liability be apportioned. The common law barred evidence of a plaintiff's negligence in strict liability claims. *Murray* deviated from the common law and allowed evidence of the plaintiff's own negligence in strict liability, but only in an attempt to harmonize conflicting laws.[153]

Still, *Murray*'s remark—that the 1957 reception statute did not transform the Restatements into a civil code—resonated, and courts began to question the scope of the statute.[154] But it would be another twenty years before another court, a concurring opinion in *Dunn v. HOVIC*,[155] examined the 1957 reception statute critically and its "restatement mandate." Then-Third Circuit Judge Samuel A. Alito wrote separately in *Dunn* to explain—after discussing the history of the Virgin Islands' reception statutes—that

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152. *Id.* at 1147.

153. *See* Hartzog v. United Corp., 59 V.I. 58, 81–82 (V.I. Super. Ct. 2011) (summarizing *Murray*):

> [T]he District Court grappled with applying both the Virgin Islands' contributory negligence statute and the common law defense of assumption of the risk to an action alleging both negligence and strict liability. A jury had found the defendant liable under both theories. The parties disputed the instructions the Court should give the jury regarding contributory negligence and assumption of the risk. Contributory negligence is not a viable defense to strict liability actions. Assumption of the risk is a defense and does bars recovery. The District Court decided to merge both into a general negligence instruction. In its verdict, the jury found Murray five percent at fault. The District Court then reduced the award proportionally.

(internal citations omitted).

154. *See, e.g.*, Glason v. P.R. Int'l Airlines, 17 V.I. 150, 153 (D.V.I. 1980) (quoting 1 V.I.C. § 4 and citing *Varlack*, but contrasting them with *Murray*); Creque v. Roebuck, 16 V.I. 197, 202 n.8 (V.I. Terr. Ct. 1979) (same).

155. 28 V.I. 467 (3d Cir. 1993) (en banc).

> 1 V.I.C. § 4 . . . mean[s] that the law of the Virgin Islands, in the absence of a relevant statutory provision, is the body of rules established by precedent as generally understood and applied in the United States and that, as suggested in *Callwood*, the Restatements provide a presumptively authoritative summary of this body of precedent. I do not interpret 1 V.I.C. § 4 to mean that the Restatements, whether adopted before or after 1957, are tantamount to Virgin Islands statutes. On the contrary, I agree with the analysis of this question in *Varlack v. SWC Caribbean Inc.,* 550 F.2d 171 (3d Cir. 1977). Addressing a conflict between a provision of the Restatement (First) of Torts (issued in 1934) and a provision of a Tentative Draft of the Restatement (Second) of Torts, the Court observed that "we read the statute as looking to the Restatements only as an *expression* of 'the rules of common law.'" 550 F.2d at 180 (emphasis in original). Thus, 1 V.I.C. § 4 does not incorporate all of the Restatement provisions in effect in 1957 as if they were actual statutory text; nor does it delegate to the American Law Institute the authority to enact changes in the law of the Virgin Islands in all of the areas covered by the Restatements. While some of our opinions cite provisions of the Restatements as if they were statutory law, I respectfully submit that these references (which I take to be merely a form of shorthand) are potentially misleading.[156]

Although the concurring opinion in *Dunn* did not cite to *Murray*, both opinions expressed similar concerns: viewing the Restatements as a quasi-statute or a common law civil code that only the Legislature could change.[157] This view still remains.

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156. *Id.* at 501–02 (Alito, J., concurring) (internal footnotes and quotation marks omitted).

157. *See, e.g.*, *In re* Manbodh Asbestos Litig. Series, 47 V.I. 215, 229 (V.I. Super Ct. 2005) (the history of 1 V.I.C. section 4 "fails to conclusively explain the apparent *delegation* of the Legislature's lawmaking authority and responsibility to a non-governmental entity, the ALI, in the plain language of title 1, section 4 of the Virgin Islands Code") (footnote omitted) (emphasis added); *Hartzog*, 59 V.I. at 85 (echoing *Manbodh*'s delegation concerns). *Cf.* Figueroa v. Hess Oil V.I. Corp., 198 F. Supp. 2d 632, 660 & n.10 (D.V.I. 2002) (Moore, J., dissenting) (asserting that the Appellate Division cannot "reject, accept, or judicially modify" a restatement rule but rather must follow the restatements "as written"). *See also* Phillip H. Corboy, Curt N. Rodin & Susan J. Schwartz, *Illinois Courts: Vital Developers of Tort Law As Constitutional Vanguards, Statutory Interpreters, and Common Law Adjudicators*, 30 LOYOLA U. CHI. L.J. 183, 193 (1999) ("The few Illinois decisions directly interpreting the Illinois reception statute have found that it constitutes a declaratory enactment. Those decisions consistently reiterate that Illinois courts adopted a system of elementary rules and general guidelines which are continually expanding with society's progression . . . .") (footnotes omitted); Hall, *supra* note 1, at 804:

As if prompted by the concerns Professor Adams raised in 2004, the next year a decision came by a judge of the Superior Court of the Virgin Islands, critically examining the 1957 reception statute. The question raised in *In re Manbodh Asbestos Litigation Series* concerned what law governed two of the claims—negligence and strict liability—that hundreds of plaintiffs had brought against Shell Oil Company, Hess Oil Virgin Islands Corporation, and other defendants for injuries allegedly caused by exposure to asbestos and other toxic substances while working at an oil refinery on St. Croix.[158] Shell and the plaintiffs disputed whether the *Restatement (Second) of Torts* applied or the *Restatement (Third) of Torts: Products Liability*. The difference concerned not just what law applied—since "each Restatement will produce different results"[159]—but also how many claims the plaintiffs had, since applying the *Restatement (Third)* would have "[t]he practical effect . . . [of] eliminat[ing]" the two different claims "and substitut[ing] one count based on a defective product—defective warning" theory.[160] The Court began its analysis by finding the 1957 reception statute "ambiguous, as the phrase 'in the absence of local laws to the contrary,' is susceptible to being understood in two or more

> As American civilization moved to the west coast, the common law moved with it much in the same manner as it had spread to the Northwest, Southwest and Mississippi territories. Most of the midwestern and western states adopted general reception statutes patterned in the main after the original Virginia statute, but often these reception provisions came after it had already been tacitly assumed that the common law was in force. In some instances laws of already established states or territories were extended to a new territory until the local government should have time to set up laws of its own. This meant that the common law as adopted by the previous state or territory was deemed to be in force in the new territory. In cases where the passage of a reception statute came later in the development of a state or territory, it was deemd [sic] to be declaratory of existing law.

(footnotes omitted); Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX L. REV. 479, 496 n.113 (2013) ("Common law powers in many states might be understood as legislative grants via reception statutes that incorporate common law not inconsistent with state law. This might limit a court's prerogative. Yet courts often treated these statutes as merely declaratory of existing judicial powers." (citations omitted)).

158. Manbodh is the last name of one of the plaintiffs as well as the name of the master case and docket. *See Manbodh*, 47 V.I. at 222 ("In 1997, the Plaintiffs' cases were consolidated into a pretrial docket under the caption of *In re Kelvin Manbodh Asbestos Litigation Series*, Civ. No. 324/1997.").

159. *Id.* at 226.

160. *Id.* at 226 n.6.

ways":[161] statutes *and* precedent but also statutes *or* precedent. The Court also found

> [t]he meaning of "restatements of law" . . . ambiguous as it is unclear to which installment of the Restatement local law must be contrary. No court has ever identified which version of the "restatements of law" was mandated by the Legislature to be applied in disputes, whether the obligation was both continuing and automatically updating, and whether the drafters intended the adoption to be by section, topic, chapter, division or in its entirety.[162]

Manbodh then sought to bring some clarity to the ambiguity. Recognizing the 1921 reception statutes and the available historical background, and drawing on then Judge Alito's concurring opinion in *Dunn*, *Manbodh* determined that Virgin Islands "[c]ourts must first follow local precedent and second, the majority rules of the common law established by precedent in courts of the United States."[163] But what constituted local precedent? *Manbodh* identified "no less than three plausible interpretations"[164] for the restatement mandate: the newest restatement, the oldest restatement, and a "hybrid" approach.

The newest restatement approach was "attractive," the Court reasoned, "because of the ease of application and the additional clarity often contained in the newer Restatements."[165] But construing the 1957 reception statute to be "self-enacting" also meant it must ignore precedent.[166] "Where either the Third Circuit or Appellate Division"—the courts binding on the Virgin Islands Superior Court at the time—"has judicially adopted" a particular restatement section, "that decision is now precedent that must be followed," *Manbodh* reasoned.[167] And since lower courts cannot disregard the directives of higher courts,[168] automatically applying a newer restatement (when an older one

161. *Id.* at 227 (quoting 1 V.I.C. § 4).
162. *Id.* at 227–28.
163. *Id.* at 230.
164. *Id.* (footnote omitted).
165. *Id.* at 231.
166. *Id.*
167. *Id.*
168. *Cf. id.* at 231 n.15.

had been applied) was inappropriate.[169] Similarly, the hybrid approach—applying "the most recent version of the Restatement unless local law to the contrary, in the form of an earlier, contrary Restatement or other common law rule, has been previously endorsed by the courts"—would also be improper, particularly if "the newest Restatements endorsed a minority rule."[170] The Court concluded that the oldest restatement approach was "compelling because, among other reasons, it is unlikely that the Legislature contemplated the amending of the Restatements at all."[171] Rather, the Legislature probably allowed for "the Restatements in existence . . . in 1957 to lay a foundation for courts . . . while the Legislature took the time necessary to draft the Code for the Virgin Islands."[172] And it is this approach *Manbodh* adopted, holding that

> title 1, section 4's reference to the "restatements" refers to the Restatement in existence at the time of its enactment in 1957 and reflects an intent to fill a void until such a time when the Legislature codified law or the judicial branch confirmed the propriety of particular Restatements. Thus, title 1, section 4 mandates that absent statutory or precedential law to the contrary, courts in the Virgin Islands must apply the current common law majority rule, first, as expressed in the Restatement in existence at the time of its enactment and second, to the extent not so expressed, as in more recent versions of the Restatement; failing that, courts shall resort to the majority common law rules as generally understood and applied in the United States. This second inquiry should begin with the consideration of whether more recent versions of the Restatement now reflect the majority rule, before resorting to common law precedents.[173]

Rejecting section 1 of the *Restatement (Third) of Torts: Products Liability*, *Manbodh* instead applied section 388 of the *Restatement (First) of Torts*, and section 402A of *the Restatement (Second) of Torts*, because the former "was in existence at the

169. *Manbodh* did distinguish between applying a newer edition that just "copied the language of an old[er] Restatement," which would be consistent with section 4, versus applying a newer and different restatement. *Id.* at 232 n.17.

170. *Id.* at 233.

171. *Id.* at 235.

172. *Id.* at 234.

173. *Id.* at 237.

time of title 1, section 4's enactment" and the latter had "garnered widespread acceptance, including the adoption by courts in this jurisdiction."[174]

Manbodh was the first decision—apart from the concurring opinion in *Dunn*—that attempted to bring some order to the chaotic way the 1957 reception statute was being applied. The next decision to take a similar stab at it was *Hartzog*. But *Hartzog* went entirely in the opposite direction. Like *Manbodh*, *Hartzog* also concerned whether to apply the *Restatement (Second) of Torts* or the *Restatement (Third) of Torts: Product Liability*. Ms. Hartzog bought a houseplant, a *dieffenbachia*, from a grocery store on St. Croix.[175] A few months later her minor son became ill and had to be rushed to the hospital after he accidentally ingested sap from a broken leaf of the plant.[176] "*Dieffenbachia*, or dumbcane by another name [in the Virgin Islands], is poisonous if ingested."[177] She sued the grocery store on her own behalf and on behalf of her son, alleging that the store "advertised the plants as being safe for the home" but "failed to warn customers about the plant's poisonous properties."[178] In resolving the grocery store's summary judgment motion, the Superior Court noted that neither party had adequately identified the duty of care. And since her claims sounded in product liability, the Court questioned whether the *Restatement (Third) of Torts: Products Liability* could apply. However, because *Manbodh* had said it could not, *Hartzog* felt compelled to consider *Manbodh* and "examine Virgin Islands courts' application of the restatements of law."[179]

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174. *Id.* at 241. *See also id.* at 242:

> Accordingly, it is apparent that the RESTATEMENT (FIRST) OF TORTS section 388 and the RESTATEMENT (SECOND) OF TORTS section 402A supply the substantive law for products liability actions in this jurisdiction. Following the rubric of the chosen approach, the Restatement (Third) of Torts does not apply because majority rules are found in the RESTATEMENT (FIRST) OF TORTS Section 388(c) comment 1 and RESTATEMENT (SECOND) OF TORTS section 402A(1). Furthermore, since there is binding precedent, the RESTATEMENT (SECOND) OF TORTS Section 402A must be applied, unless appellate courts adopt the Restatement (Third) of Torts.

175. Hartzog v. United Corp., 59 V.I. 58, 61 (V.I. Super. Ct. 2011).
176. *Id.* at 62.
177. *Id.* at 61.
178. *Id.* at 62.
179. *Id.* at 70.

> Following the enactment of [s]ection 4, Virgin Islands courts consistently applied the common law if found within the restatements approved by the American Law Institute. For example, Virgin Islands courts applied the Restatement of Contracts, first published in 1932, the Restatement of Conflicts of Laws, first published in 1934, the Restatement of Trusts, first published in 1935, the Restatement of Torts, first published in 1939, and the Restatement of Judgments, first published in 1942. Courts continue to apply the Restatement of Restitution, published in 1937. The Restatement of Agency, published in 1933, was applied only once, just prior to the enactment of [s]ection 4. Since the Virgin Islands codified many of its property laws, resort to the Restatements of Property was not generally required. Nonetheless, where applicable, Virgin Islands courts also applied the Restatements of Property, first published from 1936 through 1944, to cases before them.
>
> Virgin Islands courts continued this practice after the American Law Institute began revising its restatements. Where a restatement was revised, Virgin Islands courts transitioned to it. When the American Law Institute revised its trusts restatements in 1957, Virgin Islands courts transitioned to the Restatement (Second) of Trusts. When the American Law Institute revised its agency restatement in 1958, Virgin Islands courts transitioned to the Restatement (Second) of Agency. When the American Law Institute revised its agency restatements in 2005, Virgin Islands courts transitioned to the Restatement (Third) of Agency. When the American Law Institute revised its conflicts restatement in 1969, Virgin Islands courts transitioned to the Restatement (Second) of Conflict of Laws. Virgin Islands courts also transitioned to the Restatement (Second) of Contracts once the American Law Institute revised it in 1979. Upon the American Law Institute revising its judgments restatement in 1982, Virgin Islands courts transitioned to the Restatement (Second) of Judgments. When the American Law Institute approved revisions to its property restatements, from 1976 through 1990, Virgin Islands courts transitioned to the Restatements (Second) of Property where applicable. When the American Law Institute revised its property restatements a second time, from 1996 through 2011, Virgin Islands courts once again transitioned to the most current version, the Restatement (Third) of Property: Mortgages.

> As with the 1957 trusts revisions, the 1958 and 2005 agency revisions, the 1969 conflicts revisions, the 1979 contracts revisions, the 1982 judgments revisions, and the multiple property revisions, when the American Law Institute approved a partial revision, published in 1965, to its torts restatement, Virgin Islands also transitioned to the newer version, the Restatement (Second) of Torts. Not all of the Restatement (First) of Torts was revised simultaneously, however. The American Law Institute did not approve revisions to sections 504 through 707 until 1976 and not until 1977 for the remaining sections. Accordingly, where the Restatement (First) of Torts remained unrevised, Virgin Islands courts continued to apply it. After the American Law Institute revised the remaining sections of its torts restatements, Virgin Islands courts again transitioned to the latest version. In fact, courts began to take notice of proposed revisions before final approval. A few, including the United States Court of Appeals for the Third Circuit, abandoned the then-current version in favor of an unapproved draft, despite [s]ection 4's clear limitation to restatements of the law *approved* by the American Law Institute.[180]

Hartzog found this "overwhelming body of judicial practice, spanning over half a century" compelling and reasoned that it "should not be overlooked"[181] and held that applying "more recent restatements should not be forestalled 'until the Legislature or appellate courts apply such a directive.'"[182]

Both *Hartzog* and *Manbodh* highlight how Virgin Islands courts struggled with the 1957 reception statutes after the American Law Institute started revising the Restatements. Both decisions show how Virgin Islands courts believed that some restatement (if one addressed an area of the common law) had to apply, whether the newest or the oldest version. In other words, neither *Hartzog* nor *Manbodh* spoke of their inherent authority to shape the common law or considered what the purpose of the 1957 statute was, even though both recognized the confusion the 1921 reception statute probably caused in the years before 1957. *Manbodh* explained:

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180. *Id.* at 72–77 (footnotes, quotation marks, citations, ellipsis, and emphasis omitted).
181. *Id.* at 83.
182. *Id.* at 80 (quoting *In re* Manbodh Asbestos Litig. Series, 47 V.I. 215, 243 (V.I. Super Ct. 2005)).

> Under Danish colonial law, in certain circumstances, the local courts were directed to follow the common law of Denmark. After the transfer, a similar mandate was imposed on local courts with respect to United States common law. Presumably, this was problematic because there was no unitary common law of the United States, but rather, it varied between states. Subsequent judicial opinions recognized the Restatements as embodying that United States common law. The Legislature, cognizant of these judicial decisions, recognized that the Restatements might serve as better guidance and adopted title 1, section 4.[183]

But rather than view section 4 of title 1 of the Virgin Islands Code for what it was—a statute to receive the common law—both courts instead turned to traditional canons of statutory construction in an attempt to make the 1957 reception statute more manageable.[184] I suggest this was incorrect.

Courts, scholars, and historians have all concluded that reception statutes are declaratory,[185] particularly general statutes that receive the common law in contrast to those that receive

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183. *Id.* at 237–38.

184. *Compare Hartzog*, 59 V.I. at 71–72:

> In examining this statute, the Court must first 'determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' If the language of the statute is clear, the court's inquiry stops there. . . . A plain reading of [s]ection 4 . . . directs courts to employ in their decisions (1) the rules of the common law; (2) as found in the approved Restatements; (3) and if not found therein, as generally understood and applied in United States, (4) but only where no local law exists to the contrary.

(citations omitted), *with Manbodh*, 47 V.I. at 227:

> Because this dispute ultimately turns on the interpretation of title 1, section 4, the Court must resort to rules of statutory construction. The guiding principle of statutory construction provides that when determining the meaning of a statute, words and phrases are to be read within their context and construed according to the common and approved usage of the English language. Where the language of a statute is ambiguous when read as a whole, however, courts should turn to both intrinsic and extrinsic aids to elicit the legislative intent.

(citation omitted).

185. *See, e.g.*, State v. Charleston Bridge Co., 101 S.E. 657, 660 (S.C. 1919) ("[T]he statute, making the common law of force in this State, is merely declaratory in its nature."); Hosts, Inc. v. Wells, 443 N.E.2d 319, 321 (Ind. Ct. App. 1982) ("The Supreme Court of Indiana is the central source for declaring the law of Indiana. It is properly empowered to alter, amend or abrogate the common law when the needs of our society dictate. In applying that power the court has had cause to construe the reception statute. It is a declaratory enactment." (citations omitted)).

English statutes as well as the common law.[186] Said another way, reception statutes are not statutes in the true sense, but rather expressions of legislative intent. Both *Manbodh* and *Hartzog* approached the edges of a question this Article indirectly raises: what function reception statutes serve. But *Banks* does so even more, because, though some courts have adopted the common law in the absence of a reception statute, no court—at least not until *Banks*—has ever struck down a statute to receive the common law.

IV. TAKE IT TO THE BANKS

On April 21, 2002, Diana Banks, Patricia Joseph, Merle Penha-Murphy, Dianne Dewindt, Zyanguelyn Poe, and Aloma Barnabas got into a car accident on St. Thomas.[187] Franklin Barnabas had rented a minivan from Budget Rent-a-Car the day before.[188] His sister-in-law, Diane Dewindt, was driving the van the next day, traveling downhill, when the brakes failed.[189] She "steered the mini-van off of the main road and into an up-hill driveway where the mini-van collided with a tree."[190] Mr. Barnabas was not a passenger at the time,[191] but the others were and were all injured in the accident.[192] Sometime thereafter, Banks, Joseph, Penha-Murphy, and Mrs. Barnabas sued Budget in the District Court of the Virgin Islands alleging negligence, strict liability, and breach of contract.[193] Mr. Barnabas also sued on a claim for loss of consortium.[194] Dewindt and Poe filed suit separately: Dewindt in the Superior Court of the Virgin Islands and Poe in United States District Court for the District of

186. *But cf.* Joseph Fred Benson, *Reception of the Common Law in Missouri: Section 1.010 as Interpreted by the Supreme Court of Missouri*, 67 MO. L. REV. 595, 607 (2002) ("Due to incomplete and, at times, inaccurate analysis, the history and *plain meaning* of Missouri's reception statute have been plagued in stygian darkness." (emphasis added)).

187. Banks v. Int'l Rental & Leasing Corp., Nos. 2002-200, 2002-201, 2002-202, 2002-203, 2008 WL 501171, at *1 (D.V.I. Feb. 13, 2008), *reversed and remanded* Banks v. Int'l Rental & Leasing Corp., 56 V.I. 999 (3d Cir. 2012).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at *3.

Maryland.[195] Several years later, Budget moved for summary judgment and the question—as in *Manbodh* and later *Hartzog*—concerned which version of the restatement of torts applied through the Virgin Islands' reception statute.[196] The District Court, citing *Manbodh*, held that the *Restatement (Second) of Torts* governed. Because "an action for strict product liability cannot be maintained against a lessor of chattels,"[197] the District Court concluded that Budget could not be found liable on the plaintiffs' strict liability claim.[198] After finding no factual dispute remaining on the plaintiffs' negligence claim—and concluding that loss of consortium derived from a viable claim—the court granted Budget's motion and dismissed the consortium claim.[199] In a subsequent opinion, the court also granted Budget's motion for summary judgment on the plaintiffs' breach of warranty claim and entered judgment.[200] Four people injured in a car accident were left without a remedy. The plaintiffs appealed.

The Third Circuit heard arguments on December 2, 2009. However, a year and a half later, in an April 19, 2011 order, the court determined "that the appeal raises important and unresolved questions concerning the applicability of strict liability to lessors under Virgin Islands law."[201] Because the Virgin Islands had established a supreme court during the eleven years it took the plaintiffs' case to wind its way through the courts, the Third Circuit took the occasion to certify, to the Supreme Court of the Virgin Islands, the question: "Whether, under Virgin Islands law, including V.I. Code Ann. tit. 1 § 4, a plaintiff may pursue a strict liability claim against a lessor for

195. *Id.* at *1 n.1. Dewindt's case was subsequently dismissed in 2013 by stipulation of the parties. Poe's case was subsequently transferred to the District Court of the Virgin Islands. *See* Poe v. Budget Rent a Car Sys., Inc., No. RWT 05-1058, 2006 WL 2161865, at *2 (D. Md. July 31, 2006) (transferring the case to the District of the Virgin Islands pursuant to 28 U.S.C. § 1631); *see also* Poe v. Budget Rent-a-Car Sys., No. 2006-128, 2008 WL 2725803, at *3 (D.V.I. July 11, 2008) (denying motion for retransfer to the District of Maryland).

196. *Banks*, 2008 WL 501171, at *1–3.

197. *Id.* at *3.

198. *See id.* at *3 ("Budget leased the minivan to Franklin Barnabas. As a lessor, a strict liability action for product liability cannot be maintained against Budget. As such, to the extent the Plaintiffs allege a claim of strict product liability against Budget, Budget is entitled to summary judgment on that count.").

199. *Id.* at *4.

200. Banks v. Int'l Rental & Leasing Corp., 49 V.I. 970, 977 (D.V.I. 2008).

201. Banks v. Int'l Rental & Leasing Corp., Nos. 08-1603, 08-2512, 2011 WL 7186340, at *1 (3d Cir. Apr. 19, 2011).

injuries resulting from a defective product."[202] The Court explained that the "dispute" on appeal "turn[ed] on whether the Virgin Islands Supreme Court would adopt the Restatement (Third) of Torts, or whether that court would rule that the Restatement (Second) of Torts remains the law of the Virgin Islands."[203]

The Supreme Court of the Virgin Islands accepted the question and issued its opinion on December 15, 2011. But the Court raised and answered two of its own questions first: "[W]hether the phrase 'local law' in section 4 encompasses judicial precedents from this Court; and" further, "[W]hether section 4 precludes this Court, as the highest local court in the Virgin Islands, from declining to follow the latest approved Restatement."[204] The Court easily answered the first question, concluding that local law, as used in the 1957 reception statute, does not include precedent from the Supreme Court of the Virgin Islands.[205] In one of its earliest decisions, In re *People of the Virgin Islands*,[206] the Virgin Islands Supreme Court explained what binding precedent is for the Virgin Islands following the creation of a local supreme court:

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202. *Id.* at *2–3.

203. *Id.* at *2.

204. Banks v. Int'l Rental & Leasing Corp., 55 V.I. 967, 973–74 (V.I. 2011).

205. *See generally id.* at 978:

> We cannot ignore that, at the time both section 4 of title 1 and its predecessor in the 1921 Codes were initially enacted, the Virgin Islands lacked a fully developed local judiciary, with the District Court—a federal court established by Congress rather than the Legislature and consisting of judges selected by the President of the United States rather than the Governor of the Virgin Islands—possessing jurisdiction over most civil actions, and local courts only exercising jurisdiction over only relatively minor civil claims. Thus, at the time the Legislature enacted section 4, the most significant Virgin Islands judicial decisions were being rendered by the District Court, which—although hearing cases that in other jurisdictions would ordinarily be heard by a local court—was essentially a federal creature that was created by federal law and consisted of federal judges appointed by the President and confirmed by the United States Senate. Moreover, even though the Virgin Islands local judiciary continued to expand and receive greater jurisdiction over local matters in the decades that followed, all decisions rendered by the Superior Court and its predecessor courts continued to be reviewed on appeal by the District Court, which made it very difficult to attain the goal of establishing an indigenous Virgin Islands jurisprudence given that local judges lacked the ability to issue decisions that would constitute binding precedent in the territory.

(quotation marks and citations omitted).

206. *In re* People of the V.I., 51 V.I. 374 (V.I. 2009) (per curiam).

> Although the establishment of this Court has changed the relationship between the local Virgin Islands judiciary and the Third Circuit, this Court's creation "did not erase pre-existing case law," and thus "precedent that was extent [sic] when the Court became operational continues unless and until the Court addresses the issues discussed there." Accordingly, decisions rendered by the Third Circuit and the Appellate Division of the District Court are binding upon the Superior Court even if they would only represent persuasive authority when this court considers an issue.[207]

Similarly, a year after In re *People*, the Third Circuit held in *Government of the Virgin Islands v. Lewis*,[208] that "[i]n the absence of controlling Virgin Islands precedent" it would "apply [its] most analogous precedent," but emphasized that "the authority to interpret [Virgin Islands law] lies centrally with the newly created Supreme Court of the Virgin Islands," whose decisions "'on matters of local law'" the Third Circuit would "'defer to'" unless found to be "'manifestly erroneous.'"[209] So, leaning on In re *People*—and the Third Circuit's clarification of both courts' roles in *Lewis*—*Banks* concluded that section 4 of title 1 "encompasses judicial decisions which are binding on the court required to apply section 4."[210] Since the only decisions binding on the Supreme Court of the Virgin Islands are the "decisions of the Third Circuit Court of Appeals in which certiorari has been granted and [the Supreme] Court's interpretation of local law has been reversed,"[211] the *Banks* court reasoned that "there [was] an 'absence of local laws to the contrary' as contemplated in 1 V.I.C. § 4."[212]

Answering the second question was more complicated. Although other courts in the Virgin Islands had applied the *Restatement (Second) of Torts*, this precedent was not binding on the Supreme Court. So, the Court questioned whether it too was

207. *Id.* at 389 n.9 (quoting People v. Quenga, 1997 Guam 6, *7 (1997)) (brackets and alterations omitted).

208. 620 F.3d 359 (3d Cir. 2010).

209. *Id.* at 365 (quoting Pichardo v. V.I. Comm'r of Labor, 53 V.I. 936, 939 (3d Cir. 2010)).

210. *Banks*, 55 V.I. at 975.

211. *Id.* at 976.

212. *Id.*

> bound to follow the most recent version of the Restatement approved by the American Law Institute whenever it is required to decide an issue of first impression, or whether, like other courts of last resort, this Court possesses the inherent power to shape the common law in the Virgin Islands.[213]

It was not bound, the court held.[214] The Legislature of the Virgin Islands "did not intend for section 4 of title 1 to compel" the Supreme Court of the Virgin Islands "to mechanically apply the most recent Restatement."[215] The Court found support for its holding in the history of the reception statutes.

> [T]he historical note that follows section 4 of title 1 states that the purpose of enacting section 4 was to rewrite section 6 of chapter 13 of title IV of the 1921 Codes. . . . But more importantly, the historical note states that the Legislature chose to replace that provision with section 4 so as to more accurately express the concept of the Common Law as constituting a body of rules established by precedent, as distinguished from a body of statutory law. Thus, any claim that this Court lacks the authority to decline to follow a Restatement provision is wholly inconsistent with the historical note, in that such an interpretation of section 4 would essentially require this Court to treat the Restatements as if they are statutes, an approach which could not be reconciled with the Legislature's clear intent to develop the common law through judicial precedent.[216]

But even without this history, the Court reasoned, in *Banks*, that it would reach the same conclusion.

> We cannot ignore that, at the time both section 4 of title 1 and its predecessor in the 1921 Codes were initially enacted, the Virgin Islands lacked a fully developed local judiciary, with the District Court — a federal court established by Congress rather than the Legislature and consisting of judges selected by the President of the United States rather than the Governor of the Virgin Islands — possessing jurisdiction over most civil actions, and local courts only exercising jurisdiction over only relatively minor civil claims. Thus, at the time the

213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* at 976–77 (internal footnotes, quotation marks, and ellipses omitted).

> Legislature enacted section 4, the most significant Virgin Islands judicial decisions were being rendered by the District Court, which — although hearing cases that in other jurisdictions would ordinarily be heard by a local court — was essentially a federal creature that was created by federal law and consisted of federal judges appointed by the President and confirmed by the United States Senate. Moreover, even though the Virgin Islands local judiciary continued to expand and receive greater jurisdiction over local matters in the decades that followed, all decisions rendered by the Superior Court and its predecessor courts continued to be reviewed on appeal by the District Court, which made it very difficult to attain the goal of establishing an indigenous Virgin Islands jurisprudence given that local judges lacked the ability to issue decisions that would constitute binding precedent in the territory.
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> A pivotal change occurred, however, when Congress subsequently amended the Revised Organic Act of 1954 to authorize creation of a local appellate court. When the Legislature established this Court in 2004, it reposed in this Court the supreme judicial power of the Territory. This includes the power to both interpret local law and modify the common law. . . . Significantly, section 21 of title 4 represents both the first time that a local court created by the Legislature—as opposed to Congress—was invested with supreme judicial power, as well as the first time that a local appellate court consisting entirely of local judges appointed by the Governor with the advice and consent of the Legislature would review on direct appeal decisions issued by a local trial court. Given that section 21 and section 4 were both passed by the same legislative body, and section 21's conferral of supreme judicial power upon on this Court is inconsistent with section 4's mandate that courts follow the Restatements, we conclude that the adoption of section 21 of title 4 in 2004 supersedes and alters section 4 of title 1, which is one of the initial provisions of the Virgin Islands Code that were adopted in 1957, and that therefore this Court and—to the extent not bound by precedent, the Superior Court—may determine the common law without automatically and mechanistically following the Restatements.[217]

217. *Id.* at 978–79 (citations, quotation marks, and footnote omitted).

Answering in the negative the second question it raised, the Supreme Court of the Virgin Islands held that the 1957 reception statute does not require that it apply any of the Restatements.

Having answered the preliminary questions, *Banks* then turned to the question the Third Circuit certified. After acknowledging the "burden" of "disrupt[ing] the state of the law in the Virgin Islands" and according the "great respect" persuasive Virgin Islands authority is "entitled to,"[218] the Court nonetheless declined to retain the status quo because the status quo in the Virgin Islands—refusing to allow lessors to be held strictly liable for leasing a defective product—was no longer the majority rule, and arguably was not even the majority rule when first decided in the Virgin Islands.[219] And so, the answer to the Third Circuit's question was that "Virgin Islands local courts should apply sections 1 and 20 of the Third Restatement and allow lessors to be held strictly liable for injuries resulting from a defective product."[220]

V. BANKING ON BANKS

On the heels of *Banks* came *Matthew v. Herman*.[221] Dermont Herman had sued Matthias Matthew in 2007 for "damages based on two common law causes of action, alienation of affection and criminal conversation, revolving around Matthew's affair with Herman's wife. The jury awarded Herman $125,000 and costs."[222] Matthew appealed in 2009 and claimed on appeal that neither cause of action should be recognized under Virgin Islands common law. Relying on *Banks*, the Supreme Court agreed, reversed Herman's judgment, and remanded with instructions to dismiss the complaint.[223] However, because *Banks* had been issued after Matthew's appeal was already pending (and after the case had been considered on June 10, 2011 without oral argument),[224] the Virgin Islands Supreme Court ordered supplemental briefing on the impact of *Banks* on Matthew's

218. *Id.* at 981.
219. *Id.* at 982–84.
220. *Id.* at 985.
221. 56 V.I. 674 (V.I. 2012).
222. *Id.* at 675–76.
223. *Id.* at 684–85.
224. Matthew v. Herman, S. Ct. Civ. No. 2009-0074, record of proceedings (June 17, 2011).

appeal.[225] The Court in *Matthew* then distilled *Banks* into three factors: "the case law of the Virgin Islands," the "position taken by" "the majority of courts from other jurisdictions," and "the soundest rule for the Virgin Islands."[226] Applying these three factors compelled the conclusion that the Virgin Islands should not recognize amatory torts. No reported decision in the Virgin Islands had ever cited *Restatement (First) of Torts* sections 683, 685 or *Restatement (Second) of Torts* sections 683, 685.[227] The majority of other American jurisdictions have abolished "the torts of alienation of affection and criminal conversation."[228] So, because the Virgin Islands never recognized it and other jurisdictions do not, and because both torts "are based on antiquated concepts of women as property and are destructive to existing marriages,"[229] the Court held the soundest rule was not to recognize either tort.

After *Matthew*, the Supreme Court of the Virgin Islands continued to dance with the Restatements and the reception statute. In *Burd v. Antilles Yachting Services, Inc.*,[230] for example, decided after *Matthew*, the Court cited *Banks*, but then applied the Restatements without considering or analyzing any of the *Banks* factors, explaining that, "by operation of 1 V.I.C. § 4, the Restatement provisions . . . in addition to others that may be applicable under the facts presented, serve as the rules of decision on this issue."[231] Similarly in *Maso v. Morales*,[232] the Court explained *Banks*, the restatements, and the reception statute as follows:

> In the absence of a local law on the subject, or binding case law, [s]ection 4 of Title 1 provides that the Restatements of Law *shall be* the rules of decision applied by the courts. 1 V.I.C. § 4. *See also Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 980 (V.I. 2011) (indicating that this Court may create

225. *Matthew*, 56 V.I. at 681.
226. *Id.* at 680.
227. *Id.* at 682.
228. *Id.*
229. *Id.* at 684.
230. 57 V.I. 354 (V.I. 2012).
231. *Id.* at 362 (citing Banks v. Int'l Rental & Leasing Corp., 55 V.I. 967, 973 (V.I. 2011)).
232. 57 V.I. 627 (V.I. 2012).

> common law rules, and, therefore, this Court is not bound by the Restatements).[233]

Yet, in *Chapman v. Cornwall*,[234] issued a year and a half after *Banks*, the Court stated that the "Restatements of the Law *may apply* to the Virgin Islands through 1 V.I.C. § 4, subject to the authority of this Court and the Superior Court to shape the common law of the Territory."[235] Then in *Simon v. Joseph*,[236] the Court held that "as the highest local court in the Virgin Islands" it "possesses the inherent and statutory authority to shape the common law of the Territory," authority that also "includes determining the existence and elements of a common law cause of action."[237] And then in *Brunn v. Dowdye*,[238] the Court concluded that "the Restatements no longer constitute the rules of decision in [the] Virgin Islands" because "1 V.I.C. § 4 . . . was superseded by the creation of [the Supreme] Court."[239] Finally, in *Thomas v. Virgin Islands Board of Land Use Appeals*,[240] the Court held that "1 V.I.C. § 4 . . . was implicitly repealed by the Legislature when it enacted section 21 of title 4 and vested [the Supreme] Court with the supreme judicial power of the Territory, which includes the power to modify the common law."[241] And then came *Connor*.[242]

The Court's equivocation during the first few years after *Banks* is understandable. Both *Burd* and *Maso* said the Restatements were still binding; *Chapman*, backpedaling, said the Restatements might apply. *Brunn* noted that *Banks* had said that the creation of a local supreme court superseded the reception statutes; but then *Thomas* characterized *Banks* as having implicitly repealed the reception statute. So, in a sense, *Banks* was not fully *Banks* yet—not until *Connor*. Yet, despite its own prior vacillations, the Supreme Court in *Connor* summarily reversed the Superior Court because it had "erroneously invoked section 4 of title 1 of the Virgin Islands Code—an effectively

233. *Id.* at 633 (emphasis added).
234. 58 V.I. 431 (V.I. 2013).
235. *Id.* at 441 n.14 (emphasis added) (citing *Banks*, 55 V.I. at 974–87).
236. 59 V.I. 611 (V.I. 2013).
237. *Id.* at 622–23.
238. 59 V.I. 899 (V.I. 2013).
239. *Id.* at 911 n.10.
240. 60 V.I. 579 (V.I. 2014).
241. *Id.* at 591 (citations omitted) (quotation marks and ellipsis omitted).
242. Gov't of the V.I. v. Connor, 60 V.I. 597 (V.I. 2014) (per curiam).

repealed statute—in automatically and mechanistically applying the Restatements of the Law."[243] In language strikingly similar to *Burd*, the Superior Court in *Connor* quoted title 1, section 4 of the Virgin Islands Code and cited *Banks* in a footnote and then in the body of the opinion applied various provisions from the Restatements.[244] In *Connor*, the Supreme Court concluded that "citing to *Banks* yet nonetheless failing to perform a *Banks* analysis and instead applying the former 1 V.I.C. § 4" was reversible "error."[245]

> [M]echanistic and uncritical reliance on the Restatements has the effect of inappropriately delegating the judicial power of the Virgin Islands to the American Law Institute and to the governments of other jurisdictions, without any regard for determining the best rules for the Virgin Islands. In fact, one commentator has observed that "the wholesale adoption of the Restatements might fairly be described as an invasion" and that the resulting "interruption of the normal common-law-making process may actually be affirmatively harmful" to the Virgin Islands. While such blind reliance on the Restatements may have been justified prior to section 4's implicit repeal in 2004, it is clear that, since the creation of this Court, the Restatements no longer hold an automatic preferred status in Virgin Islands law, but as in all other jurisdictions, merely represent persuasive authority, just like law review commentaries and decisions rendered by courts outside of the Virgin Islands.
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> Thus, the Superior Court, when considering a question not foreclosed by prior precedent from this Court, must perform a three-part analysis as set forth in *Banks*. The first step in the analysis—whether any Virgin Islands courts have previously adopted a particular rule—requires the Superior Court to ascertain whether any other local courts have considered the issue and rendered any reasoned decisions upon which litigants may have grown to rely. The second step—determining the position taken by a majority of courts from other jurisdictions—directs the Superior Court to consider all potential sides of an issue by viewing the potentially different

243. *Id.* at 599.

244. *See* Connor v. Gov't of the V.I., No. SX-10-CV-518, 2013 WL 10185754, at *4 n.2 (V.I. Super. Ct. Aug. 29, 2013) (unpublished); *id.* at *4 (citing to the Restatement (Second) of Torts and the Restatement (Third) of Agency for the analysis).

245. *Connor*, 60 V.I. at 602.

> ways that other states and territories have resolved a particular question. Finally, the third step in the *Banks* analysis—identifying the best rule for the Virgin Islands—mandates that the Superior Court weigh all persuasive authority both within and outside the Virgin Islands, and determine the appropriate common law rule based on the unique characteristics and needs of the Virgin Islands.
>
> As we explained in *Banks* itself, the Superior Court possesses, in the absence of binding precedent from [the Supreme] Court, concurrent authority with [the Supreme] Court to shape Virgin Islands common law. Our observation that the Superior Court has this authority is no accident. "Within every judicial system in the United States," including the Virgin Islands, "courts are arranged in a pyramid," with "trial courts at its base" and "a single court at the top with ultimate authority." Although the Legislature vested this Court with the supreme judicial power of the territory, original jurisdiction to adjudicate particular legal issues in the first instance remains a function of the Superior Court, to be disturbed only in truly extraordinary situations. The reason for this is clear: "independent decisions of lower courts will improve the quality of appellate decisions."[246]

VI. BANKS *TO THE FUTURE*

After *Connor*, Virgin Islands courts have largely accepted[247]—some have even embraced[248]—their role in the

246. *Id.* at 602–04 (internal citations omitted) (quoting Adams, *supra* note 13, at 456–57).

247. *See, e.g.*, Faulknor v. Gov't of the V.I, 60 V.I. 65, 88 n.72 (V.I. Super. Ct. 2014) ("It is this Court's view that the practical implications of *Connor* may prove unworkable absent a narrowing of its application."); Huggins v. Chungani, No. ST-14-CV-115, 2014 WL 4662323, at *2 n.2 (V.I. Super. Ct. Sept. 18, 2014) ("*Connor* invites the Superior Court to depart, 'in an appropriate case,' from the holding of any binding opinions which mechanistically rely on the Restatements as a source of Virgin Islands law. This Court sees no reason for such a departure here.") (unpublished). *Cf.* Wild Orchid Floral & Event Design v. Banco Popular de P.R., 62 V.I. 240, 253 (V.I. Super. Ct. 2015) (reversing and remanding internal appeal from Magistrate Division for failure to conduct *Banks* analysis). While the District Court of the Virgin Islands has come around to *Banks* recently, *see, e.g.*, Gumbs-Heyliger v. CMW & Assocs. Corp., 73 F. Supp. 3d 617, 625–29 (D.V.I. 2014) (conducting a *Banks* analysis on presumptions in civil cases), one decision issued not long after *Banks* cannot be overlooked. In Smith v. Katz, No. 2010–39, 2013 WL 1182074, at *8 n.2 (D.V.I. Mar. 22, 2013), the District Court concluded that the Virgin Islands Supreme Court had held in *Banks* that 1 V.I.C. section 4 "require[s] Virgin Islands courts to apply the most recently adopted version of the Restatement at the time of consideration, unless and until the Supreme Court decides to depart from that portion of the relevant Restatement." (citing *Banks*, 55 V.I. at 978 (and explaining Banks

development of the common law of the Virgin Islands; members of the Virgin Islands Bar, not as much.[249] Reluctance to embrace *Banks* and *Connor* fully is understandable, however, if only because of the amount of work it entails. Soon after *Connor*, one judge of the Superior Court of the Virgin Islands expressed some very practical concerns:

> [T]he Supreme Court of the Virgin Islands held that the Superior Court will be summarily reversed if it does not perform a *Banks* analysis in the first instance. While the Court recognizes its role in identifying and applying the common law without mechanistically and uncritically following the Restatements, it is equally clear that the Supreme Court is the *highest* Court in this jurisdiction that possesses the inherent power to shape the common law in the Virgin Islands—regardless of whether the Superior Court has performed a *Banks* analysis. Similar to the practice of other jurisdictions, the Superior Court applies the common law on a routine basis. However, unlike other jurisdictions, the Supreme Court has now tasked the Superior Court with determining the *sounder* common law rule, thereby causing a substantial portion of the everyday activities of the Court to

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parenthetically as "noting that, in the ordinary course, Virgin Islands Courts *must* 'mechanically apply the most recent Restatement'" (emphasis added))). This reading was either an intentional rejection of *Banks* or an incredibly fast skim-read of *Banks*.

248. *See, e.g.*, Carlos Warehouse v. Thomas, 64 V.I. 173, 186–97 (V.I. Super. Ct. 2016) (conducting *Banks* analyses on whether to recognize debt claims and payment as a defense to debt claims); Slack v. Slack, 62 V.I. 366, 373–80 (V.I. Super. Ct. 2015) (conducting *Banks* analyses on whether to recognize antenuptial agreements and duress and nondisclosure of material facts as defenses).

249. *Cf.* Antilles Sch., Inc. v. Lembach, No. 2015-0039, 2016 WL 948969, at *14 (V.I. March 14, 2016) ("Surprisingly, Antilles School offers what could charitably be described as a cursory *Banks* analysis, with virtually no analysis of the third—and most important—factor."). *See also id.* at *14 n.13:

> In its February 26, 2015 opinion . . . the Superior Court stated that only the Superior Court is required to conduct a *Banks* analysis, and that the parties only possess an obligation to cite to binding authority when faced with questions of law that lack precedent. However, there is absolutely no basis in any of this Court's precedents for the proposition that attorneys are not required to fully brief all questions of law relevant to the issues that are being litigated, including all three *Banks* factors.

(brackets, quotation marks, and citations omitted). *See also* Der Weer v. Hess Oil V.I. Corp., 64 V.I. 107, 114 (V.I. Super. Ct. 2016) (noting that court granted leave after *Connor* to file supplemental briefing but only out of roughly thirty parties responded); Benjamin v. Coral World VI, Inc., No. ST-13-CV-065, 2014 WL 2922306, at *3 n.38 (V.I. Super. Ct. June 12, 2014) (unpublished) (stating that "the Court may begin striking motions as fatally deficient" if they omit a *Banks* analysis).

> become consumed with the *Banks*' multi-factor balancing test (which goes beyond determining the common law based on this jurisdiction's prior case law, but also requires analysis of a majority of courts from other jurisdictions and the appropriate common law rule based on the unique characteristics and needs of the Virgin Islands in every question not foreclosed by prior precedent from the Supreme Court. . . . [T]he practical implications of *Connor* may prove unworkable absent a narrowing of its application.[250]

Similarly, members of the Virgin Islands Bar have also expressed concerns, both about the uncertainty and the expense associated with conducting a *Banks* analysis. For example, during the 2015 Annual Meeting of the Virgin Islands Bar Association, one panel—*Witnesses to History: The Evolution of Virgin Islands Law*—featured attorneys still practicing in the Virgin Islands, who had been admitted to practice in the 1960s. One of the panelists explained how in the past, under the 1957 reception statute, a Virgin Islands attorney had only to consult the appropriate Restatement to be fairly sure of the governing law to advise his or her client accordingly. After *Banks* (or perhaps after *Connor* is more accurate), that certainty is lacking. And clients are not willing to pay for the necessary research their attorneys must perform so that the Virgin Islands courts can "undertake[] the task of developing, for the very first time, indigenous Virgin Islands jurisprudence."[251] Uncertainty still remains, including how far *Banks* extends.[252]

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250. *Faulknor*, 60 V.I. at 87 n.72 (citations, quotation marks, and brackets omitted).

251. Bryan v. Fawkes, 61 V.I. 416, 454 (V.I. 2014) (citing *Banks*, 55 V.I. at 978; *Pichardo*, 53 V.I. at 947–48). In contrast, *Matthew* is an example of how cost and expense to attorneys and clients can be saved by addressing *Banks* early on. *Matthew* proceeded through motion practice, discovery, trial, and appeal, only to have the entire case dismissed on remand. In the Virgin Islands, costs are taxed to the prevailing party, except in personal injury cases.

252. *Cf.* Vanterpool v. Gov't of the V.I., 63 V.I. 563, 579–81 (V.I. 2015) (citing *Banks* and *Connor* and expressing concerns, similar to those raised in *Banks* about legislature's delegation of authority to the American Law Institute, about the Superior Court's "delegation" of its rule-making authority to federal courts); *see also* Malloy v. Reyes, 61 V.I. 163, 177 n.11 (V.I. 2014) (noting that a *Banks* analysis must "exclude cases [from other jurisdictions] relying on state statutes"); *Der Weer*, 61 V.I. at 105 n.4 (explaining that a *Banks* analysis, as such, is not necessary when deciding how to construe a statute but that broader concern for the soundest rule is); People v. Frett, No. ST-08-CR-452, 2015 V.I. LEXIS 104, at *3 (V.I. Super. Ct. Sept 4, 2015) (unpublished) (stating that "a *Banks* analysis is not applicable to criminal cases").

VII. CONCLUSION

Professor Hall reasoned that colonial legislatures initially adopted statutes to receive the common law to provide a measure of certainty after the Declaration of Independence.

> Among the many problems engendered by the severance from the mother country through the historic Declaration of Independence, was that of what law should American judicial tribunals thereafter apply as the rule of decision of specific cases. The substitution of the people for the king as the source of sovereignty made it necessary to exercise some caution in adopting the common law inasmuch as a good many of the old rules would not fit into the political philosophy of the newborn states. After the Declaration of Independence, three primary methods were used by the thirteen American states in dealing with the problem of what English law should be recognized thenceforth.[253]

Virginia—and later states and territories that borrowed or patterned their statutes on Virginia's statute—followed by enacting similar statutes to adopt English common law and English statutes.[254] In contrast, the majority of the other colonies—namely New Jersey, Pennsylvania, Delaware, Massachusetts, Maryland, New Hampshire, North Carolina, and New York—took another approach, adopting "'the common law of England, as well as so much of the [English] statute law, as have been heretofore practiced'" before declaring independence from England.[255] Only Connecticut (and perhaps now the Virgin Islands after *Banks*) took the approach of adopting the common law through precedent.[256]

Because almost all states and territories have formally received the common law through statute or precedent, the Virgin Islands was not unique in 1921 when the Colonial Councils adopted statutes to receive the common law. To be sure, the Virgin Islands' first reception statute—borrowed from the Territory of Alaska, which had received it from Congress—was not a model of perfection. By referring to English common law as

253. Hall, *supra* note 1, at 798.
254. *Id.*
255. *Id.* at 799 (quoting N.J. CONST., art. XXII (1776)).
256. *Id.* at 800.

adopted and understood in the United States, the statute left courts without any guidance as to which jurisdiction's understanding of the common law to follow. But almost all reception statutes omit a specific jurisdiction,[257] so most courts have had to muddle through and apply the best rules as they have seen fit. This is the beauty and the beast of the common law.

But all this changed in 1957 when the Virgin Islands parted company with the rest of the nation. The difference in the Virgin Islands—and later the Northern Mariana Islands—was that the 1957 reception statute became more problematic over time. Other reception statutes are static, a snapshot in time. So, courts have a common starting point. In this way, *Manbodh* may have been correct in looking to the Restatement (First) as the starting point for the common law of the Virgin Islands. That is, only if the Legislature's intent was not to remedy the confusion caused by the 1921 Codes and to convert the Restatements into a quasi-civil code. But the restatements of the law were (and still are) being revised and restated. Understandably, the courts in the Virgin Islands felt themselves bound to keep current with the changes in the law. *Manbodh* assumed that the Legislature of the Virgin Islands was probably unaware that the American Law Institute planned to periodically revise the Restatements;[258] *Hartzog* called that supposition into question.[259]

Putting aside valid concerns over legislative history, it is clear—when section 4 of title 1 is considered within the broader, national context—that the Legislature of the Virgin Islands would not have intended for the courts in the Virgin Islands to treat the Restatements as a quasi-common-law civil code. Instead, it is more likely that the 1957 statute with its "restatement mandate" was intended to remedy the confusion and uncertainty that existed with the 1921 reception statutes. In a foreword to the first volume of the Virgin Islands Reports,

257. *But cf.* D.C. CODE § 45-401(a) ("The common law, all British statutes in force in Maryland on February 27, 1801 . . . in force in the District of Columbia on March 3, 190, shall remain in force except insofar as the same are inconsistent with, or are replaced by, some provision of the 1901 Code.").

258. *See In re* Kelvin Manbodh Asbestos Litig. Series, 47 V.I. 215, 235 (V.I. Super. Ct. 2005) (characterizing its own reading of title 1, section 4 of the Virgin Islands Code as "compelling because . . . it is unlikely that the Legislature contemplated the amending of the Restatements at all").

259. *See* Hartzog v. United Corp., 59 V.I. 58, 83–84 & n.33 (V.I. Super. Ct. 2011) (explaining the role Judge Albert B. Maris played in developing the Virgin Islands Code and noting his service as an advisor to the American Law Institute).

Judge Albert B. Maris discussed the value of the common law in the Virgin Islands:

> With the enactment of the Codes of Law for the two former municipalities in 1920 and 1921 the Virgin Islands came under the American system of statutory and common law. . . . The common law as understood and applied in the United States was specifically made applicable to the Virgin Islands by the municipal codes and is continued by the Virgin Islands Code.
>
> The common law, however, is based on the rule of stare decisis, that is, the binding authority as a precedent of a previous decision by the courts in a similar case, and is accordingly frequently called case law. Its genius is that it develops and grows from case to case molding its rules upon the precedents of the past and applying them to so as to deal justly with new problems as they arise. For the function of the common law, therefore, it is essential that the opinions rendered by the courts in past cases be readily available to the bench and bar. Access to the many opinions which have interpreted and applied statutory law is equally needed.
>
> Heretofore in the Virgin Islands the opinions of the local courts for the most part have not been readily available, being buried unpublished, undigested and unindexed in the voluminous files of the clerks of the courts. The Virgin Islands Reports accordingly meet a pressing need. For the round out and complete the legal tools with which the courts and the bar may administer the rules of the common law as well as consistently apply the statutes.[260]

Judge Maris was "intimately involved in drafting" the Virgin Islands Code "and in promulgating the Restatements," so it is reasonable to believe he also "would have known that the American Law Institute envisioned establishing 'a system by which the legal profession will be informed of changes in the law as expressed in the first Restatement, and when the time is ripe therefor, produce a revision of an entire subject.'"[261] Yet, if the Legislature really did intend for the courts to mechanically and uncritically apply the Restatements—either until the Legislature

260. 1 VIRGIN ISLANDS REPORTS VIII (1959).

261. *Hartzog*, 59 V.I. at 84 (quoting RESTATEMENT IN THE COURTS: HISTORY OF THE AMERICAN LAW INSTITUTE AND THE FIRST RESTATEMENT OF THE LAW 21 (1945)).

found the time to codify the common law or until the Virgin Islands attained more autonomy—then, there would not have been a need to rescue Virgin Islands precedent from the archives of the clerks' offices and publish, digest, and index it. Said differently, conferring on the Restatements a status akin to a civil code would also mean that the Virgin Islands returned to its former status as a civil law, not a common law jurisdiction. Yet, in many ways, unintentionally for sure, that is what happened once the 1957 reception statute was adopted.

Banks put an end to all of this. But it also raises more questions than it answered and calls into question (indirectly to be sure) both the effect and necessity of reception statutes. Arguably, adopting a reception statute was only necessary as a temporary measure for the thirteen original colonies, a placeholder pending the result of the Revolutionary War. But once independence was obtained, was it necessary for the new states to adopt or to reenact statutes to receive the common law? Put another way, if the brilliance of the American experience is that "[t]he Executive, the Legislative and the Judiciary are *coordinate and equal*," that none can "encroach on the functions of the others," and that instead all are "subject to the Constitution of the United States and the principles of government which that Constitution contains,"[262] then how can two co-equal branches adopt a statute that dictates how the third branch functions? Are reception statutes constitutional?[263]

One question raised after *Banks* is, was *Banks* correctly decided? As the title of this Article suggests, I believe that it was . . . for the most part. *Banks* is not remarkable, insofar as it held that the highest court has the inherent authority to say what the law is. *Marbury v. Madison* concluded as much two hundred years earlier.[264] Similarly, other jurisdictions have expressed concerns as to the blanket way the common law was received: some question whose common law was received[265] and

262. People v. Francis, 1 V.I. 359, 365 (D.V.I. 1936).

263. This question necessarily excludes the reception of the common law within a constitution.

264. 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

265. Professors Blume and Brown cite a communication sent by the legislature of the Territory of Indiana to Congress requesting clarification:

> A memorial to Congress submitted by the Indiana Legislature in 1814 suggested the propriety of pointing out by law what common law the ordinance

also whether English statutory law was included; others question more generally the whitewashing effect the common law has on local customs and traditions.[266] So, the Virgin Islands' struggles

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> refers to, whether the common law of England, of France, or of the Territory over which the ordinance is the constitution. If it should be determined that, by the expression of the ordinance, a common law jurisdiction should be located on the common law of England, it is essential to define to what extent of that common law the judges shall take cognizance; whether the whole extent of feudal and gothic customs of England; whether the customs, or unwritten law shall be taken with the statute law, and that to form the common law to govern the judges; or whether the unwritten and statute law is to be taken in contradistinction to the laws, customs, and rules of chancery; or whether it includes that law which is common to all.

Blume & Brown, *supra* note 17, at 52 (citation and footnotes omitted) (ellipsis and quotation marks omitted). The authors also discuss Louisiana's rejection of English common law.

> The Orleans Organic Act of 1804 made no reference to "common law," nor did the amended act of 1805 which put in force some of the provisions of the Northwest Ordinance. Nevertheless, lawyers newly settled in Orleans took the position that by extending provisions of the Northwest Ordinance to the Territory, Congress had substituted the English common law for the law previously in force. A contrary position was taken by Edward Livingston and local French lawyers, and the question was argued at length in a test case. According to one of his biographers, Livingston argued that the words "common law" should be construed as the "common law of Louisiana," and this position was in fact sustained by the court.

Id. at 53 (footnotes omitted). *See also id.*:

> If that clause was put in force, everything was at an end in our jurisprudence; our ancient laws would have disappeared, and upon their venerable ruins would have been erected a system which none of us was acquainted with, which nowhere exists in a body of law, and which its warmest advocates themselves do hardly know.

(citation omitted) (purportedly remarks of Livingston).

266. For example, some Native American courts have changed the definition of the common law to encompass their own customs and traditions.

> Because established Navajo customs and traditions have the force of law, this Court agrees with . . . the term 'Navajo common law' rather than 'custom;' as that term properly emphasizes the fact that Navajo custom and tradition is law, and more accurately reflects the similarity in the treatment of custom between Navajo and English common law:
>
> The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular* laws, that are by custom observed only in certain courts and jurisdictions.
>
> Navajo custom and tradition may be shown in several ways: it may be shown through recorded opinions and decisions of the Navajo courts or through learned treatises on the Navajo way; it may be judicially noticed; or it may be

with its own reception statutes is not remarkable. But *Banks* is remarkable (and perhaps went too far) in holding that the Legislature repealed the Virgin Islands' reception statute when it established a court of last resort. This no other jurisdiction has done.

By throwing the restatement baby out with the bathwater of the common law,[267] it is unclear what remains now. Even the core of the common law is up for grabs now.[268] In holding that the Legislature had implicitly repealed section 4 of title 1 of the Virgin Islands Code, the Supreme Court of the Virgin Islands assumed in *Banks* that reception statutes (implicitly since the court never addressed what type of statute section 4 is) are valid and that legislatures (in contrast to the people through a constitution) can dictate by statute the legal method that courts must apply. So, arguably then, the Legislature of the Virgin Islands could adopt a new reception statute for the Virgin Islands. Similarly, if the authority through which the Virgin Islands receives the common law is now gone, and in its place is a court of last resort with inherent authority to shape the law, then the question arises what law can such a court adopt. It is not inconceivable that years from now the Supreme Court of the Virgin Islands could overrule *Banks* and adopt (within its

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> established by testimony of expert witnesses who have substantial knowledge of Navajo common law in an area relevant to the issue before the court.

In re Estate of Belone, 5 Navajo R. 161 (1987) (citation omitted) (quotation marks omitted). *See generally* RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW (2009). *Cf.* E. Band of Cherokee Indians v. Cucumber, 3 Cher. R. 66, 67 (N.C. Cherokee S. Ct. 2003):

> The result reached in this appeal is also supported by the customs and traditions of the Cherokee Nation. In terms of law, these customs and traditions form what may be referred to as the 'Cherokee Common Law'. . . . This Cherokee Common Law continues in effect except as modified by the governing charter, tribal ordinances, or acts of the United States Congress and treaties.

267. *Cf.* Benson, *supra* note 186, at 597 n.9 ("In 1776, the Commonwealth of Pennsylvania repealed the common law, but soon found that they had thrown the baby out with the bath water. In 1777, the Commonwealth revived the common law up to and including May 14, 1776.").

268. *See, e.g.*, Machado v. Yacht Haven USVI, LLC, 61 V.I. 373, 380 (V.I. 2014) ("[W]e agree with the Superior Court's assessment that the foundational elements of negligence . . . are so widely accepted and fundamental to the practice of law in the Virgin Islands and every other United States jurisdiction that maintaining these elements is unquestionably the soundest rule for the Virgin Islands." (citation omitted) (quotation marks and ellipsis omitted)).

inherent authority to shape the law and in the absence of a statutory mandate to apply English common law) another approach, perhaps even return to Danish common law. What Danish common law and customs (distinguished from statutory law) were in force in 1917 (again, in the sense of judicial precedent and practice) and whether it was, is, or should be part of the Virgin Islands' common law is still an open question in the Virgin Islands.[269]

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269. *But see* Antilles Sch., Inc. v. Lembach, No. 2015-0039, 2016 WL 948969, at *17 n.21 (V.I. Mar. 14, 2016) (questioning inferentially whether Danish common law was incorporated into Virgin Islands law):

> [P]rior to its purchase by the United States in 1917, the Virgin Islands had been a colony of Denmark. Because we decline to adopt remittitur, and for largely the same reasons would not adopt additur, we do not address here whether Congress, by incorporating the Seventh Amendment by reference through the 1968 amendments to the Revised Organic Act, intended for this reference to 'the common law' to refer to the common law as it existed in 1791, or as it existed in 1968, or to encompass only the common law of England.

(citing, *inter alia*, Browning v. Browning, 9 P. 677, 679–85 (N.M. 1886), for the holding that New Mexico's organic act did not incorporate England's common law "but the common law that existed prior to New Mexico's admission as a territory, including the civil law of Mexico") (additional citation omitted)). *Cf.* Blume & Brown, *supra* note 17, at 518 ("The Virgin Islands should be examined for remains of the law of Denmark."); Bowman, *supra* note 17, at 411 (discussing the Virgin Islands' legal heritage and its relationship to Denmark). One procedure Danish courts employed—and which continues to today—is conciliation. *See, e.g.*, Clen v. Jorgensen, 1 V.I. 497, 503 (3d Cir. 1920):

> [I]t appears that in the courts of original jurisdiction in the Virgin Islands, under the continuation of Danish procedure, a cause is begun in what is called the reconciling court. To the judge of this court the parties submit their controversy quite informally, and the judge, with equal informality, endeavors to reconcile their differences. In vindication of such informal judicial procedure it is interesting to learn that most of the litigation in these islands is successfully ended in this court. If, however, the judge fails to compose the controversy by process of reconciliation, as happened in this case, the cause is then transferred to the ordinary or district court. In this court the same judge sits (always in the presence of two court witnesses, presumably representing the public) and hears the case without a jury. As we gather from the protocol before us, oral evidence is seldom presented. The case is tried on written pleas. These pleas bear no resemblance in name or number to pleadings either at common law or under code practice. They contain a recital of what the parties regard to be the evidence bearing on their respective sides, supplemented by discursive argument. They are filed without verification, and to the admission or rejection of evidence so pleaded, no exceptions are noted.

Accord Axel Teisen, *The Danish Judicial Code*, 65 U. PA. L. REV. 543, 560–61 (1917) (discussing "the procedure to be followed in civil cases . . . that conciliation must have been tried, before the action can be proceeded with" under Danish law). *See* 4 V.I.C. §§ 141–42 (providing for a conciliation division within the Superior Court). In contrast, one procedure (assuming it was part of Danish West Indian procedure) that did not carry over—and might be suspect under the United States Constitution if it had—was the

All is not lost though because *Banks* did not declare the 1957 reception statute invalid just because a supreme court had been established. Instead, the concern squarely raised in *Banks* was the validity of the restatement mandate. Since repeal by implication is the least favored canon of statutory construction, the Virgin Islands' reception statute can still be saved. The Virgin Islands Code provides that

> [i]f any provision of this Code . . . or the application of any such provision . . . is determined by any court of competent jurisdiction to be invalid, such determination of invalidity shall not affect, impair, or invalidate the other provisions . . . of this Code . . . which can be given effect without the invalid provision . . . and to effect this purpose the provisions of this Code . . . are severable.[270]

Only the application of the Restatements was at issue in *Banks*. And, since the only portion of the Virgin Islands' reception statute that conflicts with the inherent authority of courts to shape the common law is the clause that arguably required courts to apply the Restatements, *Banks* can be clarified to explain that the Legislature only impliedly repealed the "restatement mandate." Once the offending clause that inherently conflicts with the establishment of a court of last resort is severed, section 4 of title 1 would provide: "The rules of the common law . . . shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary."

In the end, section 4 of title 1 of the Virgin Islands Code—and its predecessor, section 6 of chapter 13 of title IV of the 1921 Codes—are just reception statutes: statutes by which the Virgin Islands formally received English common law as expressed and understood in America. Viewed against the backdrop of how Virgin Islands courts understood and applied the 1921 reception statutes and later the 1957 reception statute, *Banks* makes sense. But not when viewed within the broader, national context of how other jurisdictions have traditionally received the common law. And it is in this context that *Banks* raises serious questions

practice of fining judges for delays in moving their cases. *See* Teisen, *supra*, at 569 ("The code enjoins the lower and superior courts to decide their cases without delay, and if they do not do it, the Supreme Court will, on appeal, reprove and, in flagrant cases, fine delinquent judges.").

270. 1 V.I.C. § 51.

for the Virgin Islands and beyond. If the Supreme Court of the Virgin Islands does not take up the issue, the Legislature of the Virgin Islands should reenact the Virgin Islands' reception statute without its "restatement mandate." Essentially, *Banks* has now become too big to fail.