A COMMON LAW OF AND FOR THE VIRGIN ISLANDS

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Section 4 of Title 1 of the Virgin Islands Code provides that "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute . . . 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."[1] In *Banks v. International Rental & Leasing Corp.*, the Virgin Islands Supreme Court ruled that its 2004 creation as "'the supreme judicial power of the Territory'"[2] necessarily "supersedes and alters [S]ection 4" and authorizes Virgin Islands courts to "determine the common law without automatically and mechanistically following the Restatements."[3]

In a 2004 article, Professor Kristen David Adams suggested that the Virgin Islands would make a good laboratory for studying the common law process.[4] While it is probably safe to say that few people want to think of themselves as living in a laboratory, Adams was correct in thinking that students of the common law might have an unusual opportunity to witness the emergence of homegrown common law post-*Banks*. In fact, Adams made clear that homegrown is what the common law process is all about.[5]

According to Adams, "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

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1. 1 V.I. CODE ANN. § 4 (repealed 2004), *see* Gov't of the V.I. v. Connor, 60 V.I. 597, 600 (V.I. 2014).

2. 55 V.I. 976, 978 (V.I. 2011) (quoting 4 V.I. CODE ANN. § 21 (2011)).

3. *Id.* at 979.

4. Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423 (2004).

5. *Id.* at 446.

experience."[6] By this understanding, the pre-*Banks* Virgin Islands were not truly governed by common law, notwithstanding that Section 4 purported to make "[t]he rules of the common law . . . the rules of decision in the courts of the Virgin Islands."[7] The rules expressed in the Restatements might have developed "organically over time" incorporating "the lessons of experience," but not in the Virgin Islands or in response to its "local mores and needs."[8] Imported rules might be the common law of their jurisdictions of origin, but they are just imported rules in the receiving jurisdiction.

This understanding of common law as homegrown law might be questioned by those familiar with the general American reception of the common law of England. But while American states received English common law as it stood at the time of their creation,[9] there was nothing resembling the Restatements to tie the hands of local courts. For the original thirteen states, English common law was already local law; and in all the states there was never any doubt local courts would apply and develop the law in response to their own "lessons of experience,"[10] although English law would remain as persuasive but not binding precedent.[11]

Lawyers trained in modern American law schools are likely to think of the common law as a body of law that originated in England but now exists as a free-floating set of rules not tethered to any particular jurisdiction. Law students learn that what distinguishes the common law from statutory and administrative law is that it is judge-made, as if judges are simply an alternative to legislatures and administrative agencies. They learn the common law from national casebooks still inspired, more than a century later, by the Langdellian notion that law is a science and judges are like scientists in search of the true law.[12] They learn

6. *Id.*

7. *Banks*, 55 V.I. at 973 (quoting 1 V.I. CODE ANN. § 4, *repealed by* 4 V.I. CODE ANN. § 21 (2004)).

8. Adams, *supra* note 4, at 446.

9. Richard C. Dale, *Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 553–54 (1882).

10. Adams, *supra* note 4, at 446.

11. Dale, *supra* note 9, at 553–54.

12. *See* Christopher Langdell, Address delivered Nov. 5, 1866, reprinted in 3 LAW Q. REV. 123, 124 (1887) (asserting that "law can only be learned and taught in a university by means of printed books"). Langdell introduced the case method of instruction to legal education in 1870 at the beginning of his quarter-century tenure as dean of the Harvard

that the precedents once obscured in dusty state reporters and now available in a split second through the magic of search engines are the data from which reason will extract the correct rule, independent from where the judge happens to sit. While students may be reminded now and then that the law can vary from state to state, they qualify to practice law by passing a test that treats common law subjects as unitary.

It is this understanding of the common law as a singular body of rules largely independent from its origins that underlies the American Law Institute's restatement project. Smart lawyers, in the spirit of the law school classroom, engage in Langdellian-style, reasoned discovery of the rules that best comport with prior judicial decisions across state jurisdictions. The "local mores and needs" that led to those decisions have little relevance to this search for the best rule to be applied in every jurisdiction.[13] But as Adams describes it, there is not a single common law.[14] Rather common law, by its nature, is homegrown. It is place and time specific. In relying on the Restatements as the default law pursuant to Title I, Virgin Islands courts were applying, at best, the common law of other jurisdictions. The *Banks* ruling requires Virgin Islands courts to develop and apply their own common law.[15]

In this Article the Author considers, from the perspective of a distant outsider with a keen interest in the common law process, how Virgin Islands courts have met the challenge set before them by *Banks*. Part I examines the historic common law process and concludes that it has been, with occasional exceptions, a bottom-up, supply-side, organic process. Part II describes and analyzes the Virgin Islands Supreme Court's ruling in *Banks*. Part III reviews post-*Banks* Virgin Islands court decisions applying the analysis mandated by *Banks*. Part IV concludes that the Virgin

Law School. His core idea, widely shared at the time, was that lawyers and judges are scientists, like biologists and physicists, in search of objective truth. For legal scientists, the true law was to be discovered in the accumulated data contained in the law library. *Id.*

13. Adams, *supra* note 4, at 446.

14. *Id.* at 443; *accord* DeLoach v. Alfred, 952 P.2d 320, 322 (Ariz. Ct. App. 1997), *vacated on other grounds*, 960 P.2d 628 (Ariz. 1998) (citing Cannon v. Dunn, 700 P.2d 502, 503 (Ariz. Ct. App. 1985)) (providing that the Restatement is used to decide issues of first impression because it represents the prevailing law on a particular subject in the United States).

15. Banks v. Int'l Rental & Leasing Corp., 55 V.I. 976, 979 (V.I. 2011).

Islands courts, pursuant to the *Banks* analysis, have begun to develop a common law of and for the Virgin Islands.

I. COMMON LAW PROCESS

Blackstone divided the municipal laws of England into "the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law."[16] The *lex non scripta* was unwritten because "the nations among which they prevailed had but little idea of writing."[17] It came to be called the common law "more probably, as a law *common* to all the realm."[18] But not all of the common law was common to all the realm. "The second branch of the unwritten laws of England are particular customs, or laws which affect only the inhabitants of particular districts."[19] It is such particular laws affecting only inhabitants of the Virgin Islands, it would seem, that the Virgin Islands Supreme Court envisioned in its *Banks* ruling.

In England, Blackstone reported that these particular customs were guaranteed by acts of parliament made necessary by the fact that compilations of custom, perhaps resembling the modern Restatements, "collected at first by [K]ing Alfred, and afterwards by [K]ing Edgar and Edward the confessor"[20] sought to make the law common across the entire realm. Whether motivated by a benevolent desire to facilitate interactions across the realm or a monarchical ambition to consolidate power, the establishment of uniform laws applicable to every corner of the realm ran counter to the process by which the foundational customs had come into existence.

Noting that some of "[o]ur antient lawyers . . . insist with abundance of warmth, that . . . customs . . . as old as the primitive Britons . . . [have] continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated," Blackstone sides with Selden in concluding that the Romans, Picts, Saxons, Danes, and Normans "insensibly introduced and incorporated many of their own

16. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 63 (1765).
17. *Id.*
18. *Id.* at 67.
19. *Id.* at 74.
20. *Id.*

customs with those that were before established."[21] In other words, the customs from which the common law of England derived evolved over time, not only because Romans, Picts, and others brought with them their customs, but also because local customs necessarily adapted to changing circumstances. These "customs or maxims [are] to be known, . . . and . . . their validity to be determined . . . by the judges in the several courts of justice. They are the depository of the laws."[22]

Given that common law is founded on custom, presumably because custom reflects the practices and informs the expectations of the people, and given that customs evolve over time in response to external and internal influences, it would seem that common law should evolve over time. How does this happen if "it is an established rule [for judges] to abide by former precedents, where the same points come again in litigation?"[23] Blackstone is clear that

> it is not in the breast of any subsequent judge to alter or vary from [precedent], according to his private sentiments: he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.[24]

The only exceptions to this rule of decision, said Blackstone, are "where the former determination is most evidently contrary to reason . . . [or] to the divine law."[25] In such cases, "it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established custom of the realm."[26]

Blackstone's allowance that judges may decide contrary to precedent where precedent "is most evidently contrary to

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21. *Id.* at 64. John Selden was a seventeenth-century legal historian who was responsible for tracing the roots of English law to Roman law. *See* Michael Bertram Crowe, *Eccentric Seventeenth-Century Witness to the Natural Law: John Selden (1584–1645)*, 12 NAT. L.F. 184, 185, 187 (1967) (surveying the life and works of John Selden and describing his efforts to uncover the origins of English law).

22. BLACKSTONE, *supra* note 16, at 69.

23. *Id.*

24. *Id.*

25. *Id.* at 69–70.

26. *Id.* at 70.

reason"[27] has led some judges and commentators to contend that it is within the common law judge's authority and responsibility to adapt the law to changing circumstances and public needs—that it is contrary to reason to adhere to outdated rules.[28] But how is the judge to determine that a rule is outdated as a result of changed circumstances and public needs? How is a judge to determine what different rule is better under existing circumstances and in light of current public needs?

The only occasions for judges to make such determinations are in the cases that come before their courts. Blackstone is clear that the judge may not rely upon his "private sentiments."[29] The litigants will contend for a different rule only if it serves their private ends. So the institutional framework within which the judge functions is not conducive to the formulation of public policy or the enactment of laws designed to implement public policy. Rather, the judicial process is designed to find the facts in particular cases and apply the settled law to those facts.

These inherent constraints on the judge as law reformer and lawmaker do not mean that common law is frozen in time. While Blackstone is adamant that judges are "not delegated to pronounce a new law, but to maintain and expound the old one," his description of the source of common law suggests, also, how the law is to change.[30] In dismissing a distinction between "established customs" and "established rules and maxims," Blackstone says the authority of the latter "rests entirely upon general reception and usage; and the only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it."[31] The authority of common law rules and of customs derives from their "reception and usage."[32] As old customs are no longer observed and new customs are received and relied upon, the common law judge will adapt the rules accordingly. The law thus evolves not according to the "private sentiments"[33] or public policy prescriptions of judges, but in response to the expressed

27. *Id.* at 69.
28. *E.g.*, Adams, *supra* note 4, at 449.
29. BLACKSTONE, *supra* note 16, at 69.
30. *Id.*
31. *Id.* at 68.
32. *Id.*
33. *Id.* at 69.

preferences and practices of those who rely on the law in their interactions with others. Thus the common law judge is engaged in what Douglas Whitman has labeled a "demand-side" rather than a "supply-side" enterprise.[34] The public looks to the judge to know what the law is. The judge looks to the public to know what the law should be.

Of course there are and always have been supply-side, law-making judges who purport to be engaged in the common law process. But if the common law originated in and derived its legitimacy from custom as Blackstone concluded, its development over time must be informed by custom. Absent that connection to the practices and preferences of what might be called consumers of the law, what lawmaking judges call the common law is that in name only. Judges may have the raw power to be lawmakers, but courts lack the institutional competence for informed lawmaking and, when making law as courts functioning under the constitutional separation of powers, they intrude upon the constitutional prerogatives of the legislature.

But putting historical precedent, institutional competence, and constitutional constraints aside, the most compelling reason for adhering to the bottom-up, demand-side understanding of the common law process is that it conforms to the evolutionary nature of all real human progress. In his book *The Evolution of Everything*, Matt Ridley contends that "society, money, technology, language, law, culture, music, violence, history, education, politics, God, [and] morality" evolve in much the same way as biological organisms.[35] "[T]hings do not stay the same; they change gradually but inexorably; they show 'path dependence'; they show descent with modification; they show trial and error; they show selective persistence."[36] What they do not show, according to Ridley, is a plan or a planner.[37] Not to say there are not planners aplenty. But while their intentions may sometimes be evident in the short term, their plans are invariably overwhelmed by natural evolutionary forces.

In her 2004 article, Professor Adams draws an explicit analogy to evolutionary biology in her discussion of the common

34. Douglas G. Whitman, *Evolution of the Common Law and the Emergence of Compromise*, 29 J. LEGAL STUD. 753, 775–76 (2000).

35. MATT RIDLEY, THE EVOLUTION OF EVERYTHING: HOW NEW IDEAS EMERGE 8 (2015).

36. *Id.*

37. *Id.*

law process. Adams observes that "isolated [biological] populations often produce new species."[38] Similarly,

> [B]ecause of the Virgin Islands' unique history and identity and its geographic, political, and social isolation from the rest of the United States, the Islands naturally may have tended to develop law diverging from that of the rest of the States in a manner narrowly tailored to serve the needs of the Islands' population.[39]

A common law reflective of the Virgin Islands' unique characteristics, suggests Adams, "either may not have taken place at all or may have taken place only to a limited extent" as a result of the statutory reliance on the Restatements as de jure common law.[40]

The parallel, suggested by Adams, between biological evolution and the common law process is instructive in another respect. Important to the thinking of those who conceived the Restatements and to many students of the common law is that there is *a* common law. Langdell's scientific approach to the study and practice of law, still a dominating if veiled force in American legal education, conceives of legal truths as no different from biological or other truths of hard science.[41] Pursuant to this conception, the judge's task is to discover the law not from "local mores and practices,"[42] but from the vast sea of decisions rendered by common law judges the world over. Judges from England to California to the Virgin Islands are engaged in a shared pursuit of truth, and the Restatement project is an effort to counter the influences of a federal system in which state court judges sometimes choose to go their own way.

Although Professor Adams' basic insight is important, she reveals her Langdellian training when she suggests that liberating Virgin Islands courts from the Restatements "could lead to their becoming an important resource for the future development of the law."[43] The implication, like the laboratory argument for federalism, is that the unique perspective of Virgin

38. Adams, *supra* note 4, at 451.
39. *Id.* at 456.
40. *Id.*
41. Langdell, *supra* note 12, at 124.
42. Adams, *supra* note 4, at 446.
43. *Id.* at 451.

Islands courts might contribute to understanding of *the* common law, rather than simply development of *a* common law of the Virgin Islands. But it is clear that Adams understands the common law process as one that leads to multiple common laws—each suited to its time and place.[44] As noted below, she suggests that the Restatements "might fairly be described as an invasion," citing Montesquieu, Spinoza, and Machiavelli, as well as biological theory, for the proposition that such invasions are often destructive and destabilizing.[45]

As a solution to the perceived problem of inconsistent legal rules within and across jurisdictions, the Restatements are not unlike the balance-of-nature paradigm that has dominated environmental policy over the past several decades. Much environmental policy has been directed at correcting and avoiding human disruptions of nature's balance, as if there is one correct state of nature.[46] But, as Daniel Botkin pointed out several years ago, nature is constantly changing.[47] The natural state of nature is continuous change requiring adaptation and evolution of the countless species that constitute an ecosystem. And as Emma Marris has subsequently explained, the imagined balance of nature becomes a baseline that policymakers aspire to restore: "Baselines . . . typically don't just act as a scientific *before* to compare with an *after*. They become the *good*, the goal, the one correct state."[48] While few would claim the Restatements seek to restore a disrupted common law, they do reflect a pursuit for the one correct law. Like environmental policies founded in balance-of-nature thinking, the Restatements yield legal prescriptions that misunderstand the evolutionary nature of human societies and the variation from one society to another.

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44. *See id.* at 453–56 (comparing the development of the common law in the Virgin Islands to "speciation," a biological "process by which a single species becomes two or more species").

45. *Id.* at 456–58.

46. *See* James L. Huffman, *Designing Institutions for the Anthropocene: Getting the Incentives Right*, PROP. & ENV'T RES. CENTER (PERC) (Summer 2016), *available at* http://www.perc.org/sites/default/files/pdfs/DesigningInstitutionsfortheAnthropocene_PERCReports-Summer2016.pdf (stating that "the ecological principles of hierarchy and self-organization are instructive in applying the concept of subsidiarity to the allocation of authority among various levels of government").

47. DANIEL BOTKIN, DISCORDANT HARMONIES 6 (1990).

48. EMMA MARRIS, RAMBUNCTIOUS GARDEN: SAVING NATURE IN A POST-WILD WORLD 3 (2011).

In his book, Matt Ridley does not include a chapter on the evolution of law, but if he did it would surely look to the common law as illustrative of his thesis. The common law was designed by no one. Americans and other English colonists may have looked to Blackstone for the outline and details of the common law, but Blackstone was merely an astute reporter. There was no planner. To be sure, there have been judges along the way who sought to change the course of the common law, to improve upon what mere custom has wrought, but their designs only succeed if they fit with the many other unplanned forces that together constitute human society. It is no different for planning and lawmaking by legislators or administrative agencies. If the glove does not fit, society will not wear it, and the hand is always changing.

In a democracy, legislative lawmaking has better prospects for popular embrace and acceptance for the obvious reason that, in a functioning democracy, popular needs and desires influence the lawmaking process. Judges, however, even when elected, have only their "private sentiments"[49] and the perspectives of the litigants before them to inform what lawmaking they choose to do. On the other hand, judges are better positioned than legislators or administrators to witness how well existing common law is meeting the needs and expectations of those directly affected. While there are litigants who look to the courts for lawmaking, particularly when they have failed in the legislative process, most disagreements that find their way to court arise from gaps and vagueness in existing law leading to disappointed, but not unreasonable, expectations for one or both parties.

In a legal system in which judges function as both common law judges and interpreters and enforcers of statutory and administrative law, it is important to recognize the essential difference between these functions. In both roles the judge must fill gaps and clarify uncertainties, but as interpreter and enforcer of statutory and administrative rules, the judge seeks to discern and advance the intentions of the legislative or administrative lawmaker. For the judge to fill gaps and clarify uncertainties in statutory or administrative law based on his or her "private sentiments"[50] or policy preferences would be a clear usurpation of

49. BLACKSTONE, *supra* note 16, at 69.
50. *Id.*

the lawmaking function. Because common law rules arise spontaneously and evolve naturally, there is no "framer" intention that a judge can reference. In filling gaps and clarifying uncertainties in the common law, the judge should be guided by the expectations and objectives of consumers of the law. Although it is generally accepted that legislation can preempt common law rules, legislation, like the Restatements, does not evolve on its own. When understood and implemented as a demand-side process, the judge plays an essential role in adapting the law to evolving practices and preferences.

It might be argued that adaptation of the law in response to observed demands is no less lawmaking than announcing new rules intended to alter the future course of social relations; but Ridley's analysis suggests that the supply-side approach will often work against the natural forces of human progress, while the demand-side approach is simply a part of that evolutionary process.[51] Whereas Ridley credits the fourth century BC Greek philosopher Epicurus and the first century BC Roman poet Lucretious (who revived Epicurus's already lost ideas) with suggesting that order emerges without intelligent design,[52] modern readers are more likely to associate the idea with Adam Smith and Charles Darwin. Darwin's theory of evolution is generally accepted, though assumed by most to relate only to biology. Smith's theory of the invisible hand is as likely to be ridiculed as respected in today's partisan climate. But order does arise from market transactions, and order did arise from custom and the common law. None of it was planned. Disagreements with the idea of spontaneous order in matters of social relations stem not from an absence of order but from dislike of the order established—usually on wealth distribution grounds. Principled wealth redistribution is widely accepted as a function of modern governments, despite the inevitable, unprincipled rent-seeking that follows, but courts are the least competent branch of government for the design of wealth-related adjustments to the work of the invisible hand.

51. RIDLEY, *supra* note 35, at 11–16.
52. *Id.* at 8–12.

II. THE BANKS *ANALYSIS*

The Virgin Islands Supreme Court has extracted from *Banks* a three-factor analysis to be applied by Virgin Islands courts "when confronted with an issue of Virgin Islands common law that [the Supreme] Court has not resolved—or that has been addressed only through erroneous reliance on former 1 V.I.C. [Section] 4."[53] In *Banks*, the Court found it relevant that the challenged Restatement rule "'has received widespread acceptance in Virgin Islands courts,'"[54] that "a majority of jurisdictions endorse"[55] the proposed alternative rule and, "even more importantly," that in this case the alternative rule "represents the sounder rule."[56] The *Banks* analysis was summarized in *Simon v. Joseph*[57] as invoking the following considerations: "(1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands."[58]

Whether the *Banks* analysis will result in demand-side, homegrown, Virgin Islands common law is yet to be seen. Although the third factor invites courts to adopt rules that serve the needs of Virgin Islanders, it is not clear whether those needs are to be independently assessed by the courts or informed by the accumulation of cases that find their way to the courts. Are judges to supply rules that will promote policies they conclude are sound for the Virgin Islands? Or are judges to discover in the cases that come before them rules for which Virgin Islanders have evidenced a demand? The *Banks* opinion is ambivalent on this question.

On the one hand, the *Banks* Court wrote that "[t]o determine whether to change the common law by judicial decision, a court should consider whether 'changing circumstances compel [the]

53. Machado v. Yacht Haven U.S.V.I, LLC, 61 V.I. 373, 380 (V.I. 2014).

54. Banks v. Int'l Rental & Leasing Corp., 55 V.I. 967, 981 (V.I. 2011) (quoting Banks v. Int'l Rental & Leasing Corp., Nos. 2002–200 through–203, 2008 WL 501171, at *3 n.5 (D.V.I. Feb. 13, 2008)).

55. *Id.* at 983.

56. *Id.* at 983–84.

57. 59 V.I. 611 (V.I. 2013).

58. *Id.* at 623. The court had earlier, and less succinctly, summarized the three factors in Matthew v. Herman, 56 V.I. 674, 680–81 (V.I. 2012).

court[ ] to "renovate" outdated law and policy' by 'creating new public policy.'"[59] "In other words," said the court, "'[the Supreme] Court must weigh the benefits versus the burdens of the proposed change.'"[60] This sounds like the supply-side judge making public policy alongside the legislature. The Court "acknowledge[d] that the Legislature possesses concurrent authority to alter the common law," but rejected the notion that "the Legislature possesses the authority to . . . *completely* deprive[ ] this Court of the ability to exercise its supreme judicial power to shape the common law."[61]

On the other hand, the *Banks* Court dismissed earlier contrary precedent as cases in which "the parties [did not] expressly request that [the Supreme] Court exercise its inherent power to adopt a different rule, and [the Supreme] Court is not inclined to do so *sua sponte* without receiving the benefit of briefing by the parties."[62] The Court went on to note that stare decisis is "'not a mechanical formula of adherence . . . however . . . questionable, when such adherence involves collision with a . . . doctrine more embracing in its scope, intrinsically sounder, and verified by experience.'"[63] Here, the Court expressed an interest in the demand-side briefing by litigants and looked to rules "'verified by experience.'"[64] In actually applying the third factor of its analysis, the Court looked to the interests of commercial litigants in concluding that "holding lessors strictly liable represents the sounder rule, in 'that a commercial lessor acts much like a retailer and manufacturer in placing products in the stream of commerce, and . . . a lessor will in most instances be in a better position than a consumer to prevent the circulation of defective products.'"[65]

That the *Banks* Court took a demand-side view of the common law process is further supported by the Court's conclusion that "[the Supreme] Court and—to the extent not

59. *Banks*, 55 V.I. at 981 (quoting Wholey v. Sears Roebuck, 803 A.2d 482, 489 (Md. 2002)).

60. *Id.* (quoting Gilbert v. Barkes, 987 S.W.2d 772, 774 (Ky. 1999)).

61. *Id.* at 979–80.

62. *Id.* at 984 n.9.

63. *Id.* at 985 n.10 (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).

64. *Id.* (quoting *Helvering*, 309 U.S. at 119).

65. *Id.* at 983–84 (quoting, ironically, 52 A.L.R.3d 121, although the courts' experience with Virgin Island commercial litigants might well have led them to the same conclusion) (footnote omitted).

bound by precedent, the [s]uperior [c]ourt—may determine the common law without automatically and mechanistically following the Restatements."[66] The superior courts are those closest to the day-to-day legal affairs of the Virgin Islands. Like trial courts of Blackstone's England, they are in the best position to understand "local mores and needs" or, in Professor Adams' words, to learn the "lessons of experience."[67] It is meant to be a bottom-up process, not judicial policymaking from on high.

That it is to be a bottom-up process rising from the superior courts is made clear in *Government of the Virgin Islands v. Connor*,[68] which was decided three years after *Banks*. The *Connor* Court declared it "is no accident" that the superior courts have authority and responsibility to weigh in on Virgin Islands common law.[69] "[O]riginal jurisdiction to adjudicate particular legal issues in the first instance remains a function of the [s]uperior [c]ourt to be disturbed only in truly extraordinary situations."[70] The Court described the judicial system of the Virgin Islands as "'arranged in a pyramid,' with 'trial courts at its base.'"[71] "The reason for this [structure] is clear: 'independent decisions of lower courts will improve the quality of appellate decisions.'"[72]

While the *Banks* opinion is clear on the relevance of the first two factors—Virgin Islands precedent and majority precedent from other jurisdictions—there seems to be some uncertainty about how those considerations should influence the third factor—determining the "soundest rule for the Virgin Islands."[73] Overturning Virgin Islands precedent "has a definite burden associated with it, since it would disrupt the state of the law in the Virgin Islands,"[74] and therefore is "'entitled to great respect.'"[75] The fact that a majority of jurisdictions endorse a

66. *Id.* at 979 (internal citation omitted).
67. Adams, *supra* note 4, at 446.
68. 60 V.I. 597 (V.I. 2014).
69. *Id.* at 604.
70. *Id.* (internal citation omitted).
71. *Id.* (quoting Richard K. Greenstein, *Why the Rule of Law?*, 66 LA. L. REV. 63, 71 (2005)).
72. *Id.* (quoting Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System,* 68 S. CAL. L. REV. 1605, 1626 (1995)).
73. *Id.* at 605.
74. Banks v. Int'l Rental & Leasing Corp., 55 V.I. 967, 981 (V.I. 2011).
75. *Id.* (quoting People v. Todmann*,* 53 V.I. 431, 438 n.6 (V.I. 2010)).

particular rule, though "not a dispositive factor,"[76] is evidence, presumably, that the rule has been found to meet similar needs in those jurisdictions. What may be unclear, judging by applications of the *Banks* factors in later cases, is whether Virgin Islands precedent and the majority rule in other jurisdictions are meant to be illustrative of possible rules going forward or the only possible rules from which the common law judge must select. The latter would undercut the demand-side approach by limiting judges to already existing rules while also ignoring a concern for Virgin Islands sovereignty noted in the following paragraph.

It should not be forgotten that the *Banks* decision was inspired by more than a desire to develop a common law suited to the conditions and needs of the Virgin Islands. It was also an expression of the sovereign autonomy of the people of the Virgin Islands. As Professor Adams has written, "The Virgin Islands, having had foreign law imposed on them for so many centuries, were naturally vulnerable to legal invasion. The wholesale adoption of the Restatements might fairly be described as an invasion."[77] In noting that mandated adherence to the Restatements would effectively "delegate[ ] [judicial] power to the American Law Institute and to the governments of other jurisdictions,"[78] the *Banks* Court suggested that continued obeisance to the Restatements "may violate 'the right to self-government guaranteed to the people of the Commonwealth.'"[79]

III. BANKS *APPLIED*

In applying the *Banks* analysis, there are three general approaches Virgin Islands courts might pursue. To determine "which approach represents the soundest rule for the Virgin Islands,"[80] courts could assume they are to: (1) select either a particular rule previously adopted by Virgin Islands courts or the majority rule from other jurisdictions; (2) create new laws based on public policy considerations; or (3) adapt one or some combination of the aforementioned rules to the present-day circumstances and needs of the Virgin Islands.

76. *Id.* at 983.
77. Adams, *supra* note 4, at 456–57 (internal footnote omitted).
78. *Banks*, 55 V.I. at 980.
79. *Id.* (citation omitted).
80. Gov't of the V.I. v. Connor, 60 V.I. 597, 605 (V.I. 2014).

The first approach recognizes the importance of stare decisis to people's expectations, while avoiding description as a "legal invasion."[81] If courts may prefer rules previously adopted by Virgin Islands courts over the majority rule of other jurisdictions, "the right to self-government guaranteed to the people" remains intact.[82] But being limited to existing rules, even if Virgin Islands courts had previously adopted these rules, is not consistent with the common law process as described above. The common law is not a set of rules awaiting discovery in the case reporters by Langdellian-trained judges the way unknown planets or species await discovery by scientists. Rather, they are rules to be discovered through the customs and practices of what we might call "legal consumers." While there are good reasons relating to popular expectations to adhere to existing rules, there are sometimes good reasons to adjust existing rules to expectations people actually have or would rather have. The common law process allows for such adaptations.

Although it is fair to conclude that the first two factors of the *Banks* analysis are intended to provide courts with a sampling of previous solutions to the problem at hand, while taking into account reliance litigants may have placed on existing rules, it appears that in a few post-*Banks* opinions, courts have proceeded as if confined to those existing rules.[83] In *Kiwi Construction, LLC v. Pono*,[84] the superior court concluded that "[g]iven the uniform treatment of this tort across jurisdictions, the soundest rule of law for the Virgin Islands is that a plaintiff must plead two elements to state a claim for abuse of process."[85] Uniform treatment across jurisdictions is not a persuasive reason for concluding that it is the soundest rule for the Virgin Islands, although it might be if it is shown that Virgin Islands citizens have been relying on that rule. In *Merchants Commercial Bank v. Oceanside Village*,[86] the superior court found that "[t]he soundest rule of law for the Virgin Islands is [one] that . . . incorporates the requirements imposed by nearly every jurisdiction in the United

81. Adams, *supra* note 4, at 456.

82. *Banks*, 55 V.I. at 980 (internal quotation marks omitted).

83. *See, e.g.*, Kiwi Constr., LLC v. Pono, No. ST-2013-CV-011, 2016 WL 213037, at *3 (V.I. Super. Ct. Jan. 15, 2016) (relying solely on uniformity across jurisdictions for finding the "soundest rule").

84. *Id.*

85. *Id.*

86. No. ST-2011-CV-653, 2015 WL 9855658 (V.I. Super. Ct. Dec. 18, 2015).

States . . . [and] mirrors the language of the rule previously relied upon by courts in the Virgin Islands."[87] Although the court noted that the rule "fosters consistency concerning the scope of . . . liability," it offered no further explanation for why the rule is the soundest for the Virgin Islands other than its existence in the Virgin Islands and other jurisdictions.[88] In *Jacobs v. Roberts*,[89] the superior court adopted a Restatement (Third) rule as "the soundest rule for the Virgin Islands," noting only that it is "the current majority rule."[90] In all three of these cases, the court purported to be applying the third factor of the *Banks* analysis, but only referenced what had been learned by applying the first two factors—as if it were limited to selecting from these preexisting rules.

A careless reading of the Virgin Islands Supreme Court's opinion in *Connor* could lead superior courts to conclude that in establishing the soundest rule for the Virgin Islands, they are limited to rules revealed in applying the first two elements of the *Banks* analysis. After stating that *Banks* requires courts to "ascertain[ ] whether any Virgin Islands courts have previously adopted a particular rule . . . [and] then identify[ ] the position taken by a majority of courts from other jurisdictions," the *Connor* opinion stated that courts must then "determine[ ] which approach represents the soundest rule for the Virgin Islands."[91] While this language might be understood to mean that the soundest rule is to be drawn either from existing Virgin Islands rules or from the majority rule in other jurisdictions, it is clear from other statements in *Connor* that the Supreme Court intended no such limitation. The Court stated that "[t]he power to shape the common law is amongst the most important powers vested in a judicial officer"[92] and that "identifying the best rule for the Virgin Islands—mandates that the [s]uperior [c]ourt . . . determine the appropriate common law rule based on the unique characteristics and needs of the Virgin Islands."[93]

87. *Id.* at *11.
88. *Id.*
89. No. ST-14-CV-193, 2015 WL 3406561 (V.I. Super. Ct. May 21, 2015).
90. *Id.* at *4.
91. Gov't of the V.I. v. Connor, 60 V.I. 597, 605 (V.I. 2014).
92. *Id.* at 604.
93. *Id.* at 603.

Some language in the *Banks* opinion might be read to call on Virgin Islands courts to create new law pursuant to declared policy goals, much as a legislature would. "To determine whether to change the common law by judicial decision," wrote the *Banks* court, "a court should consider whether 'changing circumstances compel [the] court[ ] to "renovate" outdated law and policy' by 'creating new public policy.'"[94] "In other words," the Court continued, "'[the Supreme] Court must weigh the benefits versus the burdens of the proposed change.'"[95] This would be the 'supply-side' approach, but the remainder of the *Banks* opinion, particularly its focus on existing Virgin Islands judicial rulings, appears to call for a more restrained, demand-side approach. Notably, there are really no post-*Banks* superior court or V.I. Supreme Court decisions that employ this supply-side approach in their *Banks* analysis.

With the exception of the few cases noted above in which the courts have limited themselves to preexisting rules and a few other cases in which courts have simply asserted that a particular rule is the soundest for the Virgin Islands,[96] Virgin Islands courts have applied the *Banks* analysis as a common law court should. Pursuant to the first two factors they have considered to what extent litigants have reasonably relied on existing rules, while examining how those rules have functioned in circumstances that may or may not be similar to those in the Virgin Islands.[97] Taking those considerations into account, they have then looked to local circumstances and needs in adopting

94. Banks v. Int'l Rental & Leasing Corp., 55 V.I. 967, 981 (V.I. 2011) (quoting Wholey v. Sears Roebuck, 803 A.2d 482, 489 (Md. 2002) (citation omitted)).

95. *Id.* (quoting Gilbert v. Barkes, 987 S.W.2d 772, 774 (Ky. 1999)).

96. *See, e.g.*, Ronan v. Clarke, 63 V.I. 95, 102 (V.I. Super. Ct. 2015) (declaring the best rule for the Virgin Islands after concluding that the question is "best left for the Legislature"); Nicholas v. Damian-Rojas, 62 V.I. 123, 130 (V.I. Super. Ct. 2015) ("The Court finds that the substantive provisions of Restatement [Section] 219 represent the soundest rule for the Virgin Islands, reflecting commonly understood legal principles that do not contradict Virgin Islands common law."); Faulknor v. Virgin Islands, 60 V.I. 65, 89 (V.I. Super. Ct. 2014) ("Finally, considering the longstanding application of the Restatement (Second) of Torts [Section] 390 in this jurisdiction and the apparent widespread application of this rule in a majority of jurisdictions, the Court finds that the Restatement (Second) of Torts [Section] 390 represents the soundest rule for the Virgin Islands and is in accord with local public policy.").

97. *See, e.g.*, *Connor*, 60 V.I. at 604–06 (explaining the court's approach to the first two factors of the *Banks* test).

what they believe to be the soundest rule of the Virgin Islands.[98] Although courts have adopted, more often than not, rules revealed by the first two factors of the *Banks* analysis, they seem to take a serious assessment of local circumstances and needs.

Several superior court cases are illustrative. In *Hodge v. Virgin Islands Telephone Corp.*,[99] the court sought "to protect individuals who are lawfully in a 'public place,' . . . in accord[ance] with the local public policy to protect members of the public from harm" and rejected the defendant's claim that the adopted rule "would result in 'chaos and inefficiency in Virgin Island business dealings.'"[100] In *Sickler v. Mandahl Bay Holding Inc.*,[101] the court rejected a proposed rule of criminal liability that "is inconsistent with fundamental principles of both [Virgin Islands] tort and real property law."[102] In *Simkins v. Virgin Islands*,[103] the court concluded that "shifting the burden of maintaining public properties to possessors of adjacent land may have far-reaching and unintended [negative] consequences" and therefore is not the soundest rule for the Virgin Islands.[104] In *Robbins v. Port of $ale, Inc.*,[105] the court opted for a statute of limitations rule that would not "'foreclose a tortfeasor's right to contribution.'"[106] In *Davis v. Hovensa, LLC*,[107] the court concluded that the soundest rule for the Virgin Islands is that which is "more consistent with Virgin Islands jurisprudence and policy."[108] In *Slack v. Slack*,[109] the court found that a rule relating to the "enforceability of [ ] antenuptial agreement[s] is the soundest rule for the Virgin Islands because the criteria balances the parties' freedom to contract, yet allows the courts to refuse enforcement of the agreement if equity requires."[110] In *Gourmet Gallery Crown*

98. *Id.* at 603 (describing the soundest rule as one "based on the unique characteristics and needs of the Virgin Islands").
99. 60 V.I. 105 (V.I. Super. Ct. 2014).
100. *Id.* at 116.
101. No. ST-10-CV-331, 2014 WL 3107449 (V.I. Super. Ct. July 7, 2014).
102. *Id.* at *6.
103. 62 V.I. 76 (V.I. Super. Ct. 2014).
104. *Id.* at 82–83.
105. 62 V.I. 151 (V.I. Super. Ct. 2015).
106. *Id.* at 157 (quoting Maurice T. Brunner, Annotation, *When Statute of Limitations Commences to Run Against Claim for Contribution or Indemnity Based on Tort*, 57 A.L.R.3d 867, § 3(a) (2015)).
107. 63 V.I. 475 (V.I. Super. Ct. 2015).
108. *Id.* at 486.
109. 62 V.I. 366 (V.I. Super. Ct. 2015).
110. *Id.* at 377.

Bay, Inc. v. Crown Bay Marina, L.P.,[111] the court held that "the soundest rule of law for the Virgin Islands is that a commercial tenant may escrow its rent . . . [under particular circumstances] because . . . [that rule] acknowledges that the law of contracts governs the relation of covenants in a commercial lease agreement."[112] In all of these cases the courts have concluded that a particular rule is soundest because of considerations important to the Virgin Islands.

Two superior court opinions warrant particular note as examples of the common law process envisioned in the *Banks* analysis. In *Lembach v. Antilles School, Inc.*,[113] the court explained its ruling on the admissibility of what would otherwise be hearsay evidence as follows:

> Because the Virgin Islands is such a small territory, by necessity its residents often, as here, have to travel to Puerto Rico, Miami or beyond for specific and expert medical care. It is already disruptive of a doctor's or other specialist's business to attend a hearing or trial, a burden that is only compounded by requiring the expert to travel sometimes thousands of miles. It is not unheard of for parties to forego expert testimony when faced with the costs and time constraints of bringing experts before the Court.[114]

In arriving at the soundest rule for the Virgin Islands, the court in *Bell v. Radcliffe*[115] stated that "[a]dopting a broad definition of trespass . . . will allow Virgin Islands courts to develop their own body of law relating to trespass while permitting reference to the Restatement when confronted with close cases, unusual facts, or new questions."[116] Together, these two trial court decisions articulate the importance of common law rules that suit current and future local circumstances and needs.

In several cases the Virgin Islands Supreme Court has made clear that its *Banks* analysis is meant to facilitate a demand-side common law process, not judicial policy and lawmaking. In

111. No. ST-2014-CV-513, 2015 WL 9874077 (V.I. Super. Ct. Nov. 10, 2015).
112. *Id.* at *3.
113. No. ST-12-CV-613, 2015 WL 2120508 (V.I. Super. Ct. Apr. 1, 2015).
114. *Id.* at *22.
115. No. ST-13-CV-392, 2015 WL 5773561 (V.I. Super. Ct. Apr. 30, 2015).
116. *Id.* at *7.

Matthew v. Herman[117] the court elaborated on its *Banks* opinion. With reference to the first *Banks* factor, the court "noted that when a doctrine gains 'widespread acceptance' [ ] there are 'definite burden[s] associated' with rejecting it, as to do so would 'disrupt the state of the law in the Virgin Islands.'"[118] Of course if there is not "widespread acceptance,"[119] there is likely demand for a different rule. With respect to the second *Banks* factor, the *Matthew* court "cautioned that the majority rule factor, while important, was not dispositive."[120] Finally, in identifying the soundest rule for the Virgin Islands, the court, after mentioning several general policy considerations, stated that "the amatory torts are based on antiquated notions of a wife as the husband's property and are otherwise in tension with the public policy of the Virgin Islands because they have a destructive effect on existing marriages."[121] The court did not purport to change Virgin Islands public policy, but rather to reinforce it.

The Virgin Islands Supreme Court's ruling in *Simon* might be read to suggest that the application of the *Banks* analysis requires courts to select from existing rules, but it makes clear that in favoring the majority rule it recognizes "that the Virgin Islands is unique among United States jurisdictions due to the small size of the Virgin Islands Bar and the large need to appoint counsel in criminal cases."[122] As the court had noted in *Matthew*, the majority position is not dispositive, but in this case, it is the better rule for the Virgin Islands. In *Garcia v. Garcia*,[123] the V.I Supreme Court elaborated on the tradeoff between respecting existing Virgin Islands law and establishing a new rule which experience indicates is better suited to present day circumstances.[124] "'[*S*]*tare decisis* is a principle of policy and not a mechanical formula of adherence . . . however . . . questionable, when such adherence involves collision with a . . . doctrine more embracing in its scope, intrinsically sounder, and verified by

117. 56 V.I. 674 (V.I. 2012).
118. *Id.* at 680 (quoting Banks v. Int'l Rental & Leasing Corp., 55 V.I. 976, 983 (V.I. 2011)).
119. *Id.* (quotation omitted).
120. *Id.*
121. *Id.* at 685.
122. 59 V.I. 611, 627 (V.I. 2013).
123. 59 V.I. 758 (V.I. 2013).
124. *Id.* at 776.

experience.'"[125] Though not specific to the particular circumstances of the Virgin Islands, the V.I. Supreme Court's opinion in *Walters v. Walters*[126] gave serious consideration to the core objectives of tort law and "conclude[d] that an unjust enrichment cause of action must have a concrete set of elements in order to further the deterrence purpose of tort law."[127] The court made similar reference to "the basic purpose for which trust law was created," ruling that "the separation of legal and equitable title in a trust property . . . 'allow[s] for more flexible management of property with split ownership.'"[128]

In two other cases, Virgin Islands courts have confirmed that the third factor of its *Banks* analysis is meant to inform legal change in response to local circumstances and demonstrated needs, and not to invite judicial policymaking. In *Malloy v. Reyes*,[129] the court made reference to a century of "significant changes in the administration of the Territory . . . providing countless opportunities for the loss of records and the neglect of certain governmental functions"[130] in its determination of the soundest rule for the Virgin Islands. In *Joseph v. Sugar Bay & Resort, Corp.*,[131] the superior court concluded that a Restatement rule, though not binding on the courts in light of *Banks*, "represents the soundest rule for the Virgin Islands, and is in accord with local public policy."[132] Rather than simply observing that the adopted rule is in accord with local public policy, it would have been more consistent with the spirit of *Banks* if it had stated that it is the soundest rule *because* it is in accord with local public policy.

IV. CONCLUSION

Although it would be premature to commend the Virgin Islands courts for embracing a restrained, supply-side approach

125. *Id.* (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940)).
126. 60 V.I. 768 (V.I. 2014).
127. *Id.* at 779.
128. King v. Appleton, 61 V.I. 339, 352 (V.I. 2014) (quoting Robert L. Glicksman, *Sustainable Federal Land Management: Protecting Ecological Integrity and Preserving Environmental Principle*, 44 TULSA L. REV. 147, 180 (2008)).
129. 61 V.I. 163 (V.I. 2014).
130. *Id.* at 179.
131. No. ST–13–CV–491, 2014 WL 1133416 (V.I. Super. Ct. Mar. 17, 2015).
132. *Id.* at *3.

to implementing the *Banks* mandate, early indications are encouraging. While all judges face the temptations to the power inherent in their role as arbiters of private and public disputes, there is little indication in the post-*Banks* decisions to date that Virgin Islands judges are anxious to assume the role of policymaker and legislator. There appears to be an understanding that *Banks* calls for the organic development of a Virgin Islands common law, not for the replacement of the Restatements with a regime of judge formulated policies and laws.

For Virgin Islands judges to succeed in developing a common law of and for the Virgin Islands, they must accept that it will be a gradual, organic process with no end in sight. Sometimes prior decisions of Virgin Islands courts or the decisions of courts in other jurisdictions will suggest what could be the soundest rule for the Virgin Islands, but it will be the soundest rule only if it reflects "contemporary local mores and needs" and "incorporate[s] the lessons of [Virgin Islands] experience."[133] Superior court judges, in particular, are well positioned to witness the ambitions, frustrations, conflicts and collaborations of day-to-day life in the Virgin Islands. A Virgin Islands common law arising from these considerations will better serve the people of the Virgin Islands than could anything promulgated by the American Law Institute.

The key to effective implementation of the *Banks* analysis, as a few courts have already demonstrated, will be considering and explaining why, in light of the expressed preferences of Virgin Islanders, a particular rule is the soundest for the Virgin Islands. If it can be said that a rule is soundest because it meets the needs of those who rely on the law in the regulation of their personal, public, and business affairs, the promise of *Banks* will be realized and the people of the Virgin Islands will come to have a common law of their own.

133. *See* Adams, *supra* note 4, at 446 (identifying certain attributes of the process by which a given jurisdiction establishes its common law).