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Cultural Identity and Territorial Autonomy: U.S. Virgin Islands Jurisprudence and the *Insular Cases*

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CULTURAL IDENTITY AND TERRITORIAL AUTONOMY: U.S. VIRGIN ISLANDS JURISPRUDENCE AND THE *INSULAR CASES*

*Dolace McLean**

This Essay utilizes the lens of postcolonial theory to analyze the development of U.S. Virgin Islands jurisprudence. This Essay asserts that the United States's acquisition of the territory served the purpose of helping to construct an American narrative of moving from colony to colonial power that surpassed its European forebears. The colonial narrative is fractured by instances of the Supreme Court of the Virgin Islands re-narrating territorial space by utilizing legal principles that are informed by local cultural expressions. Consequently, Virgin Islands jurisprudence is transformed from "colonial dependent" to "postcolonial independent" based on intersectional, progressive principles.

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INTRODUCTION: POSTCOLONIAL DISRUPTIONS

The infamous *Insular Cases*¹ are under intense scrutiny and may soon be overruled.² The basic holdings of that series of cases drew a distinction between U.S. territories on the path to full integration into the union and territories that are mere possessions with no plan for integration.³ The insular areas include five inhabited regions: American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the U.S. Virgin Islands. These territories are not incorporated—neither on the path to statehood nor subject to the full panoply of constitutional rights. As unincorporated territories, they belong to, but are not a part of, the United States, and therefore, only fundamental rights are applicable.⁴

There is a further distinction to be made in that a territory can also be organized or unorganized—the difference lies in whether Congress will exercise direct control over the territory in the case of the latter or will give some autonomy to the local territorial government to conduct its own affairs in the case of the former.⁵ Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands are organized,⁶ and their inhabitants are U.S. citizens.⁷ American Samoa is unorganized,⁸ and its people are U.S. nationals and not

1. *Balzac v. Porto Rico*, 258 U.S. 298 (1922); *Ocampo v. United States*, 234 U.S. 91 (1914); *Dowdell v. United States*, 221 U.S. 325 (1911); *Rasmussen v. United States*, 197 U.S. 516 (1905); *Dorr v. United States*, 195 U.S. 138 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Pepke v. United States (In re Fourteen Diamond Rings)*, 183 U.S. 176 (1901); *Dooley v. United States*, 183 U.S. 151 (1901); *Huus v. N.Y. & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Goetze v. United States*, 182 U.S. 221 (1901); *De Lima v. Bidwell*, 182 U.S. 1 (1901).

2. *See Fitisemanu v. United States*, 1 F.4th 862, 864, 869–70 (10th Cir. 2021), *cert. denied*, 143 S. Ct. 362 (2022) (mem.).

3. Johnny Smith, *Commonwealth Status: A Good Deal for Puerto Rico?*, 10 HARV. LATINO L. REV. 263, 268–69 (2007).

4. *See Downes*, 182 U.S. at 287; *Mankichi*, 190 U.S. at 218; *Dorr*, 195 U.S. at 149; *Rasmussen*, 197 U.S. at 524; *Balzac*, 258 U.S. at 313.

5. *See* 86 C.J.S. *Territories* § 4 (2015).

6. *See id.* §§ 20, 45–47.

7. *See* 14 C.J.S. *Citizens* § 8 (2022).

8. 86 C.J.S. *Territories* § 44.

citizens.⁹ All five of the inhabited territories are overseas possessions with overwhelmingly nonwhite¹⁰ populations who often do not speak English.¹¹

The fact that the *Insular Cases* are foundationally racist is a given. The fact that they are anachronistically imperialistic goes without question. Yet, the *Insular Cases* serve a certain cultural fiction for America to reify its belief in its own greatness. No country ever became truly dominant unless it conquered and colonized other nations, for conquest and colonization are the hallmarks of power. But where there is an assertion of power, there is always resistance—colonialism always carries with it the beginnings of an incipient postcolonialism that subverts the imperialist agenda in ways great and small.

Postcolonialism resonates on two levels: first, the historical end of colonization that is marked by formal independence, and second, the ideological counter-discourses that happen during the colonial period as a way to destabilize the cultural authority of the imperialist power. Under the second resonance, a country can be postcolonial while it is still a colony. Given the continuing colonial condition of the five U.S. territories, this Essay is grounded on the basic premise that the other American insular possessions are constantly engaged in postcolonial counter-discursive activities that subvert and rupture the unilateral operation of power from the mainland United States out to the far flung reaches of the U.S. empire.

9. See 14 C.J.S. *Citizens* § 8.

10. See *Puerto Rico: Race*, U.S. CENSUS BUREAU, <https://data.census.gov/table?g=0400000US72> [<https://perma.cc/Y9QX-3V5Z>] (last visited Mar. 6, 2023); *Guam: Demographic Characteristics*, U.S. CENSUS BUREAU, <https://data.census.gov/table?g=0400000US66&d=DECIA+Guam+Demographic+Profile&tid=DECENNIALDPGU2020.DP1> [<https://perma.cc/UM68-GGAN>] (last visited Mar. 6, 2023); *Northern Mariana Islands: Demographic Characteristics*, U.S. CENSUS BUREAU, <https://data.census.gov/table?g=0400000US69&d=DECIA+Northern+Mariana+Islands+Demographic+Profile&tid=DECENNIALDPMP2020.DP1> [<https://perma.cc/R7N6-9SS5>] (last visited Mar. 6, 2023); *U.S. Virgin Islands: Demographic Characteristics*, U.S. CENSUS BUREAU, <https://data.census.gov/table?g=0400000US78&d=DECIA+U.S.+Virgin+Islands+Demographic+Profile&tid=DECENNIALDPVI2020.DP1> [<https://perma.cc/P7NH-4Q6H>] (last visited Mar. 6, 2023); *American Samoa: Demographic Characteristics*, U.S. CENSUS BUREAU, <https://data.census.gov/table?g=0400000US60&d=DECIA+American+Samoa+Demographic+Profile&tid=DECENNIALDPAS2020.DP1> [<https://perma.cc/LU9K-UCX4>] (last visited Mar. 6, 2023).

11. See *Puerto Rico: Language Spoken at Home*, U.S. CENSUS BUREAU, <https://data.census.gov/table?t=Language+Spoken+at+Home&g=0400000US72> [<https://perma.cc/F5UU-F2K4>] (last visited Mar. 6, 2023); *Guam: Household Language*, U.S. CENSUS BUREAU, <https://data.census.gov/table?t=Language+Spoken+at+Home&g=0400000US66&tid=DECENNIALGU2010.PBG6> [<https://perma.cc/6RRV-5L9T>] (last visited Mar. 6, 2023); *Northern Mariana Islands: Household Language*, U.S. CENSUS BUREAU, <https://data.census.gov/table?t=Language+Spoken+at+Home&g=0400000US69&tid=DECENNIALMP2010.PBG6> [<https://perma.cc/H6QH-MCCR>] (last visited Mar. 6, 2023); *U.S. Virgin Islands: Language Spoken at Home by Ability to Speak English*, U.S. CENSUS BUREAU, <https://data.census.gov/table?t=Language+Spoken+at+Home&g=0400000US78&tid=DECENNIALVI2010.PCT18> [<https://perma.cc/3H3D-753A>] (last visited Mar. 6, 2023); *American Samoa: Household Language*, U.S. CENSUS BUREAU, <https://data.census.gov/table?q=language+spoken+at+home&g=0400000US60&tid=DECENNIALAS2010.PBG6> [<https://perma.cc/JMT7-2H6H>] (last visited Mar. 6, 2023).

This Essay will examine the laws of an oft-overlooked territory, the U.S. Virgin Islands, and argue that the local courts are engaged in a postcolonial subversion of federal American laws that have been applied since the territory became an American possession in 1917.¹² The Virgin Islands is described as a territory, but it is a colony—a dependent territorial entity that lacks independent sovereignty for purposes of relations with third countries.¹³

Despite the Virgin Islands's lack of self-governance, this Essay is built on the assumption that the Virgin Islands, like all territorial dependencies and colonies, is constantly engaged in multifaceted disruptions of the American imperial program. This Essay examines one form of postcolonial subversion of the colonial agenda by analyzing a few opinions issued by the Supreme Court of the Virgin Islands (the "Virgin Islands Supreme Court"). These cases have upended the legal landscape of the territory by serving notice of a radical departure from the imposition of federal precedents to the analysis of local laws. It is this Essay's contention that these opinions are issued with an aim to disrupt the American colonial legal hegemony by directing lower courts to consider Virgin Islands cultural concerns prior to issuing a ruling. This is a potent form of postcolonialism in which the territory's highest court engages in a radical deconstruction of received colonial legal structures so that the social and cultural concerns of the territory can inform local jurisprudence.

To examine the postcolonial nature of Virgin Islands jurisprudence, Part I of this Essay examines the concept of liminality as it relates to cultural expression that is incorporated into legal decision-making in the territory. Part I posits that it is the hybridized, in-between nature of Virgin Islands culture that makes it possible for the territory's local courts to engage in a postcolonial approach to legal development of local law.

Part II of this Essay examines the link between the United States's quest for power through imperialistic maneuvers and the resulting imperialization of the law that is applied in the Virgin Islands.

Part III goes into a brief overview of decisions issued by the Virgin Islands Supreme Court, which this Essay sees as the postcolonial reversal of legal imperialism through the development of territorially sensitive jurisprudence.

Part IV analyzes the Virgin Islands Supreme Court landmark case of *Banks v. International Rental & Leasing Corp.*¹⁴ and its progeny, offering a case review of some Virgin Islands Supreme Court decisions that find their postcolonial legal authority in a jurisprudence developed by Virgin Islanders to establish the rights and privileges of Virgin Islanders in Virgin Islands space.

A brief conclusion follows.

12. See BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CENSUS OF THE VIRGIN ISLANDS OF THE UNITED STATES 14 (1917).

13. *Colony*, BLACK'S LAW DICTIONARY (11th ed. 2019).

14. 55 V.I. 967 (V.I. 2011).

I. LOCATING THE POSTCOLONIAL

To the extent that the law produces identities, the United States's limited application of constitutional rights to the territories perpetuates the existence of a colonial condition, as well as well-developed postcolonial expressions of identity.¹⁵ Colonialism is based on creating a false dichotomy between “us” and the “other” as part of the fundamental basis for its operation.¹⁶ For the colonized to move past the colonial condition—to become postcolonial—the dichotomy must be interrupted.¹⁷ The concept of liminality, which is discussed in greater detail below, is a powerful point to begin the postcolonial interruption of disempowering assumptions about the colonized others of the U.S. territories.

As a threshold introduction to the concept, this Essay borrows the understanding of liminality elucidated by veteran postcolonial theorist, Professor Homi K. Bhabha. Liminality is an empowered interstitial space between fixed identities that opens the possibilities of a cultural hybridity to entertain difference without assuming the imposed superiority of the colonized culture.¹⁸ As applied to the remaining U.S. colonies, liminality enables a cultural heterogeneity and fluidity that adopts and adapts to difference in order to re-narrate the colonial condition as an empowered one.

Within postcolonialism, Bhabha's definition of liminality is at work to dismantle the basis of the colonizer's cultural authority and present a counter-discourse that challenges the influence of that authority. It is this counter-discourse, albeit more overtly political, that is at play in the growing calls for Congress to act with respect to the territories—either grant independence or offer statehood.¹⁹ This call is especially loud in the case of the 3.8 million citizens of Puerto Rico who make up 90 percent of the U.S. colonized population²⁰ and currently exist in a state of political ambiguity of freely associated commonwealth status.²¹ Simply described, that free association commonwealth status means that Puerto Rico is an unincorporated territory under U.S. sovereign control, although it enjoys internal local self-governance under a local constitution and so appears as if it enjoys some autonomy.²²

Puerto Rico's status becomes even more confusing in light of the fact that some of the other unincorporated insular territories possess even more limited autonomy. For example, since 1975, the Northern Mariana Islands

15. Stacy-Ann Elvy, *A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond*, 22 MICH. J. GENDER & L. 89, 98–100 (2015).

16. *See id.* at 99.

17. *See id.* at 99–100.

18. HOMI K. BHABHA, *THE LOCATION OF CULTURE* 4 (1994).

19. *See, e.g.*, Christina D. Ponsa-Kraus, Opinion, *Make Puerto Rico a State Now*, N.Y. TIMES (Nov. 4, 2020), <https://www.nytimes.com/2020/11/04/opinion/puerto-rico-state.html> [<https://perma.cc/TRZ5-G4NS>].

20. *See supra* note 10.

21. *See* 86 C.J.S. *Territories* § 46 (2015).

22. *See id.*; *Orta Rivera v. Congress of the U.S.*, 338 F. Supp. 2d 272, 278 n.3, 279 (D.P.R. 2004).

has been in a political union with the United States pursuant to a covenant, which established the self-governing Commonwealth of the Northern Mariana Islands (CNMI) under the sovereignty of the United States.²³ Accordingly, despite having elected officials, the Northern Mariana Islands' civil, judicial, and military powers are all ultimately vested in the U.S. Department of the Interior.²⁴

Further, pursuant to the Territorial Clause, Congress has determined that Guam is a domestic port subject to the Merchant Marine Act, 1920,²⁵ commonly known as the Jones Act, which states that only ships built in America with American crews can carry passengers or cargoes between the United States and its offshore possessions.²⁶ Conversely, the Virgin Islands is exempt from the Jones Act.²⁷

Such contradictory and mixed signals about autonomy and belonging to the imperial nation-state are a required part of the colonial game.²⁸ The *Insular Cases* were quite clear, in the oft-quoted phrase, that the territories are “foreign in a domestic sense” because being a foreign domestic is part of the imperial agenda that is framed in a discourse of “self” and “other”:

The result of what has been said is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.²⁹

Imperial power is often based on a normalized construction of identity based on shared origins and traditions. For the United States, the fixed construction of identity revolved around Americans being culturally superior and morally evolved in the tradition of their Anglo-Saxon forbearers. As such a nation, the United States was presumptively culturally superior to the “alien races” that inhabited the territories. The epistemological assumption of the United States is based on the ethnocentric notion that the peoples of the territories were not only un-American but also unfit to become so because they were completely foreign, and it might have been impossible to culturally

23. See Joseph E. Horey, *The Right of Self-Government in the Commonwealth of the Northern Mariana Islands*, 4 ASIAN-PAC. L. & POL'Y J. 180, 181 n.2 (2003) (citing Pub. L. No. 94-241, 90 Stat. 263 (1976) (codified at 48 U.S.C. § 1801 note)). The covenant was signed on February 15, 1975, approved by the Northern Mariana Islands legislature on February 20, 1975, and ratified by the people in a plebiscite on June 17, 1975. See *id.* The covenant was approved by the United States through a joint resolution adopted by the U.S. House of Representatives on July 21, 1975, and the U.S. Senate on February 24, 1976, and signed by the president on March 24, 1976. See *id.*

24. 48 U.S.C. § 1668(d).

25. Ch. 250, 41 Stat. 988 (codified as amended in scattered sections of 15 and 46 U.S.C.).

26. See 46 U.S.C. § 55102(b).

27. See *id.* § 55101(a).

28. Cf. Ediberto Román & Theron Simmons, *Membership Denied: Subordination and Subjugation Under United States Expansionism*, 39 SAN DIEGO L. REV. 437, 441–42 (2002).

29. *Downes v. Bidwell*, 182 U.S. 244, 341–42 (1901) (White, J., concurring).

transform them. This ideological construction of the “otherness” of the territorial peoples found expression in *Downes v. Bidwell*³⁰:

If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that, ultimately, our own theories may be carried out, and the blessings of a free government under the Constitution extended to them.³¹

Since the time of Danish occupation, the Virgin Islands has been a hybridized cultural space that is occupied by various persons who navigate between multiple social discourses as a fundamental part of the expression of their personal and collective identities. The Danes were eager to populate the islands, so they admitted settlers of various lingual, cultural, religious, and national persuasions.³² Plagued by a late start in the colonizing business and facing management deficiencies and inadequate resources, Denmark offered tax incentives and land to other European nationals to encourage them to settle in the territory.³³ The Dutch and the English accepted the offer—by 1721, three-fourths of St. John was Dutch, and by 1741, the English outnumbered the Danes five-to-one on St. Croix.³⁴

Given its unique history of cultivated cultural diversity, the Virgin Islands is a place where liminality is validated as the expression of identity for people whose lives are constructed in between the numerous social discourses that often arise from its multicultural confluence of heritages derived from Africa, Asia, Europe, and North and South America.³⁵ Because of its sociocultural heterogeneity, the Virgin Islands’s most salient cultural descriptor is liminality.

The word “liminality” or “liminal” is derived from the Latin word “*limen*,” which means “threshold,”³⁶ or the stage of becoming in which an individual occupies a place that is neither here nor there but somewhere in between worlds, cultures, and identities. The liminality of the Virgin Islands and its people begins with the fact that the territory occupies a geographic identity between the United States and the islands that make up the Caribbean. The people of the Virgin Islands also exhibit a liminal political identity that is shaped by being Caribbean residents who are also American citizens.

30. 182 U.S. 244 (1901).

31. *See id.* at 287.

32. Helen Richards, *Distant Gardens: Moravian Mission and the Culture of Slavery in the Danish West Indies, 1732–1848*, J. MORAVIAN HIST., Spring 2007, at 55, 58–59.

33. *See id.*

34. *Id.*

35. *U.S. Virgin Islands: Demographic Characteristics*, *supra* note 10.

36. *See Limen*, WHITAKER’S WORDS ONLINE, <https://latin-words.com> [<https://perma.cc/2YV4-Y5AS>] (last visited Mar. 6, 2023). The concept of liminality was introduced in the field of anthropology in 1909 by Arnold van Gennep in his analysis of various rites of passage. *See* ARNOLD VAN GENNEP, *THE RITES OF PASSAGE* 21 (Monika B. Vizedom & Gabrielle L. Caffee trans., Univ. of Chi. Press 1960) (1909).

Virgin Islands culture is shaped further by the presence of many other Caribbean groups whose socioeconomic realities—for example, the Cuban embargo,³⁷ the Grenada invasion,³⁸ the devaluing of the Guyanese dollar,³⁹ the International Monetary Fund restructuring in the Dominican Republic and Jamaica⁴⁰—have been impacted by Euro-American power plays. As the cultural crossroads where persons from an already hybrid Caribbean meet, the Virgin Islands has an extremely large population of local people who are foreign-born, non-native English speakers.⁴¹

37. See *Cuba Sanctions*, U.S. DEP'T OF STATE, <https://www.state.gov/cuba-sanctions/> [<https://perma.cc/JY7L-ZMBM>] (last visited Mar. 6, 2023).

38. See Robert C. Tosh, *U.S. Invades Grenada*, S.F. CHRON., Oct. 26, 1983, at 1.

39. See JOHN GAFAR, GUYANA: FROM STATE CONTROL TO FREE MARKETS 124 (2003).

40. See Garth Peron Nicholls, *Selected Debt Restructuring Experiences in the Caribbean*, in CARIBBEAN RENEWAL: TACKLING FISCAL AND DEBT CHALLENGES 205, 209–10 (Charles Amo Yartey & Therese Turner-Jones eds., 2014); INT'L MONETARY FUND, SOVEREIGN DEBT RESTRUCTURING—RECENT DEVELOPMENTS AND IMPLICATIONS FOR THE FUND'S LEGAL AND POLICY FRAMEWORK 22 tbl.1, 23–24 (2013), <https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Sovereign-Debt-Restructuring-Recent-Developments-and-Implications-for-the-Fund-s-Legal-and-PP4772> [<https://perma.cc/4HKQ-EKPB>].

41. Data excerpts for the Virgin Islands provide the following demographic information regarding foreign-born residents and the languages spoken at home in the territory:

<i>Foreign-Born Population</i>	
Total Foreign-Born Population	35,567
Latin American and Caribbean Origin	32,953
Caribbean Origin	32,302
Asian Origin	1,375
Central American and South American Origin	651
Other Place of Origin	423

<i>Language Spoken at Home</i>	
Total Population (5 years and over)	98,905
English Only	70,864
Language Other than English	28,041
Speak English Less than “Very Well”	9,382
Spanish and Spanish Creole	16,994
Speak English Less than “Very Well”	6,419
French and French Creole	8,541
Speak English Less than “Very Well”	2,363
Other Languages	2,506
Speak English Less than “Very Well”	600

2010 Census, U.S. Virgin Islands: *Place of Birth for the Foreign-Born Population*, U.S. CENSUS BUREAU, <https://data.census.gov/table?t=Foreign+Born&g=0400000US78&tid=DECENNIALVI2010.PCT22> [<https://perma.cc/45ND-D438>] (last visited Mar. 6, 2023); U.S. Virgin Islands: *Language Spoken at Home by Ability to Speak English*, *supra* note 10; see also UNIV. OF THE V.I., DP-1-GEOGRAPHY-UNITED STATES VIRGIN 2010 U.S. VIRGIN

In tandem with its cultural facts, Virgin Islands cultural identity—the lived experience of its people—operates across multiple liminal social constructs that are representative of Virgin Islands culture, such as Carnival, the Virgin Islands-Puerto Rico Friendship Day, or even the annual Dominican Republic Independence Day celebrations. These facts of Virgin Islands life help to create a cultural identity of the territory as one that valorizes liminality as a form of resistance to the ideological order of American colonialism. This liminality also forms the postcolonial foundation of the resistance and reshaping that happens in the legal world of the local territorial courts.

To appreciate the Virgin Islands postcolonial legal construct based on liminality, it is useful to ask, what is culture? As Professor Naomi Mezey argues in her insightful article, *Law as Culture*, “[t]he notion of culture is everywhere invoked and virtually nowhere explained.”⁴² This, Professor Mezey goes on to argue, is because “culture can mean so many things: collective identity, nation, race, corporate policy, civilization, arts and letters, lifestyle, mass-produced popular artifacts, ritual.”⁴³ Professor Mezey then posits a definition that dovetails nicely with the liminal nature of Virgin Islands culture as “any set of shared, signifying practices—practices by which meaning is produced, performed, contested, or transformed.”⁴⁴

Applying Professor Mezey’s definition to Virgin Islands legal culture, the postcolonial legal moment is produced, performed, contested, and transformed by the Virgin Islands Supreme Court as its jurisprudence is shaped by the norms, habits, values, meanings, and practices that influence the way in which members of the Virgin Islands melting pot perceive themselves and interact with their American colonizer.⁴⁵ Thus, playing on the postcolonial possibility inherent in the liminality of Virgin Islands cultural expression, it is easy to agree with Professor Mezey that not only is culture a social phenomenon, but it is also a legal one.

Culture as a product of law, and law as a product of culture, are exemplified by the facts that have shaped cultural and legal interactions in the colony of the Virgin Islands. When Christopher Columbus “discovered” the islands on behalf of the Spanish Crown, he engaged in a European law-sanctioned appropriation of land that ushered in a period of colonization and enslavement that was sustained by the rules of law of at least six different European owners prior to the U.S. annexation.⁴⁶ After over a century as a

ISLANDS DEMOGRAPHIC SUBJECT 4 (2013), https://www.uvi.edu/files/documents/Research_and_Public_Service/ECC/SRI/2010%20USVI%20Census%20Demographic%20Prof%20Printable.pdf [<https://perma.cc/5A2Q-YRMQ>].

42. Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 35 (2001).

43. *Id.*

44. *Id.* at 42.

45. *Cf. id.* (noting Professor Raymond Williams’s generally accepted definition of culture as “a particular way of life” that is a process and not a conclusion).

46. Jesse Reiblich & Thomas Ankersen, *Got Guts?: The Iconic Streams of the U.S. Virgin Islands and the Law’s Ephemeral Edge*, 32 J. ENV’T L. & LITIG. 71, 83 (2016) (citing HAROLD W.L. WILLOCKS, *THE UMBILICAL CORD: THE HISTORY OF THE UNITED STATES VIRGIN ISLANDS FROM PRE-COLUMBIAN ERA TO PRESENT* 3 (1995)). At least six flags have flown over all or part of the U.S. Virgin Islands prior to it becoming an organized, unincorporated territory of

U.S. colony, the territory and its people still rely on an American legal structure that is designed to maintain the colonial status quo and deny full legal rights to its inhabitants, as set forth in the *Insular Cases* and other legalized forms of imperialism that operate over the territory.

II. IMPERIAL LEGALIZATIONS

The notion of power that finds its apotheosis in conquest and colonization is at the heart of America's history of the acquisition of its current colonial possessions. The way in which U.S. imperial power operates, however, tends to appear different than the classic European models of colonialism, and so oftentimes it is not readily apparent that it is a colonial game that is afoot. In the U.S. colonial context, colonization takes the form of military aggression and the maintenance of economic violence against its territories.⁴⁷

Military aggression may take the form of outward acts of hostility or be expressed in policy decisions such as the Monroe-Polk Doctrine. The Monroe-Polk Doctrine is summed up in three precepts: (1) that no part of the Americas is to be considered a subject for future colonization by any foreign (read: European) power; (2) that any attempt by a foreign power to take control of territory in the Americas would constitute an act of aggression against the United States; and (3) even if a territory wanted to consent to be under foreign control, the United States would not allow it.⁴⁸

The Monroe-Polk Doctrine discourages attempts to colonize territories in the Western Hemisphere and allows the United States to engage in de facto control of the entire region.⁴⁹ Although it was never stated as such, the annexation of the Virgin Islands occurred precisely because there were European powers who threatened to acquire them in violation of the Monroe-Polk Doctrine.

Although the United States has been interested in the group of islands, cays, islets, and rocks now known as the U.S. Virgin Islands since the Civil War, the territory became a U.S. possession in order to ward off potential acquisition by Germany.⁵⁰ During World War I, there was widespread fear in the United States that Germany might establish bases on the former Danish West Indies and that Denmark would not be in a position to defend the islands.⁵¹ Cognizant of the strategic position of the islands as a gateway to

the United States: English, Spanish, French, the Knights of Malta, the Netherlands, and Denmark. See HAROLD W.L. WILLOCKS, *THE UMBILICAL CORD: THE HISTORY OF THE UNITED STATES VIRGIN ISLANDS FROM PRE-COLUMBIAN ERA TO PRESENT* 3 (1995).

47. See Román & Simmons, *supra* note 28, at 477–80.

48. Whitelaw Reid, *The Monroe Doctrine; the Polk Doctrine; Anarchism*, 13 YALE L.J. 16, 19–22 (1903).

49. *Id.* at 20. Whitelaw Reid noted that the doctrine is neither international law nor American law. *See id.* It consists merely of declarations of policy by presidents and secretaries of state, and these are not uniform. *See id.*

50. Willis Fletcher Johnson, *The Story of the Danish Islands*, 204 N. AM. REV. 381, 389 (1916).

51. *See id.* Denmark and the United States shared common commercial and political interests. As a lightweight player in Caribbean colonialism, Denmark's market for its plantation products was mainly with the United States, and the Virgin Islands served as a

the Panama Canal and the need to protect that avenue of lucrative trade,⁵² the United States acquired the territory on March 31, 1917,⁵³ and promptly declared war on Germany four days later.⁵⁴

Even before the rumors of threatened German invasion in the Western Hemisphere, the United States consolidated its presence as the greatest economic and political superpower of the world through acts of military violence ostensibly designed to protect itself from any threat, real or perceived, to its territorial sovereignty. Couched in the language of protecting democracy, or wrapped in the cloak of humanitarian intervention, the United States has spent decades embroiled in conflicts around the globe.

Such was the case with the Spanish-American War in 1898, the aftermath of which saw Spain cede its remaining colonies in the Pacific and the Caribbean to the United States as insular possessions whose political connections to the United States were uncertain.⁵⁵ In the case of the Spanish-American War, there appeared to be two objectives—one military and the other humanitarian—for the United States to declare war against Spain.⁵⁶ The military reason was that the sinking of the American battleship, the U.S.S. Maine, was perceived to have been caused by a Spanish mine.⁵⁷ The humanitarian reason was that the United States, as a former colony, was sympathetic to the plight of Cuba fighting for independence and therefore had to intervene in the anti-colonial war that was fought on the island's shores.⁵⁸ Neither objective was really true. The real objective was that the United States wanted to announce its entrée into the world of colonial powers, and the war enabled that announcement.

Colonialism is a cultural enterprise whose ideological impetus is to demonstrate might and power by annexing territory,⁵⁹ and thus, every strong nation showcases its might by the conquest of new territories. The United States is no different. The United States's attempts to appear to be defending Cuban freedom were a cover for its colonial ambitions as the world's newest

transshipment point for American ships in the Central and South American trades. *See id.* The exigencies of the Civil War precipitated the United States to try to acquire the Danish West Indies because they were particularly well-suited to the purpose of anchorage and defense. *See id.* In 1861, President Abraham Lincoln declared a blockade of the Confederacy, but Great Britain and France supported the Confederacy from their Caribbean ports and blocked access for Union fleets. *See id.* During this time, Denmark allowed the United States to have access to its coaling and supply stations on St. Thomas and prevented the hoisting of any Confederate flag in a Danish port. *See id.*

52. *See* BUREAU OF THE CENSUS, *supra* note 12, at 14.

53. *See id.* at 11.

54. *See* U.S. Entry into World War I, 1917, OFF. OF THE HISTORIAN, <https://history.state.gov/milestones/1914-1920/wwi> [<https://perma.cc/NU3W-A8C3>] (last visited Mar. 6, 2023).

55. John Norton Moore, *Beyond the Democratic Peace: Solving the War Puzzle*, 44 VA. J. INT'L L. 341, 342 n.2, 363–65 (2004).

56. *See id.* at 364.

57. *See id.*

58. *See id.*

59. *See* Román & Simmons, *supra* note 28, at 444–45.

power that was now a united nation after the Civil War.⁶⁰ There was not any particularly noble or heroic impetus behind the takeover of the Spanish territories—it was merely a raw grab for validation of the United States’s status as a power player in the world.⁶¹

The symbolic nature of the United States divesting Spain of its territories is especially poignant because Spain was the first modern European power to discover and conquer the vast lands of the New World west of Europe. To defeat that pioneering colonial power and stand in its stead was the United States’s way of declaring to the world that it was now a premier colonial force with which to be reckoned.

In light of the symbolic nature of Spain’s defeat, the *Insular Cases* begin to make logical sense. The *Insular Cases* could only clarify the political status of the new property vis-à-vis the U.S. Constitution’s Territorial Clause because the objective was not to make citizens but to have power through expansion of territory under U.S. control.⁶² With respect to its overseas possessions, the United States included its land as American property but excluded its people from full political participation because the goal was never to assimilate but to maintain an aura of global might.⁶³

The *Insular Cases*’ announcement of truncated constitutional rights for the people of the territories is eerily reminiscent of Creole laws created by the European imperialists in their overseas holdings.⁶⁴ Similarly, for the United States, there is one law at home and another in the colonies. Hence, the United States is not unique; it is behaving consistently with how the imperialism game is played—the Constitution does not have to follow the flag.

In annexing the Virgin Islands, however, the United States did not follow the usual pattern of military conquest. Rather, it engaged in an outright purchase of the islands. This colonization-by-purchase was the United States flexing its imperial might through economic means. Whereas military aggression represents a hard-line approach, colonialism by economic means is a softer-line tactic used to achieve imperial goals. The purchase of the Virgin Islands created an economic dependency that has an impact on the political and cultural policies that are expressed in the territory and also has the long-term effect of discouraging any potential for independence.⁶⁵

60. *Cf. id.* at 476 n.232.

61. *Cf. id.* at 448 (“With its victory in the Spanish-American War, the United States entered into the race to become a world colonial power.”).

62. The Territorial Clause provides that “Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.” U.S. CONST. art. IV, § 3, cl. 2.

63. *See Román & Simmons, supra* note 28, at 452–53.

64. *See* Natasha Ishak, *The Complicated Legacy of Simón Bolívar, the ‘Liberator’ of South America*, ALL THAT’S INTERESTING, <https://allthatsinteresting.com/simon-bolivar> [<https://perma.cc/4RV4-VCE5>] (Sept. 10, 2019) (“By the late 1770s, Spain’s Bourbon regime had enacted several anti-Creole laws, robbing the Bolívar family of certain privileges only afforded to Spaniards born in Europe.”).

65. *See Román & Simmons, supra* note 28, at 479–80.

The purchase of the Virgin Islands resulted in relative economic prosperity for the territory. As an American colony, the U.S. Virgin Islands enjoys a higher American standard of living relative to many of its Caribbean neighbors.⁶⁶ Through continued economic incentives, the United States ensures that the territory will never pursue independence because the economic benefits create a dependency that binds colony to colonizer.⁶⁷

What makes the economic form of colonization problematic is the assumption that whole countries can be sold in the first place. Even more problematic is the fact that the sale and purchase of the territory was accomplished without consulting the local population actually living in the then Danish West Indies.⁶⁸ Before the annexation of the islands, Denmark insisted on a plebiscite *in Denmark only*, and no official vote was held in the islands.⁶⁹

This failure to consult the local population is a standard feature of colonial relations within the Virgin Islands.⁷⁰ Akin to political ventriloquism, the political wishes of the local population are often overlooked, and policy makers simply rely on Congress's pronouncements, since the U.S. Constitution grants it authority to speak on behalf of U.S. territories in areas such as trade, taxation, and international affairs.⁷¹

Assistant U.S. Attorney for the District of the Virgin Islands Joycelyn Hewlett has asserted that on the legal front, the United States was not concerned with the administration of justice in the Virgin Islands.⁷² As Hewlett observes, to avoid disturbing the orderly systems already established by the Danes, the first set of laws governing judicial proceedings in the Virgin Islands kept the existing laws intact.⁷³ One of the first statutes Congress enacted after the purchase 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

66. See *GDP per Capita (Current US\$)—Latin America & Caribbean*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?locations=ZJ&most_recent_value_desc=true [https://perma.cc/LR88-UY26] (last visited Mar. 6, 2023).

67. See *id.*

68. See *A Historic Referendum*, DANISH NAT'L ARCHIVES, <https://www.virgin-islands-history.org/en/history/sale-of-the-danish-west-indian-islands-to-the-usa/a-historic-referendum/> [https://perma.cc/X97Z-BJN2] (last visited Mar. 6, 2023).

69. See *id.*; see also Francesco Biagi, *Plebiscite: An Old but Still Fashionable Instrument*, 2017 U. ILL. L. REV. 713, 737 (2017).

70. See Leila Amos Pendleton, *Our New Possessions—the Danish West Indies*, 2 J. NEGRO HIST. 267, 269–84 (1917).

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

72. Joycelyn Hewlett, *The Virgin Islands: Grand Jury Denied*, 35 HOW. L.J. 263, 266 (1992).

73. See *id.*

prescribe, any of said laws may be repealed, altered, or amended by the colonial council having jurisdiction.⁷⁴

The laws in effect in 1917 were Danish laws, which included common and statutory laws of Denmark, plus laws as developed by U.S. colonial councils.⁷⁵ For the laws prior to 1917, Professors Jesse Reiblich and Thomas T. Ankersen have set out a comprehensive recounting of Virgin Islands legal history, so this Essay will not rehash that history here.⁷⁶ Notable points, however, are that in the early days of the colony, the Danish West India Company administered justice to all within the company's service and within its immediate jurisdiction.⁷⁷ Danish law applied during this period, but local officials routinely administered justice according to custom and necessity.⁷⁸ Appeals of the company's decisions were lodged with the Danish Supreme Court in Copenhagen.⁷⁹

Though not often noted in most legal scholarship, one of the most bewildering facts of the legal history of the Virgin Islands is that under Danish occupancy, two sets of legal rules were in play—the rules for the white settlers and the rules for the African people who were enslaved.⁸⁰ When Denmark consolidated its ownership over all three islands—St. Thomas, St. John, and St. Croix—in 1733, Danish law, as noted by Reiblich and Ankersen, continued to be administered for the Danes and other white Europeans.⁸¹ For the African enslaved people, however, Governor Philip Gardelin issued the brutally oppressive rules of punishment and discipline set out in the slave code in 1733.⁸² The slave code was the law in effect for enslaved persons in the Virgin Islands who were of African descent for over one hundred years before the abolition of slavery in 1848.⁸³

74. Joseph T. Gasper II, *Too Big to Fail: Banks and the Reception of the Common Law in the U.S. Virgin Islands*, 46 STETSON L. REV. 295, 314 (2017) (alterations in original) (quoting the Virgin Islands Acquisition Act, ch. 171, § 2, 39 Stat. 1132, 1132–33 (1917) (codified as amended in scattered sections of 48 U.S.C.)).

75. *See id.* at 314–18.

76. *See generally* Reiblich & Ankersen, *supra* note 46.

77. *See id.* at 83–84.

78. *Id.*

79. *Id.*

80. *See id.*

81. *See id.*

82. *See* Pendleton, *supra* note 70, at 273.

83. In pertinent part, the 1733 slave code provided:

1. The leader of runaway slaves shall be pinched three times with red-hot iron, and then hung.
2. Each other runaway slave shall lose one leg, or if the owner pardon him, shall lose one ear, and receive one hundred and fifty stripes.
3. Any slave being aware of the intention of others to run away, and not giving information, shall be burned in the forehead and receive one hundred stripes.
4. Those who inform of plots to run away shall receive \$10 for each slave engaged therein.
5. A slave who runs away for eight days, shall have one hundred and fifty stripes, twelve weeks shall lose a leg, and six months shall forfeit life, unless the owner pardon him with the loss of one leg.
6. Slaves who steal to the value of four rix-dollars, shall be pinched and hung; less than four rix-dollars, to be branded and receive one hundred and fifty stripes.

The legal system in the Virgin Islands fared better under U.S. ownership, but the idea of there being two laws persisted in the uneven extension of full constitutionally guaranteed legal and civil rights to Virgin Islanders. Lacking a constitutional history of its own, there was no automatic extension of the Bill of Rights to the territory, and, as the *Insular Cases* teach, the extension of any constitutional rights often required federal courts to decipher what Congress may or may not have intended with respect to the territory.⁸⁴

Moreover, as a former colony of Denmark, which followed a civil-law tradition, the Virgin Islands lacked an established body of common-law principles. By 1921, two municipal codes were compiled—one for St. Thomas and St. John, and the other for St. Croix.⁸⁵ Notably, the 1921 codes were themselves a compilation of laws from multiple jurisdictions, including the former Danish West Indies.⁸⁶ In application, then, the hybrid sources of law meant that cases in an American jurisdiction were being decided based on the common law of England as adopted and understood in the United States, Danish civil and common law, the laws of the Lesser Antilles, British parliamentary law, and nascent American common law.⁸⁷

In 1936, Congress passed the Organic Act of the Virgin Islands of the United States⁸⁸ (the foundation for limited self-government for the Virgin Islands) and provided for a legislative assembly in the Virgin Islands that could enact legislation applicable to the territory.⁸⁹ The act was revised in 1954, and the legislature enacted the U.S. Virgin Islands Code.⁹⁰ Title I, chapter 1, section 4 of the newly enacted U.S. Virgin Islands Code provided:

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,

7. Slaves who shall receive stolen goods, as such, or protect runaways, shall be branded, and receive one hundred and fifty stripes.

8. A slave who lifts his hand to strike a white person or threaten him with violence, shall be pinched and hung, should the white person demand it, if not to lose his right hand.

9. One white person shall be sufficient witness against a slave, and if a slave be suspected of a crime, he can be tried by torture.

10. A slave meeting a white person, shall step aside, and wait until he passes; if not, he may be flogged.

11. No slave shall be permitted to come to town with clubs or knives, nor fight with each other, under penalty of fifty stripes.

12. Witchcraft shall be punished with flogging.

13. A slave who shall attempt to poison his master, shall be pinched three times with red-hot iron, and then broken on a wheel.

14. A free negro who shall harbor a slave or thief shall lose his liberty, or be banished.

Proclamation of Sept. 5, 1733, reprinted in JOHN P. KNOX, A HISTORICAL ACCOUNT OF ST. THOMAS, W.I. 69–70 (New York, Charles Scribner 1852).

84. See Román & Simmons, *supra* note 28, at 457–65.

85. See Gasper, *supra* note 74, at 314–15.

86. See *id.*

87. See *id.* at 318–25.

88. Ch. 699, 49 Stat. 1807 (1936) (codified as amended in scattered sections of 48 U.S.C.).

89. Gasper, *supra* note 74, at 325.

90. *Id.* at 325–26.

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.⁹¹

Section 4, along with numerous other federal precedents, would become the law of the land for at least another fifty years.⁹²

III. REVERSING IMPERIAL LEGALIZATIONS

For years until the formation of the Virgin Islands Supreme Court, the restatement rules were adopted as the common law of the Virgin Islands.⁹³ This adoption allowed for the wholesale importation of American common law as articulated—not by Virgin Islands courts or by the Virgin Islands people acting through their elected leaders—but by a group of people from all areas of legal scholarship with no reason to be committed to the development of indigenous Virgin Islands law.⁹⁴

At first blush, it seems reasonable to rely on the restatements because they ostensibly reflected the social and practical need of courts and practitioners to have a baseline of common, established rules of law that appeared to be simple announcements of the normative legal values espoused by a majority of American jurisdictions.⁹⁵ Simply put, given the mass appeal of the restatements in the American legal community, their imposition on the Virgin Islands was practical and easy to implement. But the colonized must always be careful to document and enshrine the legal principles that they think should characterize their social and cultural existence in their colonized space.

Despite the egalitarian promises of American legal principles, such as individual liberty and democracy, those promises were not fully extended to Virgin Islanders after the 1917 annexation—indeed, as to the question of whether Virgin Islanders were Americans or not, the United States waited ten years before answering and granting citizenship to Virgin Islanders in 1927.⁹⁶

Mercifully, the unquestioned legal absorption of the restatements and all prior hybridized forms of laws based on Danish and mainland American law came to a halt when the Virgin Islands Supreme Court threw out the proverbial baby with the bathwater: it issued an opinion that abandoned all

91. V.I. CODE ANN. tit. 1, § 1-4 (2022); *see also id.* tit. 4, § 2-21.

92. *See infra* note 97 and accompanying text (discussing eventual rejection of use of restatements).

93. *See infra* note 97 and accompanying text (same).

94. *See Manboth v. Hess Oil V.I. Corp. (In re Kevin Manboth Asbestos Litig. Series)*, 47 V.I. 215, 229 (Super. Ct. 2005) (bemoaning the apparent delegation of the Legislature of the Virgin Islands's lawmaking authority and responsibility to a nongovernmental entity, the American Law Institute, in the adoption of title I, chapter 1, section 4 of the U.S. Virgin Islands Code).

95. *See* Kristen David Adams, *The Folly of Uniformity?: Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 437–38 (2004) (“Several scholars have stated that the persuasive authority of the Restatements depends on their being a true and accurate representation of the common law of the United States.”).

96. *See* Act of Feb. 25, 1927, ch. 192, 44 Stat. 1234.

prior precedents in favor of a legal standard that favors local laws attuned to local cultural considerations.⁹⁷

A product of legislative acts passed by the U.S. Congress and the Legislature of the Virgin Islands, the Virgin Islands Supreme Court came into formal existence when Chief Justice Rhys S. Hodge and Associate Justices Maria M. Cabret and Ive Arlington Swan were unanimously confirmed by the Legislature of the Virgin Islands on October 27, 2006.⁹⁸ They were sworn into office on December 18, 2006.⁹⁹ Within five years after the Virgin Islands Supreme Court started deciding cases, direct appellate review to the U.S. Supreme Court was granted.¹⁰⁰

Prior to 2006, the federal U.S. District Court of the Virgin Islands functioned as an intermediate appellate court, the decisions of which could be appealed as of right to the U.S. Court of Appeals for the Third Circuit, from which an appeal by petition of certiorari could be heard before the U.S. Supreme Court.¹⁰¹ What this meant in practical terms was that there was a heavy federalization of Virgin Islands jurisprudence, with judges and practitioners deferring to federal interpretations of federal statutes and applying them to their Virgin Islands equivalents.

But the mechanistic application of the restatements and federal precedents had to yield to Virgin Islands Supreme Court legal decisions based on a postcolonial jurisprudence that was sensitive to the multiple hybrid possibilities occasioned in a place where liminality is the defining feature of the culture. The seminal case from the Virgin Islands Supreme Court that embodies the concept of legal liminality is *Banks v. International Rental & Leasing Corp.*¹⁰² *Banks* can be understood as the Virgin Islands Supreme Court applying a hybrid postcolonializing legal analysis to destabilize the authority of a failed American constitutionalism.

When analyzed against the backdrop of automatic imposition of the restatements and federal law, the *Banks* decision takes on greater meaning as a dissident, enunciative moment in which the Virgin Islands Supreme Court disrupted wholesale application of U.S. law in Virgin Islands cases. The *Banks* decision is the Virgin Islands's equivalent of the U.S. Supreme Court's *Marbury v. Madison*,¹⁰³ in which Chief Justice John Marshall famously declared: "It is emphatically the province and duty of the Judicial Department to say what the law is."¹⁰⁴

97. See Gasper, *supra* note 74, at 362 ("By throwing the restatement baby out with the bathwater of the common law, it is unclear what remains now. Even the core of the common law is up for grabs now." (citations omitted)).

98. See *History of the V.I. Judiciary*, JUD. BRANCH OF THE U.S. V.I., https://www.vicourts.org/about_us/overview_of_judiciary_of_the_virgin_islands/history_of_the_v_i_judiciary [https://perma.cc/4WBK-UN8K] (last visited Mar. 6, 2023).

99. *Id.*

100. *See id.*

101. *See id.*

102. 55 V.I. 967, 972 (V.I. 2011).

103. 5 U.S. (1 Cranch) 137 (1803).

104. *Id.* at 177.

Through *Banks*, it is now emphatically the duty of the Virgin Islands Supreme Court to say what Virgin Islands law is. The Virgin Islands Supreme Court's arrogation of interpretive power, much like the Marshall Court's, creates a teleological narrative in which it is now empowered to consider and reconstruct the law based on the social and legal values that inform Virgin Islands culture. For the Marshall Court, the social and legal values of the American people were embodied in a stable and enduring constitution that forms the fundamental and paramount law of the nation.¹⁰⁵ For the Virgin Islands Supreme Court, the social and legal values are embodied in legal enunciations that form "the soundest rule for the Virgin Islands,"¹⁰⁶ a doctrine discussed further below.

Banks came to the Virgin Islands Supreme Court by way of the certification process from the Third Circuit.¹⁰⁷ As set forth in the Virgin Islands Rules of Appellate Procedure,

the Supreme Court of the Virgin Islands may answer questions of law certified to it . . . if there is involved in any proceeding before the certifying court a question of law which may be determinative of the cause then pending in the certifying court and concerning which it appears there is no controlling precedent in the decisions of the Supreme Court.¹⁰⁸

Although answering a certified question is not an adjudicative function, the Virgin Islands Supreme Court has the inherent power to answer certified questions as the highest local court in the Virgin Islands.¹⁰⁹

The certified question, to which the court responded in the affirmative, was as follows: whether, under Virgin Islands law—including title I, chapter 1, section 4 of the U.S. Virgin Islands Code—a plaintiff may pursue a strict liability claim against a lessor for injuries resulting from a defective product.¹¹⁰ In light of the history of the development of the court system in the Virgin Islands, the mere fact of certification from the Third Circuit is, in and of itself, a legally liminal signifying moment. The Third Circuit's certification is an open recognition of the Virgin Islands Supreme Court as the final authority on Virgin Islands law. Despite being the highest appellate court with the ability to make binding legal pronouncements in federal and local courts for ninety years since the acquisition of the Virgin Islands, the Third Circuit's certification explicitly acknowledges and yields to the Virgin Islands Supreme Court as a new and empowered court of last resort for the territory.

In a larger context, the recognition of the Virgin Islands Supreme Court's authority is also the recognition of the expanding cultural autonomy of the Virgin Islands as a sovereign space with its own culture and traditions that should be reflected in its legal development. Thus, the certification of the

105. *See id.*

106. *See* Gov't of the V.I. v. Connor, 60 V.I. 597, 599 (V.I. 2014).

107. *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 972 (V.I. 2011).

108. V.I.R. APP. P. 38(a).

109. *See id.*; V.I. CODE ANN. tit. 4, § 2-32(b) (2022).

110. *Banks v. Int'l Rental & Leasing Corp.*, 680 F.3d 296, 299 (3d Cir. 2012).

question demonstrates a level of confidence in the development and maturity of the Virgin Islands Supreme Court and its jurisprudence with respect to local law and public policy.

The “soundest rule” doctrine did not originate in *Banks* but came out of the Virgin Islands Supreme Court’s equivocation about how to put *Banks* into practice.¹¹¹ The doctrine emerged in another case, *Government of the Virgin Islands v. Connor*,¹¹² in which the Virgin Islands Supreme Court explicitly noted the repeal of title I, chapter 1, section 4 of the U.S. Virgin Islands Code and chastised the Superior Court of the Virgin Islands for “automatically and mechanistically applying the Restatements of the Law,” before it remanded the case for further proceedings.¹¹³ As part of the remand in *Connor*, the superior court was instructed to conduct a three-part test when considering a question not foreclosed by prior precedent from the Virgin Islands Supreme Court.¹¹⁴

The first step in the *Banks* 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.”¹¹⁵

The second step in the *Banks* analysis—“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 ways that other states and territories have resolved a particular question.”¹¹⁶

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.”¹¹⁷

The *Banks* legal continuum represents the consolidation of legal power in the Virgin Islands Supreme Court as the highest local court in the Virgin Islands with the inherent and statutory authority to shape the common law of the territory.¹¹⁸ Through a “commendably thorough and very well reasoned opinion,”¹¹⁹ the Virgin Islands Supreme Court retraced the development of the territory’s law and found that the lack of a fully developed local judiciary—established by the local legislature and staffed by judges selected by the locally elected governor—meant the incursion of foreign legal

111. See Gasper, *supra* note 74, at 352 (tracing the court’s vacillation in determining the applicability of title I, chapter 1, section 4 of the U.S. Virgin Islands Code to cases in local courts).

112. 60 V.I. 597 (V.I. 2014).

113. *Id.* at 599.

114. See *id.* at 603.

115. *Id.*

116. *Id.*

117. *Id.*

118. See *Simon v. Joseph*, 59 V.I. 611, 622 (V.I. 2013).

119. *Banks v. Int’l Rental & Leasing Corp.*, 680 F.3d 296, 299 (3d Cir. 2012).

decisions on an indigenous Virgin Islands jurisprudence that constituted binding precedent for years.¹²⁰

The *Banks* case highlights the postcolonial legal narratives of self-empowerment in which the Virgin Islands Supreme Court is engaged as part of its mission to develop Virgin Islands law. In reviewing these cases, this Essay posits that the Virgin Islands Supreme Court's jurisprudence provides examples of the way that culture and law are in a recursive relationship in which the people of the territory get to define themselves and the values that they espouse. This recursive relationship is in line with the cultural liminality in the Caribbean, which is pronounced in the Virgin Islands in particular.¹²¹ The overarching argument advanced in this Essay is that the Virgin Islands Supreme Court plays on this liminality in constructing and expanding its role as the final legal authority in the territory—a postcolonial assertion of its judicial autonomy.

The significance of a postcolonial analysis of Virgin Islands Supreme Court cases lies in the possibility of the undoing of the epistemic violence levied by America because the colonized can construct new, empowered legal meaning around the values and ideals that inform Virgin Islands life. Although there is colonial ideology constantly being applied to the Virgin Islands through its connection to the United States, that ideology is under constant struggle to be received and accepted as authoritative because of the active postcolonial validation of the unique culture that prevails in the territory.

IV. TOWARD A POSTCOLONIAL JURISPRUDENCE IN THE VIRGIN ISLANDS

A. *Mills-Williams v. Mapp: Notice Pleading Is Sufficient*

The Virgin Islands Supreme Court's readiness to appropriate legal power in service of the Virgin Islands postcolonial social and cultural compact is evident in areas that ensure individual rights, access to justice, and full opportunity to be heard before the courts. One notable example is the fact that the Virgin Islands Supreme Court has reinstated the notice pleading rule that was partially abrogated by application of federal law in territorial cases.¹²² In *Mills-Williams v. Mapp*,¹²³ the Virgin Islands Supreme Court exercised plenary review to interpret the application of newly minted civil procedure rules that were issued by the U.S. Supreme Court itself.¹²⁴

The Virgin Islands Supreme Court interpreted the local civil procedure rules to announce and affirm that the Virgin Islands is a notice pleading jurisdiction.¹²⁵ In complete departure from the plausibility standard set forth

120. See *Banks v. Int'l Rental & Leasing Corp.*, 55 V.I. 967, 978 (V.I. 2011).

121. See *supra* note 41.

122. *Mills-Williams v. Mapp*, 67 V.I. 574, 585–86 (V.I. 2017).

123. 67 V.I. 574 (V.I. 2017).

124. See *id.* at 583–84.

125. See *id.* at 585 (interpreting V.I.R. Civ. P. 8(a)(2)).

in *Bell Atlantic Corp. v. Twombly*,¹²⁶ the Virgin Islands Supreme Court held that once a plaintiff meets the notice pleading standards outlined in Virgin Islands Civil Procedures Rule 8(a), this is sufficient to overcome a motion to dismiss.¹²⁷ Apart from the restoration of the notice pleading standard, *Mills-Williams* also reconfirmed that the Revised Organic Act of the Virgin Islands¹²⁸—which vests the Virgin Islands judiciary with the inherent authority to promulgate court rules¹²⁹—is the operative constitution for the Virgin Islands.

This focus on court rules is noteworthy because the superior court dismissed the plaintiff’s complaint based on the analysis of Federal Rule of Civil Procedure 8 in *Twombly*, which was rejected by the Virgin Islands Supreme Court under its inherent authority to create procedural rules for the local courts of the Virgin Islands.¹³⁰ With this holding in *Mills-Williams*, the Virgin Islands Supreme Court ensured that Virgin Islands litigants have access to courts and the chance to advance their claims beyond the pleading stage, since a complaint that alleges facts consistent with a recognized cause of action will survive a motion to dismiss.

B. *Davis v. UHP Projects, Inc.: Greater Plaintiffs’ Rights*

Not only has the Virgin Islands Supreme Court evinced a willingness to allow cases to proceed beyond the pleading stage, but the court is also solicitous of plaintiffs being able to have court access by being able to amend freely even long after the time to do so has lapsed. In *Davis v. UHP Projects, Inc.*,¹³¹ the Virgin Islands Supreme Court found that the lower court erred when it denied a plaintiff’s motion to amend because while the amendment would not be futile, it would nevertheless cause undue delay and prejudice to the defendant.¹³²

Applying an abuse of discretion standard, the Virgin Islands Supreme Court found that the lower court mischaracterized prejudice to the opposing party or the trial court as the principal factor under the leave to amend standard.¹³³ The Virgin Islands Supreme Court concluded that the “passage of time, without more, does not require that a motion to amend a complaint be denied.”¹³⁴

In keeping with its mission to develop indigenous Virgin Islands law, the Virgin Islands Supreme Court has decided cases that make it clear that it prefers litigants to be treated fairly and have their cases be given full consideration. For example, the court has held that statutes that are silent as

126. 550 U.S. 544 (2007).

127. See *Mills-Williams*, 67 V.I. at 585–86.

128. Ch. 558, 68 Stat. 497 (1954) (codified as amended in scattered sections of 26 and 48 U.S.C.).

129. See *Mills-Williams*, 67 V.I. at 584.

130. See *id.* at 585–86.

131. 74 V.I. 525 (V.I. 2021).

132. *Id.* at 528.

133. *Id.* at 537.

134. *Id.* (quoting *Toussaint v. Stewart*, 67 V.I. 931, 949–50 (V.I. 2017)).

to who has standing to bring suit should be broadly interpreted to confer standing.¹³⁵

The Virgin Islands Supreme Court has also found that *pro se* litigants' pleadings are interpreted with considerable lenience because they lack formal legal training, and it should be the policy of the local courts "to give *pro se* litigants greater leeway in dealing with matters of procedure and pleading."¹³⁶ Further, the failure to provide notice and an opportunity to be heard is crucial, and a party should be ordered to show cause before a case may be dismissed.¹³⁷ Finally, when a statute is enacted for the benefit of defendants, as well as the administrative and institutional interests of the courts of the Virgin Islands, it is not easily waived.¹³⁸

C. Machado v. Yacht Haven Grande: *Plaintiff's Rule*

Much like the notice pleading requirement, the Virgin Islands Supreme Court also credits the factual allegations of a nonmoving party in dispositive motions, thereby putting the burden on the trier of fact to resolve the case, rather than allowing a judge to enter summary judgment.¹³⁹ Part of the Virgin Islands Supreme Court's willingness to give litigants their day in court may stem from the fact that most plaintiffs tend to be local Virgin Islanders who have suffered either personal or economic injuries at the hands of off-island defendants with deep pockets whose strongest connections to the territory are their bank accounts and tax benefits.

This type of plaintiff-defendant scenario was at play in one of the Virgin Islands Supreme Court's seminal cases on tort liability for landowners, *Machado v. Yacht Haven U.S.V.I., LLC*.¹⁴⁰ The Virgin Islands Supreme Court held that the traditional distinctions between the status of entrants on land was abrogated in the Virgin Islands and instead replaced by the "foreseeability of harm" standard generally applicable to negligence cases.¹⁴¹ The court further abolished the American common-law distinctions among invitees, licensees, and trespassers to find that when there is evidence that a plaintiff's injury was foreseeable to the land possessor, yet the possessor did

135. See *Hansen v. O'Reilly*, 62 V.I. 494, 525 n.35 (V.I. 2015); *Mapp v. Fawkes*, 61 V.I. 521, 534 n.11 (V.I. 2014); *Bryan v. Fawkes*, 61 V.I. 201, 222 n.12 (V.I. 2014); *V.I. Narcotics Strike Force v. Pub. Emps. Rels. Bd.*, 60 V.I. 204, 212 (V.I. 2013).

136. *Marsh-Monsanto v. Clarenbach*, 66 V.I. 366, 376 (2017) (quoting *Appleton v. Harrigan*, 61 V.I. 262, 267 (V.I. 2014)).

137. *Clarke v. Lopez*, 73 V.I. 512, 516 (V.I. 2020); *In re Reynolds*, 60 V.I. 330, 336 (V.I. 2013) ("[A] party must be afforded notice and an opportunity to amend . . . or otherwise respond before trial court may *sua sponte* dismiss a complaint that fails to state a cause of action.").

138. See, e.g., *Montgomery v. Virgin Grand Villas St. John Owners' Ass'n*, 71 V.I. 1119, 1136 (V.I. 2019) (interpreting title 28, chapter 23, section 531(b) of the U.S. Virgin Islands Code providing for pre-foreclosure mediation in the Virgin Islands).

139. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379 (V.I. 2014).

140. 61 V.I. 373 (V.I. 2014).

141. *Id.* at 386.

not take reasonable action to prevent that injury, the landowner is liable.¹⁴² *Machado* was reversed and remanded in favor of the plaintiff.¹⁴³

D. *Coastal Air v. Lockhart: Federal Law Is Inapplicable in Local Cases*

Another case in which the Virgin Islands Supreme Court took local concerns into consideration is *Coastal Air Transport v. Lockhart*.¹⁴⁴ In *Coastal Air*, the plaintiff passenger was involuntarily denied boarding (“bumped”) and demanded compensation from the defendant, Coastal Air.¹⁴⁵ The airline argued that the passenger was not entitled to compensation, highlighting portions of a federal regulation providing that a passenger who is involuntarily denied boarding from an oversold flight is not eligible for compensation if the aircraft on which the passenger has a reservation has a capacity of sixty or fewer seats.¹⁴⁶

The court chided the defendant for partially quoting the regulation to present a misleading picture of the plaintiff’s eligibility for compensation.¹⁴⁷ After citing the full text of the regulation, the court found that the airline could only deny boarding “*due to weight/balance restrictions when required by operational or safety reasons.*”¹⁴⁸ The court reasoned that the plaintiff was bumped because the flight on which he was booked was full and not because of weight and balance safety restrictions.¹⁴⁹ Therefore, the plaintiff was entitled to compensation.

Coastal Air is remarkable because after finding that the plaintiff should be compensated, the court further analyzed the federal regulations to find that they were not applicable because the aircraft had fewer than thirty seats, and therefore, the matter was just a simple contract dispute.¹⁵⁰ This finding has significance because so much of interisland travel among the islands of St. Thomas, St. Croix, and Puerto Rico happens on aircrafts that carry well under thirty people.¹⁵¹ If federal regulations about passenger compensation do not apply, then passenger disputes with airlines can be resolved in a local court as a straight breach of contract for damages, without the need to invoke

142. *Id.*

143. This holding also makes sense considering anecdotal evidence that the Virgin Islands is a jurisdiction that is sensitive to plaintiffs’ injuries and that the Virgin Islands plaintiff’s bar tends to sustain high verdicts. *See Verdicts and Settlements*, ANDREW C. SIMPSON TRIALS & APPEALS, <https://www.coralbrief.com/case-results/> [<https://perma.cc/X3AA-EH3W>] (last visited Mar. 6, 2023) (setting forth table of verdicts obtained in the Virgin Islands).

144. 73 V.I. 672 (V.I. 2020).

145. *See id.* at 673–74.

146. *Id.* at 674–75 (citing 14 C.F.R. § 250.6 (2022)).

147. *See id.* at 675.

148. *Id.* (quoting 14 C.F.R. § 250.6 (2022)).

149. *See id.*

150. *See id.* at 677.

151. Robert Curley, *U.S. Virgin Islands Ferries and Inter-Island Flights*, TRIPSAVVY (June 26, 2019), <https://www.tripsavvy.com/us-virgin-islands-ferries-flights-1488777> [<https://perma.cc/H7S5-LYQG>]; Jessica Puckett, *The Safest Airlines for Island Hopping in the Caribbean*, CONDÉ NAST TRAVELER (Feb. 3, 2020), <https://www.cntraveler.com/story/the-safest-airlines-for-island-hopping-in-the-caribbean> [<https://perma.cc/D299-9HWG>].

federal regulations that have the effect of denying compensation to local interisland travelers.

The Virgin Islands Supreme Court has also scrutinized the application of federal law in the area of labor rights and collective bargaining units. The prevailing law of the territory is that federal laws such as the National Labor Relations Act¹⁵² (NLRA) and the Federal Arbitration Act¹⁵³ (FAA) take precedence in the legal analysis of documents in these areas. The court has tried to curb that broad applicability and successfully did so in *Government of the Virgin Islands, Department of Education v. St. Thomas/St. John Education Administrators' Ass'n, Local 101 ex rel. Forde*.¹⁵⁴

In *Forde*, the Virgin Islands Supreme Court found that Third Circuit precedent interpreting the FAA represents only persuasive, and not binding, authority on the Virgin Islands Supreme Court.¹⁵⁵ Looking to U.S. Supreme Court precedent, the Virgin Islands Supreme Court engaged in an analysis of the applicability of the FAA to collective bargaining agreements in the Virgin Islands.¹⁵⁶ The court reasoned that section 10 of the FAA “is among those procedural provisions that do not apply to state and territorial courts even if an action otherwise comes within the purview of the FAA.”¹⁵⁷ This is so because the U.S. Supreme Court left open the possibility of judicial review and enforcement of arbitration awards under local law.¹⁵⁸ As such, the superior court should look to local law when determining whether to vacate awards.¹⁵⁹

E. *Rennie v. Hess Oil: Local Law Triumphs!*

The final case to be analyzed squarely addresses all that has come before in this Essay as it relates to the Virgin Islands Supreme Court’s support for the Virgin Islands as a postcolonial legal space where citizens can find empowerment through a court that is mindful of the territory’s cultural concerns. In *Rennie v. Hess Oil Virgin Islands Corp.*,¹⁶⁰ the plaintiff filed a complaint in the superior court against a large oil refinery, asserting causes of action under the federal Civil Rights Act of 1964¹⁶¹ (CRA), the Virgin Islands Civil Rights Act¹⁶² (VICRA)—which the Legislature of the Virgin Islands passed in 1957, years before the federal statute—and Virgin Islands common law.¹⁶³

152. 29 U.S.C. §§ 151–169.

153. 9 U.S.C. §§ 1–15.

154. 67 V.I. 623, 629–33 (V.I. 2017).

155. *See id.*

156. *See id.* at 630–31.

157. *See id.* at 631.

158. *See id.*

159. *See id.*

160. 62 V.I. 529 (V.I. 2015).

161. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 42, and 52 U.S.C.).

162. V.I. CODE ANN. tit. 10, §§ 1-1 to 9-161 (2022).

163. *See Rennie*, 62 V.I. at 533.

In his complaint, Rennie alleged that he worked for the refinery for more than sixteen years and even “served as a ‘Shift Foreman,’ and . . . while he—as a black Virgin Islander—was required to take tests to maintain his employment, [non-Black] employees hired from the U.S. mainland were not required to do so.”¹⁶⁴ The U.S. mainland employees were paid higher wages and were frequently promoted despite having less seniority and experience.¹⁶⁵ The ultimate insult alleged by Rennie was that the refinery demoted him for racially motivated reasons, and otherwise continued to discriminate against him.¹⁶⁶

The defendant, a huge oil refinery on the island of St. Croix with a beleaguered environmental and civil rights history, filed an answer and removed the matter to the federal district court.¹⁶⁷ The district court dismissed the CRA claim as failing to state a claim because there was no private cause of action,¹⁶⁸ and, on remand, the superior court dismissed the other causes of action, stating that they fell outside the statute of limitations.¹⁶⁹

The Virgin Islands Supreme Court reversed, holding that the statute of limitations for civil rights violations under Virgin Islands law was longer than under common law.¹⁷⁰ Moreover, the court held that, contrary to the district court’s finding, the plaintiff also had a private cause of action under the VICRA.¹⁷¹ In response to the district court holding, the Virgin Islands Supreme Court derisively wrote:

*We hold that the pre-2011 District Court cases were wrongly decided, and that section 451 always authorized a private cause of action Silence or ambiguity [can]not be a reason to deny standing to enforce a statute by an individual who the statute was clearly enacted to protect.*¹⁷²

In a nod to culturally sensitive local statutes, the Virgin Islands Supreme Court found that the Legislature of the Virgin Islands codified the Virgin Islands employment discrimination statute for a different purpose from that motivating Congress when it enacted Title VII¹⁷³ of the federal CRA, and therefore, federal precedent is irrelevant with respect to interpreting local employment law.¹⁷⁴

The court further established that federal case law is irrelevant in determining whether a plaintiff properly pleads a claim for wrongful discharge.¹⁷⁵ Citing to the legislative debates on the Virgin Islands wrongful

164. *Id.*

165. *See id.*

166. *See id.* This factual scenario is all too commonly alleged in the labor relations history of Virgin Islands cases involving mainly off-island employers.

167. *See id.* at 534.

168. *See id.* at 549.

169. *See id.* at 535.

170. *Id.* at 540.

171. *See id.* at 548.

172. *Id.* (emphasis added).

173. 42 U.S.C. §§ 2000e to 2000e-17.

174. *See Rennie*, 62 V.I. at 548.

175. *See id.* at 540.

discharge statute, the Virgin Islands Supreme Court concluded that the bill sponsor was concerned that workers—particularly those Black Virgin Islanders in the tourism industry—“might be discharged for not having the right hairstyle, or for returning to the place of business to socialize with customers after work.”¹⁷⁶ Another supporter of the bill also indicated that the purpose of the statute “was to provide local employees with legal recourse in the event they were discharged” on the whim of employers, such as hotels and refineries, or demoted to a menial job with no alternative for meaningful employment.¹⁷⁷

The court also concluded that the VICRA is significantly broader in scope than the federal CRA and is one of the original provisions of the U.S. Virgin Islands Code that went into effect on September 1, 1957, thus predating the adoption of the federal CRA by nearly a decade, and therefore precluding the use of federal civil rights analyses in a case before a local court.¹⁷⁸

The Virgin Islands Supreme Court was unequivocal that case law interpreting the federal CRA was of little to no assistance in interpreting the VICRA because the two acts originated at different times¹⁷⁹ and in response to different cultural challenges. The better approach, the Virgin Islands Supreme Court reasoned, is to simply look to the language of the Virgin Islands civil rights statute to glean what entitlements were afforded to Rennie and apply them without reference to federal law.¹⁸⁰

Banks, Rennie, and their progeny represent a postcolonial liminal legal transformation for Virgin Islands jurisprudence. If we view *Banks* as a legal rite of passage, we can understand the decision as one that transforms Virgin Islands jurisprudence from unquestioning reliance on the restatements and federal law, to stable, equitable, and enduring legal principles that are sensitive to the local cultural needs of the territory. This legal transformation moves Virgin Islands law from being colonial to being postcolonial and progressive in considering “other” viewpoints before a local court engages in decision-making that affects legal relationships.

CONCLUSION: POSTCOLONIAL VICTORY

There are many other cases in which the Virgin Islands Supreme Court has done the work of postcolonial lawmaking to instantiate and reaffirm a local jurisprudence that meets the postcolonial needs of the territory. Within the framework for postcolonial judicial activism, the court shapes Virgin Islands law based on the social norms that are a product of the historical and political facts that have influenced the territory.

Within the limited rights that have been granted to the territory, the Virgin Islands Supreme Court exhibits a jurisprudential fervor that one can best understand using postcolonial theory as an analytical lens through which to

176. *See id.* at 545.

177. *See id.*

178. *See id.* at 551–52.

179. *See id.*

180. *See id.* at 552.

capture the “potent signifying practice” of Virgin Islands culture being constituted by local law, even as Virgin Islands local law itself is informed by the territory’s lived cultural practices and values.¹⁸¹ This shaping of local law based on local culture may sound like principles of federalism or something similar, but in the territories, federalism is not applicable when a political entity is a colony and not a state.

First, the territory does not have the rights and privileges of a state because, through the Territorial Clause of the Constitution, it is Congress that gets to dictate the political rights and status of the territory and its people. Second, the *Insular Cases* are still good law; these cases have not been overruled, and the U.S. Supreme Court still relies on them as precedent. When taken together, there is the real possibility that Congress could enact a statute that makes it difficult or impossible for the colony to exercise full self-governance and by extension for the Virgin Islands Supreme Court to exercise full jurisprudential authority. Signs of this possibility are already at work with the enactment of the Puerto Rico Oversight, Management, and Economic Stability Act¹⁸² (PROMESA) in response to the Puerto Rico debt crisis in 2016.

In many of its cases, the Virgin Islands Supreme Court acknowledges that Congress possesses plenary police power with regard to the territory under the Territorial Clause.¹⁸³ The postcolonial expansion of that acknowledgement, however, sees the Virgin Islands Supreme Court exercising its authority as devised by the Legislature of the Virgin Islands, which in turn exercises authority delegated to it by Congress vis-à-vis the Revised Organic Act of the Virgin Islands. Putting aside the constitutional limitations that attend the territory’s colonial status, the Virgin Islands Supreme Court signals its intention to continue relying on the concept of liminality to destabilize the homogenizing narrative of American legal values that does not work in favor of local Virgin Islanders or their interests.

The *Insular Cases* were decided before the final acquisition of the territory, but their holdings continue to inform the legal position of the Virgin Islands vis-à-vis the United States. Legal liminality sees the Virgin Islands Supreme Court reacting against this legal history by issuing opinions that recognize law as a social practice that can accommodate the vagaries of the liminal cultural spaces that we now know as the U.S. Virgin Islands.¹⁸⁴ With the creation of the Virgin Islands Supreme Court, the people of the Virgin Islands now have a judiciary that interprets and modifies common law in a way that represents the soundest rule for the territory.

The soundest rule doctrine is just a restatement itself of the concept of postcolonial hybridity, in which legal empowerment is produced and reinforced through the negotiation of identity generated by the liminal

181. See Mezey, *supra* note 42, at 45.

182. Pub. L. No. 114-187, 130 Stat. 549 (2016) (codified as amended in scattered sections of 15, 29, and 48 U.S.C.).

183. See, e.g., *Rennie*, 62 V.I. at 549.

184. Cf. Mezey, *supra* note 42, at 45.

American and Caribbean cultures of the territory. Beyond the actual results in the cases examined by this Essay lies the philosophy of the Virgin Islands Supreme Court as the final authority to exercise supreme judicial power to shape the common law in line with the social and cultural values of the territory.

The Virgin Islands Supreme Court continues to refine the scope of the common law as it applies to the lived experience of the people of the territory. The court engages in legally significant practices to subvert the limiting discourses inherent in being a colonized territory. These practices disrupt disempowering constructs and create new sociolegal norms that prioritize the people of the territory. In so doing, Virgin Islands jurisprudence reflects legal principles that are attuned to social values founded on the liminality of the many “others” who define and continue to redefine Virgin Islands culture. Hence, the overwhelming trend in the court’s jurisprudence is to do the postcolonial work to mold Virgin Islands law so that the Virgin Islands can be historically American but remain uniquely Caribbean and unquestionably empowered.¹⁸⁵

185. Taken from the motto of the University of the Virgin Islands. *See About UVI*, UNIV. OF THE V.I., <https://www.uvi.edu/about/index.html> [<https://perma.cc/8RQG-LC7C>] (last visited Mar. 6, 2023).