Constituting self-determination: Constitution-making referendums in the US Virgin Islands

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Abstract: On 27 January 2025, the sixth Constitutional Convention of the US Virgin Islands (USVI) convened. This latest attempt began in 2020 with a non-binding referendum to establish a constitutional convention. Previous attempts at constitution-making in the USVI have been rejected on two fronts: either by the electorate (in referendums held in 1979 and 1981) or by the US Congress (2010). The latter attempt was rejected by the US Congress for granting group-differentiated rights in violation of the Equal Protection standards laid out in the US Constitution. Constitution makers in the US territories therefore find themselves in an unusual position, caught between providing self-determination for the peoples of the territories while simultaneously adhering to the individual-rights requirements of the US Constitution. With a new constitutional referendum scheduled for 2027 it is important to understand why the previous attempts did not result in the adoption of a constitution and which barriers and objections were the cause of this.

Keywords: constitution-making, constitutional referendum, self-determination, US territories, US Virgin Islands

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Introduction

On 27 January 2025, the sixth Constitutional Convention of the United States Virgin Islands (USVI) convened, with a referendum on the proposed constitution scheduled for 3 July 2027 (The USVI Constitutional Convention News). Of the five populated US territories, only Guam and the USVI do not have their own constitutions. In 1976, US Public Law 94-584 was enacted by the US Congress authorising Guam and the USVI to create their own constitutions. Although both territories have created constitutional drafts that have been voted on in referendums, half a century later neither territory has their own constitution. Both Guam and the USVI are unincorporated US territories that are included in the United Nation's (UN) list of non-self-governing territories (UN, n.d.). That they are unincorporated means that they are neither part of one of the several States nor a federal district, and that only selected parts of the US Constitution apply to them (US Department of the Interior, n.d.). Non-self-governing territories are defined by the UN as territories "whose people have not yet attained a full measure of self-government" (UN, n.d.). The USVI was purchased from Denmark in 1917 and today consists of three islands located in the Caribbean with a 78% black-majority population (World Factbook, 2005).

A constitution along with status referendums are two of the ways in which US territories have achieved or are trying to achieve measures of self-determination. In both Guam and the USVI organic acts currently serve in place of constitutions. Organic acts were enacted by the US Congress in the territories to establish local governments in lieu of a constitution. However, although the organic acts do provide some measure of self-governance, the lack of a constitution means that the US Congress must approve any amendments to these organic acts (Milov-Cordoba, 2023). As the non-voting delegate from the USVI said: "While the Revised Organic Act presently serves as the main governing document of the Virgin Islands, we are unable to enact changes on a territorial level" (Plaskett, 2023). When constitutions allow for greater degrees of self-

governance than previously experienced, they can function as ways to achieve measures of self-determination. “Self-determination may be achieved through other forms of self-governance than autonomy arrangements, or in combination with them” (Roepstorff, 2012, p. 122).

Previous attempts at constitution-making in the USVI have been rejected on two fronts: either by the electorate (in referendums held in 1979 and 1981) or by the US Congress (2010). The latter attempt was rejected by the US Congress for granting group-differentiated rights in violation of the Equal Protection standards laid out in the US Constitution. Complicating this process is the caveat that any changes in the territories must also be approved by the US Congress due to the Territorial clause of the US Constitution. This means that measures taken in the US territories to preserve group-differentiated status and rights are often in conflict with the Equal Protection Clause and the individual rights of US citizens (Spitzer, 2019a).

Constitution-makers in the US territories thus find themselves in an unusual spot: caught between providing self-determination for the peoples of the territories while also adhering to the individual-rights requirements of the US Constitution. With a new constitutional referendum in the USVI scheduled for 2027 it is important to understand why the previous attempts did not result in the adoption of a constitution and which barriers and objections were the cause of this.

Referendums are a way of resolving the status of overseas territories in international law. However, for constitution-makers in the USVI their constitutional drafts must meet with the approval of the US Congress before the electorate votes on it in a referendum. The individual rights provisions in the US Constitution limits the inclusion of group-differentiated rights in a USVI constitution. However, constitution-makers must still create a document that will gain the approval of not only the US Congress but also their own citizenry.

To explore this further the article considers the dual challenge constitution-makers in the USVI face of garnering the approval of both the US Congress and their own electorate, a challenge that may be viewed in the last three constitutional drafts as one of reconciling local identity and granting group-differentiated rights with the individual rights provisions in the US Constitution. This article analyses the political and practical barriers that led to repeated rejections of constitutional drafts by the electorate in referendums.

The article begins by examining the dual challenge by looking at similar challenges in the US territories; then it analyses the political barriers that led to the referendum rejections; and finally examines the strategic intent of constitution-makers in the USVI in reconciling local identity with federal scrutiny to ensure referendum success.

The article focuses mainly on the third, fourth and fifth constitutional drafts and their attempts at ratification. The first and second constitutional conventions were held before US Public Law 94-584 was enacted and were therefore not officially sanctioned. I have also included the responses from the US Department of Justice (DOJ) to the fourth constitutional draft in 1980 and the fifth constitutional draft in 2010. The responses and the increased inclusion of group-differentiated rights in the constitutional drafts illustrate the tension between these rights and the equal rights framework of the US Constitution.

Although constitution-making in the USVI has not garnered the greatest attention, some writers have examined the process, such as Gilmore (1984) and Arce (2025), while others have studied self-determination, self-government and decolonisation in the USVI, such as Boyer (1984) and Lewis-Ambrose (2013). However, there is still a lack of research on this issue, especially on contemporary issues and the latest constitution-making attempts.

While there is a growing body of research on constitutive contestation in settler-colonial states, and literature on conflicts between group-differentiated rights and individual rights, this lens has not previously been used to examine the constitution-making process in the USVI. Furthermore, with the sixth Constitutional Convention deadline in February 2027, the issues concerning constitution-making in the USVI and the balance to be established between self-determination and US sovereignty are highly salient.

Group-differentiated rights and individual rights conflicts in settler-colonial states

Referendums are a form of direct democracy, where 'the people' decide on the outcome of a particular issue. But who are 'the people' in the first place? Ever since Dahl's observation that political philosophers had almost completely neglected the question of how to decide who legitimately make up 'the people' and Whelan's introduction of 'the boundary problem' in democratic theory, decision-makers have increasingly faced conflicting demands for inclusion and collective self-determination (Song, 2012, pp. 39-40). These conflicting demands are especially prevalent when groups within the larger whole advocate for collective self-determination through group-differentiated rights.

Group-differentiated rights are defined as the practice of affording legal rights to persons on the basis of their social or cultural group membership (Mitnick, 2006, p. 9). Such rights have become an increasingly common feature of modern liberal legal systems (Mitnick, 2006, p. 9). Whereas general individual rights are rights that individuals have because they constitute a particular kind of moral being (Reus-Smit, 2013, p. 37). Human rights are an example of individual rights granted to individuals simply because they are human beings (Reus-Smit, 2013, p. 37).

Settler colonialism is defined as the process in which the settlers claim the land and become the majority (Shoemaker, 2015). Furthermore, settler colonialism "can be understood as a metapolitical conquest conducted through demotic and territorial re-bounding" (Spitzer, 2019b, p. 548). In the archetypal settler-colonial states Indigenous peoples have joined the rights revolution, invoking the right of self-determination (Spitzer, 2024, pp. 573-574). However, the settlers have also joined the rights revolution, by "brandishing individual liberal rights in opposition to decolonization" (Spitzer, 2019a, p. 135). These conflicts, therefore, often centre on contestation between group-differentiated rights and individual rights.

An instance of a group-differentiated rights versus individual rights conflict in the US is *Rice v. Cayetano* (2002). The case involved a fifth-generation Hawaii state resident whose application to participate in an election for the Office of Hawaiian Affairs (OHA) trustees was rejected on the grounds that he lacked Hawaiian ancestry dating from 1778 (Spitzer, 2019a, p. 137). Rice sued and the case went all the way to the Supreme Court. The Court ruled in favour of Rice in a seven-two decision writing that denying him the right to participate was in violation of the 15th Amendment's guarantee of equal voting rights. However, according to J. Kēhaulani Kauanui such settler-lawsuits are "attempting to eradicate Hawaiian-specific institutions in the name of civil rights" (Kauanui, 2008, p. 643).

Such cases concerning legal status and rights can also be found in the US territories, which are neither fully incorporated nor completely self-determined. This status was established by the *Insular Cases*. The *Insular Cases* were a series of landmark decisions by the US Supreme Court starting in 1901 regarding the legal framework for the new territories acquired in the Spanish-American War. While the Insular Cases protect the territories' group-differentiated status, they also deprive territorial citizens by allowing the US to deny access to federal programmes and voting rights in national elections.

Two recent, prominent cases of group-differentiated rights versus individual rights conflicts in the US territories are *Davis v. Commonwealth Election Commission* (2016) and *Davis v. Guam* (2019). The first *Davis* case was filed in the Commonwealth of the Northern Mariana Islands (CNMI) where Davis argued that his 14th and 15th Amendment rights were violated when he was excluded in an official registry of voters of Northern Marianas descent. The appeals court ruled unanimously in favour of Davis and the US Supreme Court later denied the petition for an appeal. The second *Davis* case was filed in Guam when a different Davis, a non-Chamorro Guamanian, sued to be included in the Guam Decolonisation Registry: a registry of voters for a potential status referendum. The Court again agreed with the plaintiff that, among other things, the provision of a

law restricting voting to "Native Inhabitants of Guam" constituted an impermissible racial classification in violation of the Fifteenth Amendment, which provides that the right of a US citizen to vote shall not be denied or abridged by the US or by any State on account of race, colour or previous condition of servitude (Barnett, 2024).

While the previous examples of this type of conflict are court cases litigated by individuals they still illustrate how the US judicial system views such conflicts. They also indicate how such conflicts will be decided when and if they appear in the constitution-making processes in the territories. Although the constitutional drafts are not individual-rights cases being litigated in court, the way the DOJ views potential tensions is still part of the same pattern and reasoning the courts use in striking down group-rights in the territories. A commonly cited violation is that of the Equal Protection Clause of the 14th Amendment.

Violations of the Equal Protection Clause are one of the main reasons for upholding individual rights over group-differentiated rights in lawsuits in the US. This is also the reason why the DOJ finds certain aspects of previous USVI constitutional drafts problematic and anticipates future lawsuits if they remain. This ultimately created a conflict between constitution-makers in the territories trying to achieve measures of self-determination through group-differentiated rights while at the same time striving to adhere to the US Constitution. This leads to the dual challenge of creating a constitution the electorate will favour but still adhering to the amendments of the US Constitution to gain the approval of Congress.

To ratify a constitution in the USVI, constitution-makers are dependent on a successful referendum. A major challenge in the constitution-making process in the USVI is therefore, in balancing the equal protection of US citizens with group-differentiated rights for the people of the USVI. This has created a dual challenge for constitution-makers in the USVI who have to gain the approval of both the electorate and the US Congress to ratify their constitutional draft. To gain the approval of the US Congress the draft must not contain provisions that violate the individual rights of the US Constitution. While, on the other hand, to gain the approval of the USVI electorate the draft must include provisions for self-determination and identity. Establishing 'the people' is also an inherently intrinsic part of the constitution-making process. As Tierney explains there are two interconnected definitional elements in a constitutional referendum that emerge as acts of self-determination: the first conceptualises the polity as physical space; the second imagines it as a group of people. Therefore, "the constitutional referendum sets the boundary of the people by way of both territorial demarcation and franchise rules" (Tierney, 2012, p. 59).

In the USVI constitution-making involves the citizenry at three different junctures through public votes (Snider, 2023a). The first is a referendum on whether to convene a constitutional convention. If the voters approve this call for a constitutional convention there will be a second public vote to elect delegates to the convention. Finally, if the constitutional draft is approved by the US Congress there will be a referendum on whether to ratify it (Snider, 2023a).

The next section focuses on the role of referendums in the constitution-making process in the USVI by looking at the implications of low voter turnout, segmented opposition, practical failures, and power dynamics. The reasons the referendums for the third and fourth drafts did not result in a constitution for the USVI are likely varied and compounded. In the next section I analyse the political barriers that hindered electoral success in these referendums.

Constitutional conventions

The US Virgin Islands was a Danish colony until it was purchased by the US in 1917. This was also the year the US passed the first Organic Act for the USVI (Arce, 2025, p. 261). Although, there have been some developments away from federal administration towards local autonomy and the original Organic Act has been revised (Arce, 2025, p. 262) the USVI is still without a constitution they themselves have approved and ratified. The US Congress requires that new

constitutions in the US territories are proposed by an independently elected convention and approved by Congress as well as the voters in the territory (Snider, 2023b).

The first constitutional convention in the USVI was in 1964 (Arce, 2025, p. 268). The resulting draft, which included several reforms, was sent to the US Congress. Although Congress did address some of the reforms presented in the draft it was done in a piecemeal fashion over several years (Lincoln, 2007). In 1971 a second constitutional convention was created, and in 1972 the constitutional draft was approved by the voters in a referendum (Gilmore, 1984, p. 146). However, due to the narrow approval of the constitution it was decided not to seek Congressional approval and the draft went no further (Gilmore, 1984, p. 146). In 1976, US Public Law 94-584 was enacted by Congress officially authorising the USVI to create their own constitution (UN, 2023, p. 50). The third constitutional convention was held shortly thereafter in 1977 (Gilmore, 1984, p. 147). A fourth constitutional convention followed closely behind in 1980 (Gilmore, 1984, p. 150). The third constitutional draft was found to meet the criteria established by Public Law 94-584 by the reviewing agencies, and since the US Congress did not take any formal action within the 60 days allotted, the constitutional draft was deemed approved (Gilmore, 1984, p. 148). The fourth constitutional draft was approved by Congress in 1981 (Gilmore, 1984, pp. 152-153). Although both the third and the fourth constitutional drafts were approved by the US government, they were later rejected by the USVI electorate in referendums in 1979 and 1981 respectively (Gilmore, 1984, pp. 149-153). The fifth constitutional convention was established in 2007 (The USVI Constitutional Convention Clearinghouse, n.d. a). In 2010, Congress did not find the fifth constitutional draft compatible with the US constitution and called for the fifth constitutional convention to reconvene and change its draft to address the concerns raised by the DOJ (*The St. John Source*, 2010, June 19). The DOJ especially disapproved of the constitutional draft "conferring legal advantages on certain groups" (DOJ Views, 2010, p. 73). With a new 2012 deadline and the views of the DOJ, the fifth constitutional convention had the opportunity to revise their draft. However, the deadline lapsed without a revision (Arce, 2025, p. 269). In 2020, the electorate voted in a referendum on whether to elect a constitutional convention (The USVI Constitutional Convention Clearinghouse, n.d. b). This resulted in convening the USVI's sixth Constitutional Convention in January 2025 (The USVI Constitutional Convention Clearinghouse, n.d. a).

Constitutional referendums

Voter turnout

The constitutional referendums in the USVI have experienced a relatively low voter turnout. This may indicate that a large part of the electorate is not concerned with, or informed enough to vote in, referendums regarding a potential constitution. One interpretation of low voter turnout may be that the electorate does not have the inclination to engage. However, Tierney posits that we must not discount the possibility that a lack of interest may also stem from high levels of citizen satisfaction, not dissatisfaction (Tierney, 2012, p. 31).

The third constitutional convention in the USVI resulted in a constitutional draft that was approved by the US government and resulted in a referendum. In answer to the 1979 referendum question "Do you approve the constitution of the Virgin Islands as adopted by the Third Virgin Islands Constitutional Convention?" the voters rejected the constitution by 5,972 votes to 4,627 with a 38% voter turnout (Gilmore, 1984, p. 149). Compared with the 77% voter turnout in the previous year's gubernatorial election this was a low voter turnout by USVI standards (Feuerzeig, 1979, March 7).

In 1981 there was a new referendum for the fourth constitutional draft, and again the voters rejected the proposed constitution, this time with a 47% voter turnout and a rejection of the constitution by 7,157 votes to 4,821 (Gilmore, 1984, p. 153).

In the 2020 non-binding referendum on electing a constitutional convention, the turnout was 33.9%, with 7,275 yes votes to 2,840 no votes (The USVI Constitutional Convention Clearinghouse, n.d. b). Although the voter turnout was on the low side the overwhelming majority in favour led to the convening of the current constitutional convention.

However, while low voter turnout may not necessarily be problematic, it does have the potential of eroding the legitimacy of mechanisms of direct democracy, like referendums (Rau et al., 2025, p. 276). Since constitutional referendums are often high-stakes referendums where the outcome may greatly impact the citizenry, legitimacy and low voter turnout may become contentious issues in future constitutional referendums.

Segmented opposition

Another issue concerning constitutional referendums in the USVI is that of segmented opposition. An important conflict is the question of what comes first: a status referendum or a constitutional referendum? While the fifth constitutional draft included provisions for a political status advisory commission and a special status election, opponents like Malachi Thomas believe that ratifying a constitution that recognises the supremacy of the US Constitution is problematic and not a path to self-determination (Thomas, 2025, March 3).

This is because a USVI constitution must adhere to the US Constitution, while simultaneously not all provisions in the US Constitution apply to the citizens of the USVI. The *Insular Cases* established that not all applications of the Constitution apply to unincorporated territories (Spitzer, 2019a, p. 140). As Thomas writes about recognising US sovereignty in the USVI constitutional drafts: “This means the privileges and protections of the US Constitution pertain to us only in part, not in totality. How can we recognise the sovereignty and supremacy of a document in whole when it only matters to us in part? It would make for a fractured, impracticable, and anomalous framework of governing” (Thomas, 2025, March 3). This opposition to a constitution before addressing their status as an unincorporated US territory is an echo of the sentiments expressed by the opposition to the fourth constitutional draft referendum. In 1981, Senator Ruby M. Rouss, who at the time was the president of the USVI’s unicameral Legislature and a powerful opponent of the constitutional draft, expressed: “The Virgin Islands needs to get a clear understanding with the Federal Government as to our relations” (*The New York Times*, 1979, March 8).

While this opposition speaks to the preferred strategies for attaining self-determination, there has also been opposition to specific segments in the constitutional drafts themselves. For the third constitutional draft there was speculation that the rejection was a fear of increased taxes (*The New York Times*, 1979, March 8). Feuerzeig writes that the additional layers of local government outlined in the draft was feared to cost untold millions and resulting in increased taxes (Feuerzeig, 1979, March 7). At the time *The New York Times* posited that this rejection of the third constitutional draft was also caused by “Strong opposition from white continentals” (*The New York Times*, 1979, March 8).

Practical failures

Practical failures for a constitutional referendum can include timing issues, misunderstandings, and an information deficit. Timing issues regard choosing the best referendum date to mobilise a high voter turnout, and whether to hold the referendum in conjunction with other elections. Misunderstandings regard how well the electorate comprehend the constitutional draft and

understand the framers' intent. Finally, an information deficit occurs when the public has not been sufficiently educated on the content of the referendum.

In the third constitutional draft referendum political observers blamed not only the cost factor but also "the failure of supporters to explain its provisions adequately or to conduct a get-out-the-vote drive" (Feuerzeig, 1979, March 7). This failure to adequately educate the electorate, resulting in an information deficit, may have led to voters misunderstanding the constitutional draft. Senator Ruby Simmonds believed that the rejection of the third constitution was caused by many voters just not understanding the constitution (*The New York Times*, 1981, November 5).

The fourth constitutional draft referendum was a single-issue ballot and proponent Governor Juan Luis later regretted having the referendum in a non-election year (*The New York Times*, 1981, November 5). This shows that the Governor was concerned with the timing of the referendum and believed that the referendum would have fared better in an election year. The inclusion of the definition of Virgin Islander was also a debated issue, as *The New York Times* wrote: "Even though a Virgin Islander would have no special privileges, the mere inclusion of the definition was an emotional issue for many" (*The New York Times*, 1981, November 5).

In the complex situation constitution-makers in the USVI find themselves in of crafting a constitution that balances self-determination for the peoples of the USVI with the individual-rights requisites of the US Constitution, sufficiently educating the public before a referendum is a crucial but difficult task. In navigating the dual challenge of gaining the approval of both the electorate and the US Congress it is imperative to educate the electorate to the degree that they can make an informed decision on whether to adopt a constitution in the USVI.

Power dynamics

Finally, power dynamics may have also contributed to the referendum failures. In this case voter rejection might not stem from apathy, fear of increased taxes, or misunderstandings but rather a distrust of the process as a whole. Snider believes that the rejection stems from the constitutional drafts serving the political elites rather than truly furthering the people's interests (Snider, 2023a, p. 1). Snider writes that in constitutional matters the Legislature has always prioritised itself, viewing empowering itself and the people as identical pursuits (Snider, 2023a, p. 1). He believes this influenced voter's refusal to ratify previous constitutional drafts (Snider, 2023a, p. 1): "The territorial legislature has backed convention proposals that empower the lawmakers themselves and their special interest allies rather than the Virgin Islands' people. … The result, ironically demonstrating that the process ultimately works the way it should, has been that either Congress or Virgin Islands' people have refused to ratify each of the constitutions" (Snider, 2023b).

The opposition in the referendum on the third constitutional draft was not necessarily against ratifying a constitution, rather they were against this constitution in particular. Many opponents said, "while they favoured a constitution written by Virgin Islanders as a step toward greater self-government, the flaws in this [third] constitution far outweighed its strong points" (Feuerzeig, 1979, March 7). According to Tierney this is a common trend with referendums, stating that "within the broad category of electoral processes, referendums are particularly prone to exploitation by elites" (Tierney, 2012, p. 98).

The next section will focus on the strategic intent of the constitution-makers in the USVI. In every constitutional draft more provisions have been added regarding the *demos*, from defining the electorate and who can participate; to defining who 'Virgin Islanders' are; to finally, in the fifth constitutional draft, conferring specific group-differentiated rights on those who fulfil the requirements of being a 'Virgin Islander'. These provisions are often in conflict with the US constitutional protection of individual rights and consequently become contentious issues when obtaining US Congressional approval. In this section I analyse why constitution-makers continue to include provisions likely to be rejected by Congress.

Strategic Intent

Reconciling local identity with federal scrutiny

Although not a universal concept in sovereign states, constitutions have nonetheless come to be viewed as cornerstones of democracy. They are important instruments not only in the framing of governments and their provisions for individual rights, but they also establish the citizenry to which they apply. As Wallis writes: "Despite important implications, relatively little theoretical or comparative scholarly attention has been paid to the political and sociological role that constitutions play in constituting 'the people'" (Wallis, 2014, pp. 30-31). While Rosenfeld argues that the 'constitutional identity' created by a constitution draws on, but must be distinct from, the 'national identity', Wallis believes that in fragmented or new states the constitution itself may be required to establish the national identity, and thus "constitutional and national identity may be one and the same" (Wallis, 2014, p. 31). In states and territories undergoing a decolonisation process the need, therefore, of constituting 'the people' in their constitution takes on a greater significance. Tierney also posits that "we might even say that the referendum constitutes (or re-constitutes) not only the polity but possibly also the very people whose identity as citizens is reframed through their joint constitutive act" (Tierney, 2012, p. 60). A major challenge in the constitution-making process in the USVI is in balancing the equal protection of US citizens with group-differentiated rights for the people of the USVI.

In this sense, constitutions create 'the people' who must adhere to them, and in decolonisation processes may also create the national identity as well. While constitutions are a place for rights, freedoms and power structures they can also be a place for identity, values and symbols. Examples of these attempts to establish 'the people' and bounding the demos by including provisions for symbols, cultural protections, an educational system that teaches their history and culture, and the mention of Virgin Island identity in their preambles can be found in all of the constitutional drafts except for the first one. Constitutions can therefore be viewed as instruments for achieving self-determination in the form of self-government and creating a people and their identity.

However, instances of trying to define the people of the US Virgin Islands have been met with disapproval or outright rejection by the US Department of Justice (DOJ), especially if these definitions carry with them additional privileges not afforded to all US citizens. The DOJ did not approve of the inclusion of specific rights conferred on groups defined by place and timing of birth, timing of residency, or ancestry in the fifth constitutional draft. The DOJ wrote that "it was difficult to discern a legitimate governmental purpose that would be rationally advanced by provisions conferring legal advantages on certain groups" (DOJ Views, 2010, p. 74).

Any constitutional draft in the USVI would have to overcome the dual challenge of gaining the approval of both the US Congress and its own electorate to become a ratified constitution. Areas that have caused the highest tensions are group-differentiated rights for those defined as US Virgin Islanders, long residency requirements for public office and territorial waters and marine resources.

The strategic intent of constitution-makers

Why then are constitution-makers in the USVI continuing to include provisions they know will be disapproved of if not outright rejected by the US Congress? This might be a strategic intent on the part of the constitution-makers. In order for a constitutional draft to be ratified by the electorate in a referendum it is also necessary to satisfy local demands and define the *demos.* Wallis explains that in certain instances, like that of decolonisation and secessionism, constitution-makers may

decide that a detailed constitution will create a stronger social contract to unite the populations and legitimise state institutions under challenging circumstances (Wallis, 2014, p. 21). This can explain why to address the dual challenge of gaining the support of Congress and the electorate of the USVI the constitution-makers also have to define the *demos* they want to approve the constitution. For the constitution-makers in the USVI, it is also important to include such protections and definitions to garner the support from their own electorate. I now look at two provisions regarding the *demos*: defining who 'Virgin Islanders' are and conferring group-differentiated rights on those who are included in this definition. The first provision can be found in both the fourth and fifth constitutional draft, while group-differentiated rights can only be found in the latter.

Defining who they are

Only the last two constitutional drafts define the group 'Virgin Islanders'. In the fourth constitutional draft two categories are outlined: That of Virgin Island citizenship and that of Virgin Islander. Table 1 illustrates these definitions in the fourth and fifth constitutional drafts. To become a Virgin Island citizen one either has to be born in the Virgin Islands or be a US citizen who has been domiciled in the Virgin Islands for at least one year. To be a Virgin Islander one has to be born in the Virgin Islands or be a descendant of at least one parent born in the Virgin Islands. With these two classifications it is possible to be a Virgin Island citizen but not a Virgin Islander and vice versa. However, all Virgin Islanders can become citizens if they live in the Virgin Islands for at least a year, granted they are also US citizens. The fifth constitutional draft does not define Virgin Islands citizenship but does divide Virgin Islander into two categories: Ancestral Native Virgin Islander and Native Virgin Islander. Both of these categories are given group-differentiated rights in the constitution, with Ancestral Native Islanders given an additional tax right for which Native Virgin Islanders do not qualify.

Table 1: Citizenship and Virgin Islander definitions in the 4th and 5th constitutions.

Definitions	Citizenship	Virgin Islander	
4th Constitution	a) all persons born in the Virgin Islands and subject to the jurisdiction thereof b) all persons born outside of the Virgin Islands who are citizens of the United States, and who have been domiciled in the Virgin Islands for at least 1 year	a) a person born in the Virgin Islands b) a person who is a descendant of at least one parent who was born in the Virgin Islands	
		Ancestral Native Virgin Islander	**Native Virgin Islander**
5th Constitution		a) a person born or domiciled in the Virgin Islands prior to and including June 28, 1932 and not a citizen of a foreign country b) descendants of Ancenstral Native Virgin Islander residing outside of the U.S., its territories and possessions between January 17, 1917 and June 28, 1932, not subject to the jurisdiction of the US and who are not a citizen or a subjects of any foreign country.	a) a person born in the Virgin Islands after June 28th, 1932 b) descendants of a person born in the Virgin Islands after June 28, 1932

The DOJ views in 1980 did not necessarily see a legal problem with defining Virgin Islanders since the term did not appear again elsewhere in the constitution and hence did not have

any legal consequences (DOJ Views, 1980, p. 763). However, the DOJ did express a concern that the definition could "encourage the enactment of discriminatory legislation favouring Virgin Islanders" (DOJ Views, 1980, p. 763). While the definition in and of itself was not a problem, the DOJ raised concerns about how the definition could become a legal one at a later date. The DOJ also noted that defining Virgin Islands citizenship could potentially be a violation of the 14th amendment of the US Constitution but noted that "the direct applicability of the Fourteenth Amendment to the territories has not been settled as yet" (DOJ Views, 1980, p. 764). Governor deJongh, who served from 2007 to 2015, also opposed the inclusion of definitions in the fifth constitutional draft, saying that: "Those who are Native Virgin Islanders, as well as those who come and live among us in the Virgin Islands, are and must be treated as equal" (Windsor, 2014).

The inclusion of definitions of 'Virgin Islander' may be the constitution-makers in the USVI's way of addressing the dual challenge of gaining the support of the US Congress and the electorate. This inclusion may be a necessity to ensure local support, and therefore the intent of the constitution-makers who must address the dual challenge for ratification.

Including group-differentiated rights

The fifth constitutional draft is the only one that includes specific rights, group-differentiated rights, reserved only for members of the category 'Virgin Islanders'. This means that only those who qualify as members of this group are allowed to serve as governor, be a member of the Political Status Advisory Commission, vote on status referendums and constitutional amendments, and in the case of Ancestral Native Virgin Islanders be exempt from paying property tax on their primary residence. Table 2 illustrates the rights reserved only for Ancestral Native Virgin Islanders and Native Virgin Islanders.

Table 2: Group-differentiated rights in fifth constitution.

Qualifying requirements for	Ancestral Native Virgin or Native Virgin Islander
Governor	Both
Member of Political Status Advisory Commission	Both
Voting in special election on status	Both
Voting on constitutional amendments	Both
No real property tax shall be assessed	Yes and No

The DOJ did not approve of this inclusion of specific rights conferred on groups defined by place and timing of birth, timing of residency, or ancestry (DOJ Views, 2010, p. 74). It was therefore recommended that the provisions be removed. The DOJ further elaborated that the main concern was violating the Equal Protection Clause of the US Constitution, which it stated had been made applicable to the USVI by the Revised Organic Act (DOJ Views, 2010, p. 82). Especially problematic were the property tax exemption for Ancestral Native Virgin Islanders (DOJ Views, 2010, p. 83); certain requirements for public office and voting (DOJ Views, 2010, p. 85); and the provision that the constitutional draft extended the vote in potential status referendum to those who qualify as Virgin Islanders even when residing outside the USVI (DOJ Views, 2010, p. 86).

The constitutional drafts have dealt with the tensions these provisions have caused with the US constitution's equal-rights framework by adapting to, or sometimes ignoring, the

recommendations of the DOJ. The fifth constitutional draft is the only constitutional draft that has not been approved by the US Congress. This is also the only constitutional draft that included group-differentiated rights given only to Virgin Islanders, which in turn contributed to its rejection. In the fourth constitutional draft the definition of 'Virgin Islander' was included without legal consequences. Although the DOJ did acknowledge that this could potentially lead to legal problems later if the definitions were used in future discriminatory legislation, they did not outright object, and the fourth constitutional draft was approved by Congress. However, when the fifth constitutional draft went further, granting consequences based on the definition of 'Virgin Islander', this triggered a federal rejection. Granting legal consequences is thus the boundary crossing moment for constitution-makers in the USVI. Incentives to include provisions in constitutional drafts likely to be rejected by the US Congress was perhaps a consequence of the two previous constitutional drafts being rejected by the electorate and therefore leading to the prioritising of local concerns to gain their support in the next referendum. Since the previous drafts had not been rejected by Congress, albeit with expressed concerns, constitution-makers, while aware of the legal risk and the possibility of Congressional rejection, might also be testing the boundary for constitutional provisions regarding the constituting of 'the people'.

The next section focuses on concrete steps that are being or can be implemented to ensure the future success of the sixth constitutional draft. These include creating a leaner constitutional draft focusing on governance and identity markers without including group-differentiated rights; a focus on public education and voter mobilisation; and compromising on the aspects of the previous constitutional drafts to which the DOJ objected.

The future of constitutional referendums in the USVI

If the end goal of the constitution-makers in the USVI is to overcome the dual challenge posed by having to win the support of two seemingly incompatible fronts there are a few possible actions. Firstly, the constitution-makers can adopt a leaner constitutional draft focusing on governance. Secondly, constitution-makers can focus on identity markers and the preservation of culture as ways of constituting a *demos* that simultaneously does not violate the Equal Protection Clause. Finally, the success of future constitutional drafts hinges on public education initiatives to avoid confusion and increase voter turnout.

Governance

In the DOJ views of 1980 and 2010, one of the objections was that too restrictive qualification requirements for public offices can become discriminatory. The requirement for residency or domicile increased in the constitutional drafts for certain public offices, culminating in 15 years for governor and 10 years for judges. The residency or domicile requirements were objected to by the DOJ both in 1980 and in 2010. The DOJ found the 15 years domiciled requirement for the office of governor excessive and questionable, noting that it exceeds by one-half the longest existing resident requirement for state governors (DOJ Views, 1980, p. 766). The DOJ views in 1980 do include a paragraph on the reasons the official analysis of the constitution gives for such a lengthy requirement, which acknowledges that it is included to ensure familiarity with the Virgin Islands and its geographical, historic, social, economic position and unique culture (DOJ Views, 1980, p. 767). The DOJ in 2010 agree with residency qualifications but recommend that consideration be given to shortening their duration, citing previous Supreme Court decisions, which affirmed five to seven-year residency requirements for state senators and governors (DOJ Views, 2010, p. 89). Adhering to previous DOJ recommendations there may be room for compromise in future constitutional drafts, particularly on the length of residency for certain public offices.

Furthermore, a leaner constitutional draft focusing on the governance aspects of a constitution will have a higher chance of gaining US Congressional consent while still being able to provide aspects of self-governance for the people of the USVI. Proponents of adopting the current Revised Organic Act as the constitution, believe this would improve the current situation while simultaneously increase the success rate for ratification. As Plaskett, the USVI non-voting delegate to the US Congress, explains: "If the Revised Organic Act and its amendments are adopted as the constitution by federal law, it would then free the Virgin Islands to make further amendments without congressional engagement or approval" (Plaskett, 2023). If the USVI ratifies its own constitution, the constitutional amendment power would be transferred to the Virgin Islands (Snider, 2023b).

Identity markers and preservation of culture

Protections for culture and the environment in the constitutional drafts can be found from the second constitutional draft and going forward. This category includes provisions included in the constitutional drafts concerning culture, the environment, education and symbols of identity. Although these provisions do not grant group-differentiated rights, they do affirm rights to protect, preserve and promote collective culture and the environment. Furthermore, establishing common symbols, providing for culture being taught in schools, and including a designated article on culture in the constitution are also ways in which to constitute 'the people' without conferring group-differentiated rights on segments of the population. Table 3 shows the cultural provisions included in the last four constitutional drafts.

Table 3: Cultural provisions.

	2nd draft	3rd draft	4th draft	5th draft
Open beaches	Yes	Yes	Yes	Yes
Article on culture	-	Virgin Islands culture	Virgin Islands culture	Virgin Islands. African and Caribbean and all other people of the V.I.
Environmental protection	-	Yes	Yes	Yes
Symbols	Yes, (flag, seal and anthem)	Yes (anthem, flag and seal)	Yes (anthem, flag, seal, bird, flower, fish and tree)	Yes (anthem, flag, seal, bird, flower, fish and tree)
Culture taught in school	-	Yes, the culture and traditions of the people of the Virgin Islands	Yes, Virgin Islands culture	Yes, African and Caribbean and all other people of the V.I.

In the third, fourth and fifth constitutional drafts there are designated articles concerning culture. These articles outline how culture will be preserved, protected and promoted. In the fourth constitutional draft, there is a provision to create a commission on culture: "A commission shall be established by law to study, promote, and preserve the history, culture, and traditions of the Virgin Islanders" (Article X, Section two). The last three constitutional drafts also included provisions that culture shall be taught in the public school system. In the fifth constitutional draft the commission has been replaced by the Virgin Islands Cultural Heritage Institute that "shall be charged with the protection preservation and study of African and Caribbean history, culture, arts, and tradition; and all other people of the Virgin Islands who have contributed to the history of the Virgin Islands" (Article XIV, Section two).

Steps being taken

Already there are steps being taken in the USVI towards successfully ratifying a constitution. In the 2020 referendum to convene a constitutional convention, the electorate in the USVI were asked:

> Are you in favour of the Legislature enacting legislation to convene a constitutional convention to adapt the Revised Organic Act of the Virgin Islands … or portions of it as the Constitution of the Virgin Islands? (Snider, 2023a, p. 2).

That the suggestion to adapt the Revised Organic Act was included in this referendum suggests that constitution-makers in the sixth constitutional convention are considering taking a step back and creating a leaner constitution focused on the current administrative arrangements that are already accepted by the US Congress. In October 2025, the sixth Constitutional Convention asked for an extended deadline and an increased budget of $200,000. The new deadline for the constitutional draft is now scheduled for February 2027, with the referendum to be held in July 2027. The requested additional funding is to be spent on a public education plan and to hire legal counsel for the constitutional draft review process (Charlemagne, 2025, October 30). The public education plan is an important step that might help prevent misunderstandings which occurred in previous referendums. Further, a better-informed electorate can contribute to legitimising the outcome of a referendum. That part of the additional budget will also go towards hiring legal counsel, will perhaps contribute to clearer legal drafting.

Conclusion

The adoption of a constitution in the USVI will not be the same as a status referendum. However, it can provide some degree of self-determination through self-government and identity provisions; if accepted by the DOJ. Such provisions might serve as building-blocks for further self-determination, once they have established self-government. However, this will eventually depend on what provision the DOJ accepts in the sixth constitutional draft and whether the voters of the USVI ratify the sixth constitutional draft or reject it because they believe they are relinquishing too much for too little in return. A successful ratification of a constitution in the USVI ultimately depends on overcoming the dual challenge of gaining the support from both their own electorate and the US Congress. This success ultimately hinges on sufficiently educating the electorate, clearer legal drafting, and ensuring there is an appropriate balance between local and national priorities.

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