

ARTICLES

DUTCH INFLUENCES ON LAW AND GOVERNANCE IN NEW
YORK

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When we talk about Dutch influences on New York we might begin with a threshold question: What brought the Dutch here and how did those beginnings transform a wilderness into the greatest commercial center in the world? It began with spices and beaver skins. This is not about what kind of seasoning goes into a great soup, or about European wearing apparel. But spices and beaver hats are a good starting point when we consider how and why settlers came to New York—or more accurately—New Netherland and New Amsterdam.¹ They came, about four hundred years ago, and it was the Dutch who brought European culture here.² I would like to spend some time on these origins and their influence upon us in law and culture.

In the 17th century, several European powers, among them England, Spain, and the Netherlands, were competing for commercial markets, including the far-east.³ From New York's perspective, the pivotal event was Henry Hudson's voyage, when he sailed from Holland on the *Halve Maen*, and eventually encountered the river that now bears his name.⁴

Hudson did not plan to come here.⁵ He was hired by the Dutch

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¹ See COREY SANDLER, HENRY HUDSON: DREAMS AND OBSESSION 18–19 (2007); ADRIAEN VAN DER DONCK, A DESCRIPTION OF NEW NETHERLAND 140 (Charles T. Gehring & William A. Starna eds., Diederick Willem Goedhuys trans., 2008) (1655); Oliver A. Rink, *Seafarers and Businessmen: The Growth of Dutch Commerce in the Lower Hudson River Valley*, in DUTCH NEW YORK: THE ROOTS OF HUDSON VALLEY CULTURE 7, 8, 10 (Roger Panetta ed., 2009).

² See Russell Shorto, *Forward* to DUTCH NEW YORK, *supra* note 1, at vii, ix.

³ See SANDLER, *supra* note 1, at 15, 18, 140; George Miller, *Introduction to TO THE SPICE ISLANDS AND BEYOND*, at xi, xv (George Miller ed., 1996) [hereinafter Miller, SPICE ISLANDS].

⁴ See JAAP JACOBS, NEW NETHERLAND: A DUTCH COLONY IN SEVENTEENTH-CENTURY AMERICA 30–31 (2005).

⁵ SANDLER, *supra* note 1, at 148.

East India Company to outpace the competition and find a shortcut from Europe to the far-east.⁶ This would enable the company's investors to tap into the lucrative treasures of the orient, including exotic condiments like pepper, clove, nutmeg, and cinnamon.⁷

On September 2, 1609, he sailed into what would be New York harbor and proceeded up what is now called the Hudson River, believing it led to Asia.⁸ Instead, he got as far as Albany and turned back.⁹ Although he is sometimes referred to, inaptly, as Hendrick Hudson, he was not Dutch: he was English.¹⁰ No one, however can be sure what he looked like. One of his principal biographers, Thomas Janvier, tells us that “[n]o portrait of Hudson is known to be in existence. What has passed with the uncritical for his portrait—a dapper-looking man wearing a ruffed collar—frequently has been, and continues to be, reproduced. Who that man was is unknown. That he was not Hudson is certain.”¹¹

After what we call *the* voyage of 1609, Hudson made another voyage—his fourth and final—sailing off on April 17, 1610, again in search of a short route to Asia.¹² Did he ever find it? The short answer is no. The slightly longer answer is fascinating.

After a winter of severe privation in a region known today as Hudson Bay/James Bay, Canada, his crew mutinied.¹³ According to the testimony of an eye witness, crew members abandoned Hudson on June 22, 1611, setting him adrift in a small shallop with minimal provisions, along with his young son, John, and several others who were either loyal to Hudson or too sick to be of any use to the mutineers.¹⁴ What became of the conspirators? Eight returned to England and were brought before the Trinity House Masters, who promptly concluded that they should be hanged.¹⁵ But they remained at large for several years after six of them were indicted, not for mutiny, but for leaving Hudson and the others to die.¹⁶

⁶ See *id.* at 144, 146.

⁷ See Miller, SPICE ISLANDS, *supra* note 3, at xiv; Khoo Joo Ee, *The Life of Spice*, UNESCO COURIER, June 1984, at 20, 20–21.

⁸ See SANDLER, *supra* note 1, at 158.

⁹ See JACOBS, *supra* note 4, at 31.

¹⁰ See SANDLER, *supra* note 1, at 144, 146.

¹¹ THOMAS A. JANVIER, HENRY HUDSON: A BRIEF STATEMENT OF HIS AIMS AND HIS ACHIEVEMENTS, at xi (1909).

¹² See SANDLER, *supra* note 1, at 255–57.

¹³ See JANVIER, *supra* note 11, at 140; SANDLER, *supra* note 1, at 273–74.

¹⁴ See JANVIER, *supra* note 11, at 139–40; SANDLER, *supra* note 1, at 281.

¹⁵ See JANVIER, *supra* note 11, at 128.

¹⁶ See Lawrence Millman, *Looking for Henry Hudson*, SMITHSONIAN, Oct. 1999, at 100; LLEWELYN POWYS, HENRY HUDSON 186 (1928). In New York, that could today amount to depraved indifference murder. See *People v. Mills*, 804 N.E.2d 392, 395 (N.Y. 2003) (quoting

Historians did not know what became of the mutineers until Thomas L. Powys, in the 1927 preface to his biography of Hudson,¹⁷ told of how he had acquired additional records, including the “lost verdict” of 1618, in which the Admiralty Court had fully acquitted all of the mutineers.¹⁸ Why did the government permit the mutineers to remain at large for several years and ultimately spare them? Researchers have suggested that, in the eyes of the English authorities, the survivors, “because of their knowledge of navigation in Hudson Strait,” “were apparently worth more alive than dead.”¹⁹ “There were trading routes and riches [yet] to be found.”²⁰ As another researcher put it, “[t]he guilt or innocence of the men seemed less important than the claim that they [had] discovered the Northwest Passage” to the far-east.²¹

So, it was still all about spices

As far as the spice trade was concerned, Hudson’s 1609 voyage was a failure, and that would be the end of the story. But the Dutch soon capitalized on an existing trading network along the Hudson and Mohawk rivers, particularly the beaver skin trade with the Native Americans.²²

N.Y. PENAL LAW § 125.25(2) (McKinney 2018); *People v. Kibbe*, 321 N.E.2d 773, 774 (N.Y. 1974) (quoting N.Y. PENAL LAW § 125.25).

¹⁷ See POWYS, *supra* note 16, at viii, ix; Lawrence J. Burpee, *The Fate of Henry Hudson*, 21 CAN. HIST. REV. 401, 401 (1940).

¹⁸ See POWYS, *supra* note 16, at viii, 186.

¹⁹ SANDLER, *supra* note 1, at 297.

²⁰ *Id.* at 299. No one can say for certain what became of Henry Hudson. There are myths, including one that Hudson survived and joined a Native American community, where he produced red-headed or pale-faced Indian offspring—even though we do not know his hair color. See generally G.M. ASHER, *HENRY HUDSON: THE NAVIGATOR 176* (1860) (concluding that no human is able to convey Hudson’s ultimate fate); JANVIER, *supra* note 11, at 145 (establishing that no one knows what ultimately happened to Hudson); PETER C. MANCALL, *FATAL JOURNEY: THE FINAL EXPEDITION OF HENRY HUDSON—A TALE OF MUTINY AND MURDER IN THE ARCTIC 170* (2009) (describing an unsuccessful search for Hudson); RICHARD WOODMAN, *A BRIEF HISTORY OF MUTINY 41* (2005) (“Hudson and his party were never seen or heard of again.”); Burpee, *supra* note 17, at 406 (theorizing that Hudson spent his last days on the eastern side of Charlton Island); Carl Carmer, *The Man—Hudson’s Triumph and Tragedy*, N.Y. TIMES, June 7, 1959, at 69 (questioning what, if any, conclusions can be drawn regarding Hudson’s later life); Millman, *supra* note 16 (suggesting Hudson lived for years after the mutiny and fathered light-skinned natives); Ian Chadwick, *Henry Hudson: The Aftermath of Hudson’s Voyages and Related Notes, 1611—On*, IAN CHADWICK, http://www.ianchadwick.com/hudson/hudson_05.htm# (last visited Oct. 28, 2018) (providing legends and oral history regarding what happened to Hudson).

²¹ DONALD S. JOHNSON, *CHARTING THE SEA OF DARKNESS: THE FOUR VOYAGES OF HENRY HUDSON 200* (1993).

²² See William T. Reynolds, *Henry Hudson: New World, New World View*, in *EXPLORERS FORTUNES & LOVE LETTERS: A WINDOW ON NEW NETHERLAND 10, 10, 11* (Martha Dickinson Shattuck ed., 2009); Oliver A. Rink, *Seafarers and Businessmen: The Growth of Dutch Commerce in the Lower Hudson River Valley*, in *DUTCH NEW YORK: THE ROOTS OF HUDSON VALLEY CULTURE 7, 8* (Roger Panetta ed., 2009).

“By the second decade of the [17th] century, Europe[an] demand for animal skins and furs was insatiable.”²³ In that trade, and in other forms of commerce, the Dutch settled what is now New York.²⁴

And so, in our infancy, we were Dutch until 1664, when the English took over, later ratifying their de facto assumption of sovereignty in the Treaty of Westminster in 1674.²⁵

About a century later our nation was born, so to speak, on July 4, 1776.²⁶ As New Yorkers and as Americans, we tend to think of ourselves as cultural and political descendants of the English.²⁷ After all, we were an English colony for more than a century: we saw England as the “mother country” and speak English as our “mother tongue.”²⁸ More to the point, within a year after the American Revolution, New York produced its first Constitution, in which we declared ourselves generally to be adherents of the English common law (subject to future revision and rejecting English religious establishment).²⁹

It takes nothing away from our colony’s English roots to remember that while we were subjects of the English crown for over a hundred years, we had an earlier identity, in which for almost half a century the colony was New Netherland, Manhattan was New Amsterdam, Albany was Beverwijk (or beaver district), and just up the road, the Dutch in 1624 built Fort Orange.³⁰ Brooklyn is a Dutch word, as is Gravesend, Flushing, Red Hook, the Bowery, Staten Island, Coney Island, and Harlem.³¹ Not to mention cookies, coleslaw, and waffles, all of which, for many New Yorkers are just hunky-dory—another

²³ Rink, *supra* note 22, at 7.

²⁴ See *id.* at 12–13; New Netherland Research Ctr., *What Was New Netherland?*, N.Y. ST. LIBR., <http://www.nysl.nysed.gov/newnetherland/what.htm> (last visited Oct. 28, 2018).

²⁵ See JACOBS, *supra* note 4, at 178, 186.

²⁶ Jeremy M. Miller, *A Swinging Pendulum or Damocles’ Sword: A Dramatic Perspective on Constitutional Liberties in the 1990’s*, 21 W. ST. U. L. REV. 165, 178 (1993).

²⁷ See PETER HAYS GRIES, *THE POLITICS OF AMERICAN FOREIGN POLICY: HOW IDEOLOGY DIVIDES LIBERALS AND CONSERVATIVES OVER FOREIGN AFFAIRS* 172 (2014); Randolph S. Bourne, *Trans-National America*, 118 ATLANTIC MONTHLY 86, 87, 88 (1916).

²⁸ See Paul K. Longmore, “*Good English Without Idiom or Tone*”: *The Colonial Origins of American Speech*, 37 J. INTERDISC. HIST. 513, 513 (2007) (“North American British colonials possessed a *national* language well before they became ‘Americans.’”).

²⁹ N.Y. CONST. of 1777, amend. XXXV.

³⁰ See JACOBS, *supra* note 4, xii (map of colonial New Netherland, consisting of present day New York); Charles Z. Lincoln, *The Governors of New York*, 9 PROC. OF THE N.Y. ST. HIST. ASS’N 33, 36 (1910) [hereinafter Lincoln, *Governors*].

³¹ See JACOBS, *supra* note 4, at 152, 237; NICOLINE VAN DER SIJS, *COOKIES, COLESLAW, AND STOOPS: THE INFLUENCE OF DUTCH ON NORTH AMERICAN LANGUAGES* 51, 228 (2009); LEONARD BERNARDO AND JENNIFER WEISS, *BROOKLYN BY NAME: HOW THE NEIGHBORHOODS, STREETS, PARKS, BRIDGES, AND MORE GOT THEIR NAMES* 57 (2006).

Dutch-origin term.³²

Psychologists tell us that infancies are formative,³³ and we might say the same for political development. New Netherland's neighbors to the north, in Massachusetts, and to the south, in Virginia, were English.³⁴ The three sibling colonies grew up side by side, but New Netherlanders were different from the English colonists in Massachusetts and Virginia.³⁵ Settlers came to Massachusetts principally for religious freedom, as Puritans set up what might fairly be called a theocracy.³⁶ In Virginia, settlers arrived and planted tobacco for export.³⁷

New Netherland was unique. Most settlers arrived not primarily for religious reasons, or to grow crops, although some did.³⁸ Most came under the aegis of a Dutch trading company.³⁹ From our first breaths we were members of a commercial enterprise that shaped our earliest laws and our civilization.⁴⁰ Petrus Stuyvesant, New Netherland's best known Governor/Director was essentially an employee of the Dutch West India Company, a for-profit enterprise.⁴¹ It is no coincidence that this small outpost in the middle Atlantic, sandwiched between New England and the South, and designed to do business in the New World, grew to become the greatest commercial center on earth.

Today we see the Netherlands as a quaint country, known to many Americans as a charming place to tour during tulip season; a good spot to snap pictures of windmills and canals and bicycles. In the late 16th century, however, the Netherlands was emerging a military and world power, vying with England for colonial and international

³² See VAN DER SIJS, *supra* note 31, at 124, 127, 143, 272.

³³ *Health Topics: Early Child Development*, WORLD HEALTH ORG., <http://www.who.int/topics/early-child-development/en/> (Last visited Oct. 28, 2018).

³⁴ See JACOBS, *supra* note 4, at 2.

³⁵ *Id.*

³⁶ See William E. Nelson, *The Utopian Legal Order of the Massachusetts Bay Colony, 1630-1686*, 47 AM. J. LEGAL HIST. 183, 188–89 (2005); Avihu Zakai, *Orthodoxy in England and New England: Puritans and the Issue of Religious Toleration, 1640-1650*, 135 PROC. AM. PHIL. SOC'Y 401, 401, 405 (1991).

³⁷ See James West Davidson and Mark Hamilton Lytle, *Serving Time in Virginia*, in AFTER THE FACT: THE ART OF HISTORICAL DETECTION 3 (Alfred A. Knopf ed., 2d ed. 1982); 1 WILLIAM NELSON, *THE COMMON LAW IN COLONIAL AMERICA* 23 (2008); Nelson, *supra* note 36, at 186.

³⁸ See generally JACOBS, *supra* note 4, at 2 (“Although New Netherland started as a trading post, it gradually developed into a settlement colony, which made it unique . . .”).

³⁹ See Roger Congleton, *America's Neglected Debt to the Dutch, an Institutional Perspective*, 19 CONST. POL. ECON. 35, 50 (2008).

⁴⁰ See *id.* at 50, 53.

⁴¹ See Peter Stuyvesant [1610-1672] *Early Founder/Historic Leader*, NEW NETHERLAND INST., https://www.newnetherlandinstitute.org/history-and-heritage/dutch_americans/peter-stuyvesant/ (last visited Oct. 28, 2018).

commercial power.⁴²

I. THE INFLUENCE OF THE DUTCH REPUBLIC: THE UNION OF UTRECHT, 1579

A mere forty years before Henry Hudson arrived here, the Dutch had been ruled by King Philip II of Spain.⁴³ The provinces of the Netherlands passed into the possession of the Hapsburg monarchy in 1477 as part of the Holy Roman Empire.⁴⁴ That is a long way from the founding of New Netherland.⁴⁵ Seven Northern provinces of the Netherlands, including Holland, revolted against Spanish rule and formed the Union of Utrecht in 1579 as the founding document of the Dutch Republic.⁴⁶ This remarkable document is an ancestor of our own ideas of political governance.⁴⁷ As one scholar pointed out, the founding document of the Dutch Republic “divided policymaking authority between a representative assembly and an independent executive.”⁴⁸ This, more than a century and a half before Montesquieu wrote about separation of power.⁴⁹ Under the Treaty of Utrecht (1579), “new taxes and declarations of war and peace would require the unanimous consent of the [Dutch] provinces.”⁵⁰

Consider the words of John Adams, writing from Holland on April 19, 1781, describing America’s debt to the Netherlands and the similarity of the American Republic to the earlier Dutch model:

The first planters of the four northern States found in [the Netherlands] an asylum from persecution . . . a grateful remembrance of that protection and . . . religious liberty they

⁴² See Congleton, *supra* note 39, at 35, 41.

⁴³ See *id.* at 35; see also *Dutch Revolt (1568-1648)*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/history/encyclopedias-almanacs-transcripts-and-maps/dutch-revolt-1568-1648> (last visited Oct. 9, 2018) (explaining the fight for Dutch autonomy in the “Eighty Years’ War”).

⁴⁴ See Congleton, *supra* note 39, at 4; Hermann Wiesflecker & Danielle Mead Skjelver, *Maximilian I Holy Roman Emperor*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Maximilian-I-Holy-Roman-emperor> (last visited Oct. 28, 2018) (“Maximilian was the eldest son of the emperor Frederick III and Eleanor of Portugal. By his marriage in 1477 to Mary, daughter of Charles the Bold, duke of Burgundy, Maximilian acquired the vast Burgundian possessions of the Netherlands and along the eastern frontier of France.”).

⁴⁵ See Congleton, *supra* note 39, at 50.

⁴⁶ See EVAN HAEFELI, *NEW NETHERLAND AND THE DUTCH ORIGINS OF AMERICAN RELIGIOUS LIBERTY* 20 (2012); *Dutch Revolt*, *supra* note 43.

⁴⁷ See Congleton, *supra* note 39, at 38.

⁴⁸ See *id.*

⁴⁹ See *id.*; BARON CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151–52 (Thomas Nugent, L.L.D. trans., 1748).

⁵⁰ See Congleton, *supra* note 39, at 38.

found [in the Netherlands], having sought them in vain in England.

The first inhabitants of two other States, New York and New Jersey, were immediate emigrants from [the Netherlands], and have transmitted their religion, language, customs, manners, and character . . . [and] whose history, and the great characters it exhibits . . . have been particularly studied, admired, and imitated in every State.

[T]here are no two nations, whose worship, doctrine, and discipline are more alike, than those of the [United States and the Netherlands].

In . . . the freedom of inquiry, the right of private judgment, and the liberty of conscience . . . the two nations resemble each other more than any others.

The originals of the two republics are so much alike, that the history of one seems but a transcript from that of the other.⁵¹

Another scholar, James R. Tanis, considers the Union of Utrecht “a symbol to many Americans, first of unity, and then of unity and liberty.”⁵²

II. THE INFLUENCE OF DUTCH FREEDOM OF RELIGION

Article 13 of the Netherlands’ Union of Utrecht provides that “each person shall remain free [especially] in his religion and that no one shall be investigated or persecuted because of his religion.”⁵³ This language applied only to private beliefs and not public worship, and so it did not approach our own interpretation of religious freedom.⁵⁴ It is, however, a milestone for the Dutch over 200 years before we promulgated our religious freedom guarantees in the Bill of Rights of 1791.⁵⁵ Indeed, when the religious minorities in New Netherland sought religious tolerance, they appealed to the Dutch under their

⁵¹ *Memorial to Their High Mightinesses, The States-General of The United Provinces of the Low Countries* in 7 THE WORKS OF JOHN ADAMS: SECOND PRESIDENT OF THE UNITED STATES, 396, 399, 400 (Charles Francis Adams ed. 1852).

⁵² See James R. Tanis, *The Dutch-American Connection: The Impact of “The Dutch Example” on American Constitutional Beginnings*, in NEW YORK AND THE UNION 23 (Stephen L. Schechter & Richard B. Bernstein eds., 1990).

⁵³ THE UNION OF UTRECHT [CONSTITUTION] Jan. 23, 1579, art. 13 (Neth.).

⁵⁴ See HAEFEL, *supra* note 46, at 22.

⁵⁵ See U.S. CONST. amends. I–X; Steven G. Calabresi, et al., *State Bill of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1455 (2012).

Constitution, invoking the language that prohibited religious persecution.⁵⁶

Therefore, when we speak of our Dutch legacy, it is right to bear in mind that we were settled by people who had concepts of religious tolerance that were, to say the least, advanced.⁵⁷ James Madison recognized these early Dutch expressions of religious tolerance, noting that:

Until Holland ventured on the experiment of combining a liberal toleration with the establishment of a particular creed, it was taken for granted, that an exclusive [and] intolerant establishment was essential, and notwithstanding the light thrown on the subject by that experiment, the prevailing opinion in Europe, England not excepted, has been that Religion could not be preserved without the support of Gov[ernment] nor Gov[ernment] be supported with an established religion that there must be at least an alliance of some sort between them.⁵⁸

This “Dutch Experiment” was a step along the path toward the Constitution’s First Amendment—the freedom of religion.⁵⁹ In 1822, in arguing against religious establishment and in favor of religious toleration, Madison emphasized the Dutch connection:

It was the belief of all sects at one time that the establishment of Religion by law, was right [and] necessary; that the true religion ought to be established in exclusion of every other; And that the only question to be decided was which was the true religion. The example of Holland proved that a toleration of sects, dissenting from the established sect, was safe & even useful.⁶⁰

⁵⁶ See HAEFELI, *supra* note 46, at 141, 146; David W. Voorhees, *The 1657 Flushing Remonstrance in Historical Perspective*, 81 DE HALVE MAEN 11, 11 (2008).

⁵⁷ See Voorhees, *supra* note 56, at 11 (“Although [religious freedom] applied only to private beliefs and not public worship, its embodiment in the sixteenth-century Dutch constitution as a cornerstone in the foundation of their state makes the Dutch truly unique. It is important to understand, then, that it is to the Dutch constitution New Netherland’s religious minorities . . . appealed when requesting toleration.”).

⁵⁸ See JAMES MADISON, THE WRITINGS OF JAMES MADISON 485 (Gaillard Hunt ed., 1910); see generally John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 372, 389–90 (1996) (discussing James Madison’s and other individuals’ views of religious liberty in the early republic).

⁵⁹ See U.S. CONST. amend. I.

⁶⁰ See MADISON, *supra* note 58, at 102.

Although the Netherlands had a tradition of religious freedom, there was friction in the colony of New Netherland; particularly between Petrus Stuyvesant and certain religious groups, most notably Quakers, Lutherans, and Jews.⁶¹ There were few Catholics in New Netherland,⁶² and ironically, after the English takeover, the English crown expanded religious liberty to all but Catholics.⁶³ On January 31, 1689 the Crown instructed Governor Sloughter: “And you are to permit a liberty of Conscience to all Persons (except Papists) so they be contented with a quiet and Peaceable enjoyment of it, not giving offence or scandal to the Government.”⁶⁴

III. THE DECLARATIONS OF INDEPENDENCE: THE NETHERLANDS (1581) AND THE UNITED STATES (1776)

In 1581, two years after they created their republic, the Dutch provinces proclaimed independence from Spain, in an Act of Abjuration, or *Plakkaat van Verlatinge*.⁶⁵ It is also known as the Dutch Declaration of the Rights of Man: “a pioneer utterance [that] set the model for [later] declarations” of independence including our own.⁶⁶ Reading the Dutch Declaration of Independence we find language so similar to ours that we would not be out of line in imagining that Thomas Jefferson had a copy of the Plakkaat at his elbow.⁶⁷ One commentator has examined the two documents, concluding that the structure and argument of the two state papers are almost identical.⁶⁸

⁶¹ See HAEFELI, *supra* note 46, at 138, 140, 141; Paul Finkelman, *Religious Liberty and the Quincentenary: Old World Intolerance, New World Realities, and Modern Implications*, 7 J. CIV. RTS. & ECON. DEV. 523, 544–45 (1992).

⁶² See Finkelman, *supra* note 61, at 545.

⁶³ See HAEFELI, *supra* note 46, at 254–55; *The Act of Settlement*, U.K. PARLIAMENT, <https://www.parliament.uk/about/living-heritage/evolutionofparliament/parliamentaryauthority/revolution/overview/actofsettlement/> (last visited Oct. 29, 2018).

⁶⁴ THE NEW YORK IRISH 50 (Ronald H. Bayor & Timothy J. Meagher eds., 1996); JOHN ROMEYN BRODHEAD, DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW-YORK 689 (E.B. O’Callaghan ed., 1853) [hereinafter BRODHEAD, DRCHSNY].

⁶⁵ See *The Act of Abjuration and the Declaration of Independence*, NEW NETHERLAND INST., <https://www.newnetherlandinstitute.org/history-and-heritage/additional-resources/dutch-treats/the-act-of-abjuration/> (last visited Oct. 29, 2018).

⁶⁶ See ROBERT ERGANG, EUROPE FROM THE RENAISSANCE TO WATERLOO 296 (1939).

⁶⁷ See Congleton, *supra* note 39, at 40 tbl.1 (comparing the language in the Act of Abjuration with that in the American Declaration of Independence).

⁶⁸ Stephen E. Lucas, *The Rhetorical Ancestry of the Declaration of Independence*, in 1 RHETORIC & PUB. AFF. 162 (1998). For an actual chart comparing the language of the Dutch

Both contain a long list of grievances about the monarch of tyranny.⁶⁹ Both describe the repeated, unsuccessful attempts by the monarch's subjects to gain redress by peaceable, civil means.⁷⁰ Most importantly, both see the only recourse as revolution and independence.⁷¹

The Dutch opening statement reads: “[W]hereas God did not create the people slaves to their prince, to obey his commands, whether right or wrong, but rather the prince for the sake of the subjects (without which he could be no prince) And when he does not behave thus, but, on the contrary, oppresses them, seeking opportunities to infringe their ancient opportunities and privileges, . . . [T]hen he is no longer a prince, but a tyrant.”⁷² And further on, in justifying revolt, “this is what the law of nature dictates for the defense of liberty, which we ought to transmit to posterity, even at the hazard of our lives.”⁷³

Compare that with Jefferson's phrasing, when he writes of our entitlements under the “law of nature,”⁷⁴ and that to gain liberty we pledge “our Lives, our Fortunes, and our sacred Honor.”⁷⁵

The Dutch, in their pioneering document, provided a political model from which we took a major step forward. Jefferson abandoned the Dutch notion of a contract between the monarch and the representatives of the people, replacing it with the concept of full autonomy of the people.⁷⁶

A. After Henry Hudson

Following Hudson's explorations along the River region, then called the Mauritius River, others, including Adriaen Block, came to explore trading possibilities.⁷⁷ In 1614, Hendrick Christiaensen built Fort Nassau, a trading house with military defense, on Castle Island

Plakkatt with the American Declaration of Independence, *see* Congleton, *supra* note 39, at 7.

⁶⁹ *See* Congleton, *supra* note 39, at 40 tbl.1.

⁷⁰ *See id.*

⁷¹ *See id.*

⁷² *Id.*

⁷³ PLAKKAAT VAN VERLATINGHE [Dutch Act of Abjuration] July 26, 1581 (Neth.).

⁷⁴ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

⁷⁵ *Id.* at final para.

⁷⁶ *See* Wijnand W. Mijnhardt, *The Declaration of Independence and the Dutch Legacy, in* OPENING STATEMENTS: LAW, JURISPRUDENCE, AND THE LEGACY OF DUTCH NEW YORK 62 (Albert M. Rosenblatt & Julia C. Rosenblatt, eds. 2013).

⁷⁷ *See* JOHN ROMEYN BRODHEAD, HISTORY OF THE STATE OF NEW YORK 45–46 (1853) [hereinafter BRODHEAD, HISTORY]; MARTINE GOSSELINK, NEW YORK NEW AMSTERDAM: THE DUTCH ORIGINS OF MANHATTAN 42 (2009).

below Albany.⁷⁸ That year, the Dutch government passed an ordinance authorizing further “discovery” of the region⁷⁹ and named the middle Atlantic region “New Netherland.”⁸⁰ The English were displeased and in 1620 challenged the Dutch for sponsoring settlements that the English claimed were within the jurisdiction of English patents.⁸¹ After the explorers came the settlers, arriving under the wing of the Dutch West India Company, to which the Dutch States General in 1621 had granted a monopoly that included all the coasts of America.⁸² The charter allowed the WIC to appoint officials and, in effect, set up a government in New Netherland.⁸³ An early group of settlers arrived on Governor’s Island in 1624, in the service of the WIC, carrying with them a set of instructions:⁸⁴the founding documents of our forebears here. The writing helped shape the character of New York.

It begins with introductory language reminding the settlers that they are in the service of the WIC, and that they may:

[P]ractice no other form of divine worship than that of the Reformed religion as [presently here] in this country and thus by their Christian life and conduct seek to draw the Indians and other blind people to the knowledge of God and His Word, *without however persecuting any one on account of his faith, but leaving to every one the freedom of his conscience.*⁸⁵

Blasphemy, however was not to be tolerated.⁸⁶

For its time, this was a remarkable edict, considering that elsewhere the norm was forced beliefs, murderous persecution, or

⁷⁸ See BRODHEAD, HISTORY, *supra* note 77, at 55.

⁷⁹ See CHARLES Z. LINCOLN, THE CONSTITUTIONAL HISTORY OF NEW YORK 411 (1906) [hereinafter LINCOLN, CONSTITUTIONAL HISTORY]; BRODHEAD, DRCHSNY *supra* note 64, at 5.

⁸⁰ See BRODHEAD, DRCHSNY, *supra* note 64, at 10; BRODHEAD, HISTORY, *supra* note 77, at 63.

⁸¹ See LINCOLN, CONSTITUTIONAL HISTORY, *supra* note 79, at 412; BRODHEAD, HISTORY, *supra* note 77, at 138. As we have seen, the English turned from the pen to the sword, when 40 years later, in 1664 they took over New Netherland and named it New York.

⁸² See A.J.F. van Laer, *The Documents and Their Historical Value*, in DOCUMENTS RELATING TO NEW NETHERLAND, 1624-1626 xi (A.J.F. van Laer, ed. and trans., 1924) [hereinafter A.J.F. Van Laer, *Documents*].

⁸³ See *id.*

⁸⁴ See *id.* at xx–xxi.

⁸⁵ A.J.F. van Laer, *Provisional Regulations for the Colonists*, in DOCUMENTS RELATING TO NEW NETHERLAND, at 2–5 (A.J.F. van Laer, ed. and trans., 1924) (emphasis added) [hereinafter A.J.F. Van Laer, *Provisional Regulations*].

⁸⁶ See *id.*

expulsion.⁸⁷ From Patria, the orders were to practice the faith as taught, but not to impose it on anyone else. It is fine to gain religious followers, but only by example, not by force.⁸⁸

As historian James Truslow Adams wrote: “[a]t that time, Holland was, in . . . all respects, far ahead of England intellectually. In the matter of religious toleration she was immeasurably in advance of the rest of Europe”⁸⁹—and Massachusetts. Indeed, in 1659-1661, four Quakers, including Mary Dyer, were hanged in Massachusetts for their religious beliefs.⁹⁰ As advanced as it was, it would be a mistake to believe that the WIC instructions approached today’s understanding of religious freedom, or that it was transported easily to New Netherland. As one writer points out, the “call for toleration [came from the WIC] officials in Amsterdam” but “[t]he history of religion in New Netherland is one of constant conflict between” them and the local leadership in New Netherland.⁹¹ “[W]ith a few exceptions, the leadership on the scene in New Amsterdam resisted and ignored their superiors in Amsterdam.”⁹² Lutherans, Jews, and Quakers experienced particular difficulties.⁹³ Stuyvesant referred to

⁸⁷ See Paul Finkelman, *supra* note 61, at 525–27 (“Virtually all political leaders of the sixteenth and seventeenth centuries accepted the idea that religious diversity undermined the stability of any government. Most people believed that in any kingdom a ruler and his or her subjects should have the same religion. . . . The Massachusetts Puritans sought religious liberty *for themselves*, but had little patience for those who did not agree with their theology. . . . Nineteen convicted witches were hanged in Salem in 1692 . . . four Quakers [were hanged] between 1659 and 1661. . . . In the French colonies Catholicism was not only established, but, after King Louis XIV revoked the Edict of Nantes in October 1685, Protestants were barred from Old and New France alike.”).

⁸⁸ See A.J.F. Van Laer, *Provisional Regulations*, *supra* note 85, at 2–5.

⁸⁹ JAMES TRUSLOW ADAMS, *THE FOUNDING OF NEW ENGLAND* 89 (1921).

⁹⁰ See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1423 (1990); *Mary Dyer*, QUAKERS IN THE WORLD, <http://www.quakersintheworld.org/quakers-in-action/15/Mary-Dyer> (last visited Oct. 29, 2018).

⁹¹ See Finkelman, *supra* note 61, at 537.

⁹² *Id.*

⁹³ See, e.g., FREDERICK J. ZWIERLEIN, *RELIGION IN NEW NETHERLAND: A HISTORY OF THE DEVELOPMENT OF THE RELIGIOUS CONDITIONS IN THE PROVINCE OF NEW NETHERLAND* 188 (1910) (explaining the movement by Lutherans to “organize a separate congregation” in New Netherland which was resisted by Stuyvesant and other officials); *id.* at 213 (“Director General and Council regarded [Quakers] as anarchists, whose doings tended not only to the subversion of the Protestant Religion, but also the abolition of law and order and to the contempt of civil authority.”); *id.* at 247 (explaining the religious and economic reasons for the persecution of Jews by the Protestants of New Netherland).

As crucial as were the tests provided by Lutherans and Jews for the Reformed ideal of society’s organic unity, the most significant test of all was that presented by the Quakers. . . . These people were . . . viewed by civil magistrates on both sides of the Atlantic as seditious anarchists, and by ecclesiastical authorities as “machinations of Satan.”

Quakers as a “new unheard of abominable heresy,” as to which Patria told Stuyvesant to shut his eyes.⁹⁴ His actions in dealing with Quakers led to the Flushing Remonstrance.⁹⁵

Patria also recognized that the settlers would be entering the world of Native Americans, with whom they would do commerce, and must therefore “take []special care, whether in trading or in other matters . . . to fulfill their promises to the Indians or other neighbors and not to give them any offense without cause as regards their persons, wives . . . on pain of being rigorously punished therefor.”⁹⁶

As if to emphasize the point, the WIC ordered Willem Verhulst, the director in charge of the settlers, to:

[S]ee that no one do the Indians any harm or violence, deceive, mock, or contemn them in any way, but that in addition to good treatment they be shown honesty, faithfulness, and sincerity in all contracts, dealings, and intercourse, without being deceived by shortage of measure, weight, or number, and that throughout friendly relations with them be maintained.⁹⁷

In 1626, Peter Minuit replaced Verhulst as Director of New Netherland.⁹⁸ That year “the Dutch bought the island of Manhattan from the Indians for the sum of sixty guilders, presumably in the form of some trading commodities.”⁹⁹ There is a debate over who on behalf of the Dutch made the purchase.¹⁰⁰

Did the Dutch pull one over on the Indians – as junior high school texts might suggest? Historian Paul Otto maintains that the seemingly one-sided nature of the transaction between the Munsee Indians and the Dutch has been grossly exaggerated and

GEORGE L. PROCTER-SMITH, *RELIGION AND TRADE IN NEW NETHERLAND: DUTCH ORIGINS AND AMERICAN DEVELOPMENT* 220 (1973).

⁹⁴ See PROCTER-SMITH, *supra* note 93, at 220, 245 (“When the directors rebuked Stuyvesant for his strong ordinance against conventicles in 1656, they urged him that the best policy toward dissent would be to ‘sweetly let it pass.’”)

⁹⁵ See Charles Gehring, *Prosecution or Persecution?*, in *OPENING STATEMENTS: LAW, JURISPRUDENCE, AND THE LEGACY OF DUTCH NEW YORK* 117 (Albert M. Rosenblatt & Julia C. Rosenblatt eds., 2013).

⁹⁶ A.J.F. Van Laer, *Provisional Regulations*, *supra* note 85, at 17.

⁹⁷ *Id.* at 39.

⁹⁸ See *id.* at 176.

⁹⁹ JACOBS, *supra* note 4, at 43.

¹⁰⁰ See Charles Ghering, *Peter Minuit’s Purchase of Manhattan Island — New Evidence*, 55 *DE HALVE MAEN* 6, 7 (1980); C. A. Weslager, *Did Minuit Buy Manhattan Island from the Indians?*, 43 *DE HALVE MAEN* 5 (1968).

misunderstood.¹⁰¹ To begin with, there is no true deed, no date of transfer, and no specification as to the exact identity of the parties to the exchange.¹⁰² More importantly, however, Otto asserts that the Munsees did not recognize the concept of land ownership or permanent alienation of parcels.¹⁰³ When Indians “sold” land, they were contemplating joint occupancy and peaceable relations.¹⁰⁴

This is borne out by cotemporary writings. Adriaen van der Donck, based on his interactions with the Native Americans in New Netherland wrote: “wind, stream, bush, field, sea, beach, and riverside are open and free to everyone of every nation with which the Indians are not embroiled in open conflict.”¹⁰⁵

1. Slavery

The 1620’s brought us more than Manhattan Island. Almost from the inception, America has been beleaguered by the institution of slavery.¹⁰⁶ Given the three-fifths compromise, the abolitionist movement, and the Civil War, Americans tend to associate slavery exclusively with the South. The first slaves arrived in Virginia in the early 1620’s.¹⁰⁷

In a draft of the Declaration of Independence, Jefferson wrote that England’s King George III has: “waged cruel war against human nature itself, violating its most sacred rights to life and liberty in the

¹⁰¹ See Paul Otto, *Real Estate or Political Sovereignty?: The Dutch, Munsees, and the Purchase of Manhattan Island*, in *OPENING STATEMENTS: LAW, JURISPRUDENCE, AND THE LEGACY OF DUTCH NEW YORK* 74 (Albert M. Rosenblatt & Julia C. Rosenblatt eds., 2013) (stating that through the sale of Manhattan, the natives did benefit). The natives used the sixty guilders to buy European goods which the natives viewed as superior to their own. *Id.* Also, this transaction created a trade relationship between the natives and the Dutch. *Id.* The Dutch would ask the Natives to acquire furs in exchange for more goods which the natives deemed valuable. *Id.*

¹⁰² See *id.* at 67.

¹⁰³ See *id.* at 76.

¹⁰⁴ See *id.* at 75.

¹⁰⁵ ADRIAEN VANDER DONCK, *supra* note 1, at 103. In seeking to advance popular governance in New Netherland, van der Donck confronted Petrus Stuyvesant and was a central figure (“The People’s Champion”) in Russell Shorto’s book *The Island at the Center of the World*, New York: Doubleday, 2004. See RUSSELL SHORTO, *THE ISLAND AT THE CENTER OF THE WORLD: THE EPIC STORY OF DUTCH MANHATTAN AND THE FORGOTTEN COLONY THAT SHAPED AMERICA* 13 (2004).

¹⁰⁶ See BETTY WOOD, *SLAVERY IN COLONIAL AMERICA, 1619-1776* 9 (2005) (describing that in the 1620s, the first elements of slavery were born in Virginia).

¹⁰⁷ See *id.*; see also William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 *CARDOZO L. REV.* 1711, 1751 (1996) (concluding that the legal status of slaves had been “ambiguous”); but see Jonathan L. Alpert, *The Origin of Slavery in the United States – The Maryland Precedent*, 14 *AM. J. LEGAL HIST.*

189, 190 (1970) (“Early legislation implicitly recognized the existence of slavery. ‘An Act for the liberties of the people’ in 1639, provided that all Christian inhabitants, ‘Slaves excepted’ should have the rights of Englishmen.”).

persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither.”¹⁰⁸

But it would be wrong to ignore the role of New Netherlands. Slaves arrived there in the mid-1620’s.¹⁰⁹ We have no census figures, so we do not know for certain how many people of African origin made up New Netherland. Most writers report that the first slaves, eleven men, arrived in 1625 or 1626, with three women arriving in 1628.¹¹⁰

In 1628 New Amsterdam’s first minister, Jonas Michaelius, spoke derisively of local slave women.¹¹¹

In Article XXX of the WIC Charter of Freedoms and Exemptions of 1629, officials of the Company were charged with supplying the colonists “as many Blacks as they conveniently can, on the conditions hereafter to be made, in such manner, however, that they shall not be bound to do it for a longer time than they shall think proper,”¹¹² thus documenting the time frame, if not the specific dates for the origins of the colony’s slavery.

According to Graham Russell Hodges, in 1630, there were 300 Europeans and a few blacks, the latter being the “core laborers.”¹¹³ Hodges reports that in 1635, five black men went to the Netherlands to petition for pay equal to that of whites for the building of Fort Amsterdam.¹¹⁴ In 1639, the WIC paid them.¹¹⁵

Authors vary as to how much slave labor went into building New

¹⁰⁸ LIBRARY OF CONGRESS, THE THOMAS JEFFERSON PAPERS AT THE LIBRARY OF CONGRESS: HISTORY, <https://www.loc.gov/teachers/classroommaterials/connections/thomas-jefferson/history3.html> (last visited Oct. 27, 2018).

¹⁰⁹ See Robert J. Swan, *First Africans into New Netherland, 1625 or 1626?*, 66 DE HALVE MAEN 75, 75 (1993).

¹¹⁰ *Id.* at 75, 81. In an attempt to track down these assertions Robert Swan failed to find any original documents describing these persons. *Id.* at 80. He concluded this was a matter of secondary sources’ citing each other. *Id.* at 76. Poring over documents, he noted that detailed descriptions of laborers, noting their origins, documents as late as September 1626, failed to mention anyone of black or African origin. *Id.* at 81.

¹¹¹ See Jonas Michaëlius, *Letter of Reverend Jonas Michaëlius to Reverend Adrianus Smoutius*, in NARRATIVES OF NEW NETHERLAND 1609-1664 122, 129 (J. Franklin Jameson ed., 1909); see also Dan Graves, *Michaelius, America’s 1st Dutch Reformed Pastor*, CHRISTIANITY.COM (June 2007), <https://www.christianity.com/church/church-history/timeline/1601-1700/michaelius-americas-1st-dutch-reformed-pastor-11630080.html> (“On this day, January 24, 1628, Jonas sailed for the New Netherlands. . . . Jonas was the first Dutch Reform “Domine” in the American colony. He immediately organized a church in New Amsterdam and began holding services above a grist mill for the approximately 270 European inhabitants.”).

¹¹² LAWS AND ORDINANCES OF NEW NETHERLAND, 1638-1674, at 10 (E.B. O’Callaghan trans., 1868) [hereinafter LAWS AND ORDINANCES].

¹¹³ See Graham Russell Hodges, ROOT AND BRANCH: AFRICAN AMERICANS IN NEW YORK AND EAST JERSEY 1613-1863 9 (1999).

¹¹⁴ See *id.* at 10.

¹¹⁵ See *id.*

Amsterdam.¹¹⁶ Russell Shorto states that during the early New Netherland period there were only about a dozen slaves and he disputes the account that slaves were instrumental in building the infrastructure of New Amsterdam.¹¹⁷

At first, slaves came from the Caribbean: imported from Brazil, sold by pirates, or from captured Spanish or Portuguese ships.¹¹⁸ On January 20, 1648, after Brazil fell to the Portuguese, the New Netherland Director and Council passed a resolution opening trade to Brazil and Angola and authorizing the importation of slaves into New Netherland.¹¹⁹

In April of that year, the Directors at Amsterdam agreed that when ships have completed their trade in Angola, they “may carry Negroes to your place to be employed in the cultivation of the soil.”¹²⁰ The West India Company began to import slaves directly from Africa as authorized by an August 6, 1655 ordinance.¹²¹

The first shipment of approximately 300 arrived that year on the *Witte Paert*, and by around 1660, New Amsterdam had become a major port for the slave trade¹²² in contrast to the presence of slaves there.¹²³

By 1700, New York City had the largest African-American population of any North American City and a ratio similar to that of Maryland and Virginia.¹²⁴

¹¹⁶ See Russell Shorto, *Our Captive Past*, N.Y. TIMES (Mar. 19, 2006), <https://www.nytimes.com/2006/03/19/books/review/our-captive-past.html> (reviewing SLAVERY IN NEW YORK: AFRICAN AMERICANS IN NEW YORK CITY, 1626–1863 (Ira Berlin & Leslie M. Harris eds., 2005)).

¹¹⁷ See *id.*

¹¹⁸ See LESLIE M. HARRIS, IN THE SHADOW OF SLAVERY: AFRICAN AMERICANS IN NEW YORK CITY, 1626–1863 15 (2003) [hereinafter HARRIS, SHADOW].

¹¹⁹ LAWS AND ORDINANCES, *supra* note 112, at 81.

¹²⁰ *Id.* at 81–82.

¹²¹ *Id.* at 191.

¹²² See HARRIS, SHADOW, *supra* note 118, at 15.

¹²³ Joyce Goodfriend states that by the time of the English take-over in 1664 there were about 300 slaves in New Netherland. JOYCE D. GOODFRIEND, BEFORE THE MELTING POT: SOCIETY AND CULTURE IN COLONIAL NEW YORK CITY, 1664-1730 13 (1992) [hereinafter GOODFRIEND, MELTING POT]; Joyce D. Goodfriend, *The Souls of New Amsterdam's African American Children*, in OPENING STATEMENTS, L. & JURIS. IN DUTCH N.Y. 27–35 (Albert Rosenblatt & Julia Rosenblatt, eds., 2007). New York's gradual abolition began in 1799 with an act (L.1799, ch. 62) that provided that a child born to a slave after July 4, 1799 would be considered free. See Act of Mar. 29, 1799, ch. 62, 1799 N.Y. Laws 388. The children would, however, continue to serve the mother's owner until age twenty-eight for a male or twenty-five for a female. See *id.* The legislature also passed other statutes allowing for voluntary manumission. See, e.g., Act of Mar. 31, 1817, ch. 137, 1817 N.Y. Laws 136. In 1817, the legislature (ch. 137) provided that everyone born before July 4, 1799 would become free by July 4, 1827. See *Arents v. Long Island R.R. Co.*, 50 N.E. 422, 423 (N.Y. 1898).

¹²⁴ HARRIS, SHADOW, *supra* note 118, at 12; Leslie M. Harris, *Slavery, Emancipation, and Class Formation in Colonial and Early National New York City*, 30 J. URB. HIST. 339, 339 (2004) [hereinafter Harris, *Slavery*]; see generally, Ira Berlin, *From Creole to African: Atlantic*

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Dutch Influences on New York

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2. Women

Hugo Grotius (1583-1645), a Dutch jurist, whose name is associated with lofty concepts of natural law, and whose texts were relied on by New Netherland magistrates, asserted that: “the power of husbands over their wives, which is almost peculiar to Holland,”¹²⁵ and that husbands exercise a very great control over his wife’s property.¹²⁶ Most historians agree, however, that women in New Netherland had greater political and economic rights than in the English era that followed.¹²⁷

In contrast to English primogeniture, for example, Dutch legal customs relating to inheritance prohibited parents, in the absence of good cause, from favoring one child over another regardless of gender.¹²⁸ Also, in cases of intestacy, widows received at least half of the marital estate, irrespective of her initial contribution.¹²⁹

Records also show that testators in the Netherlands and New Netherland left most of the marital estate to the surviving spouse, based on the Dutch custom of *boedelhouderschap* by which the survivor retains the estate.¹³⁰ Contrastingly, in the English period, testator-husbands generally reduced the widow’s share.¹³¹

Moreover, married couples in New Netherland typically executed joint wills; a practice rejected under English common law.¹³² There were also fewer instances in which husbands named their wives as sole executors.¹³³ Also in contrast to English practice, the Dutch, and in turn, New Netherland couples, shared equally in each other’s

Creoles and the Origins of African-American Society in Mainland North America, 53 WM. & MARY Q. 251, 272 (1996) (“Although the proportion of the black population enjoying freedom shrank steadily under English rule, the small free black settlement held its own.”); Joyce D. Goodfriend, *Burghers and Blacks: The Evolution of a Slave Society at New Amsterdam*, 59 N.Y. HIST. 125, 126 (1978) [hereinafter Goodfriend, *Evolution*] (“[T]he Dutch variant of slavery left a deeper imprint on the local societies of what became New York than previously believed.”).

¹²⁵ HUGO GROTIUS, THE INTRODUCTION TO DUTCH JURISPRUDENCE OF HUGO GROTIUS 4 (A.F.S. Maasdrorp trans., 1903); Yasuaki Onuma, *Hugo Grotius*, BRITANNICA (last updated Aug. 24, 2018), <https://www.britannica.com/biography/Hugo-Grotius>.

¹²⁶ See HUGO GROTIUS, THE INTRODUCTION TO DUTCH JURISPRUDENCE OF HUGO GROTIUS 27 (Charles Herbert trans., 1845).

¹²⁷ See *Women of New Amsterdam and New Netherland*, WOMEN HIST. BLOG (Mar. 2008), <http://womenhistoryblog.com/2008/03/dutch-womens-rights.html>.

¹²⁸ See Susan Shaw, *New Light on Old Sources: Finding Women in New Netherland’s Courtrooms*, 74 DE HALVE MAEN 9, 10 (2001).

¹²⁹ See *id.*

¹³⁰ DAVID E. NARRETT, INHERITANCE AND FAMILY LIFE IN COLONIAL NEW YORK CITY 17, 53, 55–56 (1992).

¹³¹ *Id.* at 17.

¹³² *Id.* at 17, 53.

¹³³ *Id.* at 107.

profits and losses, contemplating a “community of goods” (*gemeenschap van goederen*).¹³⁴

Further, women played a prominent role in the Leisler Rebellion of 1689.¹³⁵ Documents paint a picture of New Netherland women different from the portrayal of the Dutch housewife, spending her life cleaning and polishing while wearing a “wing-tipped lace cap and wooden shoes.”¹³⁶

Records show women to be undocile and conspicuous in a New Netherland society governed by Dutch Roman Law that: “represented them as individuals, granting women the same rights and privileges as their male counterparts.”¹³⁷ New Netherland women were at the center of the family’s religious and spiritual lives, and even in the financial support of the church.¹³⁸

A wife had a vested interest in the proper handling of her husband’s business, being made a joint contributor in the marriage, and thus equally responsible for its debts.¹³⁹ Biemer reports that unlike the 17th century English woman, the 17th century Dutch woman had a legal history rooted in Roman law, and that under the Roman–Dutch law, women in both the Netherlands and New Netherland were permitted to keep “her own surname when married, own real and personal property, own and operate her own business without her husband’s permission or co-signature, engage in trade on her own, and sue and be sued in court.”¹⁴⁰

Although it would be wrong to deny that Holland was patriarchal, visitors there were shocked to see women unescorted, running businesses, expressing opinions, selecting mates, and retaining their maiden names upon marriage.¹⁴¹

While a New England man would seek a wife of “incomparable

¹³⁴ See J.W. WESSELS, *HISTORY OF THE ROMAN-DUTCH LAW* 453 (1908); NETH. COMPARATIVE LAW ASS’N, *INTRODUCTION TO DUTCH LAW FOR FOREIGN LAWYERS* 46 (J.M.J. Chorus et al. eds., 2d ed. 1993).

¹³⁵ See David William Voorhees, “*How Ther Poor Wives Do, and Are Delt With*”: *Women in Leisler’s Rebellion*, 70 *DE HALVE MAEN* 41, 41 (1997) [hereinafter Voorhees, *Leisler’s Rebellion*].

¹³⁶ See *id.* at 41 n.7.

¹³⁷ See *id.* at 42.

¹³⁸ See Joyce D. Goodfriend, *Recovering the Religious History of Dutch Reformed Women in Colonial New York*, 64 *DE HALVE MAEN*, 53, 59 (1991).

¹³⁹ See NETH. COMPARATIVE LAW ASS’N, *supra* note 134, at 46; SIMON SCHAMA, *THE EMBARRASSMENT OF RICHES: AN INTERPRETATION OF DUTCH CULTURE IN THE GOLD AGE* 400, 403 (1987); Voorhees, *Leisler’s Rebellion*, *supra* note 135, at 47.

¹⁴⁰ LINDA BRIGGS BIEMER, *WOMEN AND PROPERTY IN COLONIAL NEW YORK: THE TRANSITION FROM DUTCH TO ENGLISH LAW, 1643–1727* x (1979); see JEAN ZIMMERMAN, *THE WOMEN OF THE HOUSE: HOW A COLONIAL SHE-MERCHANT BUILT A MANSION, A FORTUNE, AND A DYNASTY 7–9* (2006).

¹⁴¹ See SCHAMA, *supra* note 139, at 404.

meekness of spirit,” a New Netherland man sought a “house friend.”¹⁴² As the Dutch song goes, *Het Klein Hollands Goud-Vinkje*,

A house-guardian and his house friend
May be likened
Unto a King and Queen
For their home is like a kingdom
And the children their happy subjects¹⁴³

It would, however, be an exaggeration to say that by today’s measure, women’s rights flourished in New Netherland, and suddenly reversed course when the English took over in 1664.¹⁴⁴ When the English assumed control they were, by and large, politically astute enough to refrain from imposing provocative and abrupt changes.

The laws and legal culture, however gradually changed under English rule, “result[ing] in a loss of economic energy in New York women.”¹⁴⁵ After the English assumed sovereignty of New York, a woman could no longer institute legal action, but instead needed a male guardian.¹⁴⁶

After twenty years of English rule in New York, and by an act of the Assembly of 1684, a woman could not buy land or conduct business in her own name.¹⁴⁷

We are left with the impression that while the written law was somewhat better for women in New Netherland as compared with New York,¹⁴⁸ it was the mores of a frontier society and its shared tasks that produced an appreciably more equitable partnership in New Netherland than elsewhere.

¹⁴² See *id.* at 421, 422; Thomas Shepard, *A Character of Mistress Joanna Shepard*, in *A LIBRARY OF AMERICAN LITERATURE* 220 (Edmund Clarence Stedman & Ellen Mackay Hutchinson eds., 1892) (detailing an account of an English settler describing the loss of his wife, Mistress Joanna Shepard).

¹⁴³ SCHAMA, *supra* note 139, at 422.

¹⁴⁴ See *id.* at 190.

¹⁴⁵ See BIEMER, *supra* note 140, at xiii.

¹⁴⁶ See *id.* at x; see also LINCOLN, CONSTITUTIONAL HISTORY, *supra* note 79, at 104. Art. 23 of the Charter of Liberties and Privileges (1683) made a woman a “feme covert” while Art. 25 restricted her property ownership by limiting the period a widow “may tarry in the Cheife house of her husband forty dayes.” See LINCOLN, CONSTITUTIONAL HISTORY, *supra* note 79, at 104.

¹⁴⁷ See LINCOLN, CONSTITUTIONAL HISTORY, *supra* note 79, at 104.

¹⁴⁸ See BIEMER, *supra* note 140, at xiii.

3. Governance

New Netherland's jurisprudence was based on the law of the Dutch Republic. Under Article 20 of the April 22, 1625, instructions from the Directors of the Amsterdam Chamber of the WIC mandate that, "[i]n the administration of justice, in matters concerning marriages, the settlement of estates, and contracts, the ordinances and customs of Holland and Zeeland and the common written law qualifying them shall be observed and obeyed in the first place."¹⁴⁹

"In addition . . . administration of parts of [the] criminal law also fell under the [jurisdiction] of [the] director and council," with more severe punishment (e.g. capital crimes and corporal punishment subject, during the earliest period and until 1629) to Patria's approval.¹⁵⁰

In 1652 the Amsterdam Directors in the Netherlands established a "bench[es] of justice" in New Amsterdam, to be formed as much as possible after the laws of Amsterdam, Holland.¹⁵¹ The judiciary was to consist of two Burgermeesteren, five Schepenen, and one Schout.¹⁵²

The Schout in New Netherland undertook the duties of what today would be District Attorney, Sheriff, and Attorney General, and would sometimes preside at the meetings of the Burgermeesteren and Schepenen.¹⁵³

By ordinance passed April 9, 1660 the Directors of the Chamber at Amsterdam, defined the powers and duties of the Schout as the: "[d]irector General and Council's guardian of the law in the district of the city of New Amsterdam."¹⁵⁴ He was to "protect and maintain . . . the preëminences and immunities of the privileged West India Company . . . without any dissimulation, or regard for any private favor or displeasure."¹⁵⁵ He had the power to prosecute, to make arrests under certain circumstances, and to carry out the judgments of the Burgermeesteren and Schepenen, "according to the style and custom of [the] Fatherland, and especially the city of

¹⁴⁹ See A.J.F. van Laer, *Further Instructions for Willem Verhulst and the Council of New Netherland*, in DOCUMENTS RELATING TO NEW NETHERLAND: 1624–1626, at 84, 113–14 (A.J.F. van Laer, ed. & trans., 1924) [hereinafter A.J.F. van Laer, *Instructions*].

¹⁵⁰ See JACOBS, *supra* note 4, at 103.

¹⁵¹ See *id.* at 151.

¹⁵² *Id.*

¹⁵³ See BRODHEAD, HISTORY, *supra* note 77, at 453–54; Albert E. McKinley, *The English and Dutch Towns of New Netherland*, 6 AM. HIST. REV. 1, 7 (1900); see also, Roeloff Swartout 1634-1715, JDWHITLOCK.NET (Dec. 5, 2004), <https://web.archive.org/web/20040211110956/http://jdw-hitlock.net:80/gene/swartout.htm> (describing the life and duties of a Schout).

¹⁵⁴ LAWS AND ORDINANCES, *supra* note 112, at 374.

¹⁵⁵ *Id.*

Amsterdam.”¹⁵⁶ Pursuant to that ordinance, the Schout also had the power to issue something resembling what we today call an order of protection.¹⁵⁷

Upon learning that any persons “have injured each other or quarreled” the Schout could command them “to observe the peace, and to forbid them [from] committing any assault, on pain of arbitrary correction at the discretion of the [Bergermeesteren] and Schepenen[.]”¹⁵⁸ The Schout was expressly forbidden to accept gifts.¹⁵⁹ His income, however, came from a percentage of fines, half in civil cases and a third in criminal offenses.¹⁶⁰

Scholars have noted the Dutch role in introducing the concept of public prosecution to America; noting that the Schout functioned not only in New York, but in other Dutch settlements in Pennsylvania, New Jersey, and Delaware.¹⁶¹ By way of contrast, the English—from whom we adopted the common law; did not have a tradition of public prosecutors.¹⁶²

One commentator has pointed out that the English, after taking over the colony in 1664, continued the adjudicative system in New Amsterdam in much the same way as the Dutch; changing the name of the court from Schout, Burgermeesteren, and Schepenen to the Court of Mayor and Aldermen, with the Sheriff acting as prosecutor.¹⁶³ When the Dutch re-took the colony in 1673, they restored the name of the court, until the English regained the colony

¹⁵⁶ *Id.* at 376.

¹⁵⁷ Compare N.Y. CRIM. PROC. LAW § 530.13 (New York’s modern order of protection), with LAWS AND ORDINANCES, *supra* note 112, at 375 (outlining the historical New Netherland’s equivalent).

¹⁵⁸ LAWS AND ORDINANCES, *supra* note 112, at 375.

¹⁵⁹ See JACOBS, *supra* note 4, at 160; LAWS AND ORDINANCES, *supra* note 112, at 374.

¹⁶⁰ See JACOBS, *supra* note 4, at 160; see also JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK: A STUDY IN CRIMINAL PROCEDURE (1664-1776) 329 (1970) (describing the role and responsibilities of the Schout).

¹⁶¹ See BRUCE L. BENSON, TO SERVE AND PROTECT: PRIVATIZATION AND COMMUNITY IN CRIMINAL JUSTICE 96 (1998); Abraham S. Goldstein, *History of the Public Prosecutor*, in 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1287 (Sanford H. Kadish ed., 1983); THOMAS A. JANVIER, THE DUTCH FOUNDING OF NEW YORK 140 (1903); Josephine Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPP. L. REV. 117, 128 (1984); Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321, 351 (2002).

¹⁶² See PATRICK DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 25 (1958); Joan E. Jacoby, *The American Prosecutor in Historical Context*, 39 PROSECUTOR 34, 37 (2005); Michael E. O’Neill, *Private Vengeance and the Public Good*, 12 U. PA. J. CONST. L. 659, 673–74 (2010); see also John H. Langbein, *The Origins of Public Prosecution at Common Law*, 17 AMER. J. LEGAL HIST. 313, 318–19 (1973) (describing the role of justices of the peace in criminal prosecutions).

¹⁶³ See W. Scott Jr. Van Alstyne, *The District Attorney – A Historical Puzzle*, 1952 WIS. L. REV. 125, 132 (1952).

by the Treaty of Westminster in 1674, and once again established the Mayor's Court, with the Sheriff acting as prosecutor.¹⁶⁴

The English Governor's Council decreed:

Upon some misunderstanding of the place and power of the Sheriffe at the *Esopus*, Ordered, That Capt. *Chambers* and Mr. *Hall* have notice, that the Sheriff is the person, who is to see the Law putt in Execuçon and to apprehend & prosecute any Transgressors, as hee shall see cause, though not to bee judge in the Case. (August 4, 1676).¹⁶⁵

In 1796, the New York legislature created the office of Assistant Attorney General to prosecute "crimes and offences,"¹⁶⁶ and in 1801 provided for the appointment of district attorneys.¹⁶⁷ The title has stuck, but those who carry it perform many of the same functions as their grandparent, the Schout.

¹⁶⁴ See *id.* at 132–33.

¹⁶⁵ 13 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK 498 (Berthold Fernow ed. & trans., 1881).

¹⁶⁶ See Act of Feb. 1796, ch. 8, 1796 N.Y. Laws 643–44.

¹⁶⁷ See Act of Apr. 4, 1801, ch. 146, 1801 N.Y. Laws 362.