



## LAW AND THE HOLY EXPERIMENT IN COLONIAL PENNSYLVANIA

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ABSTRACT: Religious liberty is a core component of America's legal culture. William Penn, the Quaker founder and proprietor of colonial Pennsylvania, played an indispensable role in ensuring that it is. Indeed, Thomas Jefferson—the author of one of the most celebrated religious liberty laws in American history, the Virginia Statute for Religious Freedom of 1786—described Penn as “the greatest

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lawgiver the world has produced, the first in either antient or modern times who has laid the foundation of govmt in the pure and unadulterated principles of peace of reason and right." Jefferson was correct. After all, the commitment to liberty of conscience that characterized colonial Pennsylvania traced directly to Penn's vision, example, and determination: Pennsylvania enacted more laws about religious tolerance than any other British American colony, both before and after Penn's death. Delaware, which Penn also owned and which constituted the "lower counties" of Pennsylvania until it became an independent state in 1776, likewise enacted religiously tolerant laws even when Penn permitted it to govern itself with a separate assembly after 1704. Although generations of scholars have explored the political and social history of Penn's "Holy Experiment," no one has examined how colonial Pennsylvania used law to ensure its success. This article endeavors to do that through an exegesis of Pennsylvania's charter, colonial constitutions, statutes, and judicial decisions.

### I. INTRODUCTION

"William Penn was the greatest lawgiver the world has produced, the first in either antient or modern times who has laid the foundation of govmt in the pure and unadulterated principles of peace of reason and right."

— Thomas Jefferson to Peter Stephen Duponceau, November 16, 1825.

What George Calvert (1580–1632) was to Maryland and Roger Williams (1603–1683/4)<sup>1</sup> was to Rhode Island, William Penn (1644–

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<sup>1</sup> The English American colonies did not adopt the Gregorian calendar until 1752, and citations in this Article to pre-1752 Julian calendar dates between January 1 and March 25 reference both the Gregorian and Julian years.

1718) was to Pennsylvania: a visionary founder committed to religious liberty. A significant difference existed between Penn and Calvert and Williams, however. Pennsylvania was planted on a broader conception of religious liberty than were Maryland and Rhode Island. As one historian of colonial Pennsylvania concisely put it:

The concept of toleration, important for the national experience and for many of the other colonies, is of less significance for Pennsylvania. Toleration implies a concession of privileges by a controlling or dominant faction to a minority group, not the unhindered exercise of inherent rights. Pennsylvania was not founded on the principle of toleration, but of tolerance. Tolerance describes liberal attitudes toward other religious, national, or cultural groups, an acceptance of the right not to conform and to hold different beliefs. Although William Penn's goal was to establish, in almost absolute terms, religious liberty, with the expectation that mutual tolerance would prevail, Penn, Pennsylvanians, and contemporary observers often described conditions in the colony as "toleration," for it was the only frame of reference available in the context of eighteenth-century political theory.<sup>2</sup>

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<sup>2</sup> Sally Schwartz, *"A Mixed Multitude": The Struggle for Toleration in Colonial Pennsylvania* 9 (NYU 1989); see generally Nicholas P. Miller, *The Religious Roots of the First Amendment: Dissenting Protestants and the Separation of Church and State* 63 (Oxford 2012) ("Penn's practical influence on the colonial acceptance of a robust church/state separation through the success of the Pennsylvania model is hard to overstate."). Roger Williams's legendary harangues against Quakers rendered him, in my judgement, less religiously tolerant than Penn. See Scott D. Gerber, *Law and the Lively Experiment in Colonial Rhode Island*, 2 *British J. Am. Legal Studies* 453 (2013); see

Penn's father, also named William, was a decorated English naval officer knighted by King Charles II.<sup>3</sup> Penn's parents were not Quakers,<sup>4</sup> but they once invited Quaker minister Thomas Loe to

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generally Roger Williams, *George Fox digg'd out of his burrowes* (Foster 1676). George Calvert was unquestionably more concerned about religious toleration than religious tolerance: He wished to found a colony that would provide refuge for Catholics and he tried to do that by promising toleration for all Christian denominations. See Scott D. Gerber, *Law and Catholicism in Colonial Maryland*, 103 *Catholic Hist. Rev.* 465 (2017). Historian Sanford H. Cobb argued in the early twentieth century that the "boasted [religious] liberty of Pennsylvania was not so broad as has been usually supposed" because of the requirement that only Christians could vote or hold government office. Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* 444 (Cooper Square 1968) (originally published in 1902). Cobb conceded, however, that no one was persecuted in Pennsylvania for failing to believe that Jesus Christ was savior. *Id.* at 450. Clearly, Cobb's conception of religious liberty was distorted by presentism: It is difficult to believe that an Atheist, a Jew, and later a Catholic immigrating to Pennsylvania would interpret the inability to vote or hold office as an infringement on religious liberty because those restrictions in no way hindered the freedom to attend whatever place of worship a person wished to attend, if any. Moreover, England's Corporation Act of 1661, Test Act of 1673, and Toleration Act of 1689 served as religious tests for public office and imposed various civil disabilities on Catholics and nonconformists (the Toleration Act exempted nonconformists) and Pennsylvania was required to comply with those laws.

<sup>3</sup> Penn's life has been widely chronicled. See, e.g., William J. Frost, "All Who Believed in God Were Welcome": *William Penn's Idealistic Creation of Pennsylvania*, 117 *Christian Hist.* 17 (2016); Andrew R. Murphy, *William Penn: A Life* (Oxford 2018). Frost is the author of, among other publications, a book about religious liberty in Pennsylvania. See William J. Frost, *A Perfect Freedom: Religious Liberty in Pennsylvania* (Penn State 1993).

<sup>4</sup> "Quaker" originated as a pejorative term that was subsequently embraced. The "Religious Society of Friends of the Truth," founded principally by Englishman George Fox, was one of many religious groups that developed in the mid-1600s and members would sometimes "quake" prior to speaking: a physical change that was interpreted as a sign that the Spirit moved within them and was entreating them to speak their ministry. See, e.g., Margery Post Abbott, et al., *Historical Dictionary of The Friends (Quakers)* xxxi (Scarecrow 2003). For annotated bibliographies devoted to scholarship about Quaker history from 2005 to the present, see *Recent Scholarship in Quaker History* (Quaker History), archived at <https://perma.cc/Q4J2-79HA>. Older scholarship is plentiful as well, including about Pennsylvania. See, e.g., Edwin B. Bronner, *William Penn's "Holy Experiment": The Founding of Pennsylvania, 1681-1701*

speak at their home, an event that profoundly impacted Penn as a child. However, it was not until Penn's father dispatched Penn to Ireland as a young adult to manage the family's lands that Penn began to attend Quaker meetings on a regular basis. Penn converted to Quakerism in his early twenties, which led his father to disown him. They eventually reconciled.

Penn quickly became one of the most influential Quaker tract writers of his day and a vocal proponent of liberty of conscience. The Quaker desire for religious tolerance and an end to persecution rested upon the belief that the seat of religion emanated from the conscience. Significantly, Penn's commitment to religious tolerance in Pennsylvania was a product of his personal experience with religious intolerance in his native land.<sup>5</sup> Penn was imprisoned in Ireland and England on at least four occasions for his religious activities during his initial years as a Quaker and, as one intellectual historian aptly noted, "imprisonment made the costs of religious dissent painfully clear . . . [and it] also allowed [Penn] to begin

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(Praeger 1978). None of the pre-existing scholarship focused on law. For the legal history of the judicial power in colonial Pennsylvania, see Scott Douglas Gerber, *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787* at 267 (Oxford 2011). For William Penn's contributions to an independent judiciary in America, see Scott D. Gerber, *William Penn and the Origins of Judicial Tenure During Good Behavior*, 136 Pa. Magazine of Hist. & Biography 233 (2012).

<sup>5</sup> See, e.g., Andrew R. Murphy, *From Practice to Theory to Practice: William Penn from Prison to the Founding of Pennsylvania*, 43 Hist. of European Ideas 317 (2017). Murphy has published a number of articles about Penn's political thought, and those articles culminated in a 2016 book for Oxford University Press. See Andrew R. Murphy, *Liberty, Conscience, and Toleration: The Political Thought of William Penn* (Oxford 2016). For an earlier treatment of Penn's political thought by one of the editors of Penn's papers, see Mary Maples Dunn, *William Penn: Politics and Conscience* (Princeton 2015) (originally published in 1967). Penn's writings about liberty of conscience predated, and were more inclusive than, John Locke's celebrated *Letter Concerning Toleration* (1689).

working out the ideas that he would later attempt to put into practice, both in England and in Pennsylvania.”<sup>6</sup>

This Article examines how William Penn, a man who Thomas Jefferson—the author of one of the most celebrated religious liberty laws in American history, the Virginia Statute for Religious Freedom of 1786—described as “the greatest lawgiver the world has produced, the first in either antient or modern times who has laid the foundation of govmt in the pure and unadulterated principles of peace of reason and right,”<sup>7</sup> used *law* to try to secure liberty of conscience in colonial Pennsylvania. It also chronicles how the laws of colonial Pennsylvania were sometimes, albeit rarely, inconsistent with Penn’s vision, especially after Penn’s death in 1718. Like my previous articles about law and religion in other English American colonies, this Article explores the legal history of the colony under consideration—here, Pennsylvania—in order to better understand that colony’s *nomos* about religion.<sup>8</sup> In so doing, terms such as

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<sup>6</sup> Murphy, *From Practice to Theory to Practice* at 318 (cited in note 5). Penn was imprisoned in Cork in 1667, in the Tower of London in 1668–1669, and in London’s Newgate prison in 1670 and 1671. For a history of the troubles with the English legal system that English Quakers endured during the Restoration, see Craig W. Horle, *The Quakers and the English Legal System, 1660–1688* (Penn 1988). For the classic account of Quaker “sufferings” in England, see Joseph Besse, *A Collection of the Sufferings of the People Called Quakers* (Hinde 1753).

<sup>7</sup> Thomas Jefferson to Peter Stephen Duponceau (Nov. 16, 1825) (Founders Early Access), archived at <https://perma.cc/GDD3-9EDW>. The 300<sup>th</sup> anniversary of Penn’s 1718 death has generated renewed interest in Penn from scholars. None of it focuses on Penn’s use of law to effectuate his holy experiment. See, e.g., Andrew R. Murphy, et al., eds., *The Worlds of William Penn* (Rutgers 2019).

<sup>8</sup> See Gerber, *Law and Catholicism in Colonial Maryland* (cited in note 2); Scott D. Gerber, *Law and Religion in Colonial Connecticut*, 55 *Am. J. Legal Hist.* 149 (2015); Gerber, *Law and the Lively Experiment in Colonial Rhode Island* (cited in note 2). See generally Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 *Harv. L. Rev.* 4 (1983) (arguing that laws and narrative traditions of a culture cannot be critically separated).

“toleration,” “rights of conscience,” and “religious liberty” will often be employed interchangeably because Penn employed them interchangeably (Penn’s preferred phrase was “liberty of conscience”). To make this point somewhat differently, although many of America’s founders—Jefferson included—rejected the language of “toleration” in the 1780s and 1790s as too narrow, a great deal of conceptual confusion existed among them about what, exactly, religious liberty entailed. But for Penn—who antedated the founders by a century—the term always connoted an expansive view of liberty of conscience.

## II. WILLIAM PENN’S NEW JERSEY

William Penn first became involved in America when he was asked to arbitrate a dispute over the ownership of New Jersey.<sup>9</sup> In 1664 New Jersey had been gifted by James, Duke of York to the courtiers Lord John Berkeley and Sir George Carteret. The proprietorship was named “New Jersey” in honor of the Isle of Jersey in the English Channel, where Carteret had been born.<sup>10</sup> In 1674 Berkeley sold his half of the proprietorship to John Fenwick, in trust for Edward Byllynge. Fenwick and Byllynge, both of whom were Quakers, fell into a dispute about the property and, consistent with the Quaker custom of attempting to resolve disputes outside of court,<sup>11</sup> they agreed to refer the matter to Penn for arbitration. Penn

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<sup>9</sup> Historian John E. Pomfret insisted that “William Penn’s biographers have tended to neglect his important involvement in the founding of West New Jersey, thus missing the dawn of his interest in America as well as a significant aspect of New Jersey and Quaker history.” John E. Pomfret, *Colonial New Jersey: A History* 304 (Charles Scribner’s Sons 1973).

<sup>10</sup> See, e.g., *id.* at 7.

<sup>11</sup> See, e.g., Carli N. Conklin, *Transformed, Not Transcended: The Role of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 *Am. J. Legal Hist.* 39 (2006).

awarded nine-tenths to Byllynge and one-tenth to Fenwick, which Fenwick refused to accept. Byllynge eventually was forced to relinquish his interest in the proprietorship to his creditors, and Penn was appointed as one of the trustees. The plan was to improve rather than sell the property, and to this end the proprietorship was partitioned into what became East New Jersey and West New Jersey. East New Jersey, the most settled portion of the proprietorship, was assigned to Carteret, and West New Jersey was deeded to Byllynge's trustees. In 1681 Penn and eleven other Quakers purchased the proprietary rights to East New Jersey from Carteret's widow. Penn and the Quakers split their shares of East New Jersey with twelve other men, some of whom were also Quakers.<sup>12</sup>

New Jersey expressed a commitment under law to religious liberty seventeen years before the founding of the more famously tolerant Pennsylvania.<sup>13</sup> The Concessions and Agreement of the

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But see William M. Offutt, Jr., *Of "Good Laws" and "Good Men": Law and Society in the Delaware Valley, 1680-1710* at 19 (Illinois 1995) ("Quakers held a doctrine against suing other Quakers, a rule more honored than observed in the Delaware Valley.").

<sup>12</sup> See, e.g., Pomfret, *Colonial New Jersey* at 1-49 (cited in note 9). Proprietorships originated with the English palatine of the fourteenth century as a type of military defense of the northern borderlands. In English America, they were initially employed to incentivize entrepreneurs to plant colonies. American colonists came to resent the exactions inherent in a proprietorship, such as the quit-rent and oaths of fidelity to the proprietor. See, e.g., *id.*

<sup>13</sup> See, e.g., William Nelson, *Religious Liberty in New Jersey*, 6 *The Am. Hist. Researches* 343 (1910). The preceding charters of Maryland, Rhode Island, and Carolina also contained provisions for liberty of conscience. The Duke of York's Laws of 1664/5 provided religious toleration for Protestants. Scholars tend to conclude that the founders of New Jersey promised religious freedom for an economic reason—to encourage settlement so as to enable them to collect more quit-rents—rather than for the principled basis for which William Penn founded Pennsylvania. See, e.g., Stephen B. Presser, *An Introduction to the Legal History of Colonial New Jersey*, 7 *Rutgers-Cam. L. J.* 262, 283 (1976). Historian Jean R. Soderlund maintained that the hallmarks of Delaware Valley society—including but not limited to religious liberty—began not

Lords Proprietors of the Province of New-Jersey of 1664/5 proclaimed that no inhabitant of

the said Province at any time shalbe any waies molested punished disquieted or called in Question for any difference in opinion or practice in matters of Religious concernements, who doe not actually disturbe the civill peace of the said Province, but that all and every such person and persons may from time to time and at all times freely and fully have and enjoy his and their Judgments and Consciences in matters of Religion throughout all the said Province.<sup>14</sup>

The Concessions and Agreement also provided that the assemblies elected by the people were empowered to “Constitute and appoint such and soe many Ministers or Preachers as they shall think fitt, and to establish their maintenance, Giving liberty besides to any person or persons to keep and maintaine what Preachers or Ministers they please” and to make laws so long as “they be not repugnant to the Article for Libertie of Conscience above mentioned.”<sup>15</sup>

The Dutch and the Swedes were the first white settlers of what became New Jersey. A Declaration of the True Intent and Meaning of the Concessions and Agreement was issued by the proprietors of

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with Quaker ideals or the leadership of Penn but with the Lenni-Lenape (Delaware) Indians. See Jean R. Soderlund, *Lenape Country: Delaware Valley Society before William Penn* (Penn 2015).

<sup>14</sup> *The Concessions and Agreement of the Lords Proprietors of the Province of New-Jersey of 1664/5* is reprinted in, among other places, Julian P. Boyd, ed., *Fundamental Laws and Constitutions of New Jersey, 1664–1964* at 51, 54 (Reinhold 1964). The Concessions and Agreement tracked the guarantee of religious liberty in the Charter of Rhode Island and Providence Plantations of 1663 “almost verbatim.” Boyd, ed., *Fundamental Laws and Constitutions of New Jersey* at 5 (cited in note 14).

<sup>15</sup> *Concessions and Agreement, 1664/5* at 56 (cited in note 14).

New Jersey in 1672 and renewed in 1674 when the English retook the province after a brief interlude of return to Dutch control.<sup>16</sup> That Declaration explained that the Concessions and Agreement should be understood to empower the governor and council “to constitute and appoint such Ministers and Preachers as shall be nominated and chosen by the several Corporations ... giving Liberty besides to any Person or Persons to keep and maintain what Preachers and Ministers they please.”<sup>17</sup>

A historian who compiled a book-length collection of the fundamental laws and constitutions of New Jersey praised the “eloquent affirmations of human rights” in the Concessions and Agreements of the Proprietors, Freeholders, and Inhabitants of the Province of West New-Jersey of 1676/7, the articulation of which he credited primarily to William Penn.<sup>18</sup> Most notable among the human rights was that of liberty of conscience:

That no Men nor number of Men upon Eearth hath power or Authority to rule over mens consciences in religious matters therefore it is consented agreed and ordained that no person

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<sup>16</sup> See, e.g., *Concessions and Agreement* at 11 (cited in note 14); *A Declaration of the True Intent and Meaning of the Concessions and Agreement*, in Boyd, ed., *Fundamental Laws and Constitutions of New Jersey* at 67, 67-70 (cited in note 14).

<sup>17</sup> *Declaration of the True Intent* at 68 (cited in note 16).

<sup>18</sup> Julian P. Boyd, *Introduction*, in Boyd, ed., *Fundamental Laws and Constitutions of New Jersey* 2, at 11-12. Boyd acknowledged that some scholars dispute whether Penn should receive much credit for drafting the document. See Boyd, *Introduction* at 13 (cited in note 18); see also Caroline Robbins, *Laws and Governments Proposed for West New Jersey and Pennsylvania, 1676-1683*, 105 *Pa. Magazine of Hist. & Biography* 373 (1981) (suggesting that Edward Byllynge was probably the author of the West New Jersey Concessions, although Penn signed the organic law). See *The Concessions and Agreements of the Proprietors, Freeholders, and Inhabitants of the Province of West New-Jersey of 1676/7*, in Boyd, ed., *Fundamental Laws and Constitutions of New Jersey* at 71-104 (cited in note 14).

or persons whatsoever within the said Province at any time or times hereafter shall be any waies upon any pretence whatsoever called in question or in the least punished or hurt either in Person Estate or Priveledge for the sake of his opinion Judgment faith or worship towards God in matters of Religion but that all and every person and persons may from time to time and at all times freely and fully have and enjoy his and their Judgments and the exercise of their consciences in matters of religious worship throughout all the said Province.<sup>19</sup>

In the early days of East New Jersey, the laws closely resembled the Duke of York's Laws of 1664/5 and the laws of the New England Puritan colonies.<sup>20</sup> After Thomas Rudyard – one of the Quakers who joined with William Penn in purchasing East New Jersey – became deputy governor of East New Jersey, a new criminal code was enacted that tracked Pennsylvania's "Laws agreed upon in England" (written by Penn with the assistance of Rudyard) and *Exodus* 21 and 22, rather than the Duke's Laws and the laws of the New England colonies.<sup>21</sup> As a result, "many characteristic dissipations of English life in the gay reign of Charles II, namely, 'prizes, stage plays, games, masques, revels, bull-baitings, and cock-fightings,' [became] punishable offences because they would 'excite the people to rudeness, cruelty, looseness, and irreligion.'" <sup>22</sup> West New Jersey's

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<sup>19</sup> *Concessions and Agreements of 1676/7*, in Boyd, ed., *Fundamental Laws and Constitutions of New Jersey* at 84–85 (cited in note 18).

<sup>20</sup> See Preston W. Edsall, ed., *Journal of the Courts of Common Right and Chancery of East New Jersey, 1683–1702* at 113 (Am. Legal Hist. Society 1937).

<sup>21</sup> See *id.* at 116. Rudyard drafted the deeds by which Penn was granted title to Pennsylvania and he also had served as Penn's lawyer in Penn's 1670 trial.

<sup>22</sup> *Id.*

laws, including its case law, were similar to that of East New Jersey once both proprietorships became predominately Quaker, particularly with respect to moral matters.<sup>23</sup> Although the regulation of morals might seem inconsistent with the modern “negative” conception of liberty – the right of the individual to be left alone by government to do what he or she wishes – Quakers, including Penn, were committed to a “positive” conception of liberty that viewed law as an instrument for helping to bring people towards right religion.<sup>24</sup>

At least two serious episodes of religious intolerance are discernable from New Jersey’s historical record. Both involved Catholics and both turned on the application of English law.<sup>25</sup> In the second of the episodes, Penn himself tried to protect the persecuted individual’s religious liberty.<sup>26</sup>

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<sup>23</sup> See H. Clay Reed and George J. Miller, eds., *The Burlington Court Book: A Record of Quaker Jurisprudence in West New Jersey, 1680–1709* (Am. Hist. Association 1944).

<sup>24</sup> See, e.g., Jane E. Calvert, *Quaker Constitutionalism and the Political Thought of John Dickinson* 19, 146, 155 (Cambridge 2008); David Hackett Fischer, *Albion’s Seed: Four British Folkways in America* 459, 498–502, 552–55 (Oxford 1989). Fischer maintained that Quaker legislation on moral matters was more severe than anywhere else in English North America. See Fischer, *Albion’s Seed* at 499, 552. But see Schwartz, “*A Mixed Multitude*” at 17 (cited in note 2) (arguing that Penn believed in penalizing immoral behavior to maintain social order).

<sup>25</sup> Considerable confusion existed throughout New Jersey’s proprietary period as to whether the proprietors had the right to govern. See, e.g., Pomfret, *Colonial New Jersey* at 22 (cited in note 9).

<sup>26</sup> In 1693 West New Jersey established a test for officeholders that required a belief in Jesus Christ as the son of God. Obviously, individuals of the Jewish faith would not fare well under the test. Similarly, in 1698 East New Jersey passed a law that limited the guarantee of religious tolerance to inhabitants who acknowledged that Jesus Christ was the son of God, provided that the inhabitant was not “of the Romish religion.” Only a “scant” number of Jews lived in New Jersey at the time, and the laws were aimed at “Catholics, and heathens, atheists, and infidels” rather than Jews. Albert M. Friedenberg, *The Jews of New Jersey from the Earliest Times to 1850*, 17 Publications of the Am. Jewish Hist. Society 33, 36 (1909). Boyd called the 1698 East New Jersey law “the

The first episode involved William Douglas, an assemblyman from the Town of Bergen in East New Jersey who publicly identified as a Catholic. On June 10, 1680, the assembly removed Douglas from his seat because of his religion. The assembly then petitioned Governor Carteret to issue a warrant to the Town of Bergen for a new election to replace Douglas. England's Corporation Act of 1661 and Test Act of 1673 were the laws that led to Douglas's removal.<sup>27</sup> The Corporation Act required all municipal officials to take Anglican communion, which had the effect of excluding nonconformists from public office. The Test Act made it illegal for any person not receiving communion in the Church of England to hold public office.<sup>28</sup>

The second episode involved "John Tatham, alias Gray," who was named governor of both East and West New Jersey in 1690.<sup>29</sup> Penn recorded Tatham as arriving in Philadelphia in 1684/5, and identified him as a Catholic, "a Scholler & avers to the Calvinists."<sup>30</sup> Penn later learned that Tatham was a Benedictine monk who had abandoned his vows and married, information that Penn tried to hide, ostensibly to protect Tatham.<sup>31</sup> Penn was unsuccessful, and Tatham's term as governor came to an abrupt end apparently

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first legislative enactment to violate the spirit of the Concessions." Boyd, *Introduction* at 11 (cited in note 18).

<sup>27</sup> See Nelson, *Religious Liberty in New Jersey* at 344 (cited in note 13).

<sup>28</sup> See Charles Butler, *Historical Account of the Laws Against the Roman-Catholics of England* 16, 19 (Keating, Brown & Co. 1811).

<sup>29</sup> See Henry H. Bisbee, *John Tatham, Alias Gray*, 83 Pa. Magazine of Hist. & Biography 253 (1959). For an early hagiography about Tatham, see John D. McCormick, *John Tatham, New Jersey's First Catholic Governor*, 5 Am. Catholic Hist. Researches 79, 82 (1888).

<sup>30</sup> William Penn to Thomas Lloyd, March 16, 1684/5, in Marianne S. Wokeck, et al., eds., 3 *The Papers of William Penn* 31, 32 (Penn 1986).

<sup>31</sup> William Penn to Thomas Lloyd, Sept. 21, 1686, in Wokeck, et al., eds., 3 *The Papers of William Penn* at 116, 119 (cited in note 30).

because, as with the incident involving William Douglas, English law forbade Catholics from holding public office.<sup>32</sup>

The relatively few recorded court cases in early colonial New Jersey almost never involved matters of religious liberty. Rather, they dealt with secular disputes such as the collection of debts and trespass.<sup>33</sup> One notable exception involved a West New Jersey court in 1705 punishing several Quakers for refusing to take off their hats while attesting for jury service.<sup>34</sup>

### III. WILLIAM PENN'S PENNSYLVANIA

#### A. CHARTER FOR THE PROVINCE OF PENNSYLVANIA OF 1680/1

In 1680/1 King Charles II granted "Pennsylvania" to William Penn in repayment of a debt to Penn's father, who had died in 1670. The province was named in honor of the senior Penn.<sup>35</sup> Penn quickly became "completely absorbed" with Pennsylvania and his active participation in New Jersey waned.<sup>36</sup> In 1702 the proprietors of East and West New Jersey surrendered to the crown their rights to govern those colonies and Queen Anne united them as a single royal colony.<sup>37</sup>

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<sup>32</sup> Tatham continued to serve in lesser public positions until 1699, however. He also denied that he was a Catholic and went so far as to file a lawsuit for defamation against someone who said he was. The outcome of the case is not known. See Bisbee, *John Tatham* at 257-58, 259 (cited in note 29).

<sup>33</sup> See Nancy Black Sagafi-Nejad, *Friends at the Bar: A Quaker View of Law, Conflict Resolution, and Legal Reform* 71 (SUNY 2011).

<sup>34</sup> See *The Burlington Court Book* at 293, 299 (cited in note 23).

<sup>35</sup> See, e.g., Charles M. Andrews, 3 *The Colonial Period of American History* 278-81 (Yale 1937).

<sup>36</sup> Pomfret, *Colonial New Jersey* at 50 (cited in note 9).

<sup>37</sup> For a general history of New Jersey during the royal period, see Donald L. Kemmerer, *Path to Freedom: The Struggle for Self-Government in Colonial New Jersey*,

Foremost among Penn's plans for Pennsylvania was to conduct a "holy experiment": he wished to establish a society that was godly, virtuous, and exemplary for all humanity. And while Penn was particularly concerned about creating a haven in Pennsylvania for the much-persecuted Quakers, he also was committed to religious tolerance in general. As Penn famously put it in a letter to his friend James Harrison shortly after receiving his patent for Pennsylvania:

for my Country [I see?] the lord in the obtaineing of it: & mor[e was] I drawn inward to looke to him, & to o[we it?] to his hand & powr then to any ot[her way.?] I have so obtained it & des[ire] that I may not be unworthy of his love, but do that w<sup>ch</sup> may answeare his Kind providence & serve his truth & people; that an example may be Sett up to the nations. There may be room there, tho not here, for such an holy experiment.<sup>38</sup>

The only extant draft of the Pennsylvania charter found Penn inserting a long clause guaranteeing religious liberty taken almost verbatim from the Rhode Island charter of 1663 and similar to a clause in the Carolina charter of 1663. William Blathwayt, the

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1703-1776 (J.E. Edwards 1968). New Jersey was one of the first states in the United States of America to memorialize disestablishment in its state constitution. See, e.g., Richard Albert, *Religion in the New Republic*, 67 *La. L. Rev.* 1, 23 (2006).

<sup>38</sup> William Penn to James Harrison, Aug. 25, 1681, in Richard S. Dunn and Mary Maples Dunn, eds., 2 *The Papers of William Penn* 107, 108 (Penn 1982). Penn had spent more than a decade trying to persuade King Charles II and James, Duke of York, among others, to adopt a policy of religious tolerance in England. He was unsuccessful, as his letter to Harrison suggested. See generally *Petition to Parliament, Nov. 1680*, in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 49-56 (Penn petitioning Parliament for religious tolerance) (cited in note 38). Penn likewise emphasized in promotional literature that he was endeavoring to create a holy experiment in Pennsylvania. See, e.g., Murphy, *Liberty, Conscience, and Toleration* at 247 (cited in note 5).

secretary to the Lords of Trade, struck the clause. Penn's clause had read:

And because it may happen that some of the People and Inhabitants of the said Province may not in their private opinions be able to conforme to the publick exercize of Religion according to the Liturgy Form'd & Ceremonies of the Church of England or take or subscribe the Oaths & Articles made and Established in this Nation in that behalfe; And for that the same by reason of the remote distances of those places will (as Wee hope) be noe breach of the Unity and Uniformity Established in [missing folio] Licentiousness nor to the civill injury Nor outward disturbance of others Any Law Statute or Clause contained or to be contained, usage, or Custome of Our Realme of England to the contrary thereof in any wise Notwithstanding[.]<sup>39</sup>

Unlike the Rhode Island charter of 1663, the Pennsylvania charter that passed the Great Seal on March 4, 1680/1 did not, therefore, contain a clause committing Pennsylvania to religious liberty.<sup>40</sup> However, Pennsylvanians were not required to attend Anglican services, although the charter permitted the Bishop of

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<sup>39</sup> William Blathwayt, *Draft of the Charter of Pennsylvania*, in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 63–77 (cited in note 38). The quoted passage that Blathwayt struck is at page 71.

<sup>40</sup> *The Charter for the Province of Pennsylvania of 1680/1* is reprinted in, among other places, Staughton George, et al., eds., *Charter to William Penn, and Laws of the Province of Pennsylvania, Passed Between the Years 1682–1700* 81–90 (L.S. Hart 1879). The charter proclaimed in the preamble that the king hoped that the “Savage Natives” in Pennsylvania would be converted to the “Christian Religion.” Id. at 81. As a strong proponent of religious tolerance, Penn did little, if anything, to make the king’s hope a reality.

London to appoint an Anglican preacher if twenty or more inhabitants requested it.<sup>41</sup> Another provision of the charter required that “a transcript or Duplicate of all lawes” enacted in Pennsylvania be transmitted within five years to the king (or queen) in council for review to ensure that the laws of Pennsylvania were consistent with the laws of England.<sup>42</sup> Laws that were not voided by the king (or queen) within six months after transmittal from Pennsylvania stood in “full force.”<sup>43</sup>

The Pennsylvania charter of 1680/1 conferred upon Penn lesser proprietary powers than the Maryland charter of 1632 had conferred upon Lord Baltimore. For example, unlike Lord Baltimore, Penn was required to enforce the Acts of Navigation.<sup>44</sup> Penn did retain virtually absolute rights to the land, however.<sup>45</sup>

#### B. FUNDAMENTAL CONSTITUTIONS OF PENNSYLVANIA OF 1681

The day after the Pennsylvania charter passed the Great Seal, Penn wrote to his friend Robert Turner that he intended to draft and publish a constitution that would serve as the basis for a virtuous and just government in Pennsylvania: “I shall have a tender care to the Govern<sup>t</sup> that it be well laid at first.”<sup>46</sup> Penn’s initial attempt to do that was the Fundamental Constitutions of Pennsylvania, drafted in or

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<sup>41</sup> See *Charter of 1680/1* at 89–90 (cited in note 40).

<sup>42</sup> *Id.* at 84–85.

<sup>43</sup> *Id.* at 85.

<sup>44</sup> See *id.* at 86.

<sup>45</sup> See *Charter of 1680/1* at 81–83 (cited in note 40).

<sup>46</sup> William Penn to Robert Turner, Mar. 5, 1680/1, in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 83 (cited in note 38).

about the summer of 1681 but never implemented.<sup>47</sup> Penn planned in that organic law to transfer as much political power as possible to the colonists “& to leave myselfe & successors noe powr of doeing mischief.”<sup>48</sup> With respect to religious liberty, Penn pledged in the opening section of the Fundamental Constitutions what the crown had voided in the Pennsylvania charter of 1680/1:

In reverrence to God the Father of lights and Spirits the Author as well as object of all divine knowledge, faith and worship, I do hereby declare for me and myn and establish it for the fi{r}st fundamentall of the Government of my Country, that every Person that does or shall reside therein shall have and enjoy the Free Possession of his or her faith and exercise of worship towards God, in such way and manner As every Person shall in Conscience beleive is most acceptable to God and so long as every such Person useth not this Christian liberty to Lincentiousness, that is to say to speak loosly and prophainly of God Christ or Religion, or to Committ any evill in their Conversation, he or she shall be protected in the enjoyment of the aforesaid Christian liberty by the civill Magistrate[.]<sup>49</sup>

Penn did, however, in his XXI fundamental of government, strictly regulate the setters’ morals by outlawing taverns, alehouses,

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<sup>47</sup> *The Fundamental Constitutions of Pennsylvania of 1681*, in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 141–56 (cited in note 38).

<sup>48</sup> William Penn to Robert Turner, Anthony Sharp, & Roger Roberts, Apr. 1681, in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 88, 89 (cited in note 38).

<sup>49</sup> *Fundamental Constitutions of Pennsylvania of 1681*, in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 143 (cited in note 38).

morris dances, games, and sports.<sup>50</sup> As described above in the section about New Jersey, Penn's vision required government to regulate the inhabitants' moral life to help ensure the success of the holy experiment itself.<sup>51</sup>

### C. FRAME OF GOVERNMENT OF PENNSYLVANIA OF 1682

Penn's advisors apparently persuaded him that direct popular sovereignty in Pennsylvania would be dangerous for his proprietary rights.<sup>52</sup> Penn and his advisors subsequently prepared at least a dozen drafts of what became known as the "Frame of Government of Pennsylvania." The initial drafts dealt primarily with the mechanisms of government, while the later drafts resembled a bill of rights.<sup>53</sup>

When Penn arrived in Pennsylvania in 1682 to serve as governor, he brought with him the Frame of Government of 1682 and the Laws Agreed Upon in England, which he wrote.<sup>54</sup> Both documents conferred much less authority on the people than the Fundamental Constitutions of 1681 and established Penn as a powerful governor.

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<sup>50</sup> *Fundamental Constitutions* at 151 (cited in note 49). Penn subsequently changed his mind about outlawing taverns, although he continued to regulate them to encourage what Quakers considered appropriate moral behavior. See *Tavern Regulations*, Mar. 23, 1682/3, in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 367-69 (cited in note 38).

<sup>51</sup> See, e.g., Dunn, *William Penn* at 67-71 (cited in note 5); Frost, *A Perfect Freedom* at 2 (cited in note 3).

<sup>52</sup> See Jean R. Soderlund, *Editor's Introduction*, in Jean R. Soderlund, ed., *William Penn and the Founding of Pennsylvania, 1680-1684: A Documentary History* 95-96 (Penn 1983).

<sup>53</sup> Many of the drafts are reprinted in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 135-238 (cited in note 38).

<sup>54</sup> *The Frame of Government of Pennsylvania of 1682* and *The Laws Agreed Upon in England* are reprinted in, among other places, Dunn and Dunn, eds., 2 *The Papers of William Penn* at 211-27 (cited in note 38).

For example, the governor and provincial council were empowered to “prepare and propose” legislation that the general assembly could then “pass” or “reject.”<sup>55</sup>

The preface to the 1682 Frame of Government expressed Penn’s belief that good government was laid on religious foundations and should be dedicated to moral goals. Law XXVI of the Laws Agreed Upon in England accommodated the Quaker preference for refraining from swearing oaths in judicial and other governmental processes (“solemnly Promising” to tell the truth was sufficient).<sup>56</sup> Law XXXIV required voters and officeholders to be Christians but, unlike in England and other colonies, it did not discriminate against Catholics.<sup>57</sup> Law XXXV guaranteed religious freedom to all inhabitants who believed in God:

That all Persons living in this Province, who confess and acknowledge the One Almighty and Eternal God, to be the Creator, Upholder and Ruler of the World, and that hold themselves obliged in Conscience to live peaceably and justly in *Civil Society*, shall in no wayes be molested or prejudiced for their Religious Perswasion or Practice in matters of *Faith* and *Worship*, nor shall they be compelled at

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<sup>55</sup> *Frame of Government of 1682* at 216 (cited in note 54).

<sup>56</sup> *Id.* at 223.

<sup>57</sup> Earlier, Penn had not been inclined to grant religious freedom to Catholics because he believed that Catholicism was steeped in persecution, superstition, and popery, and that these practices were incompatible with true Christianity. He remained critical of Catholicism, but he nevertheless came to believe that Catholics should not be discriminated against because “we must give the liberty we ask, and cannot be false to our principles . . . for we . . . would have none suffer for a truly sober and conscientious dissent on any hand.” Frost, *A Perfect Freedom* at 12 (cited in note 3) (quoting a 1678 speech by Penn to Parliament). See generally Fischer, *Albion’s Seed* at 595–603 (cited in note 24) (noting the Quaker commitment to “reciprocal liberty”).

any time to frequent or maintain any Religious **Worship**,  
Place or **Ministry** whatever.<sup>58</sup>

Laws XXXVI–XXXVII prohibited work on Sunday and a wide array of what Penn considered immoral activities, such as swearing, sex outside of marriage, violence, stage plays, dancing, and most sports.

Penn characterized the Laws Agreed Upon in England as “*Conditional Laws*.”<sup>59</sup> He complied with the charter and permitted the provincial council and the general assembly to have a voice in enacting legislation, although no consistent pattern emerged for lawmaking in early Pennsylvania.<sup>60</sup> In some years no laws were enacted, while in others 50 to 100 were passed. For example, 525 laws were enacted between 1682 and 1709, but those laws were unevenly dispersed over the 29 assemblies that convened during that time period. No legislation was enacted during 11 of the assemblies, while 418 measures were passed in five others.<sup>61</sup>

Significantly, the opening chapter of the first statute enacted at the inaugural session of the Pennsylvania government in December 1682 tracked Law XXXV of the Laws Agreed Upon in England. Chapter 1 of what became known as the “Great Law” read in pertinent part:

it is Enacted by the Authority Aforesaid that no Person now  
or at Any time hereafter Liveing in this Province who Shall  
Confess and acknowledge one Almighty God to be the  
Creatour Upholder and Ruler of the World and that

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<sup>58</sup> In Dunn and Dunn, eds., 2 *The Papers of William Penn* at 225 (cited in note 38) (emphasis in original).

<sup>59</sup> *Id.* at 214 (emphasis in original).

<sup>60</sup> See, e.g., Craig W. Horle, et al., eds., 1 *Lawmaking and Legislators in Pennsylvania: A Biographical Dictionary* 30 (Penn 1991).

<sup>61</sup> See *id.*

professeth him or herselfe Obliged in Conscience to Live Peaceably and Justly under the Civill Government shall in any case be Molested or Prejudiced for his or her Conscientious Perswasion or Practice nor shall he or she at any time be Compelled to frequent or Maintaine any Religious Worshipp place or Ministry whatever Contrary to his or her mind but shall freely and fully Enjoy his or her Christian Liberty without any Interuption or reflection and if any Person shall abuse or deride any Other for his or her Diferant Perswasion and Practice in Matters of Religion Such shall be Lookt upon as a disturber of the Peace and be punished accordingly.<sup>62</sup>

Chapter 1 of the Great Law likewise codified the prohibition in Law XXXVI of the Laws Agreed Upon in England against work on Sunday so that the inhabitants of Pennsylvania “may the Better dispose themselves to read the Scriptures of truth at home or frequent such Meetings of Religious Worship abroad as may best Sute their Respective Perswasions,” while Chapter 2 codified Law XXXIV’s requirement that voters and officeholders be Christians (Catholics were again not excluded).<sup>63</sup>

As Laws XXXVI and XXXVII of the Laws Agreed Upon in England made clear, Penn believed that immoral behavior went against the ends of both government and religion. Penn had previously stated that “to be *Drunk*, to *Whore*, to be *Voluptuous*, to *Game*, *Swear*, *Curse*, *BlaspHEME* and *Profane* ... These are Sins against

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<sup>62</sup> The “Great Law” – December 7, 1682 (Pennsylvania Hist. & Museum Commission, Aug. 26, 2015), archived at <https://perma.cc/PU4N-E5TW> (taken from Gail McKnight Beckman, ed., 1 *The Statutes at Large of Pennsylvania in the Time of William Penn* (Vantage 1976)).

<sup>63</sup> The “Great Law” (cited in note 62).

Nature; and against *Government*, as well as against the *Written Laws* of God.”<sup>64</sup> In this first round of legislation and in subsequent years, numerous religiously-based morals offenses were therefore criminalized. For example, Chapters 3 and 5 of the Great Law prohibited profane swearing and speaking “loosely” of the Christian God’s name. Adultery (Chapter 7), incest (Chapter 8), sodomy (Chapter 9), bigamy (Chapter 11), drunkenness (Chapter 12), and facilitating drunkenness (Chapter 13) were also prohibited by law.<sup>65</sup> However, Penn made certain that no criminal liability attached to “religious experimentation,” a state of affairs that led to “unstinting praise” being “heaped upon Pennsylvania by European admirers.”<sup>66</sup> Other chapters of the Great Law addressed more general matters, such as destruction of property and persons, administration of justice, and fidelity to Penn. The last of these general matters would lead to tension in the province.

In what present-day legal historians would regard as a “legality” –in other words, “law” produced outside of a formal governmental setting and generated from a widely-accepted repetitive social practice “within a specific locale, call the result rule, custom, tradition, folkway or pastime, popular belief or protest”<sup>67</sup> – Quakers were supposed to attempt to resolve their disagreements outside of court in their monthly, quarterly, and yearly meetings.<sup>68</sup>

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<sup>64</sup> William Penn, *An Address To Protestants Of All Perswasions More Especially The Magistracy And Clergy, For The Promotion Of Virtue And Charity* (1679), in Andrew R. Murphy, ed., *The Political Writings of William Penn* 135 (Liberty Fund 2001).

<sup>65</sup> See “*The Great Law*” (cited in note 62).

<sup>66</sup> Jack D. Marietta and G. S. Rowe, *Troubled Experiment: Crime and Justice in Pennsylvania, 1682–1800* at 7, 14 (Penn 2006).

<sup>67</sup> Christopher Tomlins, *Introduction*, in Christopher L. Tomlins and Bruce H. Mann, eds., *The Many Legalities of Early America* 1, 2–3 (Omohundro Institute and UNC 2001).

<sup>68</sup> See, e.g., Conklin, *Transformed, Not Transcended* (cited in note 11).

The Quaker preference for settling disputes without litigation flowed from Matthew's caution in the *New Testament* against going to law.<sup>69</sup> Quakers believed that disputes between members undermined the harmony of the Quaker community and required community-determined and community-controlled procedures to try to resolve the dispute and restore unity in the community.<sup>70</sup>

This alternative dispute resolution process originated in England and it became known as the Quaker "gospel order." It was implemented almost immediately in William Penn's Pennsylvania.<sup>71</sup> If a Quaker sued without first trying to resolve the dispute in the appropriate meeting, he was regarded as having departed from the principle of truth and risked disownment.<sup>72</sup> If the gospel order proved incapable of resolving the dispute, the parties were then, but only then, authorized to pursue a court action.<sup>73</sup>

The gospel order was also where Quakers were to be disciplined for misconduct, including but not limited to for immoral behavior such as fornication, drunkenness, profanity, horse-racing, and card-playing. Typically, an overseer would advise the monthly meeting that a member had committed an offense. The monthly meeting would appoint two men to interview the accused and extract from the accused a sense of remorse. If the original committee reported that it could do no more to persuade the wrongdoer of his sin,

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<sup>69</sup> See Matt. 18:15-17. Paul also warned against litigation. See 1 Cor. 6:1-7 and Titus 3:9. For detailed discussions of this particular Quaker legality, see, e.g., Offutt, *Of "Good Laws" and "Good Men"* at 146 (cited in note 11); and Sagafi-Nejad, *Friends at the Bar* at 177 (cited in note 33).

<sup>70</sup> See, e.g., Offutt, *Of "Good Laws" and "Good Men"* at 146 (cited in note 11).

<sup>71</sup> See, e.g., Sagafi-Nejad, *Friends at the Bar* at 178 (cited in note 33).

<sup>72</sup> *Id.* at 178-79.

<sup>73</sup> *Id.* at 186 ("Quakers cannot be peacemakers in every instance if they are also to witness other testimonies.").

alternative members were occasionally appointed to try again. If a person accused of wrongdoing believed he had not been treated fairly by the monthly meeting, he could appeal to the quarterly meeting and then to the yearly meeting. The Quaker disciplinary process usually took months, and sometimes years, to complete.<sup>74</sup>

Pennsylvania remained relatively crime free during Penn's lifetime because its population was stable, few inhabitants were marginalized in slavery or indentured servitude, and there was little religious oppression.<sup>75</sup> Litigation, at least in the early years, tended to involve debt collection,<sup>76</sup> a type of civil action that was a manifestation of the importance Quakers placed on keeping one's word. The first significant court case involving religion would not occur until the so-called Keithian schism in the early 1690s, and even that was an anomaly, as discussed below.<sup>77</sup>

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<sup>74</sup> See, e.g., Jean R. Soderlund, *Quakers & Slavery: A Divided Spirit 190–91* (Princeton 1988); see generally Jack D. Marietta, *The Reformation of American Quakerism, 1748–1783* (Penn 1984).

<sup>75</sup> See Marietta and Rowe, *Troubled Experiment* at 7–62 (cited in note 66).

<sup>76</sup> See, e.g., William E. Nelson, *Government by Judiciary: The Growth of Judicial Power in Colonial Pennsylvania*, 59 *SMU L. Rev.* 3 (2006), reprinted in William E. Nelson, 2 *The Common Law in Colonial America* 99–123 (Oxford 2013). Legal historian William E. Nelson argues that Quakers used judicial power to maintain the socio-economic dominance of the Quaker elite. See Nelson, *Government by Judiciary* at 99–123. I have my doubts about Nelson's thesis, especially because he advances it through a series of questionable suppositions and his emphasis on socio-economic considerations trivializes the importance of ideas – including, for colonial Pennsylvania, the idea of religious tolerance. See Scott D. Gerber, *Bringing Ideas Back In: A Brief Historiography of American Colonial Law*, 51 *Am. J. Legal Hist.* 359 (2011).

<sup>77</sup> See, e.g., Sagafi-Nejad, *Friends at the Bar* at 71 (cited in note 33) (“the early reported cases did not often involve Friends' religious scruples or matters of conscience”). See generally Samuel W. Pennypacker, *Pennsylvania Colonial Cases: The Administration of Law in Pennsylvania Prior to A.D. 1700 as Shown in Cases Decided and in the Court Proceedings* (Nabu 2010) (summarizing approximately 75 unreported early Pennsylvania cases); Marietta and Rowe, *Troubled Experiment* at 7–62 (cited in note 66).

## D. FRAME OF GOVERNMENT OF PENNSYLVANIA OF 1683

Benjamin Furly, one of William Penn's Quaker advisors, wrote to Penn in the second half of 1682 expressing a preference for the more democratic Fundamental Constitutions of 1681. Furly also argued for a broader guarantee of religious liberty than Penn had memorialized in the 1682 Frame of Government: Furly wanted to safeguard the rights of settlers who did not believe in observing the Sabbath.<sup>78</sup> Perhaps more significantly, from March 10, 1682/3 until April 4, 1683 Pennsylvania's council and general assembly convened, and the general assembly—the government body closest to the people—did not fully approve of the 1682 Frame, in large part because of the unwieldy number of representatives for which it called. The general assembly drafted and adopted, with Penn's cooperation, a second Frame of Government. Penn agreed in the Frame of Government of Pennsylvania of 1683 not to take significant legislative action without the "advice and consent" of the council, and the general assembly was afforded the privilege of conferring with the governor and council on lawmaking.<sup>79</sup> In addition, the

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(analyzing criminal justice cases during Penn's lifetime); Nelson, *The Growth of Judicial Power in Colonial Pennsylvania* (cited in note 76) (discussing cases through the lens of the development of the common law in colonial Pennsylvania); and Offutt, *Of "Good Laws" and "Good Men"* (cited in note 11) (providing a statistical assessment of early cases from the Delaware Valley). Not surprisingly, the early court records are far from comprehensive. See, e.g., Pennypacker, *Pennsylvania Colonial Cases* at 25 ("An examination of the first volume of [Dallas' Pennsylvania Reports] shows that the earliest case there reported is anonymous and was determined in September Term, 1754.").

<sup>78</sup> Benjamin Furly's *Criticism of the Frame of Government, post May 1682*, in Dunn and Dunn, eds., *2 The Papers of William Penn* at 229–38 (cited in note 38).

<sup>79</sup> *The Frame of Government of Pennsylvania of 1683* is reprinted in, among other places, Soderlund, ed., *William Penn and the Founding of Pennsylvania, 1680–1684* at 267–73 (cited in note 52). The quoted language is at page 269.

appellation “general assembly” was shortened to “assembly,” and the governor, council, and assembly together became known as the “general assembly.”<sup>80</sup>

The 1683 Frame of Government was silent about religion. However, in a February 5, 1682/3 letter to a prominent English Quaker named Jasper Batt, Penn reaffirmed his commitment to religious freedom for all Pennsylvania inhabitants, Quaker and non-Quaker alike.<sup>81</sup> And Chapter 1 of the Great Law of 1682—the statute guaranteeing liberty of conscience—was declared “fundamental” during the 1682/3 legislative session and therefore unalterable “without the Consent of the Governour his heirs or Assigns and six parts of seven of the freemen of this province, or territories thereof, in Provincial Council, and Assembly met.”<sup>82</sup> Most of the rest of the statutes enacted in 1682/3 were of a more general nature, such as those regulating farmers,<sup>83</sup> although Chapter CXII, entitled “Laws About Education,” declared that one of the main reasons that children should learn to read was so they would “be able to read the

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<sup>80</sup> The Act of Settlement of 1682/3 reduced the size of the council and assembly to a manageable number of representatives. See, e.g., Horle, et al., eds., 1 *Lawmaking and Legislators in Pennsylvania* at 12–13 (cited in note 60).

<sup>81</sup> William Penn to Jasper Batt, Feb. 5, 1682/3, in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 346–49 (cited in note 38). See also William Penn to John Alloway, Nov. 29, 1683, in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 503–06 (cited in note 38).

<sup>82</sup> Act of March 10, 1682/3, Ch. CXXI, reprinted in George, et al., eds., *Charter to William Penn and the Laws of the Province of Pennsylvania, Passed Between the Years 1682 and 1700* at 154 (cited in note 40).

<sup>83</sup> Specifically, these were Chapters LXXXV (keeping female calves and lambs), LXXXVII (marking cattle), LXXXVIII (price and weight of bread and butter), XCI (fencing in corn fields), XCVI (cow or hog stealing), XCVIII (export fee on hides), and CVII (sale of corn). See George, et al., eds., *Charter to William Penn and the Laws of the Province of Pennsylvania, Passed Between the Years 1682 and 1700* at 134, 134, 135, 136, 138, 138–39, 141 (cited in note 40).

Scriptures.”<sup>84</sup> A 1690 statute permitted “any Religious Society” to maintain registries about births and deaths and decreed that those registries would be regarded as “authentick, and shall be allowed of, upon all occasions.”<sup>85</sup>

One documented incident of *possible* (underscore “possible”) religious persecution occurred under the 1683 Frame of Government, but to count it against William Penn’s “holy experiment” would require a broader conception of religion than seventeenth century Pennsylvanians could be expected to understand. The incident involved the “first and last trial for witchcraft” in the history of Pennsylvania.<sup>86</sup> The Wicca religion dates from the mid-twentieth century,<sup>87</sup> which suggests that the incident was not conceived of at the time of the trial as a threat to religious liberty. In December of 1683 one Margaret Mattson was indicted by a grand jury for being a witch. Penn himself presided over the trial. The evidence consisted of witnesses testifying to Ms. Mattson’s “bewitching” of certain livestock and her denial of those actions. Unfortunately, Penn’s charge to the petit jury has not been located. But he apparently treated the defendant fairly because, although the petit jury found Ms. Mattson guilty “of haveing the Comon fame of a witch,” it

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<sup>84</sup> Act of March 10, 1682/3, Ch. CXII, in George, et al., eds., *Charter to William Penn and the Laws of the Province of Pennsylvania, Passed Between the Years 1682 and 1700* at 142 (cited in note 40).

<sup>85</sup> Act of May 10, 1690, Ch. CCI, in George, et al., eds., *Charter to William Penn and the Laws of the Province of Pennsylvania, Passed Between the Years 1682 and 1700* at 186–87 (cited in note 40). The 1684 legislative session enacted a number of statutes about alcohol, the abuse of which Quakers opposed. See George, et al., eds., *Charter to William Penn and the Laws of the Province of Pennsylvania, Passed Between the Years 1682 and 1700* at 166–75 (cited in note 40).

<sup>86</sup> Pennypacker, *Pennsylvania Colonial Cases* at 35 (cited in note 77). For an account of the case, see *id.* at 38.

<sup>87</sup> See, e.g., *History of Wicca – A (Very) Brief Guide* (Wicca Living, 2019), archived at <https://perma.cc/AYG2-W9SC>.

adjudged her not guilty “in manner and forme as Shee stands Indicted.”<sup>88</sup> The lawyer who provided the account of the case some two hundred years later gave Penn and the jury great credit for not succumbing to the hysteria about witches of their day.<sup>89</sup>

Litigation continued to be frowned upon under the 1683 Frame of Government. An oft-repeated anecdote illustrates the point. In March 1684/5 a dispute arose between a party named Johnson and a party named Peterson.<sup>90</sup> The governor and council instructed them “to shake hands and forgive One Another.”<sup>91</sup> The court also “Ordered that the Records of Court Concerning that Business should be burnt.”<sup>92</sup> A September 1685 dispute between a Tho. Budd and a Phill. Thlenman likewise found a court advising the parties “to goe together and try if they Could friendly End it between themselves, ... wch they did.”<sup>93</sup>

Immoral behavior was sometimes addressed by a court, however. Cases in May of 1685, December of 1685, and July of 1686,

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<sup>88</sup> Pennypacker, *Pennsylvania Colonial Cases* at 37 (cited in note 77).

<sup>89</sup> *Id.* at 38 (“Gentlemen of the Law Academy, future lawyers and judges in the Courts of Pennsylvania, pause for a moment and in an humble spirit offer your tribute of respect to the memories of William Penn and those worthy jurymen. Cherish the hope that you may be able, amid the duties and responsibilities with which you will soon be confronted, to do somewhat to maintain the reputation of the profession in your native state at the height, established in the earliest days of the province, so far beyond that of less enlightened and less fortunate communities.”). A better reading of the incident than the *possibility* explored in the text is that the Quaker-controlled Pennsylvania government was concerned about witchcraft, which Christians and Jews had feared since the ancient world. The Bible condemns witchcraft in several places in the Old Testament. See Exod. 22:18; Levit. 20:27; Deut. 18:10–11.

<sup>90</sup> See, e.g., Pennypacker, *Pennsylvania Colonial Cases* at 38–39 (cited in note 77).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 39.

<sup>93</sup> *Id.* at 54.

for example, involved theft of livestock.<sup>94</sup> Alcohol abuse was at issue in judicial proceedings in January of 1684/5, March of 1684/5, November of 1685, December of 1685, January of 1685/6, and April of 1686.<sup>95</sup> Fornication was the subject of court action in August of 1685, January of 1685/6, June of 1689, and January of 1692/3.<sup>96</sup> Adultery was punished as a “dishonor to God” by the Pennsylvania courts “with some frequency.”<sup>97</sup>

#### E. FRAME OF GOVERNMENT OF PENNSYLVANIA OF 1696

William Penn returned to England in 1684 to make his case to the crown that the “lower counties” of Pennsylvania (today, Delaware) belonged to him rather than to Lord Baltimore, the proprietor of Maryland. Penn remained in England for the next decade and a half: through the turmoil surrounding the reign of James II, through the Glorious Revolution and the ascendancy to the throne of William and Mary, and through the imperial reorganization of the 1690s. The situation got so bad for Penn that King William and Queen Mary revoked Penn’s right to govern Pennsylvania from 1692–1694 because they suspected that Penn was treasonously involved with the deposed and exiled James II.<sup>98</sup>

Pennsylvania was governed chaotically during Penn’s lengthy sojourn in England. The most dramatic illustration of the disorder involved George Keith (1638–1716), a prominent Quaker leader and

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<sup>94</sup> See Pennypacker, *Pennsylvania Colonial Cases* at 49–52, 84–86, 115–16 (cited in note 77).

<sup>95</sup> See *id.* at 71, 68–69, 53, 72–73, 90–92, 103–04.

<sup>96</sup> See *id.* at 79–84 and 108–09, 88–90, 53, 54.

<sup>97</sup> Nelson, *Government by Judiciary* at 43 (cited in note 76) (citing two cases adjudicated under the 1683 Frame of Government and four cases under the 1701 Charter of Privileges).

<sup>98</sup> See, e.g., Joseph E. Illick, *Colonial Pennsylvania: A History* 43–46 (Scribner 1976).

one-time Penn associate who began to espouse a version of Quakerism during Penn's absence from Pennsylvania that emphasized the life and teachings of the historical Jesus Christ.<sup>99</sup> Although Keith had previously written prolifically in defense of traditional Quaker beliefs, he had increasing doubts about the Quaker tenet that the resurrection of Jesus was a purely spiritual event and he started to insist on creedal affirmation of his contrary position, which traditional Quakers resisted. Keith also came to question the propriety of Quakers holding government office, and without Quakers in the government the "'Holy Experiment' would collapse."<sup>100</sup> Keith's criticisms became so vitriolic that the Quaker leadership in Pennsylvania suppressed the press, accused Keith of sedition, and brought Keith and several of his associates to trial for defamation: an extremely dramatic step for a sect opposed to litigation. As a result, Keith and his associates upped the ante and accused the Quaker leadership of persecuting them in much the same fashion that the Puritan establishment had persecuted dissenters in New England. Penn himself was forced to respond from England when news of what has become known as the "Keithian schism" began to damage Penn's cause with the crown. Penn wrote:

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<sup>99</sup> The details of the Keithian schism have been widely chronicled. See, e.g., Jon Butler, *"Gospel Order Improved": The Keithian Schism and the Exercise of Quaker Ministerial Authority in Pennsylvania*, 31 *Wm. & Mary Q.* 431 (1974); J. William Frost, *The Keithian Schism in Early Pennsylvania* (Norwood Editions 1979); and Ethyn Williams Kirby, *George Keith (1638-1716)* (Appleton 1941).

<sup>100</sup> Horle, et al., eds., 1 *Lawmaking and Legislators in Pennsylvania* at 44 (cited in note 60). Quakers controlled Pennsylvania's government from the province's founding until approximately 1755. Penn maintained in the preface to the 1682 Frame of Government that "Government seems to me a part of Religion it self, a thing Sacred in its Institution and End." *Frame of Government of Pennsylvania of 1682*, in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 212 (cited in note 38).

as we are for Liberty of Conscience every where, so we are no where for having Government affronted and abused, in the name of Conscience, by Gross and Insolent Behavior. And for our Friends there [in Pennsylvania], they have been so far from a Spirit of Persecution, that it is but too plain they have long suffered under it, from such Insolent and Abusive Pens as this Man has treated us with.<sup>101</sup>

The jury failed to convict Keith and his co-defendants on the most serious charges,<sup>102</sup> but the Keithians were nevertheless unable to regain their momentum in Pennsylvania. Keith soon departed for London to attend the yearly meeting there in order to ask that meeting to endorse his position. The London Friends refused to do so and went so far as to disown Keith. A few years later, Keith joined the Church of England.

Once Penn's problems in England were resolved – Penn not only survived the Keithian schism, he got his government back and was awarded the “lower counties” – he named his cousin William Markham deputy governor of Pennsylvania. Markham had initially believed that the 1683 Frame of Government was again in effect. Benjamin Fletcher, the governor of Pennsylvania (and New York) during Pennsylvania's brief stint as a royal colony, had governed as if it were not.<sup>103</sup> Pennsylvania's council and assembly agreed with Fletcher's interpretation, and Markham yielded to the pressure from a restless assembly and agreed in 1696 to a new constitution that

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<sup>101</sup> William Penn, *A Just Censure of Francis Bugg's Address to the Parliament Against Quakers* 43 (T. Sowle 1699).

<sup>102</sup> See Pennypacker, *Pennsylvania Colonial Cases* at 117–42 (cited in note 77).

<sup>103</sup> See, e.g., Horle, et al., eds., *1 Lawmaking and Legislators in Pennsylvania* at 13 (cited in note 60). Markham also had served as deputy governor to Fletcher and, on a prior occasion, to Penn.

conferred upon the assembly the power to initiate legislation that the assembly had long wanted and that Fletcher had permitted. Penn never formally approved the new constitution, although he probably knew that opposing it from England would be pointless.<sup>104</sup>

The Frame of Government of Pennsylvania of 1696 stated that, pursuant “to the late act of parliament, made in the first year of king William, and the late queen Mary,” government service was limited to Protestants.<sup>105</sup> Obviously, this was not a tolerant provision, but the government of Pennsylvania apparently believed that the laws of England required it and Markham’s primary purpose was to reestablish the proprietary government. That said, the 1696 Frame did constitutionalize the Quaker preference for affirming, attesting, or declaring, rather than swearing, when an individual was asked to provide evidence or take an oath.<sup>106</sup> Statutes quickly began to codify

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<sup>104</sup> See, e.g., Isaac Sharpless, *Two Centuries of Pennsylvania History* 82 (Forgotten Books 2018) (originally published in 1911). *The Frame of Government of Pennsylvania of 1696* is reprinted in, among other places, *The Frame of Government of Pennsylvania of 1696* (Avalon Project, 2008), archived at <https://perma.cc/TB5F-T7TG>.

<sup>105</sup> *Frame of Government of Pennsylvania of 1696* (cited in note 104). Fletcher had likewise insisted on limiting office-holding to trinitarian Protestants when he governed Pennsylvania on behalf of the crown. See, e.g., Schwartz, “*A Mixed Multitude*” at 32 (cited in note 2).

<sup>106</sup> See *Frame of Government of Pennsylvania of 1696* (cited in note 104) (“And whereas divers persons within this government, cannot, for conscience sake, take an oath, upon any account whatsoever, Be it therefore enacted by the authority aforesaid, That all and every such person and persons, being, at any time hereafter, required, upon any lawful occasion, to give evidence, or take an oath, in any case whatsoever, shall, instead of swearing, be permitted to make his, or their solemn affirmation, attest, or declarations which shall be adjudged, and is hereby enacted and declared to be of the same force and effect, to all intents and purposes whatsoever, as if they had taken an oath, and in case any such person or persons shall be lawfully convicted of having wilfully and corruptly affirmed, or declared any matter or thing, upon such solemn affirmation or attest, shall incur the same penalties and forfeitures as by the laws and statutes of England are provided against persons convicted of wilful and corrupt perjury.”).

this provision in concrete terms and in specific contexts. For example, a 1698 law designed to prevent fraud and regulate abuses in trade not only reiterated the provision of the 1696 Frame on this issue but also asserted that “said Solemn affirm’n or attest shall be adjudged and taken and is hereby Enacted and Declared to be binding and most available in Law and shall be accepted instead of an Oath in all Courts and other places within this government, where, by the Said Acts an oath is required Concerning the premises.”<sup>107</sup>

Governor Fletcher had decreed in 1693 when Pennsylvania became a royal colony that all laws enacted by the proprietary government of Pennsylvania were “dissolved and at an end.”<sup>108</sup> The 1693 assembly re-enacted many of the previous laws and also passed new laws. After the proprietorship was restored, additional laws were enacted, with the two most important being the 1696 Frame of Government itself and a provincial tax for support of the war effort in New York against France. Enactment of the latter law was one of the conditions upon which Penn was allowed to resume governing his province.<sup>109</sup> Although previously unaddressed topics were sometimes confronted by the Pennsylvania general assembly, many of the “new” laws were re-enactments of prior legislation with minor edits, including the “fundamental” law about liberty of conscience. Section II of Chapter I of the Code of 1700 read in pertinent part:

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<sup>107</sup> Act of May 10, 1698, Ch. 2 (“An Act for Preventing Frauds & Regulating Abuses in Trade, with the Province of Pennsylvania & Counties Annexed”), in George, et al., eds., *Charter to William Penn and the Laws of the Province of Pennsylvania, Passed Between the Years 1682 and 1700* at 268, 272 (cited in note 40).

<sup>108</sup> Governor Benjamin Fletcher to the Pennsylvania Assembly, 1693, in George, et al., eds., *Charter to William Penn and the Laws of the Province of Pennsylvania, Passed Between the Years 1682 and 1700* at 547 (cited in note 40).

<sup>109</sup> See Horle, et al., eds., 1 *Lawmaking and Legislators in Pennsylvania* at 31 (cited in note 60).

Be it enacted . . . That no person, now or at any time hereafter, living in this province or territories, who shall confess and acknowledge one Almighty God to be the Creator, Upholder and Ruler of the world, and that profeseth him or herself obliged in conscience to live peaceably and quietly under the civil government, shall in any case be molested or prejudiced for his or her conscientious persuasion or practice; nor shall he or she, at any time, be compelled to frequent or maintain any religious worship, place or minister whatsoever, contrary to his or her mind, but shall freely and fully enjoy his or her Christian liberty in that respect, without any interruption or reflection. And if any person shall abuse or deride any other for his or her different persuasion and practice in matter of religion, such person shall be looked upon as a disturber of the peace and be punished accordingly.<sup>110</sup>

Chapter XXV of the 1700 code of laws prohibiting “clandestine marriages” was another example of re-enacting with edits a prior law that reflected Pennsylvania’s animating principle of religious tolerance. Chapter XXV was similar to the statute on marriage enacted in 1683, but it was edited to include the following provision: “Provided, that this law shall not extend to any who shall marry or

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<sup>110</sup> Act of November 27, 1700 (“The Law Concerning Liberty of Conscience”), reprinted in James T. Mitchell and Henry Flanders, eds., *2 The Statutes at Large of Pennsylvania* 3–4 (Busch 1896) (compiled under the authority of the Act of May 19, 1887). Section II of Chapter I forbade the people of Pennsylvania from working on Sunday – what Quakers referred to as the “First” day of the week – which was “the Lord’s Day.” “The Law Concerning Liberty of Conscience” at 4 (cited in note 110). This provision disadvantaged Pennsylvanians of the Jewish faith. It was a common provision across Europe, England, and the English American colonies at the time. See, e.g., Robert Fortenbaugh and H. James Tarman, *The Pennsylvania Story* 103 (Penns Valley 1950).

be married in the religious society to which they belong, so that they observe the methods of publication as before in this law expressed.”<sup>111</sup>

#### F. CHARTER OF PRIVILEGES OF 1701

William Penn finally returned to Pennsylvania in 1699. His lengthy absence had resulted in many of the colonists viewing him more as a feudal overlord than as a spiritual leader.<sup>112</sup> Penn could not stay long in Pennsylvania, however. A bill had emerged in Parliament calling for the unification of the charter and proprietary colonies and Penn was forced to return to England to protect his interests.<sup>113</sup> Before doing so, he acquiesced to the assembly’s demand for a new frame of government. The Charter of Privileges of 1701, which Penn wrote, made the assembly the lawmaking body of Pennsylvania.<sup>114</sup> The council exercised an advisory role only, although Penn himself retained the power to veto legislation. Most important for present purposes, the Charter of Privileges opened with a reaffirmation of Penn’s famous commitment to liberty of conscience:

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<sup>111</sup> Act of November 27, 1700, Ch. XXV (“An Act for the Preventing of Clandestine Marriages”) (repealed by the assembly in 1701), in Mitchell and Flanders, eds., 2 *The Statutes at Large of Pennsylvania* at 21, 22–23 (cited in note 110). Chapter LXXV about the registry of “any” religious society was another example. Act of November 27, 1700, Ch. LXXV (“An Act for Keeping a Registry in Religious Societies”), in Mitchell and Flanders, eds., 2 *The Statutes at Large of Pennsylvania* at 91 (cited in note 110).

<sup>112</sup> The apparent exemption in the Pennsylvania charter from the statute *Quia Emptores* that permitted grantees of land in Pennsylvania to subinfeudate persons wishing to hold a parcel of that land had technically turned Penn into a feudal lord in Pennsylvania of a type that had not existed in England since 1290.

<sup>113</sup> See, e.g., Illick, *Colonial Pennsylvania* at 63–80 (cited in note 98).

<sup>114</sup> *The Charter of Privileges of Pennsylvania of 1701*, in Craig W. Horle, et al., eds., 4 *The Papers of William Penn* 105–10 (Penn 1987).

Because noe people can be truly happy though under the Greatest Enjoyments of Civil Liberties if Abridged of the Freedom of their Consciences as to their Religious Profession and Worship. And Almighty God being the only Lord of Conscience Father of Lights and Spirits and the Author as well as Object of all divine knowledge Faith and Worship who only {{can}} Enlighten the mind and perswade and Convince the understandings of people **I doe hereby** Grant and Declare that noe person or persons Inhabiting in this Province or Territories who shall Confesse and Acknowledge one Almighty God the Creator upholder and Ruler of the world and professe him or themselves Obligated to live quietly under the Civill Governement shall be in any case molested or prejudiced in his or their person or Estate because of his or their Conscientious perswasion or practice nor be compelled to frequent or mentaine any Religious Worship place or Ministry contrary to his or their mind or doe or Suffer any other act or thing contrary to their Religious perswasion.<sup>115</sup>

The Charter of Privileges likewise repeated Penn's longstanding promise that Christians of any denomination were allowed to hold government office. It also declared "That the first Article of this Charter Relateing to Liberty of Conscience and every part and Clause therein according to the True Intent and meaneing thereof shall be kept and remaine without any Alteration Inviolably for ever."<sup>116</sup> Penn added a postscript to the charter as he was boarding a ship to England in which he promised to permit a "Distinct Assembly" for

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<sup>115</sup> *Charter of Privileges of Pennsylvania of 1701* at 106 (cited in note 114).

<sup>116</sup> *Id.* at 108.

the “lower counties” (today, Delaware) if it became clear to him that the inhabitants of those counties and the inhabitants of the other counties of Pennsylvania could not work effectively together in a common legislative assembly.<sup>117</sup> Often regarded as the “most liberal and best known of all colonial constitutions,” the Charter of Privileges continued as Pennsylvania’s constitution until the American Revolution.<sup>118</sup>

Most of the statutes passed under the prior organic law of Pennsylvania were re-enacted under the 1701 Charter of Privileges, including the statute about liberty of conscience. Two new statutes expressly allowed for attestations in formal occasions and they did not mention a need to swear by or make an oath.<sup>119</sup>

King William III died in 1702 and was succeeded by Queen Anne, who, unlike her father James II, was not Catholic.<sup>120</sup> Queen Anne repealed a number of Pennsylvania laws for a variety of reasons,<sup>121</sup> which led Pennsylvania to re-enact many of them in the January 1705/6 legislative session, including a nearly identical

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<sup>117</sup> *Id.* at 109.

<sup>118</sup> William Penn, *Charter of Privileges for the Province of Pennsylvania, 1701*, at *Treasures of the APS* (Am. Philosophical Society, 2006), archived at <https://perma.cc/YTU5-RQP8>. Pennsylvanians created the famed Liberty Bell in 1751 to commemorate the 1701 Charter of Privileges. See, e.g., Frost, *A Perfect Freedom* at 58 (cited in note 3).

<sup>119</sup> See Act of October 28, 1701, Ch. CVI (“An Act for Establishing Courts of Judicature in the Province and Counties Annexed”) (repealed by the Queen in council on February 7, 1705/6), in Mitchell and Flanders, eds., 2 *The Statutes at Large of Pennsylvania* at 148, 148–59 (cited in note 110); Act of October 28, 1701, Ch. CXII (“An Act for the Destruction of Blackbirds and Crows”), in Mitchell and Flanders, eds., 2 *The Statutes at Large of Pennsylvania* at 166–67 (cited in note 110).

<sup>120</sup> See, e.g., Richard Blythe, *Queen Anne of England* (Kings College, February 1998), archived at <https://perma.cc/FA3U-27Z2>.

<sup>121</sup> See Marietta and Rowe, *Troubled Experiment* at 20 (cited in note 66) (maintaining that the privy council in England disallowed more of Pennsylvania’s laws than it did the laws of any other colony).

statute about liberty of conscience.<sup>122</sup> However, an anti-Catholic statute was enacted in the 1705/6 session that required members of the assembly to make the following declaration before being allowed to vote or be seated, which effectively barred Catholics from public office:

I A. B. do sincerely promise and solemnly declare before God and the world, that I will be faithful and bear true allegiance to Queen Anne. And I do solemnly profess and declare, that I do from my heart abhor, detest and renounce as impious and heretical that damnable doctrine and position, that princes excommunicated or deprived by the Pope or any authority of the See of Rome, may be deposed or murdered by their subjects or any other whatsoever. And I do declare, that no foreign prince, person, prelate, state or potentate hath or ought to have any power, jurisdiction, superiority, pre-eminence or authority ecclesiastical or spiritual, within the realm of England or the dominions thereunto belonging.

And I A. B. do solemnly and sincerely in the presence of God profess, testify and declare, that I do believe that in the sacrament of the Lord's Supper there is not any transubstantiation of the elements of bread and wine into the body and blood of Christ, at or after the consecration thereof by any person whatsoever; and that the invocation or adoration of the Virgin Mary or any other saint, and sacrifice

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<sup>122</sup> The 1705/6 version omitted the twenty shillings fine for any person who did not "abstain from their usual and common toil and labor" on the Lord's Day, but a separate 1705/6 statute included it. See Act of January 12, 1705/6, Ch. CXIX ("An Act to Restrain People from Labor on the First Day of the Week"), in Mitchell and Flanders, eds., 2 *The Statutes at Large of Pennsylvania* at 175 (cited in note 110).

of the Mass, as they are now used in the Church of Rome, are superstitious and idolatrous.

And I A. B. do solemnly in the presence of God profess, testify and declare, that I do make this declaration and every part thereof in the plain and ordinary sense of the words read unto me, as they are commonly understood by English Protestants, without any evasion, equivocation or mental reservation whatsoever, and without any dispensation already granted me for this purpose by the Pope or any other authority or person whatsoever, or without any hope of such dispensation from any person or authority whatsoever; or without thinking I am or may be acquitted before God or man, or absolved of this declaration or any party thereof, although the Pope or any other person or persons or power whatsoever should dispense with or annul the same, or declare that it was null or void from the beginning.

And I A. B. profess the faith in God the Father, and in Jesus Christ, His Eternal Son, the true God, and in the Holy Spirit, one God blessed for evermore; and do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration.<sup>123</sup>

The next statute that reflected the animating principle was enacted in 1709. It was another law permitting attestation on formal

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<sup>123</sup> Act of January 1705/6, Ch. CXXXVII (“An Act to Ascertain the Number of Members of Assembly and to Regulate the Election”), in Mitchell and Flanders, eds., 2 *The Statutes at Large of Pennsylvania* at 212, 219-20 (cited in note 110). Penn probably did not object to this law because he feared he would lose Pennsylvania again if he failed to abide by English restrictions on the political rights of Catholics. See Schwartz, “A Mixed Multitude” at 34 (cited in note 2).

occasions, specifically, for non-English born inhabitants to acquire a vested interest in land.<sup>124</sup> Several additional statutes were adopted in 1710/1 that specifically allowed for affirmations instead of oaths in matters throughout the colony.<sup>125</sup> The clearest example was Chapter CLXXI, “An Act Directing an Affirmation to Such Who for Conscience Sake Cannot Take an Oath,” which specified the actual affirmation Quakers were to give when called upon to provide evidence or participate in other matters where an oath was usually needed:

We humbly pray that it may be enacted . . . that when any such person who for conscience’ sake cannot take an oath shall be called before any magistrate or proper officer to give evidence in any matter or case whatsoever, such magistrate or officer shall administer the affirmation as hereinafter directed to such person or persons in these words: . . . Thou art called here to give thy evidence; dost thou protest solemnly and declare that the evidence thou shalt give be the truth, the whole truth and nothing but the truth; and the affirmant shall answer yes or yes.<sup>126</sup>

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<sup>124</sup> Act of September 1709, Ch. CLXVII (“Directing an Affirmation to Such Who for Conscience Sake Cannot Take an Oath”), in Mitchell and Flanders, eds., 2 *The Statutes at Large of Pennsylvania* at 297, 299–300 (cited in note 110).

<sup>125</sup> One of the 1711/2 statutes also repeated the longstanding prohibition against “riotous sports, plays and games.” Act of February 1711/2, Ch. CLXXIV (“An Act Against Riotous Sports, Plays and Games”), in Mitchell and Flanders, eds., 2 *The Statutes at Large of Pennsylvania* at 360 (cited in note 110).

<sup>126</sup> Act of February 1711/2, Ch. CLXXI (“An Act Directing an Affirmation to Such Who for Conscience Sake Cannot Take an Oath”), in Mitchell and Flanders, eds., 2 *The Statutes at Large of Pennsylvania* at 355, 356 (cited in note 110). A “supplementary act” was passed in June 1712. See Act of June 7, 2012, Ch. CLXXXIX (“Supplementary Act

Quakers objected to swearing oaths on the grounds of biblical prohibition and the careless way oaths invoked the name of God.<sup>127</sup> Queen Anne disallowed the 1710/1 law when she received it in 1714, but in 1715 Pennsylvania enacted essentially the same law again.<sup>128</sup> The 1715 version also was disallowed by the crown. Pennsylvania tried again in 1718, and this time the statute was confirmed in 1719 by the new king in council.<sup>129</sup> Section III of Chapter CCXXXVI provided in pertinent part:

That all and all manner of crimes and offenses, matters and causes whatsoever, to be inquired of, heard, tried and determined by virtue of this or any other act or law of this province, or otherwise, shall and may be inquired of, heard, tried and determined by judges, justices, inquests and witnesses, qualifying themselves according to their conscientious persuasions respectively, either by taking a corporal oath, or by the solemn affirmation allowed by act of parliament to those called Quakers in Great Britain, which affirmation of such persons as conscientiously refuse to take an oath, shall be accounted and deemed in the law to have the full effect of an oath in any case whatsoever in this province.<sup>130</sup>

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to a Law about the Manner of Giving Evidence”), in Mitchell and Flanders, eds., 2 *The Statutes at Large of Pennsylvania* at 425 (cited in note 110).

<sup>127</sup> See, e.g., Sharpless, *Two Centuries of Pennsylvania History* at 110 (cited in note 104).

<sup>128</sup> *Id.*

<sup>129</sup> Act of May 31, 1718, Ch. CCXXXVI (“An Act for the Advancement of Justice, and More Certain Administration Thereof”), in Mitchell and Flanders, eds., 3 *The Statutes at Large of Pennsylvania* at 199, 214 (cited in note 110).

<sup>130</sup> Act of May 31, 1718, Ch. CCXXXVI at 200–01 (cited in note 129).

A 1712 statute entitled “An Act Concerning the Register-General’s Office” likewise authorized persons who worked in the register’s office to opt out of administering oaths if for “conscience’ sake” they “cannot administer oaths,”<sup>131</sup> and a separate statute enacted in 1712 permitted all “Protestant” religious societies to obtain land for religious uses.<sup>132</sup> A 1712/3 statute allowed for a person to be convicted by the “oath or affirmation” of one or more witnesses if the person tried to sell liquor without a license,<sup>133</sup> while a statute enacted in 1715 permitted reports about the number of Africans imported into Pennsylvania to be subjected to “oath or affirmation.”<sup>134</sup> A 1717/8 statute about encouraging trade within Pennsylvania continued the province’s practice of authorizing persons regulated by the law to affirm rather than swear an oath that they had complied with the dictates of the law.<sup>135</sup>

The crown’s disallowance of the Pennsylvania statute that allowed witnesses to testify in court via affirmation rather than oath had serious consequences for a case involving the 1715 murder of a

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<sup>131</sup> Act of June 7, 1712, Ch. CLXXXVII (“An Act Concerning the Register-General’s Office”), in Mitchell and Flanders, eds., 2 *The Statutes at Large of Pennsylvania* at 421, 423 (cited in note 110).

<sup>132</sup> Act of June 7, 1712, Ch. CLXXXVIII (“An Act for Empowering Religious Societies to Buy, Hold and Enjoy Lands, Tenements and Hereditaments”), in Mitchell and Flanders, eds., 2 *The Statutes at Large of Pennsylvania* at 424 (cited in note 110).

<sup>133</sup> Act of March 27, 1713, Ch. CXCIX (“An Act for the Laying of a Duty or Excise upon Sundry Liquors, and also upon Hops, to Answer Several Exigencies of this Government”), in Mitchell and Flanders, eds., 3 *The Statutes at Large of Pennsylvania* at 26, 28 (cited in note 110).

<sup>134</sup> Act of May 28, 1715, Ch. CCXVIII (“An Act for Laying a Duty on Negroes Imported into this Province”), in Mitchell and Flanders, eds., 3 *The Statutes at Large of Pennsylvania* at 117, 120 (cited in note 110).

<sup>135</sup> Act of February 22, 1717/8, Ch. CCXXIV (“An Act for the Better Encouraging the Trade of this Province”), in Mitchell and Flanders, eds., 3 *The Statutes at Large of Pennsylvania* at 145, 146, 148 (cited in note 110).

local farmer named Jonathan Hayes.<sup>136</sup> When then Deputy Governor Charles Gookin opined that, as a result of the crown's action, criminal trials not based on oaths were invalid, the Pennsylvania judiciary countered by refusing to permit the case to proceed because most persons involved with the judicial system were Quakers. The two alleged perpetrators of the Hayes murder were released on bail. But when Deputy Governor William Keith assumed office in 1717 the two men were put on trial. Eight members of the jury were Quakers, as were many of the witnesses, and the Quakers affirmed, rather than swore an oath, to perform their assigned responsibilities. A guilty verdict was returned against the men, which they appealed to the crown on the ground that the trial was not conducted consistently with the oath requirement. Before the crown could respond, Keith and his council concluded that an appeal to the crown was unwarranted and the men were executed.

#### IV. WILLIAM PENN'S DELAWARE

In 1638 the Swedes became the first permanent non-native settlers of what is now the state of Delaware. The Swedes' animating principles for planting in the Delaware Valley were money and prestige.<sup>137</sup> The Dutch took control of the region in 1655. The English displaced the Dutch in 1664; the Dutch briefly reclaimed the area from 1673-1674; and the English regained control after that. The Dutch and the English, like the Swedes before them, were animated by economics and glory. The Delaware Valley was included in the 1663/4 land grant from King Charles II to James, Duke of York, and

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<sup>136</sup> The case is discussed in Sharpless, *Two Centuries of Pennsylvania History* at 111 (cited in note 104).

<sup>137</sup> See, e.g., John H. Wuorinen, *The Finns on the Delaware, 1638-1655* at 32-33 (Columbia 1938).

it was a part of New York until 1682, when the Duke of York ceded much of the region to William Penn.<sup>138</sup> Penn—who defeated a competing claim to the area by Lord Baltimore, the proprietor of Maryland—and his heirs retained control of the region as a territory of Pennsylvania until Delaware became an independent state in 1776.<sup>139</sup> Delaware was referred to as the “three lower counties,” “territories,” or “government of New Castle, Kent and Sussex on Delaware” while under the Penn proprietorship.<sup>140</sup> Penn needed control of the Delaware counties to secure a passage to the sea to help ensure the financial success of his holy experiment.<sup>141</sup> The population of the Delaware counties was predominately Swedish, Finnish, Dutch, English, and non-Quaker.<sup>142</sup>

The frequent changes in sovereignty during the colonial period over what is now the state of Delaware is relevant for any assessment of religious tolerance in colonial Pennsylvania because of the toleration shown to diverse religious communities in the Delaware Valley from the start. In fact, the government in Sweden instructed Governor Johan Printz of “New Sweden” — the Swedish colony in the

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<sup>138</sup> See *Deed for New Castle*, Aug. 24, 1682, in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 281–84 (cited in note 38). Three other legal documents were involved in this complicated grant from the Duke of York: a deed from the southern limit of the twelve-mile circle around New Castle to Cape Henlopen and two leases for ten thousand years for these same two parcels.

<sup>139</sup> See, e.g., Carol E. Hoffecker, *Delaware: A Bicentennial History* xiii (Norton 2d ed. 1977). Penn and his heirs faced various and varied challenges to their claim to the Delaware counties until the eve of the American Revolution. See, e.g., John A. Munroe, *Colonial Delaware: A History* 143 (KTO 1978). For the legal history of the judicial power in Delaware, see Gerber, *A Distinct Judicial Power* at 289–304 (cited in note 4).

<sup>140</sup> See, e.g., Dudley Cammett Lunt, *Tales of the Delaware Bench and Bar* 27–32 (Del. St. Bar Association 1963).

<sup>141</sup> See, e.g., Dunn and Dunn, eds., 2 *The Papers of William Penn* at 82 (cited in note 38).

<sup>142</sup> See, e.g., Craig W. Horle, *Editor's Introduction*, in Craig W. Horle, ed., 1 *Records of the Courts of Sussex County, Delaware, 1677-1710* (1677-1689) at 4 (Penn 1991).

Delaware Valley—to be tolerant of the religious practices of Sweden’s most serious competitor, the Netherlands: “But so far as relates to the Holland colonists that live and settle under the government of [Her] Roy[al] Maj[esty] and the Swedish Crown, the Governor shall not disturb them in which was granted them in the Royal Charter, as to the exercise of the Reformed religion.”<sup>143</sup>

The Dutch continued the practice of religious toleration when they took control of the Delaware region from the Swedes. Although so-called schepens—a sort of combination town councillor and judge—were charged with ensuring that the Reformed Christian religion was maintained, Swedes (and Finns) who remained in the area and who took an oath of allegiance to the Dutch regime were allowed to live in their own community with their own government.<sup>144</sup> Moreover, in order to entice more settlers to the Delaware Valley, the Dutch government promised that no poll or mineral taxes on land would be imposed for twenty years on “all Christian people of tender conscience in England or elsewhere,

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<sup>143</sup> Amandus Johnson, *Instructions for Johann Printz, Governor of New Sweden: the First Constitution Or Supreme Law of the States of Pennsylvania and Delaware* 94, 96 (Swedish Colonial Society 1930) (Instruction 26). Recall that historian Jean R. Soderlund argued that the hallmarks of Delaware Valley society—including but not limited to religious liberty—began with the Lenni-Lenape (Delaware) Indians. See Soderlund, *Lenape Country* (cited in note 13).

<sup>144</sup> See, e.g., Leon deValinger, Jr., *The Development of Local Government in Delaware, 1638–1682* at 43, 12 (unpublished M.A. thesis, history and political science, University of Delaware, 1935). DeValinger served as state archivist of Delaware for nearly thirty years. See, e.g., Jerry A. Shields, *Dr. Leon deValinger, Jr.: A Glimpse and a Checklist* (John P. Reid 2019), archived at <https://perma.cc/PP63-DFVW>.

oppressed.”<sup>145</sup> Only members of the “Reformed Christian Religion” could serve in the local government, however.<sup>146</sup>

Religious toleration continued when the Duke of York controlled the Delaware Valley from 1663/4 until 1682, notwithstanding the Dutch interlude of 1673–1674.<sup>147</sup> The Dutch remaining in the Delaware Valley who swore allegiance to the English crown were allowed all the liberties to which the English on English lands were entitled, including freedom of conscience in religion.<sup>148</sup> For example, when Robert Carr was ordered to subdue the Dutch settlement at New Amstel, he was instructed that “all the People shall Enjoy the Liberty of their Conscience, in Church Discipline as formerly.”<sup>149</sup> One of the 1674 Articles of Agreement between the English and the burgomasters of New Castle likewise specified that the people of the Delaware region would enjoy freedom of conscience in religious matters.<sup>150</sup>

The Duke of York’s Laws of March 1, 1664/5 were a set of rules covering nearly every facet of life in the English American territories controlled by James, Duke of York. The Duke’s Laws were

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<sup>145</sup> As quoted in deValinger, *The Development of Local Government* at 90 (cited in note 144). The Dutch also had another reason for being “considerate” to the Swedes (and Finns): the Dutch were significantly outnumbered by them. See, e.g., Munroe, *Colonial Delaware* at 42 (cited in note 139).

<sup>146</sup> See, e.g., E. B. O’Callaghan, *Laws and Ordinances of New Netherland, 1638–1674* at 479 (Weed, Parsons 1868).

<sup>147</sup> See, e.g., Louise B. Heite, *New Castle under the Duke of York: A Stable Community* 144 (unpublished M.A. thesis, American studies, University of Delaware, 1978) (“Inhabitants of the Delaware colony possessed a rare degree of freedom of religion. . . . This condition persisted through the end of the Duke of York’s tenure with very little interference from without.”).

<sup>148</sup> See, e.g., *id.* at 13.

<sup>149</sup> As quoted in *id.* at 14.

<sup>150</sup> See, e.g., *id.* at 144.

introduced into the Delaware region in 1674.<sup>151</sup> With respect to religion, Duke's Laws number 4 mandated that all ministers submit credentials for government approval "to prevent Scandalous & Ignorant pretenders to the Ministry from intruding themselves as Teachers."<sup>152</sup> Specifically, a minister was required to "produce Testimonials to the Governour, that he hath Received Ordination either from some Protestant Bishop, or Minister within some part of his Majesties Dominions or the Dominions of any foreign Prince of the Reformed Religion."<sup>153</sup> Local courts in the Delaware Valley could order that fines be paid to the church. In early 1679, for example, one Thomas Harwood declared that he had paid a fine assessed against him "as a free gift towards the Repairing of the old or the building of a new Church within this Towne of New Castle,"<sup>154</sup> while in 1680 the local court directed that one-third of all fines collected for selling liquor to Native Americans should go to the church.<sup>155</sup> Respect for the Christian Sabbath was enforced.<sup>156</sup> However, the local government did not hire or fire church personnel: any minister with valid credentials could establish a congregation. Ministers had to rely on private donations for their salaries.<sup>157</sup>

The diversity of religious views tolerated in the Delaware region before William Penn's acquisition of control was unusual for the time. Several factors congealed to produce this result. First, James,

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<sup>151</sup> See, e.g., Horle, *Editor's Introduction*, in Horle, ed., *1 Records of the Courts of Sussex County, Delaware, 1677-1710 (1677-1689)* at 8 (cited in note 142).

<sup>152</sup> The Duke's Laws of 1664/5, in George, et al., eds., *Charter to William Penn and the Laws of the Province of Pennsylvania* at 1-77 (cited in note 40) (listing the introduction date of the Duke's Laws in the Delaware Valley as Sept. 22, 1676).

<sup>153</sup> Duke's Laws at 18 (cited in note 152).

<sup>154</sup> As quoted in Heite, *New Castle Under the Duke of York* at 146 (cited in note 147).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 150.

<sup>157</sup> *Id.* at 146-47.

Duke of York, had Catholic sympathies. Second, the English government in New York had demonstrated in other contexts a toleration of the various and varied customs and preferences of the local populace. Third, the Dutch burghers in towns such as New Castle had themselves immigrated from a tolerant nation. The result was a relatively open and liberal religious climate in which Penn's philosophical commitment to religious tolerance as an animating principle could thrive.<sup>158</sup>

In 1682 the Pennsylvania assembly approved an "Act of Union" that made the Pennsylvania Frame of Government of 1682 and "all the rights and privileges" enjoyed by the inhabitants of Pennsylvania—including freedom of religion—applicable to the three counties on the Delaware River.<sup>159</sup> The law of Pennsylvania was also the law of the Delaware counties.<sup>160</sup> Pennsylvania's 1683 and 1696 Frames of Government likewise applied to the three Delaware counties. The 1701 Charter of Privileges did too, but that colonial constitution contained two significant provisions that dealt specifically with the Delaware counties. The first repeated the pledge in the Act of Union by specifying that "the Inhabitants of both Province and Territories, shall separately enjoy all other Liberties, Privileges and Benefits, granted jointly to them in this Charter."<sup>161</sup>

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<sup>158</sup> Heite, *New Castle Under the Duke of York* at 152. See generally Evan Haefeli, *New Netherland and the Dutch Origins of American Religious Liberty* (Penn 2012) (arguing that the critical factor in laying the groundwork for religious tolerance in the Delaware Valley was not what the Dutch did but rather their loss of the region to the English at a moment when the English were unusually open to religious tolerance).

<sup>159</sup> See *Petition for an Act of Union*, Dec. 6, 1682, in Soderlund, ed., *William Penn and the Founding of Pennsylvania* at 192–93 (cited in note 52).

<sup>160</sup> See, e.g., Lunt, *Tales of the Delaware Bench and Bar* at 33 (cited in note 140).

<sup>161</sup> *Charter of Privileges Granted by William Penn, esq. to the Inhabitants of Pennsylvania and Territories*, Oct. 28, 1701, (The Avalon Project, 2008), archived at <https://perma.cc/GY9Y-GJWH>.

The second was mentioned above in the Pennsylvania section about the 1701 Charter of Privileges; namely, that the three Delaware counties would be permitted to establish their own distinct legislative assembly if they continued to feel neglected by the assembly that convened in Pennsylvania.<sup>162</sup> If this occurred, Penn stated in the new colonial constitution, “the Inhabitants of both Province and Territories, shall separately enjoy all other Liberties, Privileges and Benefits, granted jointly to them in this Charter.”<sup>163</sup> Although Penn attempted to prevent it, in 1704 the three Delaware counties did in fact establish an independent legislature. This complicated governmental relationship between Pennsylvania and the Delaware counties continued until Delaware became an independent state in 1776.

With the establishment of its own general assembly, the three Delaware counties essentially functioned as a separate colony, although Delaware and Pennsylvania shared a common governor.<sup>164</sup> Colonial Delaware therefore had two legal histories: one before legislative autonomy in 1704 and one after. Prior to Delaware establishing its own general assembly, it was tied to Pennsylvania

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<sup>162</sup> See *id.* Pennsylvania’s third general assembly was the first to convene in the Delaware counties. The joint general assembly almost always met in Philadelphia, which the inhabitants of the Delaware counties resented. See, e.g., Carol E. Hoffecker, *Democracy in Delaware: The Story of the First State’s General Assembly* 11 (Cedar Tree Books 2004). Differences between Pennsylvania and Delaware occasionally arose from differing religious perspectives. For example, inhabitants of the Delaware counties urged the construction of fortifications at Lewes and on the Delaware River so that cannons could be fired at pirates, but Pennsylvania’s Quaker majority opposed this on religious grounds. The primary religious denominations in the Delaware counties were Anglican, Presbyterian, and Lutheran. See, e.g., *id.* at 16.

<sup>163</sup> *Charter of Privileges of 1701* (cited in note 161).

<sup>164</sup> See, e.g., Munroe, *Colonial Delaware* at xiii (cited in note 139). Unlike Pennsylvania, the laws of the Delaware assembly were not subject to review in England. They did require the joint governor’s approval. *Id.* at 124.

and Quaker reform. The legal system of the Quakers was one in which its leaders attempted to amend the common law of England to make it more fair and equitable based on their adherence to the biblical injunction to do unto others as they themselves would be done by.<sup>165</sup> For Quakers, religious persecution was the most egregious civil injustice, which was why they desired to create a “Civil Safety”: a unity in liberty in which everyone must be free to believe as they wished on matters of religion.<sup>166</sup> The Delaware assembly did not at this time in its history enact laws specifically protecting religious liberty like Pennsylvania did, but one can fairly conclude that religious toleration continued during Penn’s proprietorship from the dearth of legislation penalizing persons for their religious views. As a leading historian of colonial Delaware concisely put it, “the spirit of Penn, who was determined, as he wrote in the preamble to the Great Law, to establish a government where ‘true Christian and Civil Liberty’ would be preserved, . . . was largely retained in the Lower Counties as in Pennsylvania.”<sup>167</sup>

Two anecdotes further illustrate the culture of religious toleration in the Delaware counties during the Penn proprietorship. The first involved the Swedes thirty-eight years *after* they lost control of the region. In 1693 the Swedish king received a letter from Swedes who had remained in the Delaware Valley.<sup>168</sup> The letter summarized the state of the Swedish settlements in the region and it assured the king that “We live in great amity with the Indians, who have not

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<sup>165</sup> See, e.g., Horle, ed., 1 *Records of the Courts of Sussex County, Delaware, 1677-1710* (1677-1689) at 9-10 (cited in note 142).

<sup>166</sup> See, e.g., Calvert, *Quaker Constitutionalism* at 75 (cited in note 24).

<sup>167</sup> Munroe, *Colonial Delaware* at 88 (cited in note 139).

<sup>168</sup> The letter is reprinted and described in Conrad J. I. Bergendoff, *The Swedish Church on the Delaware*, 7 *Church Hist.* 215 (1938).

done us any harm for many years.”<sup>169</sup> More important for present purposes, the Swedes living in the Delaware region had a practical reason for writing to a king who no longer ruled them: their Swedish minister had died and their religious services were now conducted by a man named M. Jacobus Fabritius “who [was] a German, and preache[d] for us in the German (Holland) language” and who was so old he could barely see.<sup>170</sup> The Delaware Swedes requested that the king, as head of the Swedish church, send two ministers “who are well learned and well exercised in the Holy Scriptures, and who may well defend both themselves and us against all the false teachers and strange sects by whom we are surrounded.”<sup>171</sup> They also requested books, including Bibles and catechetical manuals.<sup>172</sup>

The letter to the king of Sweden from the Delaware Swedes resulted in three Swedish clergymen arriving in the Delaware counties during the summer of 1697.<sup>173</sup> These three Swedish pastors went on to perform “the first Lutheran ordination in America.”<sup>174</sup> The toleration afforded to the Swedish church in the region was all the more impressive in light of the fact that the Swedish church’s high ritualism—its seeming Catholicism—almost certainly would have been distrusted by the English in general and the Quakers in particular. For example, in 1711 a Swedish minister named Eric Bjork was “reviled” by “a Baptist minister by the name of Cabner.”<sup>175</sup> Cabner later apologized publicly, and the Swedish minister “talked

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<sup>169</sup> Id. at 218.

<sup>170</sup> Id.

<sup>171</sup> Id.

<sup>172</sup> Bergendoff, *Swedish Church* at 218 (cited in note 168).

<sup>173</sup> Id. at 222.

<sup>174</sup> Nelson Rightmayer, *Swedish-English Relations in Northern Delaware*, 15 *Church Hist.* 101, 105 (1946).

<sup>175</sup> Id. at 10.

to him with regard to what it was to be a Priest, and he acknowledged that he was not a minister as the English term it, but only served those of his opinion with the intention of building up a society.”<sup>176</sup>

The survival of the Swedish church community in colonial Pennsylvania likewise illustrates that the Quaker government was willing to be tolerant of a different religious denomination whose ministers could be fairly viewed as agents of a foreign sovereign. The Delaware Swedes continued to practice their Lutheran faith unhindered by Pennsylvania’s government up to the point that their congregation joined the Episcopal Church after the American Revolution.

The second anecdote involved Catholics in the Delaware region. Although it is unclear exactly when the first Catholics arrived in the three lower counties of Pennsylvania, it is clear they were not persecuted there. A leading authority on Catholicism in the Delaware Valley credited William Penn for creating a culture that led to the toleration of the Catholic faith in the region. In a paper delivered to the American Catholic Historical Society of Philadelphia on March 23, 1886, that scholar reported the following:

The first Catholic settlers in the three lower counties were undoubtedly Irish. But why did they come to Delaware instead of going to Maryland? Or did they go to Maryland first and then migrate to Delaware? I think not. The persecution of the Catholics in Maryland was over by that late date. Mr. Griffin’s exoneration of the character of William Penn seems to me the true solution. He had a large acquaintance in Ireland, held estates there, as his

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<sup>176</sup> Id.

descendants do to this day, had traveled much therein, and by his own persuasion had induced large numbers of its people to come out to his colony; and the reputation of his mild rule and the well-known tolerance of its government had made it quite as safe a haven for Catholics as Catholic Maryland.<sup>177</sup>

Toleration of Catholics in the lower counties of Pennsylvania was manifested in a number of significant ways. To mention two of the most significant, Catholics were allowed to say Mass in the region and to intermarry.<sup>178</sup> An “interesting incident” illustrates the latter.<sup>179</sup> The son of a prominent Catholic named Cornelius Hollahan “violated all religious proprieties and family traditions by marrying a Quakeress.”<sup>180</sup> Neither a Catholic priest nor the Quaker meeting would perform the marriage ceremony. The Catholic groom and the Quaker bride were therefore married by a magistrate. The bride was subsequently disowned by the Quaker meeting, but not punished in any legal sense.<sup>181</sup> In short, although the “Quakeress” was subjected to what was almost certainly an uncomfortable exile from her native religious community, Catholics, Quakers, and other religious groups were able to intermarry in the lower counties of Pennsylvania and otherwise peacefully coexist without the legal suppression of any particular religious group.<sup>182</sup>

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<sup>177</sup> Charles H. A. Esling, *Catholicity in the Three Lower Counties; or The Planting of the Church in Delaware*, 1 Records of the American Catholic Historical Society of Philadelphia 117, 121 (1884–86).

<sup>178</sup> See Esling, *Catholicity* at 124 (cited in note 177).

<sup>179</sup> *Id.* at 145.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 145–52.

<sup>182</sup> Quakers had a strict set of marriage customs that were “urgently important” to them. Fischer, *Albion’s Seed* at 485 (cited in note 24).

Courts records for colonial Delaware are, not surprisingly, scarce.<sup>183</sup> Those that exist indicate that, as in colonial Pennsylvania itself, the bulk of the cases involved debt collection.<sup>184</sup> Adjudication of morals offenses likewise followed the Pennsylvania pattern.<sup>185</sup> The most explicitly religious case in the Delaware court records was a 1705 blasphemy trial against one Gabriell Jones for having publicly cried out: “Cursed be My God for Suffering me to live to be so old to be abused by Dennis Dyer against the Peace of Our Lady the Queen her Crown and Dignity and to the Evill Example of all Others her Maties Subjects and all good Christains etc.”<sup>186</sup> The jury acquitted Jones.<sup>187</sup>

#### V. PENNSYLVANIA AFTER WILLIAM PENN

William Penn wrote in a July 1681 letter that “Though I desire to extend religious freedom, yet I want some recompense for my trouble.”<sup>188</sup> Penn was a better religious leader than a businessman: he died penniless in England in 1718. He had been much diminished physically since 1712 after suffering a series of strokes and his second wife Hannah served as de facto proprietor of Pennsylvania until his death (Penn’s first wife Gulielma had died in 1696). Penn’s

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<sup>183</sup> See Horle, *Editor’s Introduction*, in Horle, ed., 1 *Records of the Courts of Sussex County, Delaware, 1677-1710 (1677-1689)*, at 1, 4 (cited in note 142).

<sup>184</sup> *Id.* at 17.

<sup>185</sup> *Id.* See also Nelson, 2 *The Common Law in Colonial America* at 129–30 (cited in note 76) (mentioning cases involving fornication, adultery, drunkenness, and buggery); Leon deValinger, Jr., ed., *Court Records of Kent County, Delaware, 1680–1705* at 15, 21–22, 31, 48–49, 69, 119–20, 137, 146, 167, 197–98, 278–79 (The American Historical Association 1959) (cases involving slander or bearing a child outside of marriage).

<sup>186</sup> DeValinger, ed., *Court Records of Kent County, Delaware, 1680–1705* at 329 (cited in note 185).

<sup>187</sup> *Id.*

<sup>188</sup> As quoted in Schwartz, “*A Mixed Multitude*” at 22 (cited in note 2).

significant financial difficulties – he served a stint in debtor’s prison in England – and the problems he experienced maintaining control of Pennsylvania led him as early as 1703 to begin negotiations to surrender Pennsylvania’s government to the crown. Only then did the people of Pennsylvania start to appreciate Penn’s importance in protecting their freedom, especially their religious freedom.<sup>189</sup> As a Pulitzer Prize winning historian succinctly put it, William Penn was “one of Christianity’s greatest spiritual leaders.”<sup>190</sup>

It can be fairly said that William Penn had a greater impact on Pennsylvania than any individual had on any other English American colony.<sup>191</sup> Of course Penn was not perfect, at least according to the artificial construct of presentism and including with respect to religious matters. For example, the Great Law of 1682 that guaranteed liberty of conscience barred persons from voting or holding public office unless they professed the belief that Jesus Christ was the son of God and the savior of the world. As a result, Unitarians, Jews, and Atheists could not participate in government. Penn also was forced to accept a law propounded by the assembly in 1705/6 that mandated a pledge against Catholic doctrine. Significantly, however, the pledge was required for service in the government only and did not in any way restrict Catholics from practicing their faith. Moreover, after 1692 Pennsylvania was the sole English American colony to permit Catholic Mass to be celebrated in public<sup>192</sup> and, as the preceding sections of this Article described, Pennsylvania enacted many religiously-tolerant laws during Penn’s

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<sup>189</sup> See, e.g., Dunn and Dunn, eds., 4 *The Papers of William Penn* at 3–8 (cited in note 38); Hans Fantel, *William Penn: Apostle of Dissent* 260–61 (William Morrow 1974).

<sup>190</sup> Fischer, *Albion’s Seed* at 456 (cited in note 24).

<sup>191</sup> See, e.g., Illick, *Colonial Pennsylvania* at xviii (cited in note 98); Sharpless, *Two Centuries of Pennsylvania History* at 54 (cited in note 104).

<sup>192</sup> See Joseph J. Casino, *Anti-Popery in Colonial Pennsylvania*, 105 Pa. Magazine of Hist. & Biography 279, 289 (1981).

lifetime, not the least of which were the repeatedly-stated *constitutional* commitment by Penn himself to religious liberty.

When William Penn died the proprietorship of Pennsylvania (and Delaware) passed to his three sons by Hannah: John Penn “the American,” Thomas Penn, and Richard Penn Sr. John inherited the largest share and became the chief proprietor. When John died without children, Thomas inherited John’s share and became the chief proprietor. The proprietorship passed to Thomas’s son John Penn “of Stoke” upon Thomas’s death. In summary, William Penn was sole proprietor from 1680/1–1718, John “the American” was chief proprietor from 1718–1746, Thomas was chief proprietor from 1746–1775, and John “of Stoke” was chief proprietor from 1775–1776.<sup>193</sup> In 1763 John “of Stoke” became the first family member since his grandfather William to be resident governor.

William Penn’s heirs fought frequently with the assembly, including about military defense, paper money, the legitimacy of the proprietors issuing instructions to the governor, and taxation of proprietary lands. The renunciation of the Quaker faith by John and Thomas Penn further undermined the Penns’ standing with the Quaker-dominated assembly.<sup>194</sup> Tensions became so great that a so-called Anti-Proprietary Party that featured Benjamin Franklin—almost certainly second only to William Penn himself in importance

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<sup>193</sup> See, e.g., William Brooke Rawle, *The General Title of the Penn Family to Pennsylvania*, 23 Pa. Magazine of Hist. & Biography 60 (1899); Henry Wharton and William Henry Rawle, *The General Title of the Penn Family to Pennsylvania (continued)*, 23 Pa. Magazine of Hist. & Biography 464 (1899). William Penn was the sole proprietor to own a one hundred percent interest in the province. John “the American” was the only one of William Penn’s sons to be born in the New World. For more about the Penn family after the death of William Penn, see Loretta Treese, *The Storm Gathering: The Penn Family and the American Revolution* (Penn State 1992).

<sup>194</sup> See, e.g., Fortenbaugh and Tarman, *The Pennsylvania Story* at 57 (cited in note 110).

in Pennsylvania's history<sup>195</sup> — in a pivotal role considered petitioning the crown to buy out the proprietorship and transform Pennsylvania into a royal colony. The Stamp Act crisis intervened, however, and the petition was never presented: with all its faults, continued proprietary control was viewed by the people of Pennsylvania as preferable to increased royal control.<sup>196</sup>

A social historian, in a book entitled "*A Mixed Multitude*": *The Struggle for Toleration in Colonial Pennsylvania*, divided Pennsylvania's colonial history into five periods demarcated by immigration patterns and religious controversies.<sup>197</sup> The first period, "Penn's Province, 1681–1718," was bracketed by the crown awarding Pennsylvania to William Penn and Penn's death, and this period found Quakers and Anglicans in conflict over oaths and armies, with Quakers establishing domination of the government. The second period, "Immigration, 1717–1740," witnessed the initial consequential non-English immigration to Pennsylvania, and questions about naturalization, land policy, and public health came to the fore. The new immigrants belonged to various churches and sects, which created a heterogeneity that demanded good will from the old residents. Between 1740 and 1755, the third period of Pennsylvania's colonial social history, Pennsylvanians experienced religious revival and French war, although neither seriously disrupted the province's concord. The fourth period, "Wartime Disruption, 1755–1765," brought a second French war that threatened the colony directly and saw many Quakers stepping down from government while a new power balance, still influenced

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<sup>195</sup> See, e.g., Gordon S. Wood, *The Americanization of Benjamin Franklin* (2004).

<sup>196</sup> See, e.g., Fortenbaugh and Tarman, *The Pennsylvania Story* at 113–16 (cited in note 110).

<sup>197</sup> See Schwartz, "*A Mixed Multitude*" (cited in note 2).

by Quakers, was achieved. The fifth and final period, “The Revolutionary Era, 1765–1783,” opened with renewed German and Scots-Irish immigration and closed with the Revolutionary War and the drafting of a new state constitution that reiterated Pennsylvania’s foundational commitment to freedom of conscience.<sup>198</sup>

Although the present Article is focused on the legal history of colonial Pennsylvania as it pertains to religious liberty, the time periods identified by social historians provide a useful framework for discussing law and religion in colonial Pennsylvania after the close of period one, when William Penn died.<sup>199</sup> This Section will proceed accordingly.

After Penn’s death, and during Penn’s life when he was absent from Pennsylvania, it was the people of Pennsylvania themselves who had to translate Penn’s ideals into day-to-day, tolerant human relationships. The issue of oath taking was addressed by statute during the initial era after Penn’s death—1718–1740—as it had been on numerous occasions during Penn’s life. For example, a May 11, 1723 amendment to a March 2, 1722/3 statute that enumerated the procedure that Pennsylvanians needed to follow to obtain a bill of credit specified that Quakers who “scrupled” to take an affirmation in the usual form “shall be admitted by the said trustees to mortgage, upon his or her solemnly and sincerely declaring to be true that he or she is seized of the lands, houses or ground rents so offered to be mortgaged.”<sup>200</sup>

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<sup>198</sup> See *id.*

<sup>199</sup> Other scholars of Pennsylvania’s colonial history employ a similar, albeit not identical, typology. For example, the multi-volume *Lawmaking and Legislators in Pennsylvania: A Biographical Dictionary* cited frequently in this Article does.

<sup>200</sup> Act of May 11, 1723, Ch. CCLXXIV (“An Act for the Better and More Effectual Putting in Execution an Act of the Assembly of this Province Entitled ‘An Act for the Emitting and Making Current Fifteen Thousand Pounds in Bills of Credit’”), in

As was mentioned in a previous section, between 1715–1717 there was a disagreement between Deputy Governor Gookin and many inhabitants of Pennsylvania about the proper administration of oaths and affirmations. The matter was resolved in a 1724 statute that altered the *forms* of the declarations and affirmations Quakers could make instead of swearing an oath, and they were forms that had already been implemented in England by King George I.<sup>201</sup> The amended form is too lengthy to quote, but it is worth highlighting that (1) a form of affirmation omitting God’s name – making a simple promise to speak the truth – was adopted; (2) persons having no “scruple” about oath-taking were permitted to swear an oath; and (3) Quakers were practically, albeit not formally, driven from positions that were required to administer oaths as a part of their duties because an official could not decline the giving of an oath if an individual requested one.<sup>202</sup> This statute was confirmed by the king in council on March 27, 1725, and remained in effect for the remainder of the colonial period.<sup>203</sup> As a result, “Religious liberty in the colony had been clearly expanded.”<sup>204</sup>

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Mitchell and Flanders, eds., 3 *The Statutes at Large of Pennsylvania* at 385, 386 (cited in note 110). See also Act of October 11, 1722, Ch. CCLXI (“An Act for the Emitting and Making Current Fifteen Thousand Pounds in Bills of Credit”), in Mitchell and Flanders, eds., 3 *The Statutes at Large of Pennsylvania* at 324 (cited in note 110).

<sup>201</sup> Act of May 9, 1724, Ch. CCLXXXI (“An Act Prescribing the Forms of Declaration of Fidelity, Abjuration and Affirmation, Instead of ‘The Forms Heretofore Required in such Cases’”), in Mitchell and Flanders, eds., 3 *The Statutes at Large of Pennsylvania* at 427, 427–31 (cited in note 110).

<sup>202</sup> See, e.g., Sharpless, *Two Centuries of Pennsylvania History* at 113 (cited in note 104).

<sup>203</sup> See Act of May 9, 1724, Ch. CCLXXXI at 431 (cited in note 201).

<sup>204</sup> Craig W. Horle, et al., eds., 2 *Lawmaking and Legislators in Pennsylvania: A Biographical Dictionary* at 30, 33 (Penn 1997). Item 3 in the above list did not adversely impact the Pennsylvania Quakers’ ability to believe as they wished to believe, although it did limit their ability to serve in some government offices. England’s 1696 affirmation act authorized the use of an affirmation in England if God’s name was included in the

Recall that Pennsylvania experienced its initial consequential non-English immigration between 1717–1740, and that the new immigrants belonged to various churches and sects, which created a heterogeneity that demanded good will from the old residents. The law memorialized that good will. For example, two statutes enacted during February of 1729/30 reflected Pennsylvania’s animating principle of religious tolerance. The first was a “supplement” to the 1701 statute for preventing clandestine marriages designed to remedy the defect in the 1701 law of not imposing a proper penalty for those persons who violated it. The supplement specified that a fine of fifty pounds would be levied upon any justice of the peace, clergyman, minister, or “other person” who married a couple who failed to follow the notification procedures mandated by the statute. Significantly, however, the statute exempted “any person who shall be married in the religious society to which they belong” as long as their parents, guardian, or master lived within the province at least twenty days before the marriage.<sup>205</sup> The second statute laid out the procedures insolvent debtors were to follow to obtain relief of their

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affirmation and if the affirmation was not employed to qualify officeholders or jurors or witnesses in criminal trials. The affirmation acts passed in Pennsylvania that were voided by the crown in council had omitted God’s name. The latter were sometimes referred to as the “Pennsylvania affirmation.” (A 1715 English statute extended the “English affirmation” to the colonies.) In 1722 King George I endorsed a new English affirmation act that permitted affirmations in England that omitted God’s name. It was the acceptance by the crown of the 1722 English affirmation act that led to the confirmation in 1725 by the king in council of the 1724 Pennsylvania affirmation act. See, e.g., *id.* at 30–33.

<sup>205</sup> Act of February 14, 1729/30, Ch. CCCXI (“A Supplement to the Act Entitled ‘An Act for Preventing Clandestine Marriages’”), in Mitchell and Flanders, eds., 4 *The Statutes at Large of Pennsylvania* at 152, 154 (cited in note 110).

debts.<sup>206</sup> This statute was similar to several enacted earlier in that it afforded Quakers the opportunity to affirm rather than swear about what possessions they owned: "I, A. B., do solemnly (swear in the presence of Almighty God) or (sincerely and truly declare and affirm) that the account by me delivered into this honorable court in my petition to this court doth contain a full and true account of all my real and personal estate, debts, credits and effects whatsoever ...."<sup>207</sup>

A 1730/1 statute enabled Protestant religious societies to purchase land for cemeteries, churches, and schools.<sup>208</sup> The statute also prohibited the trustees of the land from changing the land's religious affiliation and required that the land's "sole use . . . and benefit" be for the religious societies that have been in peaceable possession of the land for twenty-one years or more.<sup>209</sup>

A second statute enacted in 1730/1 appeared to cut both ways as far as the animating principle was concerned. This statute was what today would be termed a "private bill" because it listed specific individuals by name and decreed that the named individuals, all of whom were immigrants from Germany, were invested with the privileges of natural-born inhabitants of Pennsylvania.<sup>210</sup> The statute

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<sup>206</sup> Act of February 14, 1729/30, Ch. CCCXV ("An Act for the Relief of Insolvent Debtors within the Province of Pennsylvania"), in Mitchell and Flanders, eds., 4 *The Statutes at Large of Pennsylvania* at 171 (cited in note 110).

<sup>207</sup> Act of February 14, 1729/30, Ch. CCCXV at 173 (cited in note 206).

<sup>208</sup> Act of February 6, 1730/1, Ch. CCCXX ("An Act for the Enabling Religious Societies of Protestants within this Province to Purchase Lands for Burying Grounds, Churches, Houses of Worship, Schools, &c"), in Mitchell and Flanders, eds., 4 *The Statutes at Large of Pennsylvania* at 208 (cited in note 110).

<sup>209</sup> Act of February 6, 1730/1, Ch. CCCXX at 210 (cited in note 208).

<sup>210</sup> Act of February 6, 1730/1, Ch. CCCXXIV ("An Act for the Better Enabling Divers Inhabitants of the Province of Pennsylvania to Hold Lands, and to Invest Them with the Privileges of Natural-Born Subjects of the Said Province"), in Mitchell and Flanders, eds., 4 *The Statutes at Large of Pennsylvania* at 219 (cited in note 110).

opened by noting that the late William Penn himself, with the permission of the late King George I, had encouraged the named individuals—Protestants all—to immigrate to Pennsylvania.<sup>211</sup> The statute further specified that the named individuals “have always behaved themselves religiously and peaceably, and have paid a due regard and obedience to the laws and government of this province.”<sup>212</sup> All of this is consistent with the animating principle of religious tolerance. The inconsistency arose when the statute went on to declare that the named individuals had “qualified themselves” by pledging to help prevent “the dangers which may happen by Popish recusants, &c.”<sup>213</sup> This anti-Catholic provision was located in the portion of the statute dedicated to convincing the king of the named individuals’ fidelity to “His Majesty’s person and government,” so perhaps it is not as inconsistent as it reads.<sup>214</sup> But it certainly was not a paean to religious tolerance.<sup>215</sup>

Another private bill was enacted in 1735 to enable specific Protestant, (mostly) German, immigrants to Pennsylvania to own land in Pennsylvania and enjoy the privileges of natural-born

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<sup>211</sup> Act of February 6, 1730/1, Ch. CCCXXIV at 219 (cited in note 210).

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 220.

<sup>214</sup> Act of February 6, 1730/1, Ch. CCCXXIV at 220 (cited in note 210).

<sup>215</sup> Another private bill enacted on February 6, 1730/1 illustrated that the general assembly continued to permit an individual to “affirm” the accuracy of an inventory of his personal assets, rather than require him to swear an oath about them. See Act of February 6, 1730/1, Ch. CCCXXV (“An Act for the Relief of Benjamin Mayne, with Respect to the Imprisonment of His Person”), in Mitchell and Flanders, eds., 4 *The Statutes at Large of Pennsylvania* at 222 (cited in note 110). A January 19, 1733/4 statute cleared up “some doubts” about whether laws voided by the king in council without affixing the seal thereto were “actually made void and repealed.” The 1733/4 statute said they were void and repealed. Act of January 19, 1733/4, Ch. CCCXXXIII (“An Act for Confirming the Repeal of Divers Laws of this Province”), in Mitchell and Flanders, eds., 4 *The Statutes at Large of Pennsylvania* at 257–60 (cited in note 110).

inhabitants of the province.<sup>216</sup> Testaments of affection and obedience to the English crown via “oaths and declarations or solemn affirmations” as codified by several acts of Parliament, and application to the governor and assembly of Pennsylvania, were the requirements that the named individuals satisfied.<sup>217</sup> The 1735 law did not contain the 1730/1 version’s statement that the named individuals had behaved “religiously.”

Of course, conferring rights upon the named foreign Christians would help stabilize Pennsylvania society and it was plainly in accordance with the animating principle of religious tolerance to do so. However, as was true of the 1730/1 statute, religious tolerance, including for all Christian denominations, was not ubiquitous: the 1735 law declared that the named individuals had “qualified themselves” by pledging to help prevent “the dangers which may happen by Popish recusants, &c.”<sup>218</sup> A related 1739 private bill omitted the anti-Catholic language, although it did mention that the named individuals were of the “Protestant or Reformed religion.”<sup>219</sup>

The final statute enacted during the second period of Pennsylvania’s colonial history that reflected the animating principle of religious tolerance was a 1739 “supplement” to the landmark 1724 statute that had altered the forms of the declarations and affirmations

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<sup>216</sup> See Act of March 29, 1735, Ch. CCCXXXIX (“An Act for the Better Enabling Divers Inhabitants of the Province of Pennsylvania to Hold Lands and to Invest Them with the Privileges of Natural-Born Subjects of the Said Province”), in Mitchell and Flanders, eds., 4 *The Statutes at Large of Pennsylvania* at 283 (cited in note 110).

<sup>217</sup> Act of March 29, 1735, Ch. CCCXXXIX at 284 (cited in note 216).

<sup>218</sup> Id.

<sup>219</sup> See Act of May 19, 1739, Ch. CCCXLIX (“An Act for the Better Enabling Divers Inhabitants of the Province of Pennsylvania to Trade and Hold Lands within the Said Province”), in Mitchell and Flanders, eds., 4 *The Statutes at Large of Pennsylvania* at 326, 328 (cited in note 110).

Quakers could make instead of taking an oath.<sup>220</sup> The 1739 supplement was designed to alleviate a problem Presbyterians encountered when taking an oath; specifically, the kissing of the Bible as mandated by English law. The 1739 supplement exempted Presbyterians from this requirement, and although the king in council voided the supplement the following year, the supplement nevertheless exemplified how the government of Pennsylvania was striving to accommodate non-dominant Christian denominations during a period of substantial immigration. The 1739 supplement is worth quoting at length:

Whereas the liberty of conscience freely enjoyed by the inhabitants of this province ever since its first settlement hath encouraged great numbers of Protestants of different persuasions to remove themselves and families hither, where they have generally behaved themselves soberly and given testimony of their fidelity and affection to his present Majesty and his royal predecessors, Kings and Queens of Great Britain; yet notwithstanding many of them have labored under difficulties frequently happening relating to the forms of taking the oaths, declarations and abjurations prescribed by the laws of that part of Great Britain called England. And whereas by the aforesaid act of assembly, which afterwards received his late Majesty's royal approbation, great ease and relief was granted to the people called Quakers, who conscientiously scruple the taking an

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<sup>220</sup> See Act of May 19, 1739, Ch. CCCLI ("A Supplement to an Act of Assembly of this Province, Entitled 'An Act Prescribing the Forms of Declarations of Fidelity, Abjuration and Affirmation, Instead of the Forms Heretofore Required in Such Cases'"), in 4 Mitchell and Flanders, eds., *The Statutes at Large of Pennsylvania* at 337 (cited in note 110).

oath. And whereas many other Protestant dissenters inhabiting this province, who (notwithstanding they are willing to take an oath) are under the like conscientious scruple as to the form of administering and taking the same, especially those of the Presbyterian persuasion [as] established in that part of the Kingdom of Great Britain called Scotland, who in taking an oath do scruple kissing the Bible, and yet are obliged to bear their share of the burden of the government and to serve their country in common with the rest of the inhabitants. It is therefore judged reasonable to relieve them from the difficulties aforesaid and give them ease in that behalf.

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And be it enacted . . . That in all cases where an oath by law is required or enjoined to be taken by any person or persons conscientiously scrupling to take the same in the usual form, yet [who] voluntarily offers to take an oath by repeating the same, the ceremony of the book excepted, or shall take the oath commonly administered and taken in Scotland, such oath or oaths shall be accepted of, judged and allowed to be of the same force and effect to all intents and purposes in all courts of justice and elsewhere within this province as if such persons had taken the oath in the usual form, any thing in the before-recited act of assembly or any law, custom or usage to the contrary notwithstanding.<sup>221</sup>

The animating principle of religious tolerance was equally evident in the decades-long tension between Quaker pacifism and

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<sup>221</sup> Act of May 19, 1739, Ch. CCCLI at 337–38 (cited in note 220).

the need to defend Pennsylvania (and Delaware) from foreign threats.<sup>222</sup> The “peace testimony” is almost certainly the best known of the Quaker testimonies. It derives from the teachings of Jesus to love one’s enemies and the Quaker belief in the inner light. The seminal statement of the peace testimony was the Quakers’ 1660 Declaration to King Charles II, which proclaimed in pertinent part:

We utterly deny all outward wars and strife and fightings with outward weapons, for any end, or under any pretence whatsoever; and this is our testimony to the whole world. The spirit of Christ, by which we are guided, is not changeable, so as once to command us from a thing as evil and again to move unto it; and we do certainly know, and so testify to the world, that the spirit of Christ, which leads us into all Truth, will never move us to fight and war against any man with outward weapons, neither for the kingdom of Christ, nor for the kingdoms of this world.<sup>223</sup>

With respect to the law, Quakers insisted that pacifism was central to William Penn’s conception of the rights of conscience and a fundamental tenet of the Pennsylvania constitution.<sup>224</sup> When the Quaker position manifested itself as opposition to specific defense appropriations and preparations in times of war—including resistance to the creation of a militia—non-Quakers in the colony and in England objected vigorously. Indeed, Anglicans maintained that

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<sup>222</sup> For detailed discussions of this tension, see, e.g., Horle, et al., eds., *2 Lawmaking and Legislators in Pennsylvania* at 71–78 (cited in note 204); Frost, *A Perfect Freedom* at Ch. 2 (cited in note 3).

<sup>223</sup> *Declaration of Friends to Charles II, 1660* (Quaker.org), archived at <https://perma.cc/X8WK-JZXU>. For other statements of the peace testimony, see, e.g., *id.*

<sup>224</sup> See, e.g., Frost, *A Perfect Freedom* at 34 (cited in note 3).

the Quaker-controlled assembly was violating the religious freedom of non-Quakers by imposing the peace testimony on everyone else in Pennsylvania (and in Delaware, which never had a Quaker majority).<sup>225</sup> Squabbles such as this occurred frequently throughout the colonial period: from King William's War (1688–1697), to the prelude to the American Revolution, and during Queen Anne's War (1702–1713), the War of Jenkins' Ear (1739–1748), and the French and Indian War (1754–1763) in between. Although the Quaker-controlled assembly would occasionally agree to appropriate money for the "use" of the government without specifying it was for war-like purposes,<sup>226</sup> by the time of the French and Indian War and the

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<sup>225</sup> See, e.g., *id.* at 30. Anglican priest William Smith thundered at the time:

[Y]ou see that our Assembly are, and have always been *Quakers*, and that they are still *principled* against bearing Arms. What can be more absurd than such a Declaration from those who are in the room of our *Protectors*? That which is the chief Design of Government, they declare they can have nothing to do with! . . . [The Quakers say that] we will not provide for [the Province's] Safety, as other Provinces have done for theirs, by compulsive Methods, nor depart one Jot from our Principles, if it were to save it from Destruction. Neither will we give up the Government to others who would take Care of its Defence; for the Laws are all *ours*, the Country is *ours*, and tho' it be true that great Numbers of People, of other religious Denominations, are come among us, yet they came by our *Toleration*. And now what more need be said to shew how unjustly this Province is swayed by a Faction, and sacrificed to their separate Interests. Our very Laws themselves breathe the Spirit, and speak the Language, of a Faction, who tell us that we are all *tolerated* only by their Grace and Favour. And yet these high and mighty Lords, who speak so loudly of *tolerating* others, can plead no Establishment in their own Behalf.

William Smith, *A Brief View of the Conduct of Pennsylvania, for the Year 1755* at 75 (1756), available at Infotrac, Gale Doc. No. CW3302956857.

<sup>226</sup> For an example, see Act of June 24, 1746, Ch. CCCLXX ("An Act for Granting Five Thousand Pounds to the King's Use Out of the Bills of Credit Now Remaining in the Hands of the Trustees of the General Loan Office, for Exchanging Torn and Ragged Bills and for Striking the Like Sum to Replace in Their Hands"), in Mitchell and

resulting raids on the Pennsylvania frontier by French-allied Native Americans even Quaker legislators recognized that the peace testimony was in inexorable conflict with the survival of the colony. Consequently, in or about 1756 many Quakers resigned from the assembly or declined to seek re-election to it. Quakers would never again constitute a majority in the Pennsylvania assembly.<sup>227</sup>

A short time earlier, during the third period of Pennsylvania's colonial history (1740–1755), a religious revival had occurred and conflict between England and France persisted. But Pennsylvania was relatively tranquil during this decade-and-a-half, and the law continued to reflect the animating principle of religious tolerance. For example, a statute was enacted on February 3, 1742/3 by the Quaker-controlled general assembly that omitted the requirement of swearing an oath for the naturalization of foreign-born non-Quaker Protestants.<sup>228</sup> The statute required the individual in question to have lived in the colony for a minimum of seven years without a gap in residence exceeding two months, and that he proffer a declaration of fidelity to the king and a profession of his Christian beliefs. However, like the Quakers before him, he was not required to swear an oath for his proffers to “have full effect of an oath in any case whatsoever in

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Flanders, eds., 5 *The Statutes at Large of Pennsylvania* at 45 (cited in note 110). The statute specified that “the representatives of the freemen of the province ... so far as our religious principles will admit ... do pay unto the honorable George Thomas, Esquire, lieutenant-governor ... the sum of five thousand pounds, to be by him applied for the King's use.” Act of June 24, 1746, Ch. CCCLXX at 45 (cited in note 226).

<sup>227</sup> See, e.g., Horle, et al., eds., 2 *Lawmaking and Legislators in Pennsylvania* at 78 (cited in note 204).

<sup>228</sup> Act of February 3, 1742/3, Ch. CCCLIX (“An Act for Naturalizing such Protestants as are Settled or Shall Settle within this Province, Who, Not Being of the People Called Quakers, Do Conscientiously Refuse the Taking of any Oath”), in Mitchell and Flanders, eds., 4 *The Statutes at Large of Pennsylvania* at 391 (cited in note 110).

this province.”<sup>229</sup> Although true religious freedom as we understand it today was not present, religious freedom within Christianity was furthered by this act and it allowed foreign Christian sects to settle and prosper in Pennsylvania.

Previously, this Article described how Quakers, including William Penn, were committed to a “positive” conception of religious liberty that viewed law as an instrument for helping to bring people towards right religion.<sup>230</sup> A 1745/6 statute that endeavored to provide for a “more effectual” solution to the problem of “profane cursing and swearing” was an additional example of this fact.<sup>231</sup> The act made it a crime for a person to profanely swear or curse within earshot of a justice of the peace or other local government official. Punishment upon conviction was, for a person sixteen years of age or older, a fine of five shillings or five days of hard labor for the first offense, and double that for any subsequent offenses. If the perpetrator was under the age of sixteen, the punishment was whipping by the constable or by the “parent, guardian, or master” of the perpetrator in the presence of the constable.<sup>232</sup> The statute opened by proclaiming that “the sins of profane cursing and swearing are odious and abominable to Almighty God and all good men, and may draw down God’s almighty judgments were such grand offense to go unpunished.”<sup>233</sup>

A January 27, 1749/50 amendment to an earlier law about killing deer out of season provided additional evidence of the Quaker-

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<sup>229</sup> Act of February 3, 1742/3, Ch. CCCLIX at 392–93 (cited in note 228).

<sup>230</sup> See note 24.

<sup>231</sup> Act of March 7, 1745/6, Ch. CCCLIX (“An Act for the More Effectual Suppressing Profane Cursing and Swearing”), in Mitchell and Flanders, eds., 5 *The Statutes at Large of Pennsylvania* at 42 (cited in note 110).

<sup>232</sup> Act of March 7, 1745/6, Ch. CCCLIX at 43–44 (cited in note 231).

<sup>233</sup> *Id.* at 42.

controlled assembly's "positive" conception of religious liberty.<sup>234</sup> The amendment prohibited the killing of "any kind of game on the first day of any week, commonly called Sunday (cases of necessity excepted)."<sup>235</sup> Similarly, a February 9, 1750/1, law to help prevent fires contained a separate provision regulating "sin" that made it illegal to "promote or encourage any . . . horse races, shooting matches or other idle sports, or [to] sell any wine, rum, beer, cider, or other strong liquors whatsoever to any persons so assembled on pretense of horse races, shooting matches or any other unlawful sports or games."<sup>236</sup> The statute also made it illegal to "enter, start or run any horse . . . or be concerned in any shooting match for . . . [anything] of value whatsoever," and the making, printing, publishing, or advertising of any prize for any such sport was prohibited without the governor's special license.<sup>237</sup>

The fourth period of Pennsylvania's colonial history, 1755–1765, saw a second French war threaten Pennsylvania and, as described above, many Quakers retiring from government service due to the intractable conflict between the Quaker peace testimony and the survival of the colony itself. Not surprisingly, a number of the laws enacted during this period related to the French and Indian War.<sup>238</sup>

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<sup>234</sup> Act of January 27, 1749/50, Ch. CCCLXXXIII ("An Act for Amending the Laws of this Province Against Killing of Deer out of Season"), in Mitchell and Flanders, eds., 4 *The Statutes at Large of Pennsylvania* at 98 (cited in note 110).

<sup>235</sup> Act of January 27, 1749/50, Ch. CCCLXXXIII at 99 (cited in note 234).

<sup>236</sup> Act of February 9, 1750/1, Ch. CCCLXXXVIII ("An Act for the More Effectual Preventing Accidents Which May Happen by Fire and for Suppressing Idleness, Drunkenness and Other Debaucheries"), in Mitchell and Flanders, eds., 4 *The Statutes at Large of Pennsylvania* at 108, 109 (cited in note 110).

<sup>237</sup> Act of February 9, 1750/1, Ch. CCCLXXXVIII at 109–10 (cited in note 236).

<sup>238</sup> See, e.g., Act of April 5, 1755, Ch. CCCC ("An Act to Prevent the Exportation of Provisions, Naval or Warlike Stores, from this Province to Cape Breton or to any other the Dominions of the French King or Places at Present in Possession of Any of His

The focus here will be on those statutes that concerned the animating principle of religious tolerance. For instance, a 1755 law addressed in detail Pennsylvania's need for a militia and the Quakers' conscientious objection to war.<sup>239</sup> The statute authorized the formation of a militia by those "willing and desirous" to serve but prohibited "compulsive means . . . to force men into military service."<sup>240</sup> Further, it forbade "giv[ing] any power or authority to the governor . . . to make any rules that shall in the least affect those inhabitants of the province who are conscientiously scrupulous of bearing arms . . . nor any persons of what persuasion or denomination soever who have not voluntarily and freely signed the articles [of war] after due consideration."<sup>241</sup> Significantly, the statute opened by proclaiming that compelling Quakers into military service would "violate a fundamental in our constitution," "be a direct breach of our charter of privileges," and "commence persecution against all that part of the inhabitants of the province."<sup>242</sup> It is difficult

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Subjects"), in Mitchell and Flanders, eds., 5 *The Statutes at Large of Pennsylvania* at 184 (cited in note 110).

<sup>239</sup> See Act of November 25, 1755, Ch. CCCCX ("An Act for the Better Ordering and Regulating Such as are Willing and Desirous to be United for Military Purposes with this Province"), in Mitchell and Flanders, eds., 5 *The Statutes at Large of Pennsylvania* at 197 (cited in note 110). An August 15, 1755 statute about punishing mutiny and desertion and better payment of the army and their quarters included a long-accepted provision allowing persons who were religiously opposed to swearing oaths to comply via affirmation. See Act of August 15, 1755, Ch. CCCCIII ("An Act for Extending so much of an Act of Parliament, Entitled 'An Act for Punishing Mutiny and Desertion and for the Better Payment of the Army and Their Quarters,' as Relates to the Quartering and Billeting of Soldiers and Payment of Their Quarters in that Part of Great Britain Called England"), in Mitchell and Flanders, eds., 5 *The Statutes at Large of Pennsylvania* at 194, 195 (cited in note 110).

<sup>240</sup> Act of November 25, 1755, Ch. CCCCX, in Mitchell and Flanders, eds., 5 *The Statutes at Large of Pennsylvania* at 198-99 (cited in note 239).

<sup>241</sup> Act of November 25, 1755, Ch. CCCCX at 200 (cited in note 240).

<sup>242</sup> *Id.* at 197.

to tie a statute to the animating principle of Pennsylvania more clearly than that, but the statute was nevertheless repealed by the king in council in 1756.<sup>243</sup>

In 1756 Pennsylvania's general assembly re-enacted several sections of an act of Parliament concerning the punishment of mutiny and desertion and the payment and quartering of troops, but with the proviso that the act of Parliament was subject to the laws of Pennsylvania.<sup>244</sup> This meant that, in Pennsylvania, every protection afforded for religious tolerance was to control those parts of the English law that were viewed in Pennsylvania as religious persecution. The Pennsylvania law was referred to the king in council and became law by lapse of time in accordance with Pennsylvania's charter.<sup>245</sup>

The general assembly enacted several statutes during the legislative session that commenced on October 14, 1757 and adjourned on September 30, 1758 that touched upon the animating principle. In the first, "commissioners of Indian affairs" were appointed to encourage, among other things, "ministers of the gospel, schoolmasters and other prudent and virtuous men to reside among the Indians and learn their language and customs, [so that the Native Americans] may be civilized and instructed in the Christian religion."<sup>246</sup> Of course, the immediate objective was to persuade

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<sup>243</sup> Id.

<sup>244</sup> See Act of December 8, 1756, Ch. CCCCXV ("An Act for Extending Several Sections of an Act of Parliament Passed in the Twenty-Ninth Year of the Present Reign, Entitled 'An Act for Punishing Mutiny and Desertion and for the Better Payment of the Army and Their Quarters'"), in Mitchell and Flanders, eds., 5 *The Statutes at Large of Pennsylvania* at 269 (cited in note 110).

<sup>245</sup> Act of December 8, 1756, Ch. CCCCXV at 278 (cited in note 244).

<sup>246</sup> Act of April 8, 1758, Ch. CCCCXXVIII ("An Act for Preventing Abuses in the Indian Trade, for Supplying the Indians, Friends and Allies of Great Britain, with Goods at More Easy Rates, and for Securing and Strengthening the Peace and Friendship Lately

Native Americans “to seek our alliance, withdraw themselves from the French and effectually secure their affections to the British interest.”<sup>247</sup> The second statute appropriated funds for “His Majesty’s Use” but, unlike the practice when Quakers controlled the assembly, the law specifically stated that the funds could be used to prosecute the war,<sup>248</sup> while a third was equally clear that a duty on the tonnage of a ship, on wine, rum, brandy and other spirits, and on sugar, was granted to the king to help with the costs of protecting the trade of Pennsylvania (and Delaware) by supporting a “ship-of-war.”<sup>249</sup>

Subsequent general assembly sessions re-enacted many of the laws passed in earlier sessions.<sup>250</sup> (Prior sessions also did so because

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Concluded with the Indians Inhabiting the Northern and Western Frontiers of this Province”), in Mitchell and Flanders, eds., 5 *The Statutes at Large of Pennsylvania* at 320, 321 (cited in note 110).

<sup>247</sup> Act of April 8, 1758, Ch. CCCCXXVIII at 320 (cited in note 246). A commissioner was permitted to “affirm” his commitment to his office if he preferred not to swear an oath. Id. at 327. “Protestant teachers of the gospel” were preferred over Catholics. Id. at 326.

<sup>248</sup> See Act of April 22, 1758, Ch. CCCCXXXI (“An Act for Granting the Sum of One Hundred Thousand Pounds to His Majesty’s Use and for Striking the Same in Bills of Credit, and for Continuing the Several Acts of Assembly of this Province Hereinafter Mentioned for Sinking the Bills of Credit so to be Struck at the Times and in the Manner Hereinafter Directed and Appointed”), in Mitchell and Flanders, eds., 5 *The Statutes at Large of Pennsylvania* at 337, 350 (cited in note 110).

<sup>249</sup> Act of April 29, 1758, Ch. CCCCXXXII (“An Act for Granting to His Majesty a Duty of Tonnage Upon Ships and Vessels and also Certain Duties Upon Wine, Rum, Brandy and Other Spirits and a Duty Upon Sugar for Supporting and Maintaining the Provincial Ship-of-War for Protecting the Trade of this Province and Other Purposes for His Majesty’s Service”), in Mitchell and Flanders, eds., 5 *The Statutes at Large of Pennsylvania* at 352 (cited in note 110).

<sup>250</sup> See, e.g., Act of April 21, 1759, Ch. CCCCXLIII (“An Act for Regulating the Officers and Soldiers in the Pay of this Province”), in Mitchell and Flanders, eds., 5 *The Statutes at Large of Pennsylvania* at 424, 424 (cited in note 110) (noting that “whereas the act, entitled ‘An act for regulating the officers and soldiers commissioned and raised by the governor for the defense of this province,’ is near expiring by its own limitations

statutes were frequently enacted with sunset provisions.) However, non-war-related statutes that reflected the animating principle were sometimes enacted during the height of the French and Indian War. For example, in 1759 the general assembly passed a law “for the more effectual suppressing and preventing [of] lotteries and plays” that continued Pennsylvania’s longstanding practice of discouraging what was regarded as immoral behavior.<sup>251</sup> In addition, consistent with many religions’ conception of charity, fines assessed for violating specific commercial regulations were typically “delivered to the overseers of the poor for the use of the poor.”<sup>252</sup> A 1761 statute authorized the trustees of land on which the Oxford church once stood to sell the land and use the profits to erect a new church on other lands,<sup>253</sup> while a 1763 statute repeated the practice of enacting

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...”); Act of February 17, 1762, Ch. CCCCLXXVI (“An Act for the Recovery of Duties of Tonnage Upon Ships and Vessels and Certain Other Duties Upon Wine, Rum, Brandy and Other Spirits and Upon Sugar Which Became Due by Virtue of a Law of this Province Lately Expired, and Which Were Not Received or Secured During the Continuance Thereof, and for Appropriating the Surplus of the Said Duties”), in Mitchell and Flanders, eds., 6 *The Statutes at Large of Pennsylvania* at 173 (cited in note 110); Act of May 14, 1762, Ch. CCCCLXXXIII (“An Act for Granting to His Majesty the Sum of Twenty-Three Thousand Five Hundred Pounds for the Purposes Therein Mentioned”), in Mitchell and Flanders, eds., 6 *The Statutes at Large of Pennsylvania* at 226, 227 (cited in note 110) (noting that “wars between our Most Gracious Sovereign and the Courts of France and Spain render it absolutely necessary that some further provision should be made for the protection of His Majesty’s subjects within this province”).

<sup>251</sup> Act of June 20, 1759, Ch. CCCCLXVI (“An Act for the More Effectual Suppressing [of] Lotteries and Plays”), in Mitchell and Flanders, eds., 5 *The Statutes at Large of Pennsylvania* at 445 (cited in note 110).

<sup>252</sup> Act of March 14, 1761, Ch. CCCCLX (“An Act to Regulate the Assize of Bread”), in Mitchell and Flanders, eds., 6 *The Statutes at Large of Pennsylvania* at 69, 71 (cited in note 110).

<sup>253</sup> Act of March 14, 1761, Ch. CCCCLXVI (“An Act to Enable Certain Trustees to Sell Lands in the County of Philadelphia Settled in Trust for the Use of the Minister of Oxford Church, and to Receive the Voluntary Donations of the Inhabitants and with

private bills that conferred upon the named European immigrants who had declared their loyalty to the “Crown of Great Britain” the privileges of natural-born subjects of Pennsylvania.<sup>254</sup>

Also in 1763, the general assembly passed a law “for erecting a house of correction in the county of Lancaster” that was designed to address the absence of a facility to house “unruly, disobedient servants . . . who have taken shelter in that county.”<sup>255</sup> According to the statute, “drunkenness, profane swearing, breach of Sabbath, tumults and other vices so much prevail that it is not in the power of the magistrates to suppress them and preserve peace and good order, having no house of correction for the punishment of such offenders.”<sup>256</sup> A statute “for securing and strengthening the peace and friendship lately concluded with the Indians inhabiting the Northern and Western frontiers” was enacted in 1763 too, and it repeated the earlier directive that “ministers of the gospel, schoolmasters and other sober and virtuous men . . . be sent among them to civilize and instruct them in the Christian religion.”<sup>257</sup>

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the Money Arising Therefrom to Purchase Other Lands to be Settled to the Same Use”), in Mitchell and Flanders, eds., 6 *The Statutes at Large of Pennsylvania* at 100 (cited in note 110).

<sup>254</sup> Act of March 4, 1763, Ch. CCCCXCIII (“An Act the Better to Enable the Person Therein Named to Hold Lands and to Invest Them with the Privileges of Natural-Born Subjects of this Province”), in Mitchell and Flanders, eds., 6 *The Statutes at Large of Pennsylvania* at 270, 271 (cited in note 110).

<sup>255</sup> Act of March 4, 1763, Ch. CCCCXCVIII (“An Act for Erecting a House of Correction in the County of Lancaster”), in Mitchell and Flanders, eds., 6 *The Statutes at Large of Pennsylvania* at 280 (cited in note 110).

<sup>256</sup> Act of March 4, 1763, Ch. CCCCXCVIII at 280 (cited in note 255).

<sup>257</sup> Act of April 2, 1763, Ch. CCCCXCIX (“An Act for Preventing Abuses in the Indian Trade and for Securing and Strengthening the Peace and Friendship Lately Concluded with the Indians Inhabiting the Northern and Western Frontiers of this Province”), in Mitchell and Flanders, eds., 6 *The Statutes at Large of Pennsylvania* at 283 (cited in note 110).

The war in North America officially ended with the signing of the Treaty of Paris on February 10, 1763. Nevertheless, nine of the twelve statutes enacted during the October 14, 1763–September 22, 1764 general assembly session related to military matters, and with Quaker-control of the government long since ended, they were explicit about it. For example, the first law passed during the session unabashedly appropriated “the sum of twenty-four thousand pounds lawful money” for “the defense and protection of this province.”<sup>258</sup>

The final general assembly session of the fourth period of Pennsylvania’s colonial history, that which convened between October 14, 1764 and September 20, 1765, opened with an unambiguous illustration of Pennsylvania’s commitment to religious tolerance: the statutory authorization of a lottery “of three thousand and three pounds, fifteen shillings” for the completion and refurbishing of a number of non-Quaker churches, and for the repair of others.<sup>259</sup> The desire to fund these “commendable and religious

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<sup>258</sup> Act of October 22, 1763, Ch. DV (“An Act for Granting to His Majesty the Sum of Twenty-Four Thousand Pounds for the Defense and Protection of this Province and for Other Purposes Therein Mentioned”), in Mitchell and Flanders, eds., *6 The Statutes at Large of Pennsylvania* at 311, 312 (cited in note 110). A supplement to that act was passed on September 22, 1764. See Act of September 22, 1764, Ch. DXVI (“A Supplement to the Act, Entitled ‘An Act for Granting to His Majesty the Sum of Twenty-Four Thousand Pounds for the Defense and Protection of this Province and for Other Purposes Therein Mentioned’”), in Mitchell and Flanders, eds., *6 The Statutes at Large of Pennsylvania* at 379 (cited in note 110).

<sup>259</sup> Act of February 15, 1765, Ch. DXVII (“An Act for Raising by Way of Lottery the Sum of Three Thousand and Three Pounds, Fifteen Shillings, to be Applied to the Payment of the Arrears of Debt Due for the Finishing St. Peter’s and St. Paul’s Episcopal Churches, in the City of Philadelphia, and Towards Finishing the Episcopal Church at Carlisle and the Building of an Episcopal Church in each of the Towns of York and Reading, and Repairing the Episcopal Church at Molattin, in Berks County, and the Episcopal Church in [Huntingdon] Township in York County, and for Repairing the Episcopal Churches at Chichester, and Concord, and Purchasing a Glebe

designs” obviously trumped the general assembly’s previous aversion to lotteries. The lottery was carefully regulated, however.<sup>260</sup> Several additional statutes continued Pennsylvania’s longstanding practice of affording persons the option of certifying a formal statement by “oath or affirmation,”<sup>261</sup> and another law specified that three specifically named Protestant immigrants from Germany who had pledged fidelity to the British crown were invested with the same privileges as a natural-born resident of Pennsylvania.<sup>262</sup>

The most significant law enacted during the final period of Pennsylvania’s colonial history—the Revolutionary Era, 1765–1783—was, of course, Pennsylvania’s first state constitution in 1776 that reiterated Pennsylvania’s foundational commitment to liberty of conscience. Statutes continued to be passed before Pennsylvania declared independence that likewise reflected the animating principle. For example, a “supplement” was enacted in 1766 to “prolong” the lottery previously authorized to raise funds for the construction and repair of “several Episcopal churches” in the province,<sup>263</sup> and a separate statute was passed during that same

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for the Church at Chester, in the County of Chester”), in Mitchell and Flanders, eds., 6 *The Statutes at Large of Pennsylvania* at 382 (cited in note 110).

<sup>260</sup> Act of February 15, 1765, Ch. DXVII at 382 (cited in note 259).

<sup>261</sup> See, e.g., Act of February 2, 1765, Ch. DXIX (“An Act for the Relief of Walter Davies, a Languishing Prisoner in the Gaol of Philadelphia, with Respect to the Imprisonment of His Person”), in Mitchell and Flanders, eds., 6 *The Statutes at Large of Pennsylvania* at 393, 396 (cited in note 110).

<sup>262</sup> See Act of February 2, 1765, Ch. DXXI (“An Act the Better to Enable the Person Therein Named to Hold Lands and to Invest Them with the Privileges of Natural Born Subjects of this Province”), in Mitchell and Flanders, eds., 6 *The Statutes at Large of Pennsylvania* at 399 (cited in note 110).

<sup>263</sup> Act of September 20, 1766, Ch. DXLV (“A Supplement to the Act, Entitled ‘An Act to Prolong the Time Limited for Drawing the Lottery Instituted and Directed to be Drawn in and by Virtue of an Act, Entitled ‘An Act for Raising by Way of Lottery the Sum of Three Thousand and Three Pounds Fifteen Shillings to be Applied to the

general assembly session to help fund the construction of a new “Presbyterian . . . house of worship.”<sup>264</sup>

Pennsylvania’s general assembly enacted twenty-two laws during the 1766–67 session. The most visible expression of the animating principle was a statute providing “for raising by way of lottery the sum of four hundred and ninety-nine pounds nineteen shillings, to be applied to the payment of the arrears of debt due for the building and finishing [of] the German Lutheran Church . . . and towards the erecting and building [of] a school house to the same church.”<sup>265</sup> The act appointed managers and directors of the lottery, and it specified precisely what was to be printed on each lottery ticket.<sup>266</sup> A separate statute from the 1766–67 session endeavored to ensure that a lottery that had previously been approved to construct a Presbyterian church in Lancaster County was administrated to do

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Payment of the Arrears of Debt Due for the Finishing St. Peter’s and St. Paul’s Episcopal Churches, in the City of Philadelphia, &c’), in Mitchell and Flanders, eds., 7 *The Statutes at Large of Pennsylvania* at 51 (cited in note 110).

<sup>264</sup> Act of September 20, 1766, Ch. DXLVI (“An Act to Enable the Commissioners Hereinafter Named to Settle the Accounts of the Managers and to Sue for and Recover from Several Persons Such Sums of Money as are Now Due and Unpaid on Account of the Lottery Set Up and Drawn for Erecting a House of Worship at the Town of Carlisle, in the County of Cumberland, for the Use of the First Presbyterian Congregation Under the Pastoral Care of John Steel, Minister”), in Mitchell and Flanders, eds., 7 *The Statutes at Large of Pennsylvania* at 52, 54 (cited in note 110).

<sup>265</sup> Act of May 20, 1767, Ch. DLXV (“An Act for Raising by Way of Lottery the Sum of Four Hundred and Ninety-Nine Pounds Nineteen Shillings, to be Applied to the Payment of the Arrears of Debt Due for the Building and Finishing the German Lutheran Church in Earl Township, in Lancaster County, and Towards the Erecting and Building a School House to the Same Church”), in Mitchell and Flanders, eds., 7 *The Statutes at Large of Pennsylvania* at 133 (cited in note 110).

<sup>266</sup> See Act of May 20, 1767, Ch. DLXV at 133–40 (cited in note 265).

that.<sup>267</sup> Other statutes continued the religious practice of assisting the poor.<sup>268</sup>

In the 1767–68 general assembly session another statute was enacted that unambiguously appropriated funds for military purposes,<sup>269</sup> and concern for the poor remained the theme of a different statute.<sup>270</sup> Not surprisingly, as was true throughout Pennsylvania’s colonial history, the majority of the statutes adopted

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<sup>267</sup> See Act of February 21, 1767, Ch. DLI (“An Act to Enable the Commissioners Thereinafter Named to Settle the Accounts of the Managers and to Sue for and Recover from Several Persons, Their Executors, Administrators and Assigns, Such Sums of Money as Are Now Due and Unpaid on Account of the Lottery Set Up and Drawn, for Erecting a House of Worship in the Borough of Lancaster for the Use of the Presbyterian Congregation in and about the Said Borough”), in Mitchell and Flanders, eds., 7 *The Statutes at Large of Pennsylvania* at 72 (cited in note 110).

<sup>268</sup> See, e.g., Act of February 21, 1767, Ch. DXLVIII 57, 60 (“An Act to Amend the Act, Entitled ‘An Act to Prevent the Exportation of Bread and Flour Not Merchantable’”), in Mitchell and Flanders, eds., 7 *The Statutes at Large of Pennsylvania* at 57, 60 (cited in note 110); Act of February 21, 1767, Ch. DLII (“An Act for Amending the Act, Entitled ‘An Act for the Better Employment, Relief and Support of the Poor Within the City of Philadelphia, the District of Southwark, the Townships of Moyamensing and Passyunk and the Northern Liberties’”), in Mitchell and Flanders, eds., 7 *The Statutes at Large of Pennsylvania* at 75 (cited in note 110). The 1766 general assembly session, among others, enacted similar legislation. Laws also continued to be enacted that allowed for a person who objected on religious grounds to swearing an oath to confirm by affirmation instead.

<sup>269</sup> See Act of February 20, 1768, Ch. DLXXIV (“An Act for Appropriating a Sum of Money for Building the Middle House on the West Side of the Barracks in the Northern Liberties of the City of Philadelphia”), in Mitchell and Flanders, eds., 7 *The Statutes at Large of Pennsylvania* at 161 (cited in note 110).

<sup>270</sup> See Act of February 20, 1768, Ch. DLXXIII (“An Act to Amend the Act, Entitled ‘An Act for the Better Employment, Relief and Support of the Poor Within the City of Philadelphia, the District of Southwark, the Townships of Moyamensing and Passyunk and the Northern Liberties’”), in Mitchell and Flanders, eds., 7 *The Statutes at Large of Pennsylvania* at 159 (cited in note 110).

during the 1767–68 session involved mundane matters such as paving the streets.<sup>271</sup>

The 1768–69 general assembly session passed a number of laws that more directly reflected the animating principle of religious tolerance than those of 1767–68. For instance, one statute authorized a lottery to raise funds “to be applied to the payment of the arrears of debt due for erecting the German Reformed or Lutheran churches in York, Heidelberg and Lebanon”;<sup>272</sup> a second assisted with the debts accumulated during the sale of a “Calvinist or Reformed church” in Philadelphia;<sup>273</sup> a third authorized a lottery to help pay off the debts of “the First and Third Presbyterian churches and the Second Presbyterian church in Philadelphia and the German Reformed church in Worcester township”;<sup>274</sup> a fourth appointed and

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<sup>271</sup> Act of February 20, 1768, Ch. DLXXV (“An Act for Raising by Way of Lottery the Sum of Five Thousand Two Hundred and Fifty Pounds for Purchasing a Public Landing in the Northern Liberties and Paving the Streets of the City of Philadelphia”), in Mitchell and Flanders, eds., *7 The Statutes at Large of Pennsylvania* at 163 (cited in note 110).

<sup>272</sup> Act of February 17, 1769, Ch. DLXXXI 212 (“An Act for Raising by Way of Lottery the Sum of One Thousand Six Hundred and Eighty-Seven Pounds Ten Shillings, to be Applied to the Payment of the Arrears of Debt Due for Erecting and Finishing the German Reformed Church and the German Lutheran Church in York Town and for the Payment of the Arrears of Debt Due for the Erecting and Finishing the German Lutheran Churches at Heidelberg and Lebanon, Both of Lancaster County”), in Mitchell and Flanders, eds., *7 The Statutes at Large of Pennsylvania* at 212 (cited in note 110).

<sup>273</sup> Act of February 18, 1769, Ch. DLXXXII 222 (“An Act for the Sale of a Church in the City of Philadelphia, to Pay the Debts Now Due for Building the Same and Distributing the Residue of the Purchase Moneys Arising from Such Sale Among the Several Persons Who Have Been Obligated to Advance Moneys on Account of the Said Church”), in Mitchell and Flanders, eds., *7 The Statutes at Large of Pennsylvania* at 222 (cited in note 110).

<sup>274</sup> Act of February 18, 1769, Ch. DLXXXIII (“An Act for Raising by Way of Lottery the Sum of Three Thousand and Ninety-Nine Pounds Twelve Shillings for the Use of the First and Third Presbyterian Churches, and the Second Presbyterian Church in the

authorized specified commissioners to settle and sue for monies owed from a lottery for the use of the “High Dutch Reformed Congregation at Lancaster” and the “St. James’s Church, in the said borough”;<sup>275</sup> and a fifth mirrored the fourth for the benefit of the First Presbyterian congregation in Carlisle.<sup>276</sup>

Sixteen statutes were enacted during the 1769–70 general assembly session. Although one reaffirmed Pennsylvania’s religious commitment to the “principle of charity . . . towards the relief and support of [the] poor,”<sup>277</sup> none were about religious tolerance per se. Another private bill to confer upon a specific German immigrant “the privileges of a natural-born subject of this province” was enacted in

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City of Philadelphia, and of the German Reformed Church in the Township of Worcester”), in Mitchell and Flanders, eds., 7 *The Statutes at Large of Pennsylvania* at 226 (cited in note 110).

<sup>275</sup> Act of February 18, 1768, Ch. DXCII 271 (“An Act to Enable the Commissioners Thereinafter Named to Settle the Accounts of the Managers and to Sue for and Recover of Them, Their Executors or Administrators, Such Sums of Money as Are Now Due and Unpaid on Account of the Lottery Set Up and Drawn for Erecting a New School House for the High Dutch Reformed Congregation and for Enabling the Vestry and Wardens of St. James’s Church, in the Borough of Lancaster, to Complete this Work by Them Begun, and Also to Enable the Managers to Sue for an Recover Money Due to Them for the Sale of Tickets in the Said Lottery”), in Mitchell and Flanders, eds., 7 *The Statutes at Large of Pennsylvania* at 271 (cited in note 110).

<sup>276</sup> See Act of September 30, 1769, Ch. DC (“An Act to Continue the Act, Entitled ‘An Act to Enable the Commissioners Hereinafter Named to Settle the Accounts of the Managers and to Sue for and Recover from Several Persons Such Sums of Money as are Now Due and Unpaid on Account of the Lottery Set Up and Drawn for Erecting a House of Worship at the Town of Carlisle, in the County of Cumberland, for the Use of the First Presbyterian Congregation Under the Pastoral Care of John Steel’”), in Mitchell and Flanders, eds., 7 *The Statutes at Large of Pennsylvania* at 316 (cited in note 110).

<sup>277</sup> Act of February 24, 1770, Ch. DCIX (“An Act of Incorporating the Society Formed for the Relief of Poor, Aged and Infirm Masters of Ships, their Widows and Children”), in Mitchell and Flanders, eds., 7 *The Statutes at Large of Pennsylvania* at 341 (cited in note 110).

the 1770–71 session,<sup>278</sup> along with a number of practical laws regulating the fisheries and appropriating funds for defending Philadelphia, among other topics.<sup>279</sup>

Several statutes were enacted during the 1771–72 general assembly session that unquestionably reflected the animating principle of religious tolerance. As previous statutes had done for a variety of denominations, a statute enacted during 1771–72 session authorized “the commissioners therein named to settle the accounts of the managers of a lottery” that was designed to raise money “for repairing the meeting house, and building or repairing the house for the residence of the minister of the Presbyterian Congregation of Newtown.”<sup>280</sup> The Newtown Presbyterian congregation needed to pay for repairing its meeting house, and so the church had been previously permitted to conduct a lottery to raise four hundred and five pounds. The 1772 law settled the accounts of the managers of

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<sup>278</sup> Act of March 9, 1771, Ch. DCXXXVII (“An Act to Enable Peter Mierken, Sugar Refiner, to Hold Lands and to Invest Him with the Privileges of a Natural-Born Subject of this Province”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 116 (cited in note 110). Another law to help the poor was passed too. Act of March 9, 1771, Ch. DCXXXV (“An Act for the Relief of the Poor”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 75 (cited in note 110).

<sup>279</sup> See, e.g., Act of March 9, 1771, Ch. DCXXI (“An Act to Regulate the Fishery in the River Schuylkill”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 12 (cited in note 110); Act of March 9, 1771, Ch. DCXXII (“An Act for the Immediate Raising of Money Heretofore Granted for the Defense of the City of Philadelphia”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 15 (cited in note 110).

<sup>280</sup> Act of March 21, 1772, Ch. DCXLIX (“An Act to Enable the Commissioners Therein Named to Settle the Accounts of the Managers of a Lottery Set Up and Drawn for Repairing the Meeting House, and Building or Repairing the Residence of the Minister of the Presbyterian Congregation of Newtown, in the County of Bucks, and to Sue for and Recover Such Sums of Money as Remain Due and Unpaid on Account of the Said Lottery”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 175 (cited in note 110).

that previously held lottery and designated the sums of money to the specified Presbyterian congregation.

The list of capital crimes was amended in 1772 to include the burning of “any church, meeting house or other building for public worship.”<sup>281</sup> Another 1772 statute continued Pennsylvania’s longstanding practice of allowing “protestant inhabitants” who “cannot for conscience sake take an oath in the common form by laying the hand upon and kissing the book when thereto legally required” to qualify in legal proceedings by making a “solemn affirmation” instead.<sup>282</sup> The 1772 law opened by quoting the 1705/6 fundamental law about “liberty of conscience.”<sup>283</sup> Two statutes reiterated Pennsylvania’s strong position against adultery, another appropriated funds for military purposes without the equivocation that typified that kind of law when Quakers controlled the general assembly, and a third conferred upon a specifically-named German immigrant “the privileges of a natural-born subject of this province.”<sup>284</sup>

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<sup>281</sup> Act of March 21, 1772, Ch DCLII (“A Supplement to the Act, Entitled ‘An Act for the Advancement of Justice and Certain Administration Thereof’”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 183 (cited in note 110).

<sup>282</sup> Act of March 21, 1772, Ch. DCLX (“An Act for the Relief of Such Persons as Conscientiously Scruple the Taking of an Oath in the Common Form”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 239, 240 (cited in note 110).

<sup>283</sup> Act of March 21, 1772, Ch. DCLX at 239 (cited in note 282).

<sup>284</sup> See Act of March 21, 1772, Ch. DCLXII (“A Supplement to the Act, Entitled “An Act Against Adultery and Fornication”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 242 (cited in note 110); Act of March 21, 1772, Ch. DCLXIII (“An Act to Dissolve the Marriage of George Keehmle of the City of Philadelphia, Barber, with Elizabeth his wife, late Elizabeth Miller, and to Enable Him to Marry Again”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 243 (cited in note 110); Act of March 21, 1772, Ch. DCLXI (“An Act for Granting to His Majesty the Sum of 4,000 Pounds for the Purposes Therein Mentioned”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 241 (cited in note 110); Act of March 21, 1772, Ch. DCLXVII (“An Act to Enable William Hembell of the City of Philadelphia, Tailor,

Two of the eighteen statutes enacted during the 1772–73 general assembly session reflected the animating principle. One vested a particular tract of land in the Presbyterian Society of Middleton and a second conferred upon specified Protestant German immigrants the rights of natural-born inhabitants of Pennsylvania.<sup>285</sup> The other laws addressed standard government concerns such as building a new jail and establishing a new county.<sup>286</sup> The seventeen statutes passed in the 1773–74 session likewise focused on practical matters such as constructing new roads and structures and protecting the public from disease and crime.<sup>287</sup> The eleven statutes adopted in the 1774–75 general assembly session also concentrated on basic

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to Hold Lands and to Invest Him with the Privileges of a Natural-Born Subject of this Province”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 256 (cited in note 110).

<sup>285</sup> See Act of February 26, 1773, Ch. DCLXXIX (“An for Vesting a Certain Tract of Land in the Township of Middleton and County of Cumberland and a Lot in the Town of Carlisle in the said County in Trustees to be Sold for the Purpose Therein Mentioned”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 323 (cited in note 110); Act of February 26, 1773, Ch. DCLXXXV (“An Act to Enable the Persons Therein Named to Hold Lands and to Invest Them with the Privileges of Natural-Born Subjects of this Province”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 337 (cited in note 110).

<sup>286</sup> See Act of February 26, 1773, Ch. DCLXXIII (“An Act for Erecting a New Gaol, Workhouse and House of Correction in the City of Philadelphia”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 300 (cited in note 110); Act of February 26, 1773, Ch. DCLXXVIII (“An Act for Erecting a Part of the County of Bedford Into a Separate County”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 314 (cited in note 110).

<sup>287</sup> See, e.g., Act of January 22, 1774, Ch. DCLXXXIX (“An Act for Regulating the Buildings, Keeping in Repair the Streets, Lanes, Alleys and Highways in the Borough of Lancaster and for Other Purposes Therein Mentioned”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 347 (cited in note 110); Act of January 22, 1774, Ch. DCXCI (“An Act to Prevent Infectious Diseases Being Brought into this Province”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 369 (cited in note 110).

government tasks rather than on the animating principle,<sup>288</sup> although one of the laws continued the general assembly's practice of assisting a variety of Protestant denominations – here, “Low Dutch Reformed Congregation” or “Dutch Presbyterian” – in acquiring land and constructing houses of worship.<sup>289</sup>

The 1775–76 general assembly session was, of course, a different story. The legislative process proceeded in two forms. In the first, ten statutes addressing basic government functions were enacted.<sup>290</sup> In the second, the “constitutional convention” that convened from June through September of 1776 and that was “[d]etermined that nothing of the old government [that had resisted independence from Great Britain] should remain,”<sup>291</sup> adopted nine ordinances, one of which was a September 14 “Ordinance for Rendering the Burden of Associators and Non-Associators in the Defense of this State as

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<sup>288</sup> See, e.g., Act of March 18, 1775, Ch. DCCVI (“A Supplement to the Act, Entitled ‘An Act for Acknowledging and Recording of Deeds’”) (the law did reiterate that proof could be offered via “oath or affirmation”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 412, 414 (cited in note 110).

<sup>289</sup> Act of March 18, 1775, Ch. DCCXI (“An Act to Enable the Trustees Therein Mentioned to Sell and Dispose of a Certain Tract of Land and to Apply the Moneys Arising Therefrom to the Use of the Low Dutch Reformed Congregation or a Religious Society of Christians called Dutch Presbyterians”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 438 (cited in note 110).

<sup>290</sup> See, e.g., Act of April 6, 1776, Ch. DCCXX (“An Act to Continue an Act, Entitled ‘An Act to Regulate the Fishery in the River Schuylkill’ and to Make Further Provisions Therein”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 467 (cited in note 110). The previously enacted law to provide relief to the poor was made perpetual during this session. See Act of April 6, 1776, Ch. DCCXXIII (“An Act to Make Perpetual an Act Passed in the Eleventh Year of the Reign of His present Majesty King George the Third, Entitled ‘An Act for the Relief of the Poor’”), in Mitchell and Flanders, eds., 8 *The Statutes at Large of Pennsylvania* at 474 (cited in note 110).

<sup>291</sup> Appendix XXXIV, in Mitchell and Flanders, eds., 9 *The Statutes at Large of Pennsylvania* at 451, 461 (cited in note 110) (an abridgement of an article by historian Paul Ford about the adoption of the Pennsylvania Constitution of 1776).

Nearly Equal as May Be.”<sup>292</sup> The ordinance was the culmination of a bitter dispute over the Quakers’ refusal to participate in the war effort against the British because of their continuing commitment to the peace testimony and liberty of conscience.<sup>293</sup> The ordinance opened by criticizing, albeit not explicitly by religious denomination, inhabitants of the new state of Pennsylvania who were not doing their part in a time of crisis, and it went on to require those who were not serving in the military to contribute, in effect, the monetary equivalent of military service.<sup>294</sup> Previously, the convention had “practically disfranchised every Quaker in the colony, as well as all who still held allegiance to George III, or to the Penn charter,” by limiting who was eligible to vote for representatives to the convention to inhabitants who were, by “oath or affirmation,” committed to independence.<sup>295</sup>

Pennsylvania’s first state constitution is widely regarded as the most “democratic” or “radical” of the Revolutionary-era constitutions.<sup>296</sup> But as inconsistent with the animating principle of

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<sup>292</sup> See Act of September 14, 1776, Ch. DCCXXV (“An Ordinance for Rendering the Burden of Associators and Non-Associators in the Defense of this State as Nearly Equal as May Be”), in Mitchell and Flanders, eds., 9 *The Statutes at Large of Pennsylvania* at 22 (cited in note 110). See generally Appendix XXXIV at 461 (cited in note 291) (“Instead of proceeding at once to the framing of a constitution, the convention, though called for the ‘express purpose,’ first set itself to regulating the affairs of the colony, as if both an executive and legislative body.”).

<sup>293</sup> See, e.g., Craig W. Horle, et al., eds., 3 *Lawmaking and Legislators in Pennsylvania: A Biographical Dictionary* 91 (Penn 2005).

<sup>294</sup> See Act of September 14, 1776, Ch. DCCXXV, in Mitchell and Flanders, eds., 9 *The Statutes at Large of Pennsylvania* at 22–27 (cited in note 292).

<sup>295</sup> Appendix XXXIV, in Mitchell and Flanders, eds., 9 *The Statutes at Large of Pennsylvania* at 460 (cited in note 291).

<sup>296</sup> See, e.g., Stephen B. Presser & Jamail S. Zainaldin, *Law and Jurisprudence in American History: Cases and Materials* 106 (West 5th ed. 2004); John M. Coleman, *Thomas McKean and the Origin of an Independent Judiciary*, 34 Pa. Hist. 111, 114 (1967). Among the “radical” and “democratic” features of Pennsylvania’s 1776 constitution were a

religious tolerance as the march towards independence may have sometimes been, that constitution, adopted by the state's constitutional convention on September 28, 1776, was a paean to William Penn and his promise of liberty of conscience for the inhabitants of the "Country" he founded in 1680/1.<sup>297</sup> The Declaration of Rights proclaimed in Chapter I, Section II:

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding. And that no man ought or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any ministry, contrary to, or against, his own free will and consent. Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship. And that no authority can or ought to be vested in, or assumed by any power whatever,

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unicameral legislature with members elected for one term, a twelve-member supreme executive council to administer the government, and a judiciary appointed by the legislature for seven-year terms and removable at any time. See generally J. Paul Selsam, *The Pennsylvania Constitution of 1776: A Study in Revolutionary Democracy* (1936; repr. 1971).

<sup>297</sup> William Penn to James Harrison, in Dunn and Dunn, eds., *2 The Papers of William Penn* at 108 (cited in note 38). For an essay arguing that Thomas Paine—a celebrated champion of liberty, polemicist, and architect of democratic revolutions—tried to rally Pennsylvanians to rebel against Great Britain and maintain enthusiasm for revolution by manipulating pre-existing provincial animosities to portray pacifist and neutral Quakers as Loyalists, and that Paine therefore did not understand Quakerism or, despite his own claims, value the rights of religious dissenters, see Jane E. Calvert, *Thomas Paine, Quakerism, and the Limits of Religious Liberty during the American Revolution*, in Ian Shapiro and Jane E. Calvert, eds., *Selected Writings of Thomas Paine* 602 (Yale 2014).

that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.<sup>298</sup>

Pennsylvania's commitment to religious tolerance was manifested elsewhere in the 1776 constitution too. Section VII of the Declaration of Rights did not impose a religious qualification for voting or holding public office,<sup>299</sup> although Section the Tenth of the Frame of Government limited membership in the assembly to Christians by requiring a public declaration before a member was seated acknowledging "the Scriptures of the Old and New Testament to be given by Divine Inspiration."<sup>300</sup> Section VIII of the Declaration of Rights respected the Quaker peace testimony by specifying that "Nor can any man who is concientiously scrupulous of bearing arms be justly compelled thereto, if he will pay such equivalent";<sup>301</sup> and the option of taking "oaths or affirmations" was enumerated

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<sup>298</sup> Pa. Const. of 1776, Ch. I, § II (superseded 1790). Section I of Chapter I addressed the "unalienable rights" of man in language similar to that found in the U.S. Declaration of Independence. See Pa. Const. of 1776 Ch. I, § I (superseded 1790). The declaration of rights was explicitly decreed to be part of the Pennsylvania constitution that "ought never be violated on any pretence whatever." Pa. Const. of 1776 Ch. II, § 46 (superseded 1790).

<sup>299</sup> Pa. Const. of 1776, Ch. I § VII (superseded 1790); see Pa. Const. of 1776, Ch. 2 § VII (superseded 1790).

<sup>300</sup> Pa. Const. of 1776, Ch. II § X (superseded 1790). The section concluded by stating "And no further or other religious test shall ever hereafter be required of any civil officer or magistrate in this State." Pa. Const. of 1776, Ch. II § X (superseded 1790).

<sup>301</sup> Pa. Const. of 1776, Ch. I § VIII (superseded 1790). Law professor Douglas Laycock authored an article about regulatory exemptions of religious behavior in America prior to the First Amendment of the Constitution of the United States that included a discussion of military service in Pennsylvania. See Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793 (2006).

throughout the document.<sup>302</sup> Section the Forty-second of the frame of government constitutionalized Pennsylvania's generous immigration policy.<sup>303</sup> Finally, Section the Forty-fifth reiterated Pennsylvania's foundational commitment to the connection between moral and religious liberty properly understood:

Laws for the encouragement of virtue and prevention of vice and immorality shall be made and constantly kept in force, and provision shall be made for their due execution. And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion and learning, or for other pious and charitable purposes, shall be encouraged and protected in the enjoyment of the privileges, immunities and estates which they were accustomed to enjoy, or could of right have enjoyed under the laws and former Constitution of this State.<sup>304</sup>

#### VI. DELAWARE AFTER WILLIAM PENN

Previously, this Article maintained about Delaware during William Penn's lifetime that, although the Delaware assembly to which Penn acquiesced in 1704 did not enact laws specifically

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<sup>302</sup> Pa. Const. of 1776, Ch. I § X (superseded 1790); Pa. Const. of 1776, Ch. II § IX (superseded 1790); Pa. Const. of 1776, Ch. II § X (superseded 1790); Pa. Const. of 1776, Ch. II § XL (superseded 1790); Pa. Const. of 1776, Ch. II § XLII (superseded 1790).

<sup>303</sup> See Pa. Const. of 1776, Ch. II § XLII (superseded 1790).

<sup>304</sup> Pa. Const. of 1776, Ch. II § XLV (superseded 1790). Other than cases involving moral breaches, no instances involving the animating principle of religious tolerance were apparently litigated between William Penn's death and the end of Pennsylvania's colonial period. See, e.g., Nelson, *Government by Judiciary* at 37-39 (cited in note 76); Sagafi-Nejad, *Friends at the Bar* at 71 (cited in note 33). The Divesting Act of November 27, 1779 paid the Penn family 130,000 pounds for the loss of their proprietorship. See Wharton and Rawle, *The General Title of the Penn Family to Pennsylvania (continued)* at 464 (cited in note 193).

protecting religious liberty like Pennsylvania, it is reasonable to conclude that religious freedom continued throughout the duration of the Penn family's proprietorship from the dearth of legislation in Delaware penalizing persons for their religious views and from what a leading historian of colonial Delaware called "the spirit of Penn."<sup>305</sup> A historian of colonial America more broadly construed had a slightly different take on why Delaware remained religiously tolerant after Penn's death: in a word, pragmatism. That historian wrote: "the diverse character of the people most eligible to settle there made religious exclusiveness not only impractical but a contradiction. Thus, except in Pennsylvania and Rhode Island, the increasingly lenient religious atmosphere in the later seventeenth-century colonies was more opportunistic than ideological, more a case of helpless acquiescence than an endorsement of the principle of religious freedom."<sup>306</sup>

It is also important to remember that Delaware was initially planted for economic rather than religious reasons. The original Swedish and Dutch settlers viewed the Delaware Valley as a potentially lucrative area, and later English settlers viewed it that way too. Moreover, Penn wanted to control the territory because he saw access to the Delaware River as essential for the economic viability of Pennsylvania. Of course, even after Delaware established a separate assembly, the guarantee of liberty of conscience in the Pennsylvania Charter of Privileges of 1701 remained in effect there.<sup>307</sup>

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<sup>305</sup> Munroe, *Colonial Delaware* at 88 (cited in note 139).

<sup>306</sup> Patricia U. Bonomi, *Under the Cope of Heaven: Religion, Society, and Politics in Colonial America* 37 (Oxford 1986).

<sup>307</sup> See Charter of Privileges of 1701, in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* 8, 14 (Franklin and Hall 1752) ("NOTWITHSTANDING which Separation of the Province and Territories, in Respect of Legislation, I do hereby promise, grant and declare, That the Inhabitants of both Province and Territories, shall

Unlike for Pennsylvania itself, the laws of the Delaware assembly were never subject to review in England. This did not mean that the crown was unaware that Delaware was enacting legislation, however. In April of 1740, the Board of Trade raised questions about the lower counties with Ferdinand John Paris, the Penn family's agent. "They desired to know," Paris wrote to Thomas Penn, "how [your title] was writ in the Lower County acts. And to see all those Lower County Laws."<sup>308</sup> Paris answered the inquiries as best he could: "I told them I was not Agent nor had no authority from those People, that I did not know that I had ever seen two Acts made by that separate Province."<sup>309</sup>

Delaware's legislative records were in disarray during the early years, and considerable attention was devoted in the 1730s to rectifying the problem.<sup>310</sup> The assembly wrote to Governor George Thomas in Philadelphia in or about 1739: "we beg leave to say that many of our laws being lost and others lying in the offices of this Government in great disorder made it absolutely necessary to us to endeavor to get the whole revised which were to be found and to supply the place of those which were lost to the Addition of new ones . . . for the press."<sup>311</sup> The assembly's efforts resulted in a code of laws entitled *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware*, published by Benjamin Franklin in 1742.<sup>312</sup> The laws were

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separately enjoy all other Liberties, Privileges and Benefits, granted jointly to them in this Charter, any Law, Usage or Custom of this Government, heretofore made and practised, or any Law made and passed by this General Assembly, to the Contrary hereof, notwithstanding."

<sup>308</sup> Munroe, *Colonial Delaware* at 148 (cited in note 139).

<sup>309</sup> *Id.*

<sup>310</sup> See Hoffecker, *Democracy in Delaware* at 25 (cited in note 162).

<sup>311</sup> *Id.*

<sup>312</sup> See *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* (cited in note 307).

grouped into categories: establishment and procedures of governmental offices; crime and punishment; regulation of slaves, free blacks and servants; and land and the environment.

Delaware, like Pennsylvania, was not perfect as far as religious tolerance was concerned, at least in presentist terms. At the opening meeting of a legislative session, for example, each assemblyman was required to stand before the speaker's chair and declare and profess to be "faithful and bear true Allegiance" to the king, to "profess Faith" in the Trinity and the Old and New Testaments and to denounce Catholicism as "heretical," "superstitious" and "damnable Doctrine."<sup>313</sup> But this declaration and profession was more liberal than those in other colonies that restricted government service to members of particular Protestants sects and, in any event, not many Catholics lived in the lower counties.<sup>314</sup> Moreover, non-Anglican immigrants found Delaware (and Pennsylvania) more attractive than other mid-Atlantic and southern colonies because the Church of England was established in those other colonies and in the southern counties of New York.<sup>315</sup>

Delaware continued the longstanding practice in Pennsylvania of permitting by statute inhabitants—including, by name, Quakers—to qualify in legal processes by means other than the swearing of an oath<sup>316</sup> and of recognizing marriages performed in accordance with

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<sup>313</sup> "An ACT for regulating Elections, and ascertaining the Number of the Members of Assembly," in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 125 (cited in note 307). Pennsylvania had a similar requirement at the time.

<sup>314</sup> See Hoffecker, *Democracy in Delaware* at 24 (cited in note 162).

<sup>315</sup> See Munroe, *Colonial Delaware* at 161 (cited in note 139).

<sup>316</sup> See, e.g., "An ACT for Naturalization," in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 16 (cited in note 307); "An ACT for the Advancement of Justice, and more certain Administration thereof," in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 31 (cited in note 307); "An ACT for keeping in good Repair the Dykes and Sluices belonging to the Marsh on the North End of the

the “Way and Method” of various and varied religious societies.<sup>317</sup> Another statute decreed that “the Registry now kept, or which shall hereafter be kept by any Religious Society in their respective Meeting Book, or Books, of any Marriage, Birth, or Burial, within this her Majesty’s Government, shall be held good and authentick, and shall be allowed of upon all Occasions whatsoever,”<sup>318</sup> while yet another enabled “Religious Societies of Protestants within this Government, to purchase Lands for Burying-Grounds, Churches, Houses for Worship, Schools, &c.”<sup>319</sup> Delaware’s assembly likewise enacted legislation about morals offenses and profane swearing and

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Town of Newcastle, lately in the Tenure and Occupation of John Donaldson, Robert French, and Richard Halliwell, Esquires, deceased,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 53 (cited in note 307); “An ACT for regulating Elections, and ascertaining the Number of the Members of Assembly,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 118 (cited in note 307); “An ACT for the Relief of Insolvent Debtors within this Government,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 164 (cited in note 307); “An ACT for raising County-Rates and Levies,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 231 (cited in note 307); “An ACT concerning Rangers and Strays,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 278 (cited in note 307); “An ACT for regulating Attachments within this Government,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 314 (cited in note 307); “An ACT about Contracts and Assumptions,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 346 (cited in note 307); “An ACT prescribing an easy and summary Method to perpetuate the Testimony of Witnesses, relating to the Bounds of Lands within this Government,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 361 (cited in note 307).

<sup>317</sup> “An ACT for preventing clandestine Marriages,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 23, 24 (cited in note 307).

<sup>318</sup> “An ACT for keeping a Registry in Religious Societies,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 25 (cited in note 307).

<sup>319</sup> “An ACT for the enabling Religious Societies of Protestants within this Government, to purchase Lands for Burying-Grounds, Churches, Houses for Worship, Schools, &c.,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 273 (cited in note 307).

blasphemy similar to that in Pennsylvania.<sup>320</sup> As in Pennsylvania, persons whose “religious Persuasion is against bearing or using Arms” were excused from military service in Delaware<sup>321</sup> and a statute was enacted “for Relief of the Poor.”<sup>322</sup> In addition, the Delaware assembly enacted an expansive law “to prevent the Breach of the Lord’s Day, commonly called Sunday.”<sup>323</sup>

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<sup>320</sup> See “An ACT against Adultery and Fornication,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 74 (cited in note 307); “An ACT against Riots, Routs, and unlawful Assemblies,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 88 (cited in note 307); “An ACT against Drunkenness, Blasphemy; and to prevent the grievous Sins of prophane Cursing, Swearing and Blasphemy,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 142 (cited in note 307); “An ACT for the more effectual preventing and punishing the evil and wicked Practices of Horse-stealing, and other Felonies and Offences committed within this Government,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 208 (cited in note 307); see also “An ACT for regulating Innholders, Tavernkeepers, and other Publick House-keepers with|in this Government, and empowering the Justices to settle the Rates of Liquors,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 160 (cited in note 307).

<sup>321</sup> “An ACT providing for the Security and Defence of the Town of Lewes, in the County of Sussex, within this Government,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 143, 147 (cited in note 307).

<sup>322</sup> “An ACT for Relief of the Poor,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 200 (cited in note 307); see also “An ACT for the better Relief of the Poor of the County of Newcastle,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 262 (cited in note 307).

<sup>323</sup> “An ACT to prevent the Breach of the Lord’s Day, commonly called Sunday,” in *Laws of the Government of New-Castle, Kent, and Sussex, Upon Delaware* at 183 (cited in note 307). Other laws were enacted after the publication of Delaware’s code of laws that unambiguously reflected Pennsylvania’s animating principle of religious tolerance. See, e.g., “AN ACT for the easing scrupulous consciences, in the mode of taking an oath,” in John D. Cushing, ed., 1 *The First Laws of the State of Delaware* 543 (M. Glazier 1981). Other than cases involving moral breaches, no instances involving religious tolerance were apparently litigated between William Penn’s death and the end of Delaware’s colonial period. See, e.g., Cobb, *The Rise of Religious Liberty in America* at 453 (cited in note 2) (“Delaware did not much concern itself with inquiring into men’s religious opinions, and I find no instance of molestation for conscience’ sake.”).

The year 1776 was doubly significant for the people of Delaware because it was then that Delaware declared independence from both Great Britain and Pennsylvania. Delaware's reason for declaring independence from Great Britain was the same as that of Pennsylvania and the other former British American colonies: to protect private rights from British oppression.<sup>324</sup> Delaware declared independence from Pennsylvania because, notwithstanding that William Penn had allowed the inhabitants of the "lower counties" to establish their own assembly, most Delawareans continued to feel inferior to, and threatened by, the inhabitants of the "upper counties."<sup>325</sup> Significantly, the Delaware Constitution of 1776, like the Pennsylvania constitution of that same year, continued to *constitutionalize* the animating principle of religious tolerance. In a provision that traced directly to the Pennsylvania Constitution of 1776,<sup>326</sup> Article 2 of the Delaware Declaration of Rights proclaimed:

That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings, and that no man ought, or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever, that shall in

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<sup>324</sup> See, e.g., Scott Douglas Gerber, *To Secure These Rights: The Declaration of Independence and Constitutional Interpretation* (NYU 1995). Initially, there was considerable debate in Delaware about whether to seek reconciliation with Great Britain. See, e.g., H. Clay Reed, *The Delaware Constitution of 1776*, 6 Delaware Notes 7-22 (1930).

<sup>325</sup> See, e.g., Reed, *The Delaware Constitution of 1776* at 22-23 (cited in note 324).

<sup>326</sup> See Max Farrand, *The Delaware Bill of Rights of 1776*, 3 Am. Hist. Rev. 641, 642 (1898).

any case interfere with, or in any manner control, the right of conscience in the free exercise of religious worship.<sup>327</sup>

Article 3 guaranteed to all “Christian[s] . . . equal rights and privileges in this State,” and Article 10 provided that no person who was “conscientiously scrupulous of bearing arms in any case justly be compelled thereto if he will pay such equivalent.”<sup>328</sup> Article 22 allowed public officials to qualify via affirmation rather than oath so long as they declared “I, A. B. do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the holy scriptures of the Old and New Testament to be given by divine inspiration.”<sup>329</sup> The Pennsylvania Constitution of 1776 was similarly worded.

## VII. CONCLUSION

“Great man” theories of history are unfashionable at the moment, especially if the great man was a white male.<sup>330</sup> But there can be no credible doubt that the commitment to liberty of conscience that characterized colonial Pennsylvania (and Delaware) traced

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<sup>327</sup> Id.

<sup>328</sup> Id. at 643, 644.

<sup>329</sup> The *Delaware Constitution* of 1776 is reprinted at, among other places, (Avalon Project, 2008), archived at <https://perma.cc/72UC-HAWQ>.

<sup>330</sup> See, e.g., Camilla Turner, *Schools must look beyond “dead white men” to make the curriculum more diverse, teacher union chief says*, (Telegraph, 2018), archived at <https://perma.cc/P662-YB54>. Thomas Carlyle was probably the most influential proponent of the “great man” theory of history. See, e.g., Thomas Carlyle, *On Heroes, Hero-Worship, and The Heroic in History* (Fraser 1841). Herbert Spencer was an early critic of the theory. See, e.g., Herbert Spencer, *The Study of Sociology* 31 (Appleton 1896) (“You must admit that the genesis of a great man depends on the long series of complex influences which has produced the race in which he appears, and the social state into which that race has slowly grown. . . . Before he can remake his society, his society must make him.”).

directly to William Penn's vision, example, and determination. In fact, Pennsylvania enacted more laws about religious tolerance than any other British American colony, both before and after Penn's death, and Delaware's laws also were religiously tolerant even when the "lower counties" had a separate assembly.

Some scholars have denied that Penn founded a successful colony. For example, one socio-legal historian concluded from a book-length statistical analysis of the court records of four rural counties surrounding Philadelphia between 1680 and 1710 that the "Gospel order failed miserably in its stated goal of keeping Quakers from 'going to law' against each other."<sup>331</sup> Unfortunately, not only did this historian not understand how the "gospel order" worked – Quakers were permitted to sue in court if the dispute could not be resolved in a Quaker meeting<sup>332</sup> – his quantitative approach caused him to miss a crucial qualitative point: the litigation he documented was not about religious discrimination (because almost none existed).

A prominent intellectual historian concluded in a book about Penn's political thought that Penn's legacy was "mixed."<sup>333</sup> On the credit side of the ledger, this historian praised Penn for an unwavering commitment to liberty of conscience even when his own

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<sup>331</sup> Offutt, *Of "Good Laws" and "Good Men"* at 152 (cited in note 11). Jack D. Marietta and G. S. Rowe modified Offutt's assessment in their own quantitative analysis of Pennsylvania's criminal justice system from 1682 to 1800. They concluded that the province functioned well in the beginning due to Quaker homogeneity but faced increasing difficulties as a result of liberal immigration policies. See Marietta and Rowe, *Troubled Experiment* (cited in note 66). Like Offutt before them, Marietta and Rowe overlooked that the litigation they analyzed was not about religious discrimination, a point they conceded at several places in their book. *Id.* at 14.

<sup>332</sup> See, e.g., Sagafi-Nejad, *Friends at the Bar* at 186 (cited in note 33) ("Quakers cannot be peacemakers in every instance if they are also to witness other testimonies.").

<sup>333</sup> Murphy, *Liberty, Conscience, and Toleration* at 252 (cited in note 5).

personal fortunes changed markedly over the years. On the debit side, he claimed that although Pennsylvania became a “mecca for American, scientific, economic, and political life,” it probably did so despite Penn, not because of Penn, because Penn was an “absentee landlord” who was regularly at odds with the colonists.<sup>334</sup> Clearly, this historian failed to appreciate how strongly the *law* in Pennsylvania reflected the animating principle of liberty of conscience and how central a role Penn’s *constitutional* commitment to the animating principle of his “Country” played in shaping the law.<sup>335</sup>

Historians who have focused directly on religious liberty in Pennsylvania rather than on, say, litigation patterns or political thought, tend to offer a more positive assessment of Penn’s legacy. They also tend to fail to credit the law itself as much of a source of Pennsylvania’s success, and of Penn’s. One such historian, for instance, stressed that because Penn was largely an absentee proprietor and was dead before the end of the second decade of the eighteenth century, it was the people of Pennsylvania themselves who had to translate his ideals into day-to-day, tolerant human relationships.<sup>336</sup> But as this Article has documented, the people of Pennsylvania translated Penn’s ideals into *law*, and they were willing to do so because of their shared commitment to Pennsylvania’s animating principle. Indeed, a 2018 commemorative collection about the history of Pennsylvania’s supreme court included an essay by a Pennsylvania law professor chronicling that court’s religious liberty

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<sup>334</sup> *Id.* at 231, 206.

<sup>335</sup> William Penn to James Harrison, in Dunn and Dunn, eds., 2 *The Papers of William Penn* at 108 (cited in note 38).

<sup>336</sup> See Schwartz, “*A Mixed Multitude*” (cited in note 2); see also Frost, *A Perfect Freedom* (cited in note 3).

decisions that concluded that “When the modern [Pennsylvania] Supreme Court is inevitably asked to consider an independent and more robust interpretation of the right of conscience under Article I, Section 3 of the Pennsylvania Constitution, it will be confronted with a choice between two historic visions—the ‘Holy Experiment’ conducted by William Penn, founder of the colony, and the philosophy of judicial restraint and deference to the legislature vigorously fronted by Chief Justice [John Bannister] Gibson.”<sup>337</sup>

The smart money is on William Penn.

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<sup>337</sup> Gary S. Gildin, *The Supreme Court and Religious Liberty: The Competing Visions of William Penn and Chief Justice John Bannister Gibson*, in John J. Hare, ed., *The Supreme Court of Pennsylvania: Life and Law in the Commonwealth, 1684–2017* at 137, 144 (Penn 2018). Gildin’s chapter confirmed the dearth of litigation about religious discrimination during Pennsylvania’s colonial period. See also Frost, *A Perfect Freedom* at Ch. 8 (cited in note 3). Space constraints permitted a discussion in this Conclusion of only a representative sample of the voluminous scholarship about colonial Pennsylvania. The criticism offered of those works for overlooking or understating the law’s impact was not meant to diminish the positive historiographical contributions they otherwise made. A number of additional works were cited in the footnotes to the various sections of this Article.