

RELIGIOUS FREEDOM IN PHILADELPHIA

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Some controversies seem particularly significant for the development of constitutional rights. For the freedom from an establishment of religion, the most famous early debate occurred in Virginia in the mid-1780s.¹ For the more immediate freedom of religion, however—the freedom from penalty or constraint on religion—the central historical debate is less familiar. It was in some respects merely a local quarrel, which embroiled Quakers and Revolutionaries in Philadelphia during a few tense weeks in 1775. Nonetheless, it was a revealing moment in the development of American religious liberty. At a time when Americans were struggling for equality against Britain, they also expected equality in their religious liberty, and their egalitarian vision of their freedom from penalties on religion soon came into conflict with the perspective of those who needed a greater religious liberty. Of course, this tension between different conceptions of religious liberty was evident in many states, but nowhere were the results more dramatic than in Philadelphia, and today, the controversy in Philadelphia reveals much about the character of American religious liberty and about its foundations in American society and its ideals.

The Philadelphia controversy illuminates the historical background of the freedom from penalty on religion in the same way that the debate in Virginia sheds light on the freedom from an establishment. Although the Virginia controversy was only one of many state controversies over an establishment, it was the most extensive and salient such dispute, and therefore when the

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¹ For the best account of the Virginia debate, see THOMAS E. BUCKLEY, *CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776–1787* (1977). Incidentally, it is customary to assume that James Madison introduced into the First Amendment the antiestablishment position he earlier developed in Virginia. The evidence, however, reveals that the First Amendment stated a position similar to that which Madison had attributed to his religious allies in Virginia. PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 101–07 (2002); *see, e.g., infra* note 8.

Supreme Court and modern commentators examine the federal or state establishment clauses, they regularly hark back to the events in Virginia.² It is another matter, however, when they discuss the First Amendment's free exercise clause—let alone the state guarantees of freedom from penalty on religion. Particularly when judges and commentators consider whether the freedom from penalty includes a right of religious exemption from general laws, they tend to write as if there was no public debate on which they can rely. To be sure, much is known about the struggle against laws that penalized minority religions, but there has not seemed to be any public dispute equivalent to the Virginia establishment debate on whether the freedom from penalty extended to a freedom from general laws. Hence, the significance of the controversy in Philadelphia. It was the most prominent late eighteenth-century debate on a general constitutional right of religious exemption, and although it has been elegantly explored by the church historian Richard K. MacMaster, and although his hints about its constitutional significance have been echoed by Ellis West, the debate in Philadelphia has not received adequate attention for the ways it can fill in some of the missing historical background behind the Free Exercise Clause and other constitutional guarantees of the freedom from penalty.³

Conceptually, the Philadelphia debate illustrates a turning point, for it reveals how two concepts of religious liberty—a freedom *under* law, *regardless* of one's religion and a freedom *from* law *on account of* one's religion—came to be sharply differentiated in popular politics. Religious dissenters in England had long sought a freedom from the penalties imposed

² For the importance of distinguishing among the different antiestablishment arguments in Virginia, see PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 89–107 (2002). For the value of looking at antiestablishment arguments beyond Virginia, see Philip Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295, 313–67.

³ Richard K. MacMaster, *Neither Whig Nor Tory: The Peace Churches in the American Revolution*, 9 FIDES ET HISTORIA 8, 12 (1977) [hereinafter MacMaster, *Neither Whig Nor Tory*]. MacMaster concludes that “[t]he real significance of the wartime experience of the historic peace churches is theological.” *Id.* at 20. Although this Article has a different focus, it is much indebted to MacMaster's work. For the classic account of the Quakers during the Revolution, see generally ARTHUR J. MEKEEL, *THE QUAKERS AND THE AMERICAN REVOLUTION* (1996).

The Philadelphia debate has been noted in the literature on a constitutional right of exemption by the author of this Article and later in greater depth by Ellis West. Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 930 n.65 (1992) [hereinafter Hamburger, *A Constitutional Right*]; Ellis M. West, *The Right to Religion-Based Exemptions in Early America: The Case of the Conscientious Objectors to Conscription*, 10 J.L. & RELIGION 367, 389–93 (1993–94). These studies, however, simply rely on MacMaster and do not explore the breadth of the debate's implications for religious liberty.

on account of their religion, and most of them therefore desired an equal freedom under general, nondiscriminatory laws. Some dissenters, however, most prominently the Quakers, traditionally sought a more expansive freedom—a freedom from general laws precisely on account of their religious objections to them. While English laws continued to single out religious differences as a basis for penalizing individuals, Quakers and other dissenters could join in common cause against such laws, regardless of the sort of religious liberty they ultimately needed, and therefore a sharp distinction between their different conceptions of religious liberty did not ordinarily rise to the surface of popular politics. Even when Quakers sometimes sought a separate peace with the English government, they did not disturb the sense that all Protestant dissenters had a common complaint against unequal laws. For example, the English religious dissenter Philip Furneaux in 1770 prominently argued that laws should impose penalties on individuals “without any regard to their religious principles,” but he felt no need to distance himself from the Quakers or others who might need a freedom from law on account of their religion.⁴ In America, however, expectations of equality increasingly came into conflict with Quaker aspirations, and when Americans in 1775 created a regime based on ideals of equal freedom, it was inevitable that there would be a parting of the ways between those who expected equal freedom under law, regardless of their religion, and those who still needed a freedom from law on account of their religion.⁵ The Revolution thus was the catalyst in which these conceptions of religious liberty became more completely differentiated and in which a majority emphatically chose one over the other.⁶

⁴ Philip Furneaux, Letters to the Honourable Mr. Justice Blackstone, Concerning His Exposition of the Act of Toleration 61 (London, T. Cadell 1770).

⁵ Similarly, Quakers dropped out of the campaign against establishments. 1 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT, 1630–1883: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE, at 595, 607 n.33 (1971).

Incidentally, MacMaster observes that “[w]ar brought the essential conflict between the sects and the state into sharper focus, because in wartime the state necessarily makes far greater demands on the individual than in time of peace.” MacMaster, *Neither Whig Nor Tory*, *supra* note 3, at 21. The War undoubtedly exacerbated the conflict between the pacifist sects and the government, but the sharpened differentiation between the two concepts of religious liberty followed more directly from the establishment of a religiously diverse regime that idealized equal liberty. Earlier, for example, the French and Indian War created much tension between Quakers and their fellow Pennsylvanians without leading to as sharp a differentiation among ideals of religious liberty as occurred during the Revolution, and after the Peace Treaty of 1783, Quakers were as anxious about the threat to their vision of religious liberty during peacetime as during war—the most prominent illustration being the 1791 controversy over the militia bill.

⁶ Methodologically, the events in Philadelphia thus serve as a reminder of how much can be learned from a diversity of opinion among early Americans. Eighteenth-century Americans tended to disagree about the proper scope of their freedom, and it has been suggested that this precludes attempts to decipher their

The debate in Philadelphia additionally reveals the role of context in limiting conceptual options. Religious liberty was typically understood as a freedom from government oppression. Different conceptions of this freedom, however, can seem more or less appealing in different circumstances, and American ideas about the freedom from penalties on religion developed along somewhat different lines than English ideas. The hierarchy and inequality of England was such that dissenters could find common cause against the unequal constraints of English law, and therefore neither Quakers nor other dissenters had much occasion in the eighteenth century to draw attention to their differences about religious liberty. In contrast, the diversity of Americans and their expectations of equal rights sharpened their differences about religious liberty and left little doubt which ideal would prevail. In Pennsylvania, Quakers became painfully isolated in their attachment to a religious freedom from law, and a diverse majority acquired an uncompromising sense of confidence in its ideals of equal religious liberty. Diverse religious groups united in a struggle for equal liberty against foreign and domestic oppression, and when Quakers complained that equal liberty was not enough—when they demanded a general freedom from the laws they considered contrary to conscience—the Revolutionaries responded with little patience. The Pennsylvania Revolutionaries were tolerant enough to guarantee a constitutional exemption from military service, but they were sufficiently attached to equality under law to demand an equivalent from those who were exempted and to deny that there was a general constitutional religious liberty

constitutional guarantees. In particular, the absence of a “common understanding” of the freedom from an establishment or the freedom from penalty is said to be an obstacle to ascertaining what the First Amendment meant when it guaranteed these rights. *McCreary County v. ACLU of Ky.*, 125 S. Ct. 2722 (2005). Early Americans, however, recognized that they disagreed about religious liberty, and those who had the power to shape the drafting of their constitutions therefore took care to specify the sort of religious liberty they desired. Precisely because early Americans struggled over different conceptions of their liberty and carried this struggle into their drafting of constitutions, it is possible to observe where their constitutions stood within the range of different opinions.

For these purposes, it is necessary to understand the fractures among and within religious societies and to resist the homogenization of religious societies and beliefs that is commonplace in the literature on religious liberty. For example, MacMaster and many others tend to lump different religious societies together under the rubric of “peace churches,” and although MacMaster acknowledges that Moravians and Schwenkfelders consented to pay an equivalent for military service, he suggests on limited evidence that “Quakers and Mennonites generally took” a “stand” against payment as much as against military service. MacMaster, *Neither Whig Nor Tory*, *supra* note 3, at 19. Yet this obscures some essential tensions. In particular, it clouds the differences between the Mennonites and the Quakers in 1775, and it thus fails to recognize the degree to which the controversy in 1775 was at least as much about paying as about fighting. Moreover, it glosses over the divisions within religious societies—divisions that as will be seen can shed light on the broader disputes. Indeed, not only religious societies, but even individuals could be of two minds—as when men spoke in general terms against an equivalent but were content to pay it.

from nondiscriminatory laws. Amid the diversity of the New World, popular tolerance thus moderated popular demands for equal rights, but expectations of equal rights precluded any general religious freedom from law.

In drawing constitutional conclusions, some caveats are necessary. A single controversy in Philadelphia is not by itself evidence of the model of religious liberty adopted elsewhere, and the Philadelphia evidence therefore needs to be evaluated against the background of what was happening in other parts of the country. As it happens, the evidence from other states suggests that the Philadelphia debate illustrates more general tendencies, but certainly the events in Philadelphia were distinctively dramatic.⁷ More broadly, every model of religious liberty has many possible variants, and therefore the prevalence of the model based on equal freedom under law should not obscure the details of the specific guarantees of religious liberty in each American constitution, whether state or federal. Indeed, attention to the specific guarantees in each constitution is particularly important because the more general a model of religious liberty, the more easily it can be taken to dangerous extremes. Accordingly, even while observing how Americans pursued the ideal of equal freedom under law, it is essential to note that American constitutions moderated the rigor of this model by specifying exemptions or at least leaving space for them.⁸ These caveats having been stated, it is possible to reach the constitutional points: that the particular constitutional guarantees of the freedom from penalty were variations on a broader concept of this religious liberty—a notion of equal freedom under law, regardless of one’s religion—and that the choice of this concept of religious liberty over the alternative desired by the Quakers has deep foundations in American society and its ideals of equal rights.

⁷ For more on the late eighteenth-century American rejection of a general constitutional right of religious exemption, see generally Hamburger, *A Constitutional Right*, *supra* note 3, and Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835 (2004) [hereinafter Hamburger, *More Is Less*].

⁸ Thus, in the U.S. Bill of Rights, the free exercise clause merely prohibits any penalty on religion, but the establishment clause permits at least some legislative exemptions. Although some Americans (including James Madison) had hoped for a constitutional guarantee against any law respecting, touching, or taking cognizance of religion, the First Amendment stated that Congress shall make “no law respecting an establishment of religion,” thus allowing laws respecting religion and even (as in the case of exemption statutes) favoring it, as long as they did not go so far as to respect an establishment of religion.

I. THE BEGINNING OF THE DISPUTE: EXEMPTION AND EQUIVALENT

As the contest between Britain and America began in earnest during 1775, Quakers and Revolutionaries in Philadelphia increasingly found themselves in disagreement. They took divergent views of an exemption from military service and the payment of an equivalent by those who were excused from fighting, and in the course of debating these issues, they enunciated sharply different conceptions of religious liberty.

Already two decades before the Revolution, Quakers had resolved to withdraw from politics and rely upon the goodwill of the British. After their arrival in the seventeenth century, Quakers had dominated Pennsylvania politics, and in so doing, they had often betrayed a worldliness not made more attractive by their professions of piety. The hypocrisy in which Quakers might be ensnared by political power became especially apparent, not least to themselves, in their disastrous handling of the beginnings of the French and Indian War in 1754. By conducting a war to defend the frontier, Quaker leaders drew upon themselves the reproach that they were violating their own assertions of conscience; by failing to conduct the war with the necessary vigor, and by refusing to impose war taxes upon Friends, Quaker leaders prompted more secular complaints. The Quakers understood as well as anyone the costs for both piety and policy, and they therefore reconsidered whether they could maintain their principles while acting in positions of worldly power. Changing demographics were in any case making Quaker control of the colony increasingly tenuous. Dedicated to their principles, they decided at their 1754 yearly meeting to withdraw from political activity.⁹ Of course, this is hardly to

⁹ RICHARD BAUMAN, *FOR THE REPUTATION OF TRUTH: POLITICS, RELIGION, AND CONFLICT AMONG THE PENNSYLVANIA QUAKERS, 1750–1800*, at 54–55, 70–71 (1971); JACK D. MARIETTA, *THE REFORMATION OF AMERICAN QUAKERISM, 1748–1783*, at 80–81, 121–22 (1984). In the words of one of the Quakers' apologists:

For a considerable number of years many of them were concerned with others in the legislative and executive part of civil government, wherein they manifested a firm attachment to the constitutional rights of the people; but as acting in these stations was attended with snares and temptations, it was the concern of their yearly-meeting to excite such a watchful care against deviating from their christian, peaceable principles; and at length as the inhabitants became numerous, by emigrations from Europe and otherwise, and the holding public offices was attended with greater difficulty, services being required which interfered more immediately with their religious principles, the yearly meeting advised their members to withdraw therefrom, perceiving that the seeking or accepting of offices in legislation or magistracy was dangerous, and frequently injurious to the individuals in a religious sense; more especially when fought for and accepted for the sake of the profits, emoluments and worldly honours annexed to them, tending to debase the mind to the odious bondage of ambition and avarice.

suggest that they all conformed immediately to this proscription or that they did not retain substantial influence through their wealth and their reputation for piety and industriousness. On the whole, however, they withdrew from the worldliness of politics, and instead of pursuing power, they cultivated good relations with the English and sought to secure for themselves the position they enjoyed in England—that of a specially protected minority.

A special relationship with the British, however, was of little comfort to the Quakers in the 1770s. Indeed, the Quakers' relations with the British were among the reasons they were distrusted. Quite apart from those Quakers who actively cooperated with the British, many continued to acquiesce in colonial rule—their justification being that they had a religious obligation to submit with Christian patience to the civil authority.

Revolutionaries particularly resented that most Quakers refused to join or otherwise support Pennsylvania's voluntary "association" or militia. It was bad enough that the Quakers would not participate in the association, but it therefore seemed all the more outrageous that they also declined to pay an equivalent. Although the Quaker nonassociators typically did not directly support Britain, their failure to associate or give money provoked deep suspicions among associators—suspicions hardly allayed by the knowledge that some Quakers were fighting for the Crown. Even the many Quakers whose protestations of neutrality seemed sincere appeared to the Revolutionaries to be reaping all the benefits of protection without making any of the physical or monetary sacrifices endured by their fellow citizens. The unwillingness of the Quakers to contribute to the American cause seemed all the more outrageous because of their wealth. Amid the passions of revolution and war, Quakers, Mennonites, and other pacifists found themselves at the mercy of resentful mobs of associators, who occasionally educated their fellow Americans as to the cost of ignoring their civic duties. Opposed to this sort of brutality, the Pennsylvania Assembly in June 1776 reminded the associators that "many of the good People of this Province are conscientiously scrupulous of bearing Arms" and "recommend[ed] to the Associators for the Defense of their Country, and others, that they bear a tenderly and brotherly Regard toward this Class of their Fellow-Subjects and Country-Men."¹⁰

ANTHONY BENEZET, *A SHORT ACCOUNT OF THE PEOPLE CALLED QUAKERS* 25–26 (New Bedford, Abraham Shearman 1799).

¹⁰ 6 VOTES AND PROCEEDINGS OF THE HOUSE OF REPRESENTATIVES OF THE PROVINCE OF PENNSYLVANIA 594 (Philadelphia, Henry Miller 1776) [hereinafter *PA. HOUSE JOURNAL*], also quoted in Wilbur J. Bender, *Pacifism Among the Mennonites, Amish Mennonites and Schwenkfelders of Pennsylvania to 1783*, pt. II, 1

In this tense situation, in which associators were increasingly resentful of Quakers, the Continental Congress proposed a compromise. Congress sought to ensure that the Quakers and others made contributions of some sort for their failure to serve, but it was content to allow them the illusion that such contributions were not really in support of the war. Congress proposed this compromise in July 1775 when it recommended to “the inhabitants of all the united English Colonies in North-America, that all able bodied effective men, between sixteen and fifty years of age immediately form themselves into regular companies of Militia.”¹¹ At the same time, Congress proposed that conscientious objectors be exempt from such duties, but rather than ask that objectors be required to pay an “equivalent” for military service, it suggested that they make “liberal contributions” to those who were in need as a result of the war:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.¹²

This was understood to be “protection money.”¹³ Nonetheless, if Quakers could contribute for what were euphemistically called “distressed brethren,” they and the Revolutionaries could find common ground somewhere between their different principles.¹⁴

MENNONITE Q. REV. 21, 23 (1927).

¹¹ Resolutions (July 18, 1775), in 2 JOURNALS OF THE CONTINENTAL CONGRESS 187–88 (1905) .

¹² *Id.* at 189. For this proposal and its acceptability to Quakers and Mennonites, see MacMaster, *Neither Whig Nor Tory*, *supra* note 3, at 12. See also Minutes of the Committee of Safety, July 28, 1775, in 10 COLONIAL RECORDS 293 (Harrisburg, 1852), *quoted in* Bender, *supra* note 10, at 23.

¹³ Letter from Joseph Stoll (1775), in MacMaster, *Neither Whig Nor Tory*, *supra* note 3, at 14.

¹⁴ As MacMaster puts it, “[t]he peace churches understood their contributions as charitable donations to the poor, although they were aware of ambiguities in their position.” MacMaster, *Neither Whig Nor Tory*, *supra* note 3, at 14. He quotes a letter from Jacob Stoll of the Church of the Brethren congregation at Conestoga in Lancaster County:

I have received your dear letter to me and learned from it that a demand has been made upon you to give money and I further learned from it that you would like to know how we have given our money, [whether] for “protection money” o[r] “for the needy.” Let this serve as an answer that in part it has been given for both. There seemed to be no other alternative than to give something in order to be safe, for the *fire* was too much *ignited*. Therefore, we gave our money, and told the man to whom we gave it that we were giving our money for the needy as could be seen in the newspaper of July 27.

Unfortunately for Quakers, the Revolutionaries in Philadelphia were unwilling to treat them so generously. On October 20, 1775, the Committee of the City and Liberties of Philadelphia—that is, the Committee of Safety—petitioned the Assembly to issue military regulations enforcing the Congressional proposal. Although the Committee of Safety accepted the Congressional suggestion that conscientious objectors be exempt from military service, it requested that “the Terms of Exemption” mandate the payment of an adequate equivalent:

[T]hat the Petitioners, being sensible “there are some People, who from religious Principles cannot bear Arms in any Case,” wish not to do “Violence to their Consciences,” but as by the Exertions of the Associators, the Liberty, Property and Lives of those People will be equally defended with their own, (without any Danger to the Lives, Liberty or Property of the said People) the Petitioners further pray, that the Terms of Exemption may be adequate to the Dangers, Loss of Time and Expense incurred to those who shall associate under the proposed Regulations.¹⁵

Quakers and other conscientious objectors would have to pay an open equivalent rather than enjoy the comfort of a euphemism. The next day, the Committee of the Privates of the Association of the City of Philadelphia and its Districts made an even broader demand. Resisting the privileges claimed by those with religious objections to fighting, the Privates argued that if there were to be any exemption from military service, it should be generally available:

That the Petitioners do . . . pray the Honourable House . . . to recommend to their Constituents some general Plan of a Militia Law, which shall equally extend to all the good People of this Province, and that any Indulgence which may be thought necessary to be granted by the House to any Freemen of the Province may be equally open to all, and granted on such Terms as the House may think

And as Congress had given Brother John Henrich and his traveling companion a statement . . . that the *Committee* was to use it accordingly, we therefore did as we were order and had nor further scruples as to how the Committee used it. For we gave it in good faith for the needy and the man to whom we gave it gave us a receipt stating that the money would be used for that purpose.

Id. (quoting DONALD F. DURNBAUGH, *THE BRETHREN IN COLONIAL AMERICA* 361–62 (1967)). As this quotation suggests, even when conscientious objectors avoided violence to their consciences, they could not entirely escape intimations of physical violence.

¹⁵ Petition from the Committee of the City and Liberties of Philadelphia (Oct. 20, 1775), in *PA. HOUSE JOURNAL*, *supra* note 10, at 627.

adequate to the many difficult and dangerous Services of those who are willing to hazard their Lives and Fortunes in Defense of their Country;—that this, the Petitioners are persuaded would give such general Satisfaction to those who have already associated, that they would cheerfully exert their utmost Abilities in the Service of their Country.¹⁶

Long accustomed to seeking exemptions from British monarchs, the Quakers now had to deal with privates who wanted “any Indulgence” to be “equally open to all.”

II. THE QUAKER PETITION

Fearing that the Assembly would respond to popular demands for payment of an equivalent, the Quakers at the end of October 1775 presented their own petition, in which they relied upon Pennsylvania’s constitutional guarantees of liberty of conscience.¹⁷ “It is well known,” the Quakers reminded the Assembly, “that . . . we, as a religious Society, have declared to the World that we could not for Conscience Sake bear Arms, nor be concerned in warlike Preparations, either by personal Service or by paying any Fines, Penalties or Assessments, imposed in Consideration of our Exemption from such Services.”¹⁸ On this basis, the Quakers interpreted two of Pennsylvania’s founding documents to provide a constitutional right of exemption that would have relieved Quakers from any military obligation, whether personal or financial.

The Quakers drew their constitutional arguments partly from William Penn’s “Laws Agreed to in England.” In the late seventeenth century, English law required Quakers and other religious dissenters to contribute money for the

¹⁶ Petition from the Committee of the Privates of the Association of the City of Philadelphia, and Its Districts (Oct. 21, 1775), in PA. HOUSE JOURNAL, *supra* note 10, at 627.

¹⁷ A COMMITTEE OF TEN FRIENDS, FROM THE MEETING FOR SUFFERINGS, . . . THE ADDRESS OF THE PEOPLE CALLED QUAKERS 1 (Oct. 27, 1775) [hereinafter THE ADDRESS OF THE PEOPLE CALLED QUAKERS]. The *Address* was reprinted in various Philadelphia newspapers.

The Quaker position discussed in the text here is that taken by the Society of Friends in its official documents. Of course, individual Quakers adopted many other positions about what conscience required. 2 ISAAC SHARPLESS, A HISTORY OF QUAKER GOVERNMENT IN PENNSYLVANIA: THE QUAKERS IN THE REVOLUTION 128–31, 200 (Philadelphia, T. S. Leach & Co. 1899). For rather different contemporary perspectives on the divisions among Quakers, see, for example, ISAAC GREY, A SERIOUS ADDRESS TO SUCH OF THE PEOPLE CALLED QUAKERS, . . . AS PROFESS SCRUPLES RELATIVE TO THE PRESENT GOVERNMENT 23 (2d ed. Philadelphia, Styer and Cist 1778); RULES OF DISCIPLINE AND CHRISTIAN ADVICES OF THE YEARLY MEETING OF FRIENDS FOR PENNSYLVANIA AND NEW JERSEY 132–35 (Philadelphia, Samuel Sansom, Jr. 1797).

¹⁸ THE ADDRESS OF THE PEOPLE CALLED QUAKERS, *supra* note 17.

support of the Church of England and prohibited them from meeting unless they complied with onerous conditions. In contrast, William Penn in 1682 in his “Laws Agreed upon in England” assured settlers in his new colony:

That all Persons living in the 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 wise be molested or prejudiced for their religious Persuasion, or Practice in Matters of Faith and Worship¹⁹

In 1775, the Quakers recited this seventeenth-century antidiscrimination clause and observed that it “hath ever been understood to be the fundamental Part of the Constitution of this Province from its first Settlement.”²⁰ Applying its language to their current predicament, they explained that even if written in terms of “Matters of Faith and Worship,” this guarantee “was not limited to the Acts of public Worship only, in the manner many, for Want of full Consideration, would now interpret it.”²¹

In support of their interpretation, the Quakers then quoted the religion clause of a second constitutional document, the 1701 Charter of Pennsylvania. In 1681, King Charles II gave William Penn a charter for Pennsylvania, and Penn in turn, as proprietor, issued charters for its governance, the final one being that of 1701. The preface of Penn’s charter observed that “no People can be truly happy . . . if abridged of the Freedom of their Consciences, as to their religious Profession and Worship.”²² More concretely, the Charter offered a conditional religious liberty. Most religious liberty clauses in colonial charters merely provided tolerance or a freedom from penalty, subject to the condition that a person’s religion was not a threat to civil society and its peace. The 1701 Pennsylvania religious liberty clause, however, gave not only this freedom from penalty but also a freedom from coerced support for an establishment. Moreover, the closing phrase sounded like a freedom from being required to do anything contrary to conscience.

[N]o Person or Persons . . . who shall confess and acknowledge one almighty GOD, the Creator, Upholder and Ruler of the World, and profess him or themselves obliged to live peaceably under the civil

¹⁹ *Id.* It continued, “nor shall be compelled at any Time to frequent or maintain any religious Worship, place or Ministry whatsoever.” *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 1–2.

Government, shall be in any Case molested or prejudiced in his or their Person or Estate, because of his or their conscientious *Persuasion* or *Practice*, nor be compelled to frequent or maintain any religious Worship, Place or Ministry, contrary to his or their Mind, nor to do or suffer any other Act or Thing contrary to their religious *Persuasion*.²³

Not paying attention to the initial condition, the Quakers concluded that the final phrase gave them what they wanted:

We . . . earnestly entreat you carefully to guard against any Proposal or Attempt to deprive us and others of the full Enjoyment of *Liberty of Conscience*, and that the solemn Assurance given us in the Charter, that we shall not be obliged “to do or suffer any Act or Thing contrary to our religious Persuasion,” may not be infringed.²⁴

In their internal religious language, the Quakers understood themselves to enjoy a liberty of conscience against objectionable civil laws, and they assumed they had received an assurance of this liberty in the 1701 Charter.²⁵

²³ *Id.* at 2. The 1701 Charter and other early documents are quoted from the 1775 petitions for the sake of the italics.

²⁴ *Id.* They also argued that “[t]he Power of judging respecting our Sincerity belongeth only to the Lord of our Consciences.” *Id.*

²⁵ Incidentally, the Quakers of 1775 were more persistent in asserting this liberty of conscience as a general claim than was William Penn himself. When Penn in 1705 negotiated the surrender of his proprietary interest to the Crown, he sought to ensure that the inhabitants of Pennsylvania “may have their entire Liberty of Conscience.” Letter from William Penn to Board of Trade (Jan. 2, 1705), in 4 THE PAPERS OF WILLIAM PENN, 1701–1718, at 319 (Richard S. Dunn & Mary Maples Dunn eds., 1987). Yet when asked if he was referring to anything more than what was allowed by the Toleration Act, he answered in particular rather than general terms: “I mean, not only that relating to worship, but education, or Schools, a Coercive Ministeriall maintainance [and] the Militia.” Letter from William Penn to Board of Trade (Jan. 11, 1705), *in supra* at 321.

A draft of a Schwenkfelder petition to the Committee for Berks County presented arguments similar to those of the Quakers:

That we, the said inhabitants . . . petition and remonstrate against some late resolves and doings of the last Convention of the Committee of Berks County whereby every male person between the age of sixteen and fifty-five years is, without exception and without Regard of Conscientious Scruples, obliged to take up arms . . . or be fined in such a Degree, whereby numbers of Families would be reduced to utter Ruin

If any privilege may be properly called an established privilege, the privilege of conscience is one of the foremost in the dictates of humanity and of sound reason and is indeed the foremost amongst them all, that are established and mentioned in our Province Charter, unalterable by any people or body of people whatsoever, except that six parts out of seven of the freemen of this province in general assembly met, do consent or make an alteration [I]t is declared, “That no person or persons shall be in any case molested or prejudiced . . . because of his or their conscientious persuasion or practice, nor be compelled . . . to do or suffer any act or thing contrary to their religious persuasion.”

III. THE PETITIONS OF THE REVOLUTIONARIES

The Revolutionaries in Philadelphia responded swiftly. In three petitions to the Assembly at the close of October, they challenged the Quaker understanding of religious freedom and, in particular, repudiated the Quaker interpretation of Pennsylvania's constitutional guarantees.

The first of the petitions came from the Philadelphia Committee of Safety. Two days after the Quakers presented their protest, the Committee of Safety unanimously voted that "the said Memorial should be counteracted." The next day, after a committee had prepared a draft, all sixty-six members of the Committee then present marched "two by two" in a procession to the Assembly, where they presented their petition.²⁶

The Committee of Safety argued that the Quakers were misinterpreting Pennsylvania's constitutional documents and, moreover, were taking a position that was unjust and unequal. The Committee "den[ied], that the Clause in the

In good conformity to this established charter right the wisdom of our worthy House of Assembly have lately made the following Ordinance:

"In Assembly June 30, 1775. The House . . . do hereby earnestly recommend to the Association . . . and others that they bear a tender and brotherly regard towards this class of their fellow-subjects and countrymen"

Of the same Genteel Moderation is the sense and resolution of the Continental Congress of the 18th of July, 1775, . . . by which the said, our past statute privilege is guaranteed, further confirmed and safely preserved

. . . [I]n Politicks our common duty to be watchful to preserve entire our charter and constitution, ye remonstrants cannot sufficiently express their astonishment on finding such resolves of the said convention which are in direct opposition and violation to all the above cited Charter rights and to the Recommendations both of our House of Assembly and the Continental Congress

. . .

. . . [W]e are unwilling and cannot submit Rights of civil and religious Privileges, tearing our Charters, taking our Property from us without our consent

Therefore, your Remonstrants do humbly pray and request to reconsider the aforesaid Votes, Resolves and Doings

[Christopher Schultz], A Remonstrance, *in* Bender, *supra* note 10, at 40–42. According to Bender, the draft is in Schultz's handwriting and was probably written in order to be presented and signed at a meeting of a small number of pacifist inhabitants of Berks County in 1775. *Id.* Whether it was presented is not clear. *Id.*

²⁶ For details of the preparation of the petition, its adoption and presentation, see EXTRACTS FROM THE DIARY OF CHRISTOPHER MARSHALL 49–50 (William Duane ed., Albany, Joel Munsell 1877). The drafting committee consisted of McKean, Clymer, Smith, Jones, Delany, Wilcox, and Matlack. *Id.*

Proprietary Charter, which they cite, is by them truly construed,” and it “humbly conceive[d] this will be evident not only by a due Attention to the Words themselves, and a Consideration of the Royal Charter granted to the said *William Penn*, but also from the Act of Assembly, entitled, ‘The Law concerning Liberty of Conscience.’”²⁷ In addition, the Committee rejected the Quakers’ position as unjust, accusing the Quakers of, among other things, misrepresenting their pacifism and holding opinions “unfriendly to the Liberties of *America*.”²⁸ Of particular interest for later constitutional developments in Pennsylvania, the Committee argued from the law of nature and the principle that all members of society should be equally subject to the burdens of defense:

[Y]our Petitioners beg Leave to deliver as their humble Opinion, that Self-preservation is the first Principle of Nature, and a Duty that every Man indispensably owes not only to himself, but to the supreme Director and Governor of the Universe, who gave him a Being; and that in a State of political Society and Government all Men, by their original Compact and Agreement, are obliged to unite in defending themselves and those of the same Community against such as shall attempt unlawfully to deprive them of their just Rights and Liberties;—that those who withdraw themselves from this Compact, cannot be entitled to the Protection of the Society;—that the Safety of the People is the supreme Law;—that he who receives an equal Benefit, ought to bear an equal Burthen.²⁹

The petition echoed this concern about equality in its conclusion:

[Y]our Petitioners rest assured . . . that you will do *equal* Justice to all your Constituents, and therefore they again repeat their Request, that you will not, at a Time when the united Strength of *North-America*, and the Aid of every Individual, is wanted to preserve our common Rights, exempt many of the Wealthiest among us from co-operating with their Countrymen in some Way or other, for their common Safety.³⁰

²⁷ The Petition and Remonstrance of the Committee of the City and Liberties of Philadelphia (Oct. 31, 1775), in PA. HOUSE JOURNAL, *supra* note 10, at 638.

²⁸ *Id.*

²⁹ *Id.* at 638–39.

³⁰ *Id.*

The Quaker's position would allow them to reap "all the Advantages" of the American struggle for liberty "without contributing a single Penny, and with safety to their Persons."³¹

A second response to the Quakers came from the Officers of the Military Association of the City and Liberties of Philadelphia, who made similar arguments in even sharper language. According to the Officers, the Charter language quoted by the Quakers did not provide a general exemption: "We cannot alter the Opinion we have ever held with Regard to those Parts of the Charter quoted by Addressers, that they relate only to an Exemption from any Acts of Uniformity in Worship and from paying towards the Support of other religious Establishments."³² In England, dissenters were subject to penalties on account of their dissenting beliefs, and they were obliged to provide financial support for the Church of England. The Charter gave guarantees against such inequalities, and now, rather than act on the basis of religion, the officers, in accord with the Charter, simply wanted citizens to be treated equally:

We know of no Distinctions of *Sects* when we meet our Fellow Citizens on Matters of public Concern, and ask those conscientiously scrupulous against bearing Arms, to contribute towards the Expense of our Opposition, not because of their "*religious Persuasion*, but because the general Defence of the Province demands it; therefore that Part of the Charter which relates to People not being" molested or prejudiced in their Person or Estate, on Account "of their conscientious Persuasion or Practice" is totally out of the Question, and has been held up with a View to alarm the House with groundless Apprehensions.³³

³¹ *Id.*

³² The Memorial of the Officers of the Military Association of the City and Liberties of Philadelphia (Oct. 31, 1775), *in id.* at 640.

³³ *Id.* The Officers continued:

We beg to leave to remind the Honorable House of the constant Usage of the Province, and that in all the Wars we have been engaged in, no Exemption from Fines and Taxation has been made in Favor of any Set of People; but on the contrary Laws and Ordinances have repeatedly been made, for the Purposes of Defence, laying general Imposts on the Inhabitants of the Province of all Sects and Societies.—We are however of Opinion that speculative Disputes should not now be gone into.

Id.

Conscientious persuasion or practice was not threatened by persons who made “no Distinctions of Sects when . . . meet[ing] . . . Fellow Citizens on Matters of public Concern.”

The officers not only disputed the Quakers’ misinterpretation of the Charter but also emphasized the justice of their own position by pointing to the implications of natural law for equal burdens.

The Enemy are desolating our Country and Danger daily awaits us. Our *Situation* therefore furnishes us with Arguments drawn from the Laws of *Nature* and *Reason* which transcend all local Establishments. From *these* Laws and the general Principles of civil Society it is undoubtedly certain, that all Persons who enjoy the *Benefits* should also bear their Proportion of the Burthens of the State.³⁴

Beyond this conventional analysis of benefits and burdens, the Officers ingeniously turned the rhetoric of “conscience” against the Quakers. The Officers argued “that those who *apply* Taxes, and not those whom the Exigencies of the State and the Weight of a Majority oblige to *pay* them, are answerable for the Consequences of such Application.”³⁵ In other words, legislators rather than taxpayers were morally accountable for the spending of revenue. Further, an exemption of Quakers from paying for defense would violate the liberty of conscience of the Officers:

We *conscientiously* believe that no Member of Society should be exempted from paying a reasonable Proportion of his Property towards the general Defense, though he may be exempted from actually bearing Arms; (and in such Case by paying a Fine for such Exemption, he is in a better Situation than one who risks his Life in the Service) and if the wealthy Members of the Society of Quakers are permitted to withhold their Proportion, it will in some Degree be an Invasion of *our* Liberty of Conscience by denying us the Means of so effectually making a warlike Opposition against our Oppressors, which cannot be done without Money.³⁶

Everyone’s conscience was to some extent at risk. When concluding their argument for “an *equal* and *general* Contribution . . . from all Ranks of People,” the Officers added: “[W]e fear the People will no longer submit to see

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

the public Burthen so unequally borne.”³⁷ These were the egalitarian political realities.

In a third petition, the Committee of the Privates of Philadelphia argued that a general constitutional grant of conscientious exemption could not be binding. Faced with a charter that could be interpreted to support the Quaker position, the Privates declared that a constitution’s grant of a right of exemption should be disregarded as inconsistent with the natural law of self-preservation: “[T]he great Law of Self-preservation is equally binding with the Letter of written Charters, nor can it be supposed that a People will be reasoned out of their Liberty and every Thing they hold dear by an over-nice scanning of them.”³⁸ Moreover, Penn could not have given more than the King had granted him:

William Penn, had no Right, Power or Authority to grant Privileges further than was granted to him by the Royal Charter, and that the Royal Prerogative of the King of *Great-Britain* does not comprehend any Right or Authority in the Crown to grant any Exemption from supporting the Constitution and Government to any Man or Set of men on any Pretence whatever. This is a Power unknown to the Crown, and therefore could never be granted by the King to the Worthy Proprietor who granted the Charter of Privileges.³⁹

Penn did not have greater authority than the Crown.

The Privates bolstered these arguments—based on natural law and the limited power of the Crown—by observing more generally that liberty of conscience should not be understood to undermine civil government:

Liberty of Conscience is so sacred a Thing that it ought ever to be preserved inviolate, and we will always rejoice to see any Body of Men assert their Right to it. But when, under Pretence of this Liberty the very Existence of Civil Government is struck at, we beg leave to represent that either the Liberty claimed must be given up or the Government dissolved; and this we apprehend to be the Case when any of the Members of a Community, from a claim of Religious Liberty, refuse to support the Society to which they belong, and under which they claim this very Privilege.⁴⁰

³⁷ *Id.*

³⁸ Petition of the Committee of Privates of the Association Belonging to the City of Philadelphia and Its Districts (Oct. 31, 1775), in PA. HOUSE JOURNAL, *supra* note 10, at 641.

³⁹ *Id.*

⁴⁰ *Id.*

When men refused to support their society on grounds of religious liberty, they put their government at risk.

The Privates, indeed, presented the most careful legal argument of the debate. They began their analysis of Pennsylvania's constitutional documents by noting that "as to the Thirty-fifth Section of Laws agreed upon in *England*"—which concerned molestation or prejudice on account of religious persuasion or practice—the Privates "would pass it over as a Section which we apprehend none but your Addressors [the Quakers] would apply to the present Purpose."⁴¹ The guarantee that came closest to the Quakers' purpose was that of Penn's 1701 Charter to the effect that no person "be compelled . . . *to do or suffer any other Act or Thing, contrary to their religious Persuasion.*"⁴² Yet this guarantee was subject to a condition of living quietly:

That the Clause, which they quote, never did, nor could, extend to such Exemptions on any Pretence whatever, is plain from itself, because the Persons, who have a Right to claim the Liberty granted therein, are by that very Clause made to "profess themselves obliged to live quietly under the civil Government," which cannot possibly be when they refuse to support the Measures often necessary to its very existence.⁴³

Although the Charter had stated that no person should be obliged to do anything contrary to his conscience, it had made this and its other promises of religious freedom only to persons who lived peaceably—in the language of the Privates, "quietly"—under civil government. From the intensely pious perspective of many Quakers, this condition of living peaceably or quietly under civil government was hardly an obstacle to their claims, for who if not the Quakers, were devoted to peaceable and quiet living?⁴⁴ The ideal of quiet or peaceable living, however, was open to different interpretations, and at law, peaceable conduct was that which did not amount to a criminal offense. In particular, a breach of the peace was the basic measure of the criminal

⁴¹ *Id.*

⁴² THE ADDRESS OF THE PEOPLE CALLED QUAKERS, *supra* note 17.

⁴³ Petition of the Committee of Privates (Oct. 31, 1775), in PA. HOUSE JOURNAL, *supra* note 10, at 641.

⁴⁴ Quaker writings are replete with discussions of a peaceable or quiet life and of patience, and in this context the words "patient," "peaceable," and "quiet" were almost synonymous. See, e.g., WILLIAM ROBERTSON, PHRASEOLOGIA GENERALIS 979–80, 982, 1041–43 (Cambridge, John Hayes 1681). Of course, the Christian notions of patience, peaceability, and quietness were hardly a monopoly of the Quakers and were largely derived from more ancient traditions reaching back to, among others, the Stoics. For an illustration of such ideas among other Christians, note an Anglican variant by an early seventeenth-century Bishop of Limerick. GEORGE WEBBE, THE PRACTISE OF QUIETNESS DIRECTING A CHRISTIAN HOW TO LIVE QUIETLY IN THIS TROUBLESOME WORLD (London, George Edwards 1617).

jurisdiction of the royal courts and thus was also the conventional definition of a misdemeanor.⁴⁵ Against this background, the Privates thought that the condition of living quietly under civil government was hardly met by persons who refused to serve or pay an equivalent during their government's greatest exigency.

The Privates' interpretation, that the clause in Penn's 1701 Charter did not exempt the Quakers, was supported, the Privates claimed, by the provision in the royal Charter that gave William Penn and his successors the power to "levy, muster and train all Sorts of Men" for the making of war. This provision secured by Penn from the Crown showed "evidently that the Proprietor *William Penn* never intended to grant an Exemption from paying their just Proportion." And, "[b]esides it is well known, that no such Claim of Exemption from contributing their just Proportion towards the Support of any Civil or Military Measure . . . has even been granted the Society, on account of any such Scruple of Conscience, in any Part of the *British Empire*."⁴⁶

IV. THE REJECTION OF THE QUAKER POSITION

The Pennsylvania Assembly and then the drafters of Pennsylvania's constitution gave legal force to the rejection of the Quakers' position. According to its Journal, the Assembly did not immediately address the problem of exemption once it received the anti-Quaker petitions. The Assembly was less radical than the Revolutionaries who controlled the City of Philadelphia, and it may have delayed in order to avoid harsh measures against the Quakers.⁴⁷ After a week, however, it required conscientious objectors to pay an equivalent—even if under another name.

On November 7, Mennonites and German Baptists petitioned for a liberty of conscience that would prove more attractive to the Revolutionaries than the Quakers. Unlike the Quakers, the Mennonites and German Baptists did not make so great a concession to worldly power as to rely upon the provisions of Pennsylvania's Charter. Nor, indeed, did they spell out their view on paying an equivalent. Instead, they stated in very simple language that "we are willing to pay Taxes," but "we are not at Liberty in Conscience to take up Arms to

⁴⁵ More generally, see Hamburger, *A Constitutional Right*, *supra* note 3, at 918.

⁴⁶ Petition of the Committee of Privates (Oct. 31, 1775), in PA. HOUSE JOURNAL, *supra* note 10, at 642.

⁴⁷ Wilbur Bender has argued that the Assembly "yielded from necessity" to the radical demands of the Committee of Safety, leading to a compromise not satisfactory to either side. Bender, *supra* note 10, at 25.

conquer our Enemies.” Even when the petition elaborated that “[w]e find no Freedom in giving, or doing, or assisting in any Thing by which Men’s Lives are destroyed or hurt,” it was so vague as to leave open the possibility that the Assembly could impose an equivalent in the form of a tax, provided that the proceeds were not earmarked for war.⁴⁸ Of course, some Mennonites opposed such a tax, but the Mennonites in their petition did not clearly go so far. The Mennonites apparently were divided, and their reluctance to take an unequivocal stand against an equivalent would long be remembered by the Quakers. In 1791, when Congress was considering the Militia Bill and the Quakers were lobbying for an exemption from both fighting and paying, James Pemberton urged his co-religionists to pursue their lobbying effort with particular vigor because they stood alone: It was “was the more necessary, as some other Societies who profess a testimony against War, do not object to the payment of such a fine or mulct, as the Moravians[,] Menonists, Swingfielders, & some other Inhabitants of this State.”⁴⁹

The day after the Mennonites presented their petition, the Assembly, sitting in a committee of the whole, resolved in favor of a financial equivalent from conscientious objectors:

3. That it is the Opinion of this Committee, that it be recommended to all Male white Persons within this Province, between the Ages of Sixteen and Fifty Years, who have not already associated, and are not conscientiously scrupulous of bearing Arms, to join the said Association immediately

. . .

5. That it is the Opinion of this Committee, that all Male white Persons between the ages aforesaid, capable of bearing Arms, who shall not associate for the Defence of this Province, ought to contribute an Equivalent to the Time spent by the Associators in

⁴⁸ An Address or Declaration Signed by Divers Persons in Behalf of the Societies of Mennonists and German Baptists in this Province (Nov. 7, 1775), in PA. HOUSE JOURNAL, *supra* note 10, at 645. In 1776, Mennonites and Dunkards presented a similar address to the Maryland Constitutional Convention. C. HENRY SMITH, THE MENNONITES OF AMERICA 370–72 (1909); Bender, *supra* note 10, at 24–25.

⁴⁹ Letter from James Pemberton to Moses Brown & Thomas Arnold (Jan. 19, 1791) (Rhode Island Historical Society, Moses Brown Papers—Series I, Mss 313). Mennonites for their part had reason to fear that their position would be confused with that of the Quakers. In Lancaster, the County Committee of Inspection and Observation issued a broadside regretting “that divers persons whose religious tenets forbid their forming themselves into military associations have been maltreated by some violent and ill disposed people in the county of Lancaster, notwithstanding their willingness to contribute cheerfully to the common cause otherwise than by bearing arms” Bender, *supra* note 10, at 23.

acquiring the Military Discipline, Ministers of the Gospel of all Denominations, and Servants purchased *bona fide*, and for valuable Consideration, only excepted.⁵⁰

The “conscientiously scrupulous” would not have to serve but would have to pay an “Equivalent.” Later in the month, the Assembly adopted military regulations that gave its resolutions the force of law—although probably in deference to Mennonites and some of the other German sects, the Assembly now explained that it was “*Levying Taxes on Non-Associators.*”⁵¹

The legal rejection of the Quakers’ conception of conscience did not end in November 1775. Many Revolutionaries resented a minority that had not shared power until it had little choice and that now apparently was content to reap the benefits of sacrifices made by others. To make matters worse, during the tense winter of 1776, following their defeat, some of the Quakers published rather strong expressions of sympathy for the Crown, and they thereby seemed to confirm the Revolutionaries’ worst suspicions. They published a tract, *The Ancient Testimony and Principles of the People Called Quakers*, in which they recited the benefits of “our dependence on, and connection with, the kings and government” of Britain and urged Quakers “to guard against every attempt to alter, or subvert that dependence and connection.”⁵² They also directly attacked the Revolutionaries:

May we . . . unite in the abhorrence of all such writings, and measures as evidence a desire and design to break off the happy

⁵⁰ Resolutions (Nov. 8, 1775), in PA. HOUSE JOURNAL, *supra* note 10, at 646.

⁵¹ Resolutions Directing the Mode of Levying Taxes on Non-Associators in Pennsylvania (Nov. 25, 1775), in PA. HOUSE JOURNAL, *supra* note 10, at 660. Tellingly, when the Assembly adopted regulations for the Military Association, it required: “All National Distinctions in Dress or Name to be avoided, it being proper that we should now be united in this General Association for defending our Liberties and Properties, under the sole Denomination of *Americans.*” Rules and Regulations for the Better Government of the Military Association in Pennsylvania (Nov. 25, 1775), in PA. HOUSE JOURNAL, *supra* note 10, at 656.

Of course, some associators complained that the taxes were not high enough, and others wanted “all Persons alledging Scruples of Conscience” to take “a Test by Oath or Affirmation” to prove they were not “Pretenders.” Petition of . . . Field-Officers in the Several Battalions in Berks County, in Behalf of Said Battalions (Feb. 23, 1776), in PA. HOUSE JOURNAL, *supra* note 10, at 699; The Petition of the Privates of the Military Association of the City and Liberties of Philadelphia (Feb. 23, 1776), in PA. HOUSE JOURNAL, *supra* note 10, at 673. The Assembly eventually raised the tax on non-Associators, but not to the extent that could have satisfied all Revolutionaries. Resolutions Directing the Mode of Levying Taxes on Non-Associators (April 5, 1776), in PA. HOUSE JOURNAL, *supra* note 10, at 713.

⁵² THE ANCIENT TESTIMONY AND PRINCIPLES OF THE PEOPLE CALLED QUAKERS, RENEWED, WITH RESPECT TO THE KING AND GOVERNMENT; AND TOUCHING THE COMMOTIONS NOW PREVAILING 3 (1776). The pamphlet was “Signed in and on behalf of a meeting of the Representatives of our Religious Society, in Pennsylvania and New-Jersey; held at Philadelphia, the 20th day of the first month, 1776. John Pemberton, Clerk.” *Id.* at 4.

connection we have heretofore enjoyed, with the kingdom of Great Britain, and our just and necessary subordination to the king, and those who are lawfully placed in authority under him⁵³

In response, Thomas Paine in February 1776 added a scathing address to the Quakers at the end of his *Common Sense*. After arguing that the Quakers should not mix religion with politics, Paine summarized his objections to the Quaker publication:

[I]t hath a tendency to undo that continental harmony and friendship which yourselves by your late liberal charitable donations hath lent a hand to establish; and the preservation of which, is of the utmost consequence to us all.

And here without anger or resentment I bid you farewell. Sincerely wishing, that as men and christians, ye may always fully and uninterruptedly enjoy every civil and religious right; and be, in your turn, the means of securing it to others; but that the example which ye have unwisely set, of mingling religion with politics, *may be disavowed and reprobated by every inhabitant of AMERICA*.⁵⁴

Revolutionaries frequently mixed religion and politics, but they abhorred religious support for British oppression and religious protests against the duty that secured every civil and religious right.

During the following summer, the Revolutionaries wrote the new Constitution of Pennsylvania, and they used it to remove any possible doubt as to the rights of Quakers. Article II of the Declaration of Rights stated:

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, that shall in any case interfere with, or in any manner controul, the right of conscience in the free exercise of religious worship.⁵⁵

⁵³ *Id.*

⁵⁴ THOMAS PAINE, *To the Representatives of the . . . Quakers*, in COMMON SENSE app. H (Feb. 14, 1776). For more on the *Ancient Testimony* and Paine's response, see MEKEEL, *supra* note 3, at 158–60.

⁵⁵ PA. CONST. of 1776, Decl. of Rights, art. II.

This new language largely followed the colonial Charter, but it also clarified the freedom guaranteed—a pair of changes being particularly significant. On the one hand, the Constitution dropped the Charter’s words that had conditioned religious freedom on a profession of peaceableness. On the other hand, whereas the Charter had loosely promised that no one “be compelled . . . to do or suffer any other Act or Thing contrary to their religious Persuasion,” the Constitution now limited this to worship: It declared “a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understanding,” and it protected “the right of conscience in the free exercise of religious worship.” Like other liberal guarantees of religious liberty, this provision of the Pennsylvania Constitution avoided expansive language that might allow religion to threaten civil government, and by tightening the definition of the right, it could remove the offensive condition on access to it.⁵⁶

Even while denying the Quakers’ claim of a general constitutional right of exemption, the drafters of Pennsylvania’s new constitution, like the Officers and the Committee of Safety, were neither so lacking in sympathy nor so impolitic as to threaten Quakers with military service. Yet in conformity with both their political principles and their government’s financial needs, the drafters insisted on an equivalent. In Article VIII of the Declaration of Rights, the drafters constitutionalized this combination of an exemption from service and an equivalent payment:

That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion towards the expence of that protection, and yield his personal service when necessary, or an equivalent thereto: But no part of a man’s property can be justly taken . . . without his own consent, or that of his legal representatives: Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent⁵⁷

⁵⁶ For other constitutions that similarly combined tightened definitions and unconditional access, see Hamburger, *A Constitutional Right*, *supra* note 7, at 923–24; Hamburger, *More Is Less*, *supra* note 7, at 848–57.

⁵⁷ PA. CONST. of 1776, Declaration of Rights, art. VIII. Later, in attempting to persuade Quakers to give up their view of conscience, Isaac Grey echoed some of the sentiments apparent in the 1775 petitions against exemptions and in the 1776 Pennsylvania Constitution: “[I]f we receive advantage from civil government, we ought to bear our part of the charge of maintaining it, or else have no recourse to it in any case whatever.” GREY, *supra* note 17, at 22.

It is difficult to evaluate the total amount of equivalents paid by Quakers in Pennsylvania or the total amount of fines paid by them for their various failures to conform to law. In 1790, Elias Boudinot stated:

With language reminiscent of the anti-Quaker petitions, this clause of the Constitution adopted the tolerant, but not entirely accommodating position of the Officers and the Committee of Safety.

The Constitution, however, did not stop with demanding payment of an equivalent, for it also included voter qualifications that tended to exclude Quakers. Men who failed to pay their taxes could not vote.⁵⁸ Those who refused to swear or affirm allegiance to the Constitution could not sit in the House of Representatives.⁵⁹ In general, these were not unusual or distinctly harsh measures, but against many Quakers, they amounted to disenfranchisement.

V. QUAKERS' RECOGNITION OF DEFEAT

Quakers recognized their defeat and turned from constitutional argument to religious resistance.⁶⁰ Late in 1776, the annual *Epistle* of the Philadelphia Meeting on Sufferings urged Quakers:

Thus we may with Christian firmness and fortitude withstand and refuse to submit to the arbitrary injunctions and ordinances of men, who assume to themselves the power of compelling others, either in person or by other assistance, to join in carrying on war, and of prescribing modes of determining concerning our religious principles, by imposing tests not warranted by the precepts of Christ, *or the laws of the happy constitution, under which we and others long enjoyed tranquility and peace.*⁶¹

I have taken some trouble in examining into their situation here during the late war; and find, that, from March 1777, till April 1783, they paid, in the city of Philadelphia alone, fines to the amount of £.864,262, Pennsylvania currency, in continental money, £.1,551 state money, and £.682 in specie. In the county of Bucks, they paid £.443,404, continental money; £.612 state money, and £.2,497 hard money.

H.R. (DEC. 23, 1790), *as reported in DUNLAP'S AMERICAN DAILY ADVERTISER* (Jan. 4, 1791), in 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 169 (1995).

⁵⁸ PA. CONST. OF 1776, § 6.

⁵⁹ *Id.* § 10.

⁶⁰ SHARPLESS, *supra* note 17, at 142-43.

⁶¹ AN EPISTLE FROM THE MEETING FOR SUFFERINGS, OF THE PEOPLE CALLED QUAKERS, HELD AT PHILADELPHIA, FOR PENNSYLVANIA AND NEW JERSEY, TO OUR FRIENDS AND BRETHREN IN RELIGIOUS PROFESSION, IN THESE AND THE ADJACENT PROVINCES (Dec. 20, 1776). For another printing, see TO OUR FRIENDS AND BRETHREN IN RELIGIOUS PROFESSION, IN THESE AND THE ADJACENT PROVINCES (Dec. 20, 1776).

When this Epistle and others came under criticism for questioning the Revolutionaries and their Constitution, at least some Quakers offered a secular defense of Penn's charter:

“The happy Constitution under which we and others long enjoyed Tranquility and Peace” are Words which we understand have given offence to some of those who have been engaged in forming a new one—they have thought it derogatory to their Skill as Legislators that such a Work which they had rejected should be spoken of with so much Respect—But we who have known the Happiness enjoy'd in Pennsylvania under the mild Administration of so wholesome a Form of Government cannot but express our Regret that it was so little esteemed as to be wholly set at naught.⁶²

These Quakers also argued that “as soon as” the Charter “was overturned and a new Form introduced, a Spirit of Persecution was rais'd, that threatened our Society, the Descendents of the first Settlers, with the Loss of Religious Liberty which their Ancestors had purchased at so dear a Rate & transmitted to them as an unalienable Inheritance.” Indeed, the new government “actually began to hold Cognisance over our Consciences.”⁶³ This was not, however, the sort of argument likely to persuade men who had just adopted a constitution that protected equal religious liberty and that even exempted conscientious objectors from bearing arms if they would pay an equivalent.

The Quakers came to understand the futility of protesting this equality and, retreating into their faith, they advised their brethren to respond to the Revolutionaries in a manner consistent with Quaker traditions. For example, at the close of 1776, the Yearly Meeting urged Christian patience:

[I]f after a long time of enjoying the fruits of their labors and partaking of the blessings of peace and plenty we should be restrained or deprived of some of our rights and privileges, let us carefully guard against being drawn into the vindication of them, and seeking redress by any measures which are not consistent with our religious profession and principles nor with the Christian patience manifested by our ancestors in such times of trial.⁶⁴

⁶² *Observations on the Charges Contained in Several Resolves of Congress, Against the Society of People Called Quakers*, in *A Bundle of Papers of Addressed to Robert Pleasants*, 3 PLEASANTS TRANSCRIPTS 38 (2d pagination series) Valentine Museum, Richmond.

⁶³ *Id.* at 39.

⁶⁴ General Advices of Yearly Meeting for 1776, *quoted in* SHARPLESS, *supra* note 17, at 141. Similarly, in a 1778 address relating to education, Quakers discussed the old charter, at least as a measure of what government ought to do. *Id.* at 181.

When constitutional argument failed, a people unwilling to fight had little choice but patience.⁶⁵

In the years that followed, the Quakers of Pennsylvania would need much patience, for the Revolutionaries were not entirely convinced that the Quakers were quiescent. The complaints of Quakers that they had been deprived of their rights, their ambiguous neutrality, and their failure to contribute even their wealth to the American cause provoked the deepest suspicions. When the Philadelphia Revolutionaries in 1777 became panicked that Quakers were cooperating with the enemy, they seized some leading Quakers and their families and sent them to be imprisoned at a safe distance in Winchester, Virginia.⁶⁶ More typically, Quakers were fined for failing to pay taxes or equivalents, and substantial numbers had their property sold to pay the various sums they would not willingly turn over to the authorities. These fines and sales were but some of the tribulations Quakers would suffer for holding to religious principles not entirely satisfied by the equality under law that was the model of religious liberty in the new nation.

VI. THE FREE QUAKERS

To this account of the constitutional debate between Quakers and Revolutionaries in 1775 and 1776, an ironic epilogue must be added. Although the focus here has been on the dispute between the Quakers and the Revolutionaries, each group suffered from its own, internal quarrels, and one

⁶⁵ At least one prominent, if schismatic, Mennonite, Christian Funk, optimistically interpreted the new Constitution as confirming old rights. Although first inclined to support the English, he had doubts after reading the new Pennsylvania Constitution: “[I]t caused much reflection in me that we should despise the government that offered us the like liberty, which Wm. Penn had guaranteed to our fathers in Europe Our ministers and elders, however, still considered Congress as rebels.” CHRISTIAN FUNK, A MIRROR FOR ALL MANKIND 9 (1814), *quoted in* Bender, *supra* note 10, at 25. Funk eventually sought a neutral position. *Id.*

⁶⁶ For other false accusations against the Quakers, see the explanation of the so-called “Spanktown” affair in A SHORT VINDICATION OF THE RELIGIOUS SOCIETY CALLED QUAKERS 3–4 (Philadelphia, Joseph Crukshank 1780). Perhaps the most severe measure contemplated against the Quakers was that proposed by General Lacey:

While the British were in the city [of Philadelphia], an American order was issued to prevent the attendance of Friends at the Yearly Meeting, on the plea that these meetings were centres of plotting against the government [E]ven Washington seemed to have entertained some suspicion. General Lacey, to whom the orders were given, passed them on with the injunction “to fire into those who refused to stop when hailed, and leave their dead bodies lying in the road.”

SHARPLESS, *supra* note 17, at 183.

of these internal divisions, between pacifist Quakers and the so-called “Free Quakers,” curiously echoed the debate between the Quakers and the Revolutionaries.⁶⁷ The Free Quakers supported the Revolution, and they therefore were disowned by the main body of the Quakers, the Society of Friends. In response, the Free Quakers complained that they had been excluded from the Society of Friends in violation of their right of conscience: “This separation has not been sought by, but forced upon us,” by churches that were “vainly attempting to abridge the rights of conscience,” and it appeared that “they will not permit, among them, that Christian liberty of sentiment and conduct which all are entitled to enjoy, and which we cannot consent to part with.”⁶⁸ Notwithstanding that they sought freedom from the rules of a voluntary religious society rather than from the laws of a civil society, the Free Quakers felt justified in “appealing to that divine principle breathed by the breath of God into the hearts of all, to leave every man to think and judge for himself.”⁶⁹ What Quakers had argued against the civil government, the Free Quakers, with less justification, now pressed against their religious society.

The Quakers responded with language not unlike that recently used against them: “[F]reedom of enquiry is allowed, and liberty of action is allowed, so far as can be consistent with the nature and peace of society, which cannot be properly supported, if its members are suffered to live in the breach of its rules and orders, without any animadversion.”⁷⁰ In rejecting members of their

⁶⁷ Quakers disagreed among themselves on many issues, including not only whether they should fight the British but also whether they should pay bills of credit issued to support the war. SHARPLESS, *supra* note 17, at 129–30.

⁶⁸ SOCIETY OF FRIENDS, PHILADELPHIA MEETING, AN ADDRESS TO THOSE OF THE PEOPLE CALLED QUAKERS, WHO HAVE BEEN DISOWNED FOR MATTERS RELIGIOUS OR CIVIL (Apr. 24, 1781).

⁶⁹ *Id.* In addition to this traditional argument about conscience, however, the Free Quakers employed arguments reminiscent of some of the anti-Quaker petitions of their Revolutionary compatriots: “The Creator of man,” the Free Quakers wrote, “has, in the present great revolution, thus far established among us governments under which no man, who acknowledges the being of a God, can be abridged of any civil right on account of his religious sentiments.” *The Discipline of the Society of Friends, by Some Styled the Free Quakers* (Aug. 8, 1781), in SOCIETY OF FRIENDS, PHILADELPHIA MEETING FOR BUSINESS (1781). They also wrote:

But governments established upon those liberal, just, and truly christian principles, and wisely confined to the great objects of ascertaining and defending civil rights, in avoiding the possibility of wounding the conscience of any, must unavoidably leave some cases unprovided for, which come properly under the care of religious societies. Hence we are not only left at liberty to act agreeably to our sentiments; but the necessity and obligation of establishing and supporting religious societies, are increased and strengthened.

Id.

⁷⁰ TO THE GENERAL ASSEMBLY OF PENNSYLVANIA: AN ADDRESS AND MEMORIAL ON BEHALF OF THE PEOPLE CALLED QUAKERS (Jan. 18, 1782). Incidentally, this address quoted John Locke:

Society who participated in the War, the Quakers ended up adopting the arguments of the larger society. Like a civil society, a religious society needed its members to adhere to its rules.

CONCLUSION

The Quakers failed to establish their interpretation of William Penn's Charter or otherwise to protect what they understood to be their general "liberty of conscience." Indeed, they provoked Pennsylvania's Revolutionaries to clarify in the 1776 Constitution that the right of conscience extended only to "the free exercise of religious worship." The Revolutionaries thus bluntly repudiated the Quakers' expectation of a general constitutional right of conscience, and this rejection was echoed, ironically, by the Quakers themselves.

For the history of religious liberty, the dispute in Philadelphia reveals how the American Revolution and its ideals of equality sharpened the differentiation between two ideals of religious liberty: on the one hand, an equal freedom under law, regardless of religion; on the other, a freedom from law precisely on account of one's religion. Although the men who drafted constitutions in other states faced similar choices, the Philadelphia controversy remains the most striking illustration of how the Revolution and its egalitarianism clarified this conceptual divide.

For constitutional law, the Philadelphia controversy provides some of the missing historical background to claims of a constitutional right of religious exemption. In particular, it illuminates the concept of freedom from penalty on religion and the depth of its social and political context. Disagreements about a freedom from law became public in Philadelphia, because it was there that Quakers were sufficiently accustomed to political influence that they imagined they could prevail. Yet, whereas Quakers in England could plead for exemptions with the gentry, aristocrats, and even monarchs, in Philadelphia they had to justify themselves to privates. Their confrontation with

As no man is bound to any church against his particular conscience, neither is any church bound to any man against that rule and order established therein, according to its collective conscience. I hold that no church is bound by the duty of toleration, to retain any such person in her bosom

Id. The Quakers then continued: "Liberty of conscience, is every man's undoubted right, and no less the right of every religious society . . ." *Id.*

Revolutionaries in Philadelphia was only the most prominent and poignant instance of how the Quaker ideal of a general freedom from objectionable laws increasingly collided with the new nation's developing social realities and political ideals. Americans were religiously diverse, they hoped for equal freedom, and many resented a minority that simultaneously demanded special privileges and refused shared duties. In this context, Philadelphians and other Americans tended to deny that anyone had a general freedom from law on account of his religion. Instead, they sought variants of another ideal—an equal freedom under law, regardless of religious differences.

