AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 4: The Early National Era—Individual Rights/Religion/Free Exercise/Exemptions for Religious Believers

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People v. Phillips, N.Y.Ct. Gen. Sess. (NY 1813)[1]

Daniel Philips was indicted for receiving stolen goods. While being interrogated, Phillips revealed that he had spoken with a priest, the Reverend Anthony Kohlmann. The grand jury subpoenaed Reverend Kolmann, but he refused to testify either to the grand jury or when Phillips was tried. The trial court adjourned the proceedings before a verdict was reached so a ruling could be obtained on whether the prosecutor, consistent with the free exercise clause in the state constitution, could compel a priest to reveal what was said in confession.

Phillips *is the only known judicial decision handed down during the early national period in which a judge ruled that the free exercise clause required that the state grant some person an exemption from an otherwise valid law. State laws routinely require persons who have evidence of wrongdoing to reveal their knowledge to authorities. If you tell your roommate that you have robbed the local bank, your roommate may be forced to reveal this conversation before a grand jury. In* Phillips, *New York City Mayor DeWitt Clinton (presiding over the court of general sessions) demanded "clear" proof that requiring priests to reveal confessions was in the public interest. How* Phillips *fits into the general jurisprudence of the early nineteenth century is controversial. The decision may be* sui generis. *Every other known judicial decision on religious exemptions concluded that religious believers had to follow the state law. Still, state courts before the Civil War handed down few judicial decisions on free exercise. For this reason, you should be careful before concluding that* Phillips *was an eccentric exception to the general rule that the free exercise clause did not grant religious believers exemptions from otherwise valid laws. The facts of Phillips may have influenced the decision. Mayor Clinton concluded that confession is a beneficial practice. He did not believe the free exercise clause prohibited laws banning persons from being naked when worshipping God. What is the basis of this distinction? How would Mayor Clinton decide such modern issues as whether persons can use certain drugs during religious services?*

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MAYOR CLINTON

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Religion is an affair between God and man, and not between man and man. The laws which regulate it must emanate from the Supreme Being, not from human institutions. Established religions, deriving their authority from man, oppressing other denominations, prescribing creeds of orthodoxy, and punishing nonconformity, are repugnant to the first principles of civil and political liberty, and in direct collision with the divine spirit of Christianity. Although no human legislator has a right to meddle with religion, yet the history of the world, is a history of oppression and tyranny over the consciences of men. And the sages who formed our constitution, with this instructive lesson before their eyes, perceived the indispensable necessity of applying a preventive, that would forever exclude the introduction of calamities, that have deluged the world with tears and with blood.

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[1] The case is reported in William Sampson, *The Catholic Question in America: Whether a Roman Catholic Clergyman Can Be in Any Case Compellable to Disclose the Secrets of Auricular Confession* (photo. Reprint 1974) (New York: Edward Gillespy, 1813).

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It is essential to the free exercise of a religion that its ordinances should be administered—that its ceremonies as well as its essentials should be protected. The sacraments of a religion are its most important elements. We have but two in the Protestant Church—Baptism and the Lord's Supper—and they are considered the seals of the covenant of grace. Suppose that a decision of this court, or a law of the state should prevent the administration of one or both of these sacraments, would not the constitution be violated, and the freedom of religion be infringed? . . . Will not the same result follow, if we deprive the Roman catholic of one of his ordinances? Secrecy is of the essence of penance. . . . To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman catholic religion would be thus annihilated.

It has been contended that the provision of the constitution which speaks of practices inconsistent with the peace or safety of the state, excludes this case from the protection of the constitution. . . . In order to sustain this position, it must be clearly made out that the concealment observed in the sacrament of penance, is a practice inconsistent with the peace or safety of the state.

. . . [W]e are yet to learn, that the confession of sins has ever been considered as of pernicious tendency . . . or its having been sometimes in the hands of bad men, perverted to the purposes of peculation, an abuse inseparable from all human agencies.

The doctrine contended for, by putting hypothetical cases, in which the concealment of a crime communicated in penance, might have a pernicious effect, is founded on false reasoning, if not on false assumptions: to attempt to establish a general rule, or to lay down a general proposition from accidental circumstances, which occur but rarely, or from extreme cases, which may sometimes happen in the infinite variety of human actions, is totally repugnant to the rules of logic and the maxims of law. The question is not, whether penance may sometimes communicate the existence of an offence to a priest, which he is bound by his religion to conceal, and the concealment of which, may be a public injury, but whether the natural tendency of it is to produce practices inconsistent with the public safety or tranquility. There is in fact, no secret known to the priest, which would be communicated otherwise, than by confession—and no evil results from this communication—on the contrary, it may be made the instrument of great good. The sinner may be admonished and converted from the evil of his ways: Whereas if his offence was locked up in his own bosom, there would be no friendly voice to recall him from his sins, and no paternal hand to point out to him the road to virtue.

The language of the constitution is emphatic and striking, it speaks of *acts of licentiousness,* of *practices inconsistent* with the *tranquility and safety of the state;* it has reference to something actually, not negatively injurious. To acts committed, not to acts of omitted. . . . [The constitution cannot] possible contemplate the forbearance of a Roman catholic priest, to testify what he has received in confession, or that it could ever consider the safety of the community involved in this question. . . .

If a religious sect should rise up and violate the decencies of life, by practicing their religious rites, in a state of nakedness; by following incest, and a community of wives. If the Hindu should attempt to introduce the burning of widows on the funeral piles . . . then the licentious acts and dangerous practices, contemplated by the constitution, would exist, and the hand of the magistrate would be rightfully raised to chastise the guilty agents.

But until men under the pretence of religion, act counter to the fundamental principles of morality, and endanger the well being of the state, they are to be protected in the free exercise of their religion. If they are in error, they are to answer to the *Supreme Being*, not to the unhallowed intrusion of frail fallible mortals.

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