


A SIBLING RIVALRY: ENLIGHTENMENT PHILOSOPHIES
AND RELIGIOUS LIBERTY

By Annemarie Conway

Presented to the Liberal Studies Faculty
At the University of Michigan-Flint
In partial fulfillment of the requirements for the
Master of Arts in Liberal Studies
in
American Culture

August 15, 2020

First Reader _____  _____
Name
Name


Second Reader _____  _____
Name
Name

TABLE OF CONTENTS

I.	INTRODUCTION.....	3
II.	A BALANCING ACT.....	7
	Two Competing Founding Narratives.....	7
	Sibling Religious Liberty.....	9
	Sibling Enlightenment.....	16
	All Men are [not] Endowed by Their Creator with Certain Unalienable Rights.....	19
	Tying it Back to <i>Masterpiece Cakeshop</i>	20
III.	AGAINST THE BACKDROP OF THE FOUNDING.....	22
	The Founding.....	22
	Three Constitutional Compromises.....	27
	The Expansion of Federal Power.....	30
	The One-Two Knockout Punch.....	32
IV.	RELEVANT SUPREME COURT DECISIONS SINCE 1940.....	38
	On Religious Freedom.....	38
	The Founding and the Diversity of Opinions.....	41
	Generally Applicable and Neutrally Applied; Don't Muddy the Waters...42	
	Speech Versus Free Exercise, not the Same Thing.....	48
	Religious Exemptions.....	49
V.	REFERENCES.....	52

CHAPTER I

INTRODUCTION

“Sometimes small gestures can have unexpected consequences” (Gorsuch, 2020). On June 15, 2020, the United States Supreme Court handed down in the *Bostock* case a landmark victory for the LGBTQ+ community. In a stunning 6 – 3 majority decision, the Supreme Court, led by Justice Neil Gorsuch, upheld transgender and homosexual workplace rights using Title VII of the Civil Rights Act of 1964. In a majority opinion that elated liberal activist groups and distressed conservatives, Justice Gorsuch bluntly stated that the authors of the Civil Rights Act could not have known the extent to which their statute would reach today, but the text is straightforward, their intent clear. “Only the written word is the law, and all persons are entitled to its benefit” (Gorsuch, 2020). To say that conservatives were upset is an understatement. Evangelicals and conservative Christians alike, those who yearn for traditional family values and structures, all saw in President Trump’s judicial appointments a new era in Supreme Court jurisprudence that would guarantee their values are upheld for at least a generation. However, to their dismay, Justice Gorsuch upheld transgender and gay rights in the workplace and brought Chief Justice Roberts with him. In the aftermath, legal pundits and jurist journalists found themselves in a guessing frenzy analyzing his rationale: some suggesting it’s the influence of his time spent as a Justice Kennedy law clerk, others mentioning the influence of his liberal Colorado church teachings, others criticizing his use of textualism and scoffing at his interpretation of “sex,” and still others expressing concerns that Gorsuch’s path will parallel that of the former Chief Justice Earl Warren – who significantly drifted from the tact Eisenhower

assumed he would take (Shear, 2020). However, when looking more comprehensively at Justice Gorsuch's time on the bench and the votes he has cast and opinions he has written, as well as the pattern established in the case decisions handed down since his arrival, there exists a different, curious line of reasoning that lays just beyond the obvious.

In October 2017, the Court heard an anti-discrimination case out of Colorado called *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018), wherein six justices decided to remand the case back to the lower court as they determined that the Commission had treated the cakeshop owner's religious conviction in a non-neutral manner, in violation of Colorado's public accommodations statute. What is fascinating about the *Cakeshop* decision is that though six justices joined the majority opinion, many submitted their own concurrence. Justice Gorsuch wrote one of these concurrences. In it he argued that wedding cakes for heterosexual and homosexual couples exist; or that, more specifically, marriage is a religious event, a covenant that a religious individual believes in deeply, and if his deeply held religious beliefs forbid him from designing an artistic homosexual cake, his religious belief must be upheld. Gorsuch's *Masterpiece* concurrence is a far cry from his highly lauded Civil Rights Act, Title VII adherence. Did Justice Gorsuch rethink his position on homosexual rights in the two-year span before coming to the realization of the need to uphold anti-discriminatory protections for the LGBTQ+ community, or is he slowly building a legal-ease distinction between secular and religious protections of homosexuals to balance the baker's religious minority status with the minority status of LGBTQ+? Is Gorsuch laying the groundwork for a religious deference test in public accommodations laws? How exquisite would it be for conservatives if he could make a legal distinction for the protection of homosexuals in the workforce as productive members of a community and for the baker to refuse to serve a homosexual couple in the covenant of marriage

and raising families? The latter does not fit into the Evangelical/Christian conservative Biblical world, but can he make it okay for bakers and others in the marketplace deny service in the legal world too?

If this supposition is even slightly accurate, Justice Gorsuch is playing with fire. If one could bend Gorsuch's ear for just a moment, it would be good to remind him of Justice Kagan's opinion in the *Masterpiece Cakeshop* case. She upheld the dignity that religious beliefs must receive in our country, however, she also spelled out that an anti-discrimination standard exists and that standard has withstood the test of time concerning its neutrality, generally applicable, and viability elements. Justice Ginsburg spelled it out quite clearly in her dissent. In the *Cakeshop* decision, the Colorado Civil Rights Division was accused of treating a religiously conservative baker who refused to make a gay couple a wedding cake differently from another baker who refused to bake a cake with an anti-gay marriage message written on the cake. "Ginsburg explains: 'Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display. The distinction between a refusal based on offensive messaging and "hateful rhetoric" and one based on identity isn't small, according to the dissenters'" (Livni, 2018). The baker who refused to serve the gay couple is no different from the white diner owner who refused to serve African Americans. The gay couple is asking for the same product a heterosexual couple wants. Yet, Justice Gorsuch is attempting to construct religious right protections in the marketplace by allowing an individual to refuse to act in violation of his or her faith. He is renegotiating religion's role in our society. As Linda Greenhouse of the *New York Times* submitted in her July 16, 2020 op ed regarding the

results of the 2020 Supreme Court term: “[r]eligion got a place at the public table long reserved for secular society.” However, there is a big difference between public accommodations, establishment, and free exercise. Perhaps Justices Gorsuch and Roberts should pause and review American history from colonial times to the present. Even though the nation was dubbed the “great American experiment” with Enlightenment philosophies embedded in the foundational documents, and religious liberty thrived in different colonies, Americans share a deeply scandalous past and not so honored present when it comes to overt discrimination. This is why Justice Kagan’s *Masterpiece Cakeshop* concurrence, with its adherence to Scalia’s majority opinion in *Smith*, and Justices Ginsburg’s and Sotomayor’s *Masterpiece Cakeshop* dissent regarding the balance between religious rights and public accommodations must remain settled law; its precedent has been established and now it must be applied. Given the country’s profound disregard for equality at the hands of Enlightenment thinkers and religious liberty advocates alike, anti-discriminatory statutes like public accommodations must prevail in Supreme Court decisions – otherwise, as Scalia’s opinion surmised, this “unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of ... laws against ... religious beliefs.” (*Smith*, 1990). The sibling rivalry must be balanced.

CHAPTER II

A BALANCING ACT

Two Competing Founding Narratives

It is in the diversity of individual ideas and beliefs that America thrives – a fragrant jambalaya of norms, values, beliefs, mores, and traditions stirred together that represents both freedoms and challenges for civil society. From the nation’s earliest settlers to the present, the push and pull of individual liberties clashed and still continue to clash. The most predominant of these early disputes in the New England colonies were religious, as John Winthrop, William Penn, Roger Williams, and others formed new societies under the auspices of religious freedom in an effort to escape an intolerant homeland. In the Chesapeake colonies, the early generations endured significant struggle as the quest for wealth, non-existent social structures, and high mortality rates made life difficult and set the stage for slavery’s rise (Greene, 1988). Religion in the New England colonies proved a double-edged sword as Henry Louis Gates reminds us, “[i]t shows the extraordinary power of ideas to take hold of people’s minds and drove them to commit acts of great sacrifice and love on the one hand, but also acts of tremendous barbarity and hatred on the other. It’s the double edge [sic] sword of religious belief.” As is evidenced by history, enmeshed in centuries of religion-based discrimination, he was right. For the Chesapeake colonies, religion’s hold, though it arrived later in the colonies’ development and was mostly procedural, also propped up the master/slave way of life that was abolished in Great Britain and France at this time. Virginia and the other colonies turned predominantly into slave states in the early 18th century as slavery became more financially advantageous than indentured servitude (Greene, 1988).

Since the first colonies' development, the question of religion's role in society and law has always surfaced. Throughout the colonies' history and that of the nation, the balancing of diverse individual liberties has been an issue, and it still is today. As portions of the Bill of Rights have been applied to the states, the Supreme Court has decided numerous cases to guide legislatures and lower courts when writing and interpreting laws, and the realm of religious establishment and free exercise is no exception to the Court's attention. The First Amendment's Establishment and Free Exercise Clauses have been tested time and again. Public accommodations and religion were tested in *Masterpiece Cakeshop v. Colorado Civil Rights Commission* (2018). With the string of abortion, gay rights, and religious liberty cases that the Court has heard from 2017 – 2020, it would seem the conservative justices might be trying to renegotiate religion's role in the society. From what Justices Gorsuch and Roberts signaled, the separation of church from state dollars – typically seen as a violation of the Establishment Clause – is no longer a given (*Espinosa* in 2020 and *Trinity Lutheran* in 2017). The *Lemon* test (secular purpose, neither promoting or hindering religion, and no significant government entanglement) is no longer settled law (*Lemon*, 1971). With *Masterpiece Cakeshop* (2018), the conservative justices chipped away at Scalia's majority opinion in *Smith v. Employment Division* (1990) that upheld the public accommodations portion of the 1964 Civil Rights Act. However, Justice Kagan, in *Masterpiece Cakeshop*, applied Scalia's *Smith* precedent and upheld the statute that maintains the balance between religion's rights and equality. Justice Kagan's concurrence proves that diverse ideals can be treated fairly in the modern setting, contrary to the concurrence of Justice Gorsuch. The tension produced in the *Masterpiece Cakeshop* opinions mirrors the tension between the Enlightenment philosophies and principles of religious freedom that have clashed since the New England and Chesapeake founding.

The American genetic code is a combination of Enlightenment values and a desire for religious freedom; they are two competing narratives of the nation's birth that fuel ongoing historical debate regarding original intent, among other things. The Enlightenment narrative is a secular story tied to the Founding Fathers and European political philosophy. It is reflected in Founding documents such as the *United States Constitution* and *Declaration of Independence*. The religious freedom narrative expresses a quest for religious liberty and spiritual revival realized (LaCorne, 2011). Of course, amongst historians there exists serious sparring, fact checking, and academic brawling between the two schools of thought. Yet, just like siblings around the holiday table, Americans debate, raise their voices, become angry, and accept each other – flawed thinking and all. Both philosophies came to the colonies full of hope and ready for a fresh start, but like typical siblings, neither was or is perfect, and they will always be competitive. Neither flaunts a spotless résumé and both need the other. That is why if the Supreme Court is to extend religious exemptions from otherwise neutral state antidiscrimination laws to conservative Christians, it would be disastrous. It is essential that the Court maintain the Scalia status quo within its interpretation of public accommodations. Neutral treatment towards devout religious beliefs is as important as neutral treatment of protected minority groups. Neither Founding narrative is perfect. Both philosophies have checkered pasts. Walking through a review of these histories is a reminder of these flaws and reinforces why allowing for exemptions would simply allow discrimination to rear its ugly head yet again.

Sibling Religious Liberty

In an effort to escape the intolerance of Puritan religious views in their mother country, many left Great Britain in search of heaven on Earth. One group, sailing with John Winthrop, envisioned a life of humble service to God. The English passengers aboard the *Arbela* were to

be a shining example for the world, “to follow the Counsel of Micah, to do justly, to love mercy, to walk humbly with our God; we must delight in each other, make others’ condition our own, rejoice together, mourn together, labor and suffer together...” (O’Conner). Yet, it is known how John Winthrop and the Puritan story played out. When Winthrop spoke of religious freedom, he meant that Puritans were free to do what they perceived to be God’s will, he did not mean that anyone could worship as one believed. Puritan religious beliefs legitimized the taking of land and other worldly goods from “savages” in the New World.

From *We Shall Remain - After the Mayflower*, historians cite numerous times when Puritans did not act as a “shining example upon a hill.” Rather, Puritans felt that God “cleared the way” for their domination in the New World, and in fact believed that they were “ordained by God to usurp land from ungodly people.” And dominate, they did. Quaker William Penn and his peers were driven away from the Puritan settlement, fellow Puritans like Roger Williams were banished for exhibiting religious tolerance, and Native Americans, though they literally saved these same Puritans during their first winter in the colonies, were labeled “ungodly” and treated as such. The Puritan mindset comes clearly into focus when reading Mary Rowlandson’s journal of her time in captivity. In 1675, the settlement of Lancaster of the Massachusetts Bay Colony was attacked by Native Americans. They burned down homes, killed many inhabitants and those who lived, like Mary, were taken captive. To Mary, this entire time is her time in God’s wilderness. Her faith was tested using dark-skinned heathens, “Oh the roaring, and singing and dancing, and yelling of those black creatures in the night,” she laments, “which made the place a lively resemblance of hell” (1682, 130). The fact that Mary’s minister and her husband assisted her as she wrote this account, and its “overnight sensation” standing,

underscored the disgust Puritans felt toward Native Americans. Mary was tested by her God and yet was saved by Him from the ungodly (1682).

These are just a few examples from New England's early settlements wherein religious free exercise left its ugly mark on the treatment of strangers, those who lived and believed differently. Religious liberty in the colonies and later in the United States says one thing but acts contrarily and its temperament has not changed since its arrival. Puritans spoke of just and loving society, but they meant only for those who adhered to their particular religious beliefs. Justices Gorsuch and Roberts seems to approve of allowing religious discrimination to continue. Though what constitutes the Puritan's "savage" has changed over time, religious discrimination has remained a legitimized and consistent aspect of our modern society. According to a Pew Research Center study conducted in 2016, individuals are all over the board when it comes to religious beliefs impacting business issues. They are closely divided (49% to 48%) over issues like wedding businesses providing services and which bathroom transgender individuals should use, but they overwhelmingly believe that employers should provide contraception coverage in insurance coverage (Masci, 2016). If individuals are led by the tenets of their faith, they would be allowed to discriminate against others that they deem "ungodly," which is exactly what Justice Scalia cautioned against in his *Smith* majority opinion. Scalia argues that allowing an individual's religious beliefs to guide one's actions in the marketplace is to allow the individual to be above the law. Take, for instance, the United States Attorney General William Barr. Like the Puritans at the Founding, he firmly believes that participating in religious worship is an essential element for society to attain civic virtue. In his October 2019 speech to Notre Dame law school students, Barr echoed precisely John Winthrop's beliefs. Winthrop believed that the Massachusetts Bay colonists "would live together to 'work out our salvation under the power and

purity of His holy ordinances [laws]” (CRF, 2013). Winthrop’s 1630’s “errand into the wilderness” is William Barr’s 2020 passion. In his Norte Dame address, Attorney General Barr submitted that it is the “nonbelievers” who are wreaking havoc on morality. Barr explained that without belief in a “transcendent Supreme Being” and adherence to “God’s eternal law,” the “possibility of any healthy community life crumbles.” Unless we follow “God’s instruction manual,” he sermonized, there will be “real-world consequences for man and society” — consequences that are not pretty, but quite grim. For without religion, there can be no “moral culture” and society will inevitably fall prey to humanity’s “capacity for great evil” (Zuckerman, 2019). What Barr argues is not unusual, nor new.

According to this line of reasoning, it was through the teachings of the Bible that individuals learned to put others before themselves, to work for the common good, to see the face of God in others, and to develop humility (Holmes, 2006). Thomas Hobbes argued that man’s innate being was self-interested and evil: a survival of the fittest. Therefore, enforcing religious beliefs and public worship allowed societies to teach its members to be moral. Religious norms and values were a part of the everyday New England colonist’s life. In fact, state constitutions – Massachusetts, for example – required participation in religious services and the public testimony of one’s belief in God. Choosing to not participate in religious worship or refusing to believe in God meant exclusion from civic life at best, forced resettlement or banishment at worst. Public orators delivered their messages in sermon-like ways. Public school teachers professed their belief in God and taught their students religious tenets. Enlightenment literature professed all men’s natural rights were ordained by God and was followed with religious zeal. Being religious was the norm throughout the colonies, even if most of it was

simply procedural and not from a religious liberty standpoint. The Founders acknowledged the necessity of a Supreme Being or God, even if not all of them attended services (Holmes.)

As colonies were being settled, it was religious differences and disputes that spawned the creation of new territories like Roger Williams' Providence, Rhode Island and William Penn's Pennsylvania. Dominate religious practices and tenets ruled absolutely in each of the colonies until the third generation of inhabitants grew too comfortable with their lives and let their faiths take a back seat (Greene.) In southern, slave-owning colonies, religious tenets were not the norm at all until well into the third generation of inhabitants found economic stability and success in their lives and attempted to establish a more "British-like" environment (Greene.) Over time, the South's use of the Bible was modified to keep the enslaved obedient. Sermons articulated serving thy master well while passages that spoke of the Exodus and liberation were removed from the readings (Barry, 2012). Slave owners devoutly believed they were saving the "savage" African soul by teaching the white man's faith. Puritan discriminatory treatment of Native Americans was reflected in Southern plantation owner's maltreatment of African Americans. The "Slave Bible" of the 1800s entitled *Parts of the Holy Bible, selected for the use of the Negro Slaves, in the British West-India Islands* of 1807, contained only 232 stories of the almost 1,200 stories within the *Bible*. Most of the Old Testament was redacted; any passage that spoke of freedom, escape, exodus, or equality was cut out. From the Pauline apostolic letter to the Ephesians, the pro-slavery Christians cited "[s]ervants, be obedient to them that are your masters according to the flesh, with fear and trembling, in singleness of your heart, as unto Christ." *Ephesians 6:5* Excerpts such as this taught slaves to be dutiful toward their masters and to suppress ideas of rebellion or escape, which was what slave-owners were afraid would occur. Using God and the promise of the afterlife, pro-slavery Christians kept slaves down and believed

it was for their betterment (Zauzmer). Alexis de Tocqueville noted New England's penchant for religion, greatest of all the regions he toured in the 1830s. When discussing the public spirit in the United States, Tocqueville writes, "[i]n general, the love of country springs from unself-conscious, selfless, and indescribable sentiments that bind the heart of a man to the place of his birth... When this love of homeland is heightened by religious zeal, as often happens, it can do amazing things. It becomes itself a sort of religion; it is irrational, it believes, feels, acts. ... Like all unthinking passions, this love of country promotes efforts of fleeting greatness more than sustained efforts" (63). He witnessed love for individual rights which included religious liberty (at least for the dominant faiths) but he also predicted that over time, America's faith would recede as its worldliness expanded. In the North, he observed material goods and beautiful women as distracting to the devout Christian man. In the South, Tocqueville was horrified at the way "Godly" people treated their slaves.

Fast-forward to the twentieth century where religious tenets informed state statutes so that social mores followed conservative beliefs: prohibition of birth control for married couples as well as singles, no interracial marriages, patriarchal oversight of household legal documents, liquor laws, anti-sodomy laws, anti-abortion laws, to name just a few. "Segregation academies," which were founded as predominately Christian institutions, popped up – literally – overnight to obstruct implementing the Supreme Court's mandate after it handed down the 1954 *Brown v. Board* unanimous desegregation decision. In fact, "[n]on-Catholic Christian schools doubled their enrollments between 1961 and 1971" (Merritt, 2017). Protestant, white, middle aged males dominated the discussions in legislative halls, court rooms, and executive administrations throughout the country and statutes reflected it. Basically, majority religions or politically

dominant religions undergirded the everyday norms of life, limiting freedom to think and act outside of their boundaries and setting aside the *beatitudes*.

Religious beliefs have been used to rationalized discrimination to this day. A Colorado baker refused to make a wedding cake for multiple same sex couples because his devout faith forbade him from doing so (*Cakeshop*, 2018). A white restaurant owner refused to serve a black couple because his faith maintains that the races must remain separate (*Piggie Park*, 1968). A lower northern Michigan pharmacist refused to fill a prescription for a woman suffering through a miscarriage. Though her doctor prescribed medication to help her body work through the process and provide some pain relief, the pharmacist believed it was an abortion and declined to fill her prescription (Shamus). Two Native American children and their mother were told to leave a beauty salon because that business does not provide services to them (L.Burrows, personal communication, November 21, 2019). Yet that is not what the Founders intended our constitutional republic to allow. Their Enlightenment philosophy in the late 1700s reflected the religious tolerance preached in *Voltaire's Philosophical Letters* written in 1733. In them he explained,

the Episcopal and the Presbyterian churches are dominant in Great Britain, all sects are welcomed. Go into the Royal Exchange in London, a building more respectable than most courts; there you will find deputies from every nation assembled simply to serve mankind. There, the Jew, the Mohammedan, and the Christian negotiate with one another as if they were all the same religion ... there the Presbyterian trusts the Anabaptist, the Anglican accepts the word of the Quaker. Leaving this peaceful and liberal assembly, some go to the synagogue, others go to drink; this one is baptized in a great font ... that one has his son circumcised while some Hebrew words that he does not understand are mumbled over him; still others go to their church... to await the inspiration of God, and all are content (Steiner, 2007).

Trading with one another did not require knowing each other's moral compass or way of living. Religion did not factor into the prices paid for goods or services. The London Exchange operated peacefully, without judgement nor discrimination. The Episcopal and the Jew talked quality, quantity and price, not God.

Thomas Jefferson concurred with Voltaire as he wrote in his notes on the state of Virginia, "(t)he legitimate powers of government extend to acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg" (LaCorne, 2011). Thomas Jefferson and James Madison worked closely together on the wording of the Virginia constitution, and while doing so they both took issue with the idea of religious tolerance. To them, tolerance meant that the law was allowing something that people otherwise would not uphold if not compelled by statute. For them, religious liberty allowed people to believe or not believe what they wanted, to live in freedom to pursue their own faiths without government interference: a more "Roger Williamsque" religious freedom.

Sibling Enlightenment

Enlightenment philosophies also arrived at the shores of the new world in the same boats that brought John Winthrop's form of religious liberty. Steeped in the teachings of Locke, Montesquieu, and Rousseau, these individuals believed that men enjoyed unalienable rights or Natural Rights given by God. Leaving Great Britain meant shedding the class system and the rights and privileges that accompanied it. It meant forging new ways to engage in civic discourse independent of nobility, the British parliament, and a king who lived on the other side of the vast Atlantic. It meant devising a new form of government the likes of which the world had never seen. So colonial experimentation in the Chesapeake began in earnest with attempts at

Locke's *Social Contract* wherein individuals agreed to give up some of their rights to live peaceably together. The consent of the governed was gained, albeit selfishly, with the *Mayflower Compact*, however, arguably that was because they landed away from their intended Virginia destination and were no longer covered by its charter. Swiftly, the leaders pulled together the charter with the passengers' consent to attain a stable and productive colony (history.com).

During the timeframe of declaring independence from Great Britain, state constitutions - created in haste - called for representative democracy. Each state experimented with its voting requirements: some allowed male non-property owners, others, African Americans, and even a few allowed women to vote – at least for a time (Halperin, 2018). These constitutions, instituted among men, provided for civil liberties (for example, trial by jury) that the colonists brought with them from Great Britain. They maintained separation of powers within the branches, as well as checks and balances. Even the national Bills of Rights, needed to ensure the ratification of the United States Constitution by the Anti-Federalists, was nothing new; state constitutions used them.

In fact, leaving Great Britain was propelled by the violation of deeply held rights the colonists knew as British citizens. As Edmund Burke, Esq. argued in his speech in the British Parliament in 1775, “An Englishman is the unfittest person on earth, to argue another Englishman into slavery” (Wollford, 2020). The impasse over colonial taxation, which seemed logical to parliament and the Crown to alleviate the debt incurred from the French and Indian War, as well as the added expense of protecting newly gained American territory, was decided and acted on without colonial representation. Parliament argued that the colonies were represented just as the other ninety percent of the British empire was: virtually. This did not sit well with their American peers. Hence, committees within the Second Continental Congress

were instructed to draft the *Articles of Confederation* and the *Declaration of Independence*. In writing the *Declaration of Independence*, Thomas Jefferson pieced together various Enlightenment philosophers' ideals into a sort of lawyer's brief laying open to the rest of the world the argument for separation. It is the social contract:

– That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, = That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to affect their Safety and Happiness.
(*Declaration of Independence*)

This was a gutsy move on the part of our Founders. Yes, Enlightenment disciples everywhere believed in Locke's philosophy, but to actually form a government around that very premise was astounding. True to Locke's premise, the colonists were not complaining about "light and transient causes" but rather listed the "train of abuses" that King George III imposed. As a tyrant, King George abolished legislative houses that did not submit to his wishes, refused to assent to the laws that the colonies needed to provide happiness and security, and made judges subjects of his will alone. The colonists housed soldiers and lived among them in their towns. And, of course, he taxed the colonies without their consent. The King's power was no longer legitimate, so according to John Locke, the time had come to separate. After a dismal decade of governance under the *Articles of Confederation* culminating in the fearful domestic insurrection by Daniel Shays and the militia, the Founding Fathers knew the time had come to address the failed *Articles*. At the Constitutional Convention, the delegates, moored in deadlock over legislative representation, broke through the logjam with the inspiration of Roger Sherman and his *Connecticut Compromise*. Sherman's compromise created a republican government wherein

a state's population determined its number of House of Representatives members and in the Senate, each state received two. The structural blueprint of the national government (the Constitution), authored by James Madison, embodied Enlightenment's popular sovereignty, separation of powers, checks and balances, limited government, natural rights and federalism. Its introduction, the *Preamble*, established that "We the people ... do ordain and establish the Constitution of the United States of America." Its ratification was through popular sovereignty, federalism, and consent of the governed as nine out of thirteen state conventions were needed to make it official. Yet, the Founding narrative was not as idyllic modernity might believe. Like its religious liberty brother, it, too, has stains on its past as it compromised devout Enlightenment beliefs to form a new nation.

All Men are [not] Endowed by Their Creator with Certain Unalienable Rights

The Articles of Confederation demonstrated to the Founders that power centralized at the national level was necessary to maintain a strong economy and to develop foreign alliances. However, knowing this and putting it down on paper were two very different things. Compromise can be a tough thing, and for the Enlightenment colonial founders, it was. Slave verses free, small verses large, and industrial verses agrarian proved to be three complex issues to navigate. Take, for instance, the issues of slavery and population. The Founders had to concede the belief that "all men are created equal" by not ending slavery so that slave states would stay in the union. Article I, Section 3 states,

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.

The Three-Fifths Compromise allowed Southern states to count toward their population individuals whom they considered property. In Article 1, Section 9, the Founders even allowed the slave trade to continue for twenty more years, until 1808 and collected a tax on each slave's head of not more than ten dollars per individual. In Article IV, the Founders enshrined the Fugitive Slave Act by forcing states through extradition to return individuals to the state in which he committed a crime (like escaping enslavement.) This dark shadow on the exceptional Enlightenment experiment reared and continues to rear its ugly head time and again with the Civil War, Woman's Suffrage, the Unionism and Progressive Era, Civil Rights Era, Gay Pride, and Black Lives Matter as the push and pull of civil liberties continue to challenge institutions and Americans' better selves. All men and women are created equal, but the nation has taken a long time to make any headway in this area.

Tying it back to *Masterpiece Cakeshop*

Competing national narratives have characteristics and events to which they can point with pride, however, they also have those for which they are ashamed. This is why the Supreme Court must stick to its *Smith* (1990) precedent; to remain neutral in implementing generally applicable laws. In the telling of America's narrative, brutish human nature typically overwhelmed better judgement in both secular and religious contexts. Allowing exemptions for devout religious beliefs would foment intolerance toward different cultures emerging in the marketplace. It would give individuals the right to discriminate like the Founders did in allowing Southern (and Northern) states to do, and as well, to allow discrimination against African Americans, immigrants, workers, homosexuals, women, and Native Americans. The United States has taken centuries to slowly implement universal natural rights and still has a long way to go. Following Justice Gorsuch's interpretation of wedding cakes for heterosexual and

homosexual marriages in his *Masterpiece* concurrence and permitting religious exemptions for others to refuse to serve individuals with whom they take issue would open the door to discrimination once again. Historians argue whether the founding was done in a secular or religious context. Reflecting on the paths both religious liberty and Enlightenment “siblings” chose demonstrates that the context does not matter. Revisiting in detail the debates and eventual compromises between Federalists and Anti-Federalists may further help individuals understand why.

CHAPTER III
AGAINST THE BACKDROP OF THE FOUNDING

The Founding

Upon close examination of the Federalists and Anti-Federalists essays of the Founding period, the divide between the delegates is clear. Living under the first constitution of the “united” States, the *Articles of Confederation*, these men witnessed the successes and failures that occurred within the thirteen governmental experiments. Acting as individual laboratories, each state applied its own methods to balance liberty and order. It was these experiences that informed the Founder’s eventual creation of enumerated national powers to make uniform regulations over interstate commerce, international trade, American currency and other areas inherent to national sovereignty. Both Federalists and Anti-Federalists understood the urgency within which the country’s survival loomed. At the Constitutional Convention, the delegates set to work to address the *Articles*’ deficiencies: the lack of a republican form, no executive or judicial branches, a weak centralized congress, and an impossible amendment process. In the environment created by the *Articles*, majority tyranny dominated minority liberties.

In *Federalist 10*, James Madison analyzed four potential solutions to the problem of the “mischiefs of faction.” Citizens do not want governments to dictate what they must think and feel, and because liberty is an essential element of freedom, government’s only recourse is to control factions’ effects. State governments, under the *Articles*, ruled by majority. Madison reported in *Federalist 10* that complaints from virtuous citizens, who were pious, reported being disturbed by the overbearing dominant faction that governed for its own benefit. The virtuous citizens complained that these factions disregarded the public good and weakened rival factions to maintain its power. “The latent causes of faction are thus sown in the nature of man; and we

see them everywhere brought into different degrees of activity, according to the different circumstances of civil society” (Carey, 2003). To Madison, factions “inflamed [men] with mutual animosity... and made them forget about the common good” (Carey, 2003). In most states, the lack of a unified currency created problems for both ordinary citizens, merchants and bankers alike. Trade issues caused a growing rift between large and small states, and class warfare entrenched itself within states as eastern seaboard merchants and bankers fought those from the backcountry; an urban versus rural conflict that still happens in states today. “In New Jersey, North Carolina, Rhode Island, and Massachusetts, for example, violence erupted as paper-money factions (usually debtor farmers and unskilled labor) fought a virtual class war against tidewater merchants, lawyers, and the landowning elite in an attempt to address the crisis that an absence of usable currency created for farmers and wage workers” (Carey, 2003). To Madison, the most important job government must execute correctly is, “to break and control the violence of faction” (Carey, 2003). The only way to achieve this, according to Federalists, was by organizing the government into a large republic. Madison hoped a large republic would quell faction’s ambition with the resulting effect to force the overbearing majority to be one of many factions nationally. Compromises could be reached by the multiplicity of sects, none of which made up the majority. Therefore, claims made by debtors and creditors, slave holders and abolitionists, majority religions and minority faiths would all be studied and a reasonable solution, obtained. Unlike the power of faction at the state level, factions’ power would be neutralized at the federal level.

Anti-Federalists, however, feared the idea of a large republic’s potential for tyrannical governance and spelled out their dissatisfaction with the draft constitution. In a vast republic, they argued, representatives who made up the government would not be known by their

constituents nor would these government officials remotely understand the needs of locals. The only clear outcome they envisioned was the annihilation of state governments through the *Necessary and Proper Clause* and *Supremacy Clause*. This “one-two punch” combined with national enumerated powers gave the national government unlimited power. The federal government would tax states to death collecting their sums with its peacetime armies and the Supreme Court would find it constitutional. State laws would be moot. Given these concerns, Anti-Federalists preferred to simply modify the *Articles of Confederation* with a few tweaks to strengthen national government power to bring stability. Permitting a sovereign national government to pass statutes that local governments must follow was reminiscent of the tyrannical British. How would representation work? Which region of the nation would be heard and which silenced? To them, the vast republic’s framework was too distant, too foreign. The solution was to keep government closer to the constituents that they govern.

Their concerns were addressed by Alexander Hamilton in *Federalist 15*. He titled his essay “The insufficiency of the Present Confederation to Preserve the Union” which was an interesting choice because there really was no need to argue that point. Everyone understood the failings of the *Articles of Confederation* as critical, friends and foes of the newly drafted Constitution alike. They acknowledged the national government’s imperfections created under the *Articles* and worried that more uprisings, like Shays’ Rebellion, would occur. They knew the national government could not pay its debts to foreign countries nor to its own citizens. It was too weak to raise an army, to tax the states, and to resolve disputes between them. However, by outlining just how pathetic and dire their situation had become, Hamilton reminded the citizens of New York and others that the *Articles*’ issues would not be remedied through a few simple tweaks. It required reconfiguring the governmental structure in full. For instance, “...the United

States has an indefinite discretion to make requisitions for men and money; but they have no authority to raise either... The consequence of this is, that though in theory their resolutions concerning those objects are laws, constitutionally binding on the member of the Union, yet in practice they are mere recommendations which the States observe or disregard at their option” (Carey). As there were no consequences for ignoring or denying a federal request, states were emboldened to follow their own wills. However, when the *Articles* were first drafted, Hamilton reminded his audience that it was expected that States would not disregard federal authority because a “sense of common interest would preside over the conduct of the respective members.” As the state experiments demonstrated, that was certainly not the case. Common interest was directed on the state level by majority factions, not as citizens bound by the success of their new nation. It was human nature that brought down the *Articles*, and human nature was fighting the ratification of the new constitution tooth and nail.

Armed with states’ governing experiments data, the Founders noted some of the more egregious examples. In 1619, slave ships arrived on Virginia’s coast planting the seeds of slavery and reaping its bountiful harvest for 157 years in the southern colonies (Hannah-Jones, 2019). In 1630, the *Arabella* landed safely on the shores of the future Massachusetts colony bringing John Winthrop and his tribe of Puritan Protestants who sought religious liberty while they practiced immoral treatment of “savage” Native Americans. As time passed, Massachusetts’ brand of religiosity flourished as citizens had to publicly pledge their belief in God and had to attend public religious services regularly (*We Shall Remain – After the Mayflower*). To run for office or participate in any civic duty, citizens had to be in good standing which meant they had to affirm their faith regularly. As the Massachusetts Constitution of 1780 stipulated:

Art. III. As the happiness of a people and the good order and preservation of civil government essentially depend

upon piety, religion, and morality, and as these cannot be generally diffused through a community but by the institution of the public worship of God and of the public instructions in piety, religion, and morality: Therefore, To promote their happiness and to secure the good order and preservation of their government, the people of this commonwealth have a right to invest their legislature with power to authorize and require, and the legislature shall, from time to time, authorize and require, the several towns, parishes, precincts, and other bodies-politic or religious societies to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and morality in all cases where such provision shall not be made voluntarily. (*Massachusetts Constitution 1780*)

South Carolina's first constitution (1778) made their voting requirements so strict that most white male property owning men could not vote and even more white males could not run for office as those property requirements were even stricter. Basically, South Carolina's "1%" was allowed to run the government. Pennsylvania's constitution went in the totally opposition direction as it allowed men to vote and to run for office who simply paid taxes. Even the very ratification of the *Articles of Confederation* provided an important lesson to the Constitutional Convention delegates as the state of Maryland refused to approve the charter until after they settled a land dispute with Virginia. The domestic situation in the "united" States did not improve from there. With only a bark, and no bite, the weak, centralized, unicameral government under the *Articles* could not regulate trade with foreign countries, nor could it raise taxes to support its defense of western territories and inhabitants from Native Americans attacks. The final straw came when a band of former war Revolutionary War soldiers-turned farmers took arms against Massachusetts' government courthouses and official buildings. These men, led by Daniel Shays, who were never appropriately compensated for their time in the war, were paying high taxes while at the same cut off from buying through credit. Because of this,

courthouses began foreclosure proceedings. Shays' Rebellion began in 1786 and continued for about one year as the Massachusetts' government fumbled for a way to put down the insurrection. Ultimately, contributions from rich Boston citizens were given to a makeshift army that finally defeated Shays (history.com). This event left the Founders in fear that our country was close to ruin.

The delegates at the Constitutional Convention had a broad tapestry of colorful examples from which to choose when debating the content in the new constitution. With each state's representatives sworn to protect their respective constituency's interests, it took months for the document to emerge. But emerge, it finally did, however, without all the delegates' signatures on it. Some delegates, like Benjamin Franklin, were proud of the government they had created whereas others, like George Mason, needed more protections in writing.

Three constitutional compromises

The Convention needed three specific compromises just to pass it on to state conventions for ratification. The Connecticut Compromise authored by Roger Sherman was the first. It outlined representation by population in the House of Representatives. This was what had been the Virginia Plan that was supported by the large states. The United States Senate, however, based its representation on equality with two representatives chosen by the respective state legislatures. This was the New Jersey plan, the one that most closely resembled the working of the *Articles* and the one with which small states agreed. The second compromise played into the population provision of the House of Representatives. Slave states did not want to count their enslaved peoples towards their population because the size of a state's population factored into the amount of taxes that state paid the national government. As a result, the Three-Fifths Compromise, in Article I, Section 2, was reached wherein five slaves counted as three people. In

Article I, Section 9, slave states were also allowed to maintain their slave trade for twenty years after the ratification of the constitution until the year 1808. Lastly, once the delegates agreed to having one individual as the executive, they determined how that individual would be elected by using the Electoral College. Specific electors, chosen by the states, would select who served as the president.

However, while the Committee of Style placed its final touches on the wording of the newly drafted constitution, a group of delegates, led by George Mason, argued for the inclusion of a bill of rights. Their request fell on deaf ears. Federalists felt their concerns were unwarranted as a number of protections were stated specifically within the document. James Madison pointed out the ineffectual nature of the state bills of rights from protecting their own citizens against majority rule and worried that by enumerating a list of protections, it left to future governments avenues to thwart individual liberties that had not been addressed. Alexander Hamilton again spoke to his Anti-Federalist peers in *Federalist 84* in an attempt to allay their fears:

Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations. "We the people of the United States, to secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America." Here is a better recognition of popular rights than volumes of those aphorisms which make the principal figure in several of our state bills of rights, and which would sound much better in a treatise of ethics than in a constitution of government ... (*Federalist 84*)

To Hamilton, including a bill of rights was unnecessary. The draft constitution employed the Enlightenment values of popular sovereignty, consent of the governed, republicanism, natural rights, and limited government. Hobbes, Locke, Rousseau, and Montesquieu would be proud. In fact, Hamilton argued that the addition of a bill of rights would prove a dangerous endeavor as he

feared that the addition would encourage abuse by a future government's use of such a limited list of rights. "For why declare that things shall not be done when there is no power to do them? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretense for claiming that power" (Carey, 2003). Why open the door to future governmental leaders assuming that they had the power to regulate the press or speech or privacy or religion?

The structure of the draft constitution presented the following: three separate branches given specific responsibilities, ensuring that "ambition checked ambition"; Article I's creation of bicameralism with the House of Representatives and the Senate as two distinct chambers; a system of federalism wherein both state and national governments are sovereign in their specific spheres of jurisdiction; and a Supreme Court whose members with lifetime tenure may defend the Constitution and minority rights without fear of repercussions. In *Federalist 84*, the thought never crossed Hamilton's mind that the national government would get involved in state issues. In *Federalist 51*, Madison explained that the government structure they created controlled citizens of the nation and, at the same time, controlled itself. Checks and balances and separation of powers gave the government the ability to reel in ambitious branches and provided for all rights, civil and religious, to be protected.

In the end, the Federalists relented as the ratification process slowed and their prospects seemed to dim. They promised that the first order of business of the new congress was passage of a bill of rights. But the United States' *Constitution*, as ratified by the people of the several states, was not a religious document. In fact, for some citizens, the absence of the actual word

“God” in the document, the lack of an adherence to public worship, the right to take an oath or affirmation for public office, and the prohibition of religious tests to run for office made many citizens refer to the draft constitution as a Godless document (LaCorne, 2011). Yet, the United States’ *Constitution* was eventually ratified. In the early years of this newly formed government, the national government mostly kept its distance from local affairs. It paid off international debts, slowly established itself in interstate commerce, and established a national bank. But as far as intervening in the internal affairs of states, the national Bill of Rights stayed just that – protecting individuals and states from the national government. However, as each new state entered the union and compromise after compromise strained relations between northern states and southern states, the national government’s ability to maintain the union was tested. The results of this struggle produced the most revolutionary amendment, the 14th Amendment, whose significance changed the nature and face of federalism and of equality under the law.

The Expansion of Federal Power

As the new nation navigated its way through Article I, Section 8’s enumerated and implied powers, the predominantly Federalist branches trod lightly on states’ reserved powers choosing to assist states with land grants to construct colleges and maintain states’ intrastate jurisdiction over locally based commerce. Overtime, land grants grew into stronger federal commerce power. From the establishment of a national bank (*McCulloch v. Maryland*) and the blurring of boundary lines in commerce (*Gibbons*, *NLRB*, and *Schechter Poultry*), the Supreme Court significantly strengthened federal oversight using the *Necessary and Proper Clause* and *Supremacy Clause*. The concept of commerce was beginning to take shape, though for Progressives, the next decision was quite a setback.

Since the ratification of the *Constitution*, states continued to govern like before, allowing majority tyranny to dominate in policymaking. Everyday life was local, not like the instantaneous national hubbub encountered today. Yet, that does not mean that minority rights within each state were silent, nor attempting to organize at the national level. Women were advocating for suffrage, African Americans for equality under the law, and the laborer for safer working conditions, better pay, and shorter hours. Yet, in 1918, the Supreme Court sided with states' rights and reeled in Congress' use of the *Commerce Clause*. In *Hammer v. Dagenhart* (1918), the Court ruled 5-4 that Congress overstepped its power in regulating commerce because the production of goods was not the same as commerce, so production remained a part of states' reserved powers, and therefore, stayed under state jurisdiction. This decision voided the *Keating-Owen Child Labor Act* (1916) which would have prohibited the shipment of goods across state lines of any items produced in factories where children under fourteen years of age were made to work and where children between the ages of fourteen and sixteen worked longer than eight hours per day. It was the father of a child laborer who sued the government and won (oyez.org). As their father, Mr. Dagenhart believed his sons were his property and that Congress was infringing on his Fifth Amendment protections of eminent domain found in the Bill of Rights. Progressive reforms were pushed to the back burner until President Franklin Roosevelt's "switch in time saved nine" scheme reformed the Court's thinking on his New Deal initiatives.

In a decidedly angst-ridden time in America, the Great Depression muted the celebrations of spending, consumerism, and investments on Black Tuesday, October 29, 1929 with the stock market crash. Globally, the depression devastated both rich and poor countries and left almost 25% of American workers unemployed. President Roosevelt (FDR) understood his citizens' sense of failure and labored non-stop to put them back to work. In a truly revolutionary fashion,

FDR and his Democratic Congress passed measure after measure in an attempt to employ workers. The federal government's invasion into local commerce left the Court in a quandary wherein they submitted decisions like *Schechter Poultry Corporation v. United States* (1935). In the Court's majority opinion, Chief Justice Hughes stated that Congress' actions were unprecedented, and that the executive's extensive authority which FDR deemed appropriate without specific guidelines and constraints by Congress, was unconstitutional. Yet, in *National Labor Relations Board v. Jones Laughlin Steel Corporation*, also a 1935 5-4 Court decision, this time it was in the executive's favor, Chief Justice Hughes wrote that the federal government could intervene to stop corporations from abusing their employees' right to unionize. The Court reasoned that negotiations between employers and employees did have an aggregate effect on interstate commerce. This decision handed down a significant boost to the federal government's ability to protect minority voices in the economy and in fact, blurred the lines between interstate and intrastate commerce for good.

The One-Two Knockout Punch

In fact, it was the combination of Article I Section 8's *Commerce Clause* and the addition of the 14th Amendment through which the national government protected its citizens from the overbearing hand of majority tyranny. The fear Anti-Federalists felt of national government encroachment was actualized in the protection of minority rights. To some historians, the Civil War and the passage of the 13th, 14th, and 15th Amendments constituted a second Founding in America: the slow, selective, and incomplete incorporation of civil rights to every citizen overtime (Rosen). The 39th Congress or Civil War Congress felt compelled after witnessing Lincoln's assassination and Andrew Johnson's strong Southern sympathies, to take reconstruction into their own hands. They organized a joint committee of the House of

Representatives and the Senate to investigate the domestic affairs of the Confederate States of America and the treatment of freedmen specifically. The results were the 13th, 14th and 15th Amendments, along with the Reconstruction Act of 1865. In the *Report of the Joint Committee on Reconstruction, at the First Session Thirty-Ninth Congress* in 1866, a joint resolution was submitted by two-thirds of both houses concurring, that shall be given to state legislatures as an amendment which, when ratified by three-fourths of the state legislatures, “shall be a valid part of the Constitution, namely: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws” (Soifer). However, the joint committee paved a way “for restoring to the States lately in insurrection their full political rights. Whereas it is expedient that the States lately in insurrection should, at the earliest day consistent with the future peace and safety of the Union, be restored to full participation in all political rights; and whereas the Congress did, by joint resolution, propose for ratification to the legislatures of the several States, as an amendment to the Constitution of the United States, an article in the following words, to wit”: the very same article as above. To gain entry back into the Union, Southern states had to pledge equal protection under the law and due process of law to all citizens. Congress also passed the *First Reconstruction Act* which placed the South under military supervision and by-passed President Johnson’s authority both in appointments and removals of executive officers and in military decisions. To the 39th Congress, it was the national congress’s responsibility to provide for a republican form of government in the states, not the Southern-sympathizing executive’s, so the

fact that President Johnson recognized some Southern state governments was deemed unacceptable (Soifer).

Someday, Langston, I hope, someday.

I, TOO, SING AMERICA
 I, too, sing America.
 I am the darker brother.
 They send me to eat in the kitchen
 When company comes,
 But I laugh,
 And eat well,
 And grow strong.
 Tomorrow,
 I'll be at the table
 When company comes.
 Nobody'll dare
 Say to me,
 "Eat in the kitchen,
 "Then.
 Besides,
 They'll see how beautiful I am
 And be ashamed—
 I, too, am America.
 - Langston Hughes, 1925

The effects of the 39th and subsequent Congress's actions were felt throughout the South. The northern military presence held in check pervasive racist actions, African American men were given the right to vote, and Confederate states had to rewrite their state constitutions in ways that reflected the tenets of the 14th Amendment. Southern states saw a rise in black politicians and delegates to constitutional conventions. Because prominent Confederate soldiers and leaders were prohibited from holding any government positions, the rest of the convention delegates were small business owners, farmers, local artisans and the part of the labor force not represented by plantation politics. Black politicians sought and won public offices; they governed with unprecedented powers (having spent the last two centuries in bondage); and

during the 1870s, a half a million black men plus, cast a ballot. By 1868, blacks outnumbered whites in Mississippi, Alabama, Florida, Louisiana, South Carolina and Georgia (Barber, n.d.). Yet, this was not to be sustained. In a closed-door deal between presidential candidate Rutherford B. Hayes and the election commission, Hayes promised to withdraw northern troops from Southern soil and reestablished local control in government if he won the Electoral College. Upon taking office, he kept his promise and as a result, the hostile Jim Crow emerged, intimidation flourished, and the suppression of black voting ensued. The Progressive momentum black Americans established disappeared while *de jure* and *de facto* white power cemented itself. Even a century later, white power and white supremacy held firm. One only has to examine the record of the 1950s - 1960s: bloodshed and violence, assassinations and vigils, letters from jail, open-casket funerals, more Civil Rights Acts, the Ku Klux Klan, bus boycotts, desegregation, cross-burnings, and Selma, Mississippi. Civil Rights protesters and segregationists prayed from the same Bible this time, asking God to forgive their enemies. The Supreme Court, using the Commerce Clause, the 14th Amendment and the Supremacy Clause, interpreted educational policies of Southern states in *Brown v. Board of Education* (1954) and decided what customers an owner of a business must serve a decade later in *Heart of Atlanta Motel, Inc. v. United States* (1964) establishing the validity of public accommodations laws that prohibit the use of racial discrimination in interstate commerce. The Civil Rights Act of 1964 and Voting Rights Act of 1965 mandated that the United States Department of Justice's Civil Rights Division, in an attempt to stop voter intimidation in southern states, enforce a process called "preclearance." Whenever a state had less than 50% of the state's minority population turn out to vote, the state was put on a preclearance list requiring their voter laws to be reviewed and approved by Division officials. Unfortunately, in the case *Shelby County v. Holder* (2013), the Supreme Court found

that this process was no longer needed. As Chief Justice John Roberts said, the country needs a law passed by Congress that meets current conditions within the states, though any amount of discrimination in voter registration laws is too much. However, immediately upon presenting the Court's decision, some states, such as Texas, set voter identification requirements in place and began designing voter districts. As a July 2018 article in *The Atlantic* entitled "How Shelby County v. Holder Broke America" explained, the Supreme Court "set the stage for a new era of white hegemony." As of 2016, with the election of Donald Trump, discrimination and hate against all people of color has reemerged in full force. Alt right protests, hate crimes, mass shootings, social media threats, and even Trump campaign rally slogans spew racist and bigoted beliefs.¹ Though Chief Justice Roberts spoke in 2013, perhaps now he wonders what he has allowed to set in motion, given the current conditions within the states. What had taken centuries to build, the Court undid in one fell swoop. It is the hope of this writer that Hughes' poem of 1925 will be realized and one day we will all sit at the table together. It took the national government's just and fair statutes as well as vigilant oversight to reel in ugly human nature unleashed in political and social environments.

¹The *HuffintonPost* has reported on a number of racial slurs and actions of President Trump: in a January 2018 Oval Office meeting with lawmakers said "Why are we having all these people from shithole countries come here? We should have more people from places like Norway." Senator Dick Durban (D-Ill) confirmed this. Trump took more than 48 hours to denounce the white supremacist march in Charlottesville, VA, while claiming that there were evil people on both sides. He has appointed individuals with known prejudices to his cabinet or as advisors (Steve Bannon, Mike Flynn, Jeff Sessions.) He did not denounce David Duke or *The Daily Storm's* support of his candidacy. The *Washington Post* has reported that President Trump, during his July 4th Mount Rushmore speech, called racial justice protesters "evil" and the "new far left fascism" that will be the "end of America." President Trump also shared a tweet of a Villa's white man shouting "white power, white power" over and over again.

Has the country learned from its past mistakes? National statutes that protect minority populations from discrimination are an essential aspect of a democracy. History has proven time and again, that human nature separates individuals into acceptable and other. This is based on a variety of things – typically, demographic characteristics such as race, gender, sexual orientation, social class, age – and treats them as they see fit. It has been this way since the Founding, though the ideals of the Founding were new and brought the promise of a better future. With the enactment of public accommodation laws, business owners' actions were supervised and potential discriminatory acts regulated. This is how it should be. Let's not make the same mistake in the marketplace.

IV. RELEVANT SUPREME COURT DECISIONS SINCE 1940

On Religious Freedom

This history, naturally, leads to an analysis of the Supreme Court's incorporation of religion. The Supreme Court incorporated a distinction between religious belief and religious action in *Cantwell v. Connecticut* (1940) with the latter subject to regulation by governments for the safety and protection of individuals and society. In *Cantwell*, the Court created the "valid secular policy" test wherein the Court's analysis of a government statute determines if it serves a legitimate non-religious goal and does not target any one religion. If the statute meets these criteria, the statute is allowed even if it conflicts with religious practices. In *Sherbert v. Verner* (1963), the Court added the qualification that if the statute burdens free exercise of religion, it must be for a compelling government interest such as prohibiting illicit drug use or polygamy. With *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), the Court established significant precedent when it found that the government's ability to enforce generally applicable prohibitions of socially harmful conduct, such as its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."

In *Cantwell* (1940), the Court asserted that the government may not compel an individual to affirm any religious beliefs. This doctrine stems from the country's era prior to the ratification of the U.S. Constitution, where multiple state constitutions forced citizens to acknowledge the existence of a God and required public worship from all citizens. As mentioned earlier, the Massachusetts Constitution of 1780 equated people's happiness, the promotion of good order, and the preservation of a civil government with the piety, religious adherence, and mortality of the community. To require through state statute that all inhabitants demonstrate their piety

publicly so as to prove their virtue was suspect at best.² Still, most colonies continued this practice and wrote it into their newly formed constitutions as the nation declared independence.

However, it is through the Court's decision in *Smith* (1990), that Justice O'Connor raised concerns on behalf of free exercise (though she agreed with the outcome, she could not join in the opinion.) She argued that it is difficult to deny that a law that prohibits religiously motivated conduct, even if it is generally applicable, does not at least warrant First Amendment concerns. She believed that if a state makes criminal an individual's religiously motivated conduct, that state has burdened that individual's free exercise of religion in the severest manner possible. Justice O'Connor, in her dependably astute way, predicted the arrival of the *Masterpiece Cakeshop Case* (2018) where a baker refused based on his devout religious beliefs, to bake a wedding cake for a homosexual couple, as well as the many other cases that follow suit. As reported by NBCnews.com, "The issue will very likely come back to the Supreme Court in the coming months. Other cases now working their way through the lower courts involve printers, photographers, videographers and calligraphers who said their religious beliefs will not allow them to offer their services for same-sex wedding ceremonies." However, Justice O'Connor should rest assured that Justice Scalia, in his *Smith* majority opinion, answered her concerns fairly and fully. Scalia argued:

Although a State would be "prohibiting the free exercise [of religion]" in violation of the Clause if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, the Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is

² In fact, this is exactly what Roger Williams, the founder of Providence, Rhode Island, scoffed at. He strongly disagreed in this practice as he would never pretend to know a man's beliefs nor claim that God intends for man to do so. To interfere in God's plan is blasphemy at best (Barry, 2012).

not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons.

As a result of *Smith*, the Court continually holds that an individual's religious beliefs cannot excuse him from compliance with an otherwise valid, generally applicable law that the state is free to regulate, including laws concerning public accommodation of protected groups in the public marketplace.

Since 2017, a few United States Supreme Court justices seem to be challenging the *Smith* decision in their opinions. If they succeed, these justices will permit religious discrimination to reign again. The list of religious abuse in the marketplace will expand as individuals are empowered to treat "others" as they wish. Just as Southern states increased their voter suppression tactics since the Court removed preclearance, permitting religious exemptions will do likewise. A detailed dissection of the *Masterpiece Cakeshop* case will help to illuminate this point.

In *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission et al* (2018), the right of a business owner with conservative Christian religious beliefs, Jack Phillips, came under scrutiny in the context of refusing to sell a wedding cake to a gay couple. As it turns out, the Civil Rights Commission investigation found out that Mr. Phillips had refused service to six same-sex couples. Mr. Phillips' devout conservative Christian values compels him to refuse to create a wedding cake for a religious ceremony in which he does not believe. He claims that doing so would violate his First Amendment rights to freedom of speech and free exercise of religion. The use of freedom of speech and free exercise is his counsel's attempt to expand their claim and win their suit as provided in the standards set forth in *Wooley v. Maynard* (1977) wherein the Court recognized that if one's freedom of religion was connected to another Bill of

Rights freedom, then perhaps a violation actually occurred. Yet, is this so? When voluntarily entering into the marketplace where transactions occur daily between buyers and sellers from diverse backgrounds and ways of life, can a business owner choose who he serves or does not serve? The United States has a long and sordid history of discriminatory practices prevailing over minority groups' rights. For this very reason, the national government, after witnessing extensive discrimination against African Americans in predominantly Southern cities, but Northern cities as well, enacted through the 1964 *Civil Rights Act* statutes regarding public accommodations to protect specific groups in restaurants, hotels, entertainment venues and stores, in general (Title II, CRA 1964).

In the *Masterpiece Cakeshop* case, two men attempted to order a cake to celebrate their marriage. The storeowner, Mr. Phillips, refused their request because of their sexual orientation. The Colorado Anti-Discrimination Act (CADA) prohibits discrimination from business owners who engage in sales to the public. The Colorado Civil Rights Division found probable cause that Mr. Phillips, did, in fact, discriminate against potential customers because of their sexual orientation, so they referred the case for a formal hearing with a state administrative law judge who, in turn, found in favor of the couple. The Colorado Civil Rights Commission found Mr. Phillips in violation of the statute as well. Upon appeal, the Colorado Court of Appeals affirmed the lower bodies' decisions (*Masterpiece*, 2018).

The Founding and the Diversity of Opinions

The case was appealed to the United States Supreme Court. There, in a 7-2 decision, the justices brought the country back to the diversity of opinions on which it was founded. As James Madison so aptly wrote in his opening sentence in *Federalist 10*, "Among the numerous advantages promised by a well-constructed Union, none deserves to be more

accurately developed than its tendency to break and control the violence of faction.” The Founders put in place a system of government that pitted ambition against ambition, that understood the failings of human nature and used those very failings to protect citizens from each other. In their scheme of government, they established the Supreme Court’s jurisprudence to ensure that minority rights were not trampled by the majority. That is why it is extremely important for American citizens to recognize what transpired in the *Cakeshop* case. It is a significant paradigm shift in the makeup of minority religions in America, as well as who makes up the majority. Though Protestantism is still the majority religion, there is a slowly growing trend wherein Americans are not attending church regularly or are not actively practicing their faith. A Pew Research Center study reports that 65% of telephone survey respondents described themselves as Christians, but that is down 12% points from a decade earlier. Most Americans do not attend church and though they believe in God, don’t see religion as part of everyday society (McConnell, 1990). Mr. Phillips’ beliefs are a part of a minority faith. It is important to note that many faiths have changed their former stances on LGBTQ+ rights, and that a majority of Americans, 63% as of May 2019, affirm gay marriage. Applying *Smith* to *Cakeshop* means that the minority faith needs to be treated neutrally by government entities while participating fully in the marketplace.

Generally Applicable and Neutrally Applied; Don’t Muddy the Waters

In *Masterpiece Cakeshop, Ltd., et al v. Colorado Civil Rights Commission et al.*, the owner told a same-sex couple that he would not create a cake for their wedding celebration because his devout Christian beliefs forbid him. The couple filed a charge against Mr. Phillips, the Civil Rights Division found enough evidence to investigate the violation by Mr. Phillips. The

Administrative Law Judge, the Colorado Civil Rights Commission, and the Colorado Court of Appeals found in favor of the couple. However, the Supreme Court of the United States held that the Colorado Civil Rights Commission did not treat Mr. Phillips with the neutrality required by the government when deciding free exercise claims.

In their deliberations, the Supreme Court produced three concurring opinions attached to its majority opinion. It is Justice Kagan's concurrence that embodies precedent and fairly protects minority religion within the United States. In her opinion, Kagan starkly chastised not only the Commission's mishandling of their decision but also the hostility with which the commissioners treated Mr. Phillips. In her concurrence, Justice Kagan specifically speaks to the violence of faction and requires states to follow the precedent set by *Smith*. It was noted multiple times in both submitted briefs, amicus curiae, and in oral arguments, that two Colorado Civil Rights Commissioners made comments that degraded Mr. Phillips' religious views. They likened his use of his faith to slavery and the Holocaust and told him quite frankly that he can believe in whatever, but that his beliefs do not preclude him from serving customers in his shop (*Masterpiece Cakeshop*, 2018). In other words, Mr. Phillips' faith was not treated in a neutral manner by the Commission. Justice Kagan's straight-forward interpretation of the case and application of the law preserves the diversity of religious beliefs within the marketplace transactions and, therefore, maintains the Court's precedent in *Smith*, and Justice Ginsburg's dissent illustrates exactly how and why Mr. Phillips is discriminating whereas the other bakers were not.

In her concurrence footnotes, Kagan questions Justice Gorsuch's reasoning while at the same time explains how simply the case could have been settled by the Commissioners. "In his (Gorsuch's) view, the Jack cases and the Phillips case must be treated the same because the

bakers in all those cases “would not sell the requested cakes to anyone. That description perfectly fits the Jack cases – and explains why the bakers there did not engage in unlawful discrimination.” However, she continues, where Justice Gorsuch is mistaken, or perhaps more accurately, where he is attempting to develop a context within which a religious exemption can be made, is by identifying the product being sold as not simply a wedding cake, but a “cake celebrating same-sex marriage” (*Masterpiece*, 2018). Justice Gorsuch is trying to invent ways in which religious beliefs, in fact, can allow someone to discriminate in the marketplace. In doing so, he is leading the Court down a very slippery slope with his “logic.”

Justice Scalia, who was not known as a bastion of liberalism on the Court, wrote the majority opinion in *Smith* that laid out in extremely clear language the Court’s free exercise history, “[w]e have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Educ. v. Gobitis*, (1940):

Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. (594-595)

Note that Justice Frankfurter was not extraordinary liberal either. Justice Scalia’s majority opinion, written as though he was teaching a constitutional law class (his area of expertise), laid out, point by point, why the United States cannot allow for religious exemptions of action within the public marketplace. He relates, as only Scalia can, how attempting to understand an individual’s faith and how that faith translates into serving the public is simply pointless. Why would we open that flood gate? As the Court established in *Reynolds* (1879),

"Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."

Since the mid-1960s, the general rule of thumb was that a business owner's moral or philosophical objections cannot allow him to refuse to sell the goods or services to protected groups if he would sell the goods or services to the general public.

The Court's application of public accommodation includes that the law is generally applicable and neutral as applied to the public marketplace. However, as noted by the justices, two Colorado Civil Rights Commission members were verbally hostile to Mr. Phillips' religious views. As Kagan submits and Justice Ginsburg demonstrates in her dissent, a simple application of CADA to the *Cakeshop* case could have occurred. Mr. Phillips refused to create a wedding cake that he sells to the general public to two homosexual men because he does not believe in gay marriage. The product is a wedding cake; Mr. Phillips refused to sell a wedding cake because of the identity of the customers; and those customers are a part of a protected group under the CADA. Therefore, Mr. Phillips violated CADA in his treatment of the gay couple. However, in reading the Court's majority opinion and in particular the concurring opinion of Justice Gorsuch, it looks as though the Court is attempting to expand religious free exercise rights by affording to small business owners the ability to discriminate based on their religious beliefs.

In the Court's majority opinion as well as in Justice Gorsuch's concurrence, they found that the Civil Rights Commission violated Mr. Phillips' free exercise clause by their hostile

treatment of his religious views. In other words, two commission members, by their derogatory remarks towards Mr. Phillips breached the responsibility the government has to ensure neutrality toward religion. Because commissioners in a public, formal hearing likened Phillips' use of religion to the use of religion with slavery and the Holocaust, the issue of fairness is called into question. Justice Kagan was correct to admonish the actions of the Commission. Religious views that believe that same-sex relationships are wrong are now in the minority. Free exercise of religion, especially minority religions, has always been and always will be taken seriously and limited only with compelling government interests such as in public accommodations areas where individuals must comply with valid and neutral laws that are generally applied.

In *Church of Lukumi Babalu Aye, Inc. V. Hialeah* (1993), the Court spells out that government entities cannot pass judgment on or presuppose illegitimacy of an individual's religious beliefs. In this case, the Court found that the city passed the law to discriminate against that one religion. They targeted it and therefore, it was not a generally applicable law, and it does not meet the precedent's standard (*Lukumi Babalu Aye*, 1993). In the Phillips case, the Commission did just that by both ridiculing his faith and questioning his intent; the commissioners did not act neutrally and, therefore, tainted the case. However, CADA is a generally applicable law, so it is the Commission's tainted implementation of the law that is in question, not the law itself. That is where the infringement ends.

The Supreme Court's majority opinion argues that Mr. Phillips was also treated differently by the Civil Rights Commission than other bakers who refused to bake a cake because the customer wanted offensive images and language on it. However, Justices Kagan, Ginsberg, and Sotomayor argue that Phillips refused to make a wedding cake (the product) for two homosexual individuals, whereas in the other cases, the customer asked the bakers to make a

cake with an offensive message that they refused, not because of the client's religion but because of the message. Justice Ginsburg spells it out plainly in her dissent: change *Masterpiece* sex orientation, and the baker would bake the cake. Change Jack's religion, and the cake with the offensive message would still not be baked. The distinction is solid and valid (*Masterpiece*, 2018). However, Justice Gorsuch disagrees and in doing so wades into muddied waters. He argues that cakes used to celebrate same-sex weddings are typically ordered by same-sex couples just as cakes with anti-same-sex messages are typically ordered by those from particular faiths, so turning down any of the requests is refusing a protected group under public accommodations laws. By doing so, Justice Gorsuch is subjectively creating an environment wherein a religious individual's personal beliefs trump generally applicable laws. He continues his argument stating that there are cakes for heterosexual weddings and cakes for homosexual weddings. Basically, Phillips would not make a cake for a homosexual wedding, no matter who ordered it.

What Justice Gorsuch is attempting to do is make the *product* the issue: cakes for homosexual weddings and cakes for heterosexual weddings. His logic lacks reasoning, though. Using his logic, eventually there would be questions about floral arrangements, photo shoots, dresses and tuxedos, buffets and liquor, etc. for homosexual weddings – products common to weddings in general. The bottom line is that Phillips spoke to two men who asked him to create “our” wedding cake. He refused because they are homosexual, yet sexual orientation is a protected class under public accommodation laws. The fact that this occurred in 2012 when Colorado did not recognize same-sex weddings has no bearing on the government's enforcement of civil rights legislation. Phillips discriminated against a protected group while CADA was in effect.

Speech Verses Free Exercise, Not the Same Thing

Justice Gorsuch, continuing in his brief, argued that “[i]n this country, the place of secular officials isn’t to sit in judgment of religious beliefs, but only to protect their free exercise. Just as it is the ‘proudest boast of our free speech jurisprudence’ that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive.” America does hold strongly its adherence to free speech to ensure that an open marketplace of ideas is maintained with even the ugliest and most distasteful of speech; the Court has parameters by which they determine speech’s constitutionality. The Court has also made clear that defining one’s religion while applying free exercise exemptions to public accommodation laws is simply not practical.

During oral arguments, Justice Sotomayor points to the three axes on which the Court decides the case: (1) is the action in question speech or non-speech? (2) are gays protected like race, gender and religion? and (3) does speech apply to just weddings or in general? What about funerals, First Communion, or anniversaries? Baking a wedding cake does not rise to the level of compelled speech that occurred in the *Hurley* case where inclusion would have compelled individuals to express views with which they did not agree. In *Hurley*, the Supreme Court unanimously found that the state court erred when it ruled that private citizen parade organizers had to permit a group – whose message they did not wish to convey – to walk in their parade. The Court said that it violated the intent of the First Amendment as the speaker has autonomy to choose the content of his message (oyez.org). Instead, in Phillips’s scenario, the cake at the wedding does not convey his approval of same-sex marriage at all. It is a product that will be eaten. It has no religious significance, and it is occurring in the public marketplace. The cake is not compelled speech; it is a product that Phillips sells regularly to other customers. If

cake is speech, then where does the Court draw the line? In oral arguments, Justice Sotomayor and others asked that very question. Also, who is an artisan? Is a florist, a hair-stylist, a chef? Hence, the muddied waters. Yes, a wedding cake is recognizable in society as different from other types of cakes, but it does not constitute a form of compelled expression. What about other types of cakes that have religious significance? The Supreme Court asked for clarification with that question as well. If the Supreme Court allows for Phillips to discriminate when asked to make a wedding cake, why can't he then discriminate for an anniversary cake, a funeral cake, a baby shower cake, or baptismal cake? In the *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), Justice Scalia said it best, “[t]o permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.” Otherwise, the Court feared, man would use his religion to place himself out of reach of government statutes, like Phillips is attempting to do here and some members of the Supreme Court seem willing to allow. In other words, permitting an exemption for religious free exercise that allows some groups to ignore public accommodations laws would open the door to unleashed discrimination and the nation has been down that road, witnessing its effects. Therefore, exemptions cannot be permitted.

Religious Exemptions

Religious exemptions are not new. This society has grappled with this concept since colonial times. The national government attempts to maintain “substantive neutrality” which requires that it provide religiously neutral incentives so as not to encourage or discourage religious practice. Religious exemptions that currently exist are from serving in the military, swearing oaths of office without using the Bible, and keeping government assistance to churches or religious schools secular. (Though, as mentioned earlier, since 2017, this seems to be

changing with the conservative justices on the Supreme Court.) Justice O'Connor, in her concurring opinion in *Board of Education v. Grumet* (1994), explained the importance of regulatory exemptions. "What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discrimination based on sect" (Laycock, 2005). Her philosophy reflects the religious tolerance preached in Voltaire's *Philosophical Letters* from the 1730s.

Early state constitutions protected religious free exercise, unless it was deemed "repugnant to the peace and safety of the State" (Georgia Constitution, 1777). Madison, though a student of John Witherspoon at Princeton, agreed. Free exercise of religion should prevail as long as it did not trespass on public safety or private rights. By 1789, general public opinion agreed that forced religious adherence helped no one. As Justice John Bannister Gibson's opinion in *Simon's Executors* (1831) explains, "a person entering into civil society must assume the obligation of yielding to all the laws, because no other form of association is possible." With that decision, Gibson set precedent that religious free exercise does not include the right of exemption, which the United States Supreme Court's upheld in its *Smith* decision. For Gibson, a citizen's most sacred duty was to obey the law (Vile, n.d.).

Public accommodations laws, such as Title II of the Civil Rights Act of 1964, mandate that "all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation...without discrimination" (42 U.S.C. Section 2000a). This protection extends to motels, hotels, restaurants and lunchrooms, motion picture houses, concert halls, sports arenas, and gas stations; basically,

all of the public marketplace. Title II was crucial to the expansion of individual liberties. No longer could business owners treat others disparagingly. Allowing for exemptions would, in one fell swoop, undo all the progress that United States has made in this area.

As America's great experiment continues, so too, does its diversification. The timing of *Cakeshop* and the other religious exercise cases in the pipeline make it absolutely essential that the Supreme Court adhere to Justice Scalia's *Smith* precedent when applying public accommodations laws. They must not make exemptions for religious reasons, as it is the surest way to preserve individual liberties as well as public safety. Neutral treatment of an individual's faith by government entities is an essential element of its implementation. That is the direction the Supreme Court must take; that is the guidance they must provide.

CHAPTER V.

REFERENCES

- Barber, R. Facing South: A Voice for a Changing South. *Institute for Southern Studies*.
Retrieved from www.facingsouth.org (n.d.)
- Barr, W. Remarks to the Law School and the de Nicola Center for Ethics and Culture at the University of Notre Dame. Retrieved May 13, 2020 from
<https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-law-school-and-de-nicola-center-ethics>
- Barry, J. (2012, January). God, government and Roger Williams' big idea: The Puritan minister originated a principle that remains contentious to this day – separation of church and state. *Smithsonian Magazine*, Retrieved May 13, 2020 from
<https://www.smithsonianmag.com/history/god-government-and-roger-williams-big-idea-6291280/#:~:text=The%20Puritan%20minister%20originated%20a,separation%20of%20church%20and%20state&text=Even%20the%20most%20bitter%20opponents,later%20age%20would%20call%20charisma.>
- Bruenig, E. (2019, August 14). In God's country: Evangelicals view Trump as their protector. Will they stand by him in 2020? *The Washington Post*, Retrieved on June 2, 2020 from
<https://www.washingtonpost.com/opinions/2019/08/14/evangelicals-view-trump-their-protector-will-they-stand-by-him/?arc404=true>
- Burns, R., Colt, S., Cragg, D., Eyre, C., Nelson, S., & Zwonitzer. (2009). After the Mayflower. *We shall remain*. Boston, MA: Public Broadcasting Service.
<https://www.pbs.org/wgbh/americanexperience/films/weshallremain/>

- Carey, George W., & McClellan J. (Eds.). (2001) *The Federalist*, Liberty Fund
- CivicsRenewalNetwork.org. (2013). Puritan Massachusetts: Theocracy or democracy? *Bill of Rights in Action*. Constitutional Rights Foundation, 29(1). <https://www.crf-usa.org/images/pdf/gates/puritans-of-mass.pdf>.
- Costa, R., & Rucker, P. (2020, July 4). Trump's push to amplify racism unnerves Republicans who have long enabled him. *The Washington Post*, Retrieved July 20, 2020 from https://www.washingtonpost.com/politics/trump-racism-white-nationalism-republicans/2020/07/04/2b0aeb6-bbaf-11ea-80b9-40ece9a701dc_story.html
- de Tocqueville, A. (2009). *Democracy in America*. Boston, Bedford/St. Martin's.
- Employment Division, Department of Human Resources of Oregon v. Smith*, 494 US 872 (1990). <https://www.oyez.org/cases/1989/88-1213> Retrieved July 22, 2020.
- Greene, J. P. (1988). *Pursuits of happiness: The social development of early modern British colonies and the formation of American culture*. University of North Carolina Press.
- Greenhouse, L. (2020, July 16). The many dimensions of the Chief Justice's triumphant term. *New York Times*. Retrieved July 18, 2020. <https://www.nytimes.com/2020/07/16/opinion/supreme-court-roberts-religion.html#:~:text=the%20main%20story-.The%20Many%20Dimensions%20of%20the%20Chief%20Justice's%20Triumphant%20Term,long%20reserved%20for%20secular%20society.>
- Hannah-Jones, N. (2019, August). The 1619 project. *The New York Times Magazine*, Retrieved June 18, 2020 from <https://www.nytimes.com/interactive/2019/08/14/magazine/1619-america-slavery.html>

History.com, Editors. (2019, September 20). Mayflower Compact.

<https://www.history.com/topics/colonial-america/mayflower-compact>

History.com. Editors. (2019, September 9). Shays' Rebellion.

<https://www.history.com/topics/early-us/shays-rebellion>

Holmes, D. L. (2006). *The Faiths of the Founding Fathers*. Oxford University Press.

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 US 557 (1995).

Oyez. <https://www.oyez.org/cases/1994/94-749>

Laycock, D. (2005 December 12). Two Problems in the Original Understanding of the

Establishment Clause: Religious Exemptions, and the Claim that the Clause Was Really About Federalism. Retrieved March 10, 2020 from

<https://law.utexas.edu/faculty/dlaycock/TwoProblems.pdf>

LaCorne, D. (2011). *Religion in America: A Political History*. Columbia University Press.

Livni, E. (2018, June 4). The logical flaw in the US Supreme Court's Masterpiece Cakeshop

decision, according to dissenting justices. *Quartz*. <https://qz.com/1296202/masterpiece-cakeshop-us-supreme-court-justices-ruth-bader-ginsburg-and-sonia-sotomayor-explain-their-dissent/>

Masci, D. (2016, September 28). Key findings about Americans' views on religious liberty and

nondiscrimination. *Fact tank*. Pew Research Center. <https://www.pewresearch.org/fact-tank/2016/09/28/key-findings-about-americans-views-on-religious-liberty-and-nondiscrimination/>

Masterpiece Cakeshop, Ltd., et al., Petitioners v. Colorado Civil Rights Commission, et al.,

16-111 U.S. (2018). <https://www.supremecourt.gov/opinions/opinions.aspx>

- Merritt, J. (2017, July 12). Segregation is Still Alive at these Christian Schools. *The Daily Beast*. <https://www.thedailybeast.com/segregation-is-still-alive-at-these-christian-schools>
- McConnell, M. W. (1990). The origins and historical understanding of free exercise of religion. *Harvard Law Review*, 103(7), 1409-1517.
- Newkirk, V. R. (2018, July 10). How *Shelby County v. Holder* broke America. *The Atlantic*. 1 <https://www.theatlantic.com/politics/archive/2018/07/how-shelby-county-broke-america/564707/>
- ourdocuments.gov (n.d.). Transcript of President Abraham Lincoln’s Second Inaugural Address (1865). <https://www.ourdocuments.gov/doc.php?flash=false&doc=38&page=transcript>
- O’Connor, L., & Marans, D. (2018, January 12). Trump condemned racism as “evil.” Here are 20 times he embraced it.” *Huffington Post, Politics*. Retrieved July 15, 2020 from https://www.huffpost.com/entry/trump-racism-examples_n_5991dcabe4b09071f69b9261
- Robinson, D. N., & Williams, R.N. (2012). *The American Founding: Its Intellectual and Moral Framework*. Continuum International Publishing Group.
- Rosen, J., & Donnelly, T. (2015, October 19). America’s unfinished second founding. *The Atlantic*, <https://www.theatlantic.com/politics/archive/2015/10/americas-unfinished-second-founding/411079/>
- senate.gov. (2019, September 2). The Civil War: The Senate’s Story. Joint Committee of Fifteen on Reconstruction. <https://www.senate.gov/artandhistory/history/common/generic/JointCommitteeonReconstruction.htm>

- Shaffer, B. (2020 April 2). *Mankind: The Story of All of Us, Warriors: The Crusades*. [Video] History.com. <https://www.history.com/news/history-vault-mankind-the-story-of-all-of-us>
- Shamus, K. J. (2018, October 17). Michigan pharmacist refuses medicine to woman having miscarriage. *Detroit Free Press, News*. Retrieved July 18, 2020 from <https://www.freep.com/story/news/2018/10/17/pharmacist-medicine-miscarriage-religious-objection/1600714002/>
- Shear, M. (2020, June 15). Gorsuch, conservative favorite appointed by Trump, leads way on landmark decision. *New York Times, Politics*. Retrieved July 21, 2020 from <https://www.nytimes.com/2020/06/15/us/politics/gorsuch-supreme-court-gay-transgender-rights.html>
- Soifer, A. (2000). Full and equal rights of conscience. *University of Hawaii Law Review*, 22(2), 1-33.
- Steiner, P. L. (2007). *Voltaire: Philosophical Letters: Or, Letters Regarding the English Nation*. Hackett Publishing.
- Storing, H. J. (Ed.) (1985). *The Anti-Federalist*. The University of Chicago Press.
- Vile, J. (2009). *Phillips et al. (Simon's Executor) v. Gratz (1831)*. *The First Amendment Encyclopedia*. www.mtsu.edu/first.amendment/article/754/phillips-et-al
- Williams, P. (2018, June 25). Supreme Court grants appeal of florist who refused to serve gay wedding. *NBC News*. <https://www.nbcnews.com/politics/supreme-court/supreme-court-grants-appeal-florist-who-refused-serve-gay-wedding-n886266>

Zauzmer, J. (2019, April 30). The Bible was used to justify slavery. Then Africans made it their path to freedom. *The Washington Post, Local*. Retrieved March 18, 2020 from https://www.washingtonpost.com/local/the-bible-was-used-to-justify-slavery-then-africans-made-it-their-path-to-freedom/2019/04/29/34699e8e-6512-11e9-82ba-fcfeff232e8f_story.html

Zuckerman, P. (2019, November 9). The unbearable wrongness of William Barr: Secularism doesn't destroy society or moral order. *Salon*, Retrieved June 8, 2020 from <https://www.salon.com/2019/11/09/the-unbearable-wrongness-of-william-barr/>