Having Their Cake and Eating it Too: How the Supreme Court's Religion Jurisprudence Led to the Irreconcilable Decisions of *Masterpiece Cakeshop* and *Trump v. Hawaii*

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I. *Introduction*

The United States Supreme Court has decided many controversial cases, but in the 2017-2018 term—already a term with "far more than the usual number of high-profile disputes"[1]—two cases stood out. *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*[2] (*Masterpiece Cakeshop* or *Masterpiece*) and *Trump v. Hawaii*[3] (*Trump*) exhibited common traits of many controversial decisions: intersecting governmental action, immigration, same-sex relationships, religious neutrality and expression, and, most importantly, speech.[4] Both cases rest upon the Court's interpretation of the First Amendment's religion clauses (*i.e.*, the Establishment Clause and the Free Exercise Clause), which provides that "[c]ongress shall make no law respecting an

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[1] Annie Geng, *Justice Ginsburg: Recent Term 'Much More Divisive than Usual,'* CNN.COM (Aug. 1, 2018, -08-) https://www.cnn.com/2018/08/01/politics/ruth-bader-ginsburg-divisiveness-supreme-court/index.html?utm_source=twCNNi&utm_term=image&utm_content=2018-08-02T02%3A46%3A08&utm_medium=social.

[2] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission, 138 S. Ct. 1719 (2018).

[3] Trump v. Hawaii, 138 S. Ct. 2392 (2018).

[4] National Constitution Center, *Supreme Court Scorecard: The 2018 Edition (Updated 6/27/2018),* (June 22, 2018) https://constitutioncenter.org/blog/supreme-court-scorecard-the-spring-2018-edition (including *Masterpiece* and *Trump* in a list of "major decisions.")

establishment of religion, or prohibiting the free exercise thereof[.]"[5]

As this note will highlight and discuss, the salient factor present in both of these cases is the Supreme Court's disparate treatment of statements made by government actors. The government actors in *Masterpiece* are two members of the Colorado Civil Rights Commission. In *Trump*, the government actor is the president himself. The Court's fixation on and seeming ambivalence toward certain declarations in these cases creates a confounding scenario with no clear resolution or justifiable reasoning.

Masterpiece presented complex questions concerning expressive conduct as speech and the extent to which the Constitution permits religious objections to public accommodations laws. But the Court declined to resolve those questions and narrowly decided the case by focusing on animus-driven statements made by governmental actors.[6] Conversely, in *Trump*, the Court jettisoned any meaningful discussion of a myriad of derisive statements made by President Trump leading up to the enactment the "Travel Ban," to defer to the government's national security justification.[7]

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[5] U.S. CONST. amend. I, §§ 1 & 2.
[6] *See generally* Adam Liptak, *In Narrow Decision, Supreme Court Sides With Baker Who Turned Away Gay Couple*, NEW YORK TIMES (June 4, 2018) https://www.nytimes.com/2018/06/04/us/politics/supreme-court-sides-with-baker-who-turned-away-gay-couple.html (noting that the Supreme Court ruled on narrow grounds).
[7] *See* note 23, *infra*.

Since these cases were decided in close temporal proximity,[8] the majority opinions do not address each other, leaving readers and practitioners to reconcile the two decisions independently. Justice Sotomayor, in her dissenting opinion in *Trump*, voiced what served as the inspiration for this note: "Just weeks ago, the Court rendered its decision in [*Masterpiece*], which applied the bedrock principles of religious neutrality and tolerance in considering a First Amendment challenge to government action . . . .Those principles should apply equally here." [9] This note seeks to explore and highlight the apparent inconsistency concerning the Court's treatment of the speech components in these two cases, which illustrates the Court's wavering and unprincipled application of its First Amendment precedent.

II. *Trump v. Hawaii*

On December 7, 2015, while campaigning to be President of the United States, then-candidate Donald Trump announced at a rally that he was "calling for a total and complete shutdown of Muslims entering the United States[.]"[10] The next week, he called Muslims "sick people."[11] In March 2016, Trump said during an

[8] *Masterpiece* was decided on June 4, 2018, and *Trump* was decided on June 28, 2018.
[9] Trump v. Hawaii, 138 S. Ct. 2392, 2446-47 (2018) (Sotomayor, J., dissenting).
[10] Jenna Johnson and Abigail Houslohner, *'I Think Islam Hates Us': A Timeline of Trump's Comments about Islam and Muslims*, WASHINGTON POST (May 20, 2017) https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.dca994e170a7 (internal quotation marks omitted).
[11] *Id*. (internal quotation marks omitted).

interview that he "think[s] Islam hates us."[12] Later that month, he called for widespread surveillance of Mosques in the United States, saying "We're having problems with the Muslims, and we're having problems with Muslims coming into the country."[13] That same day, he added that Muslims don't assimilate well into the United States because they want to reject the laws of this country and import "sharia law."[14] The next day, he claimed that "[Muslims] have to respect us. They do not respect us at all."[15] At a rally in June 2016, he decried the number of "immigrants" entering the country "from the Middle East and . . . Muslim countries," asserting that "[a] number of these immigrants have hostile attitudes."[16]

After accepting the Republican Party's nomination for President, Trump said in August 2016, "If you were a Christian in Syria, it was virtually impossible to come to the United States. If you were a Muslim from Syria, it was one of the easier countries to be able to find your way to the United States."[17] Notably, shortly after taking office as President, Trump asked his close advisor and supporter, Rudy Giuliani, to institute a task force to create a "Muslim Ban" but to find "the right way to do it legally."[18]

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[12] *Id*. (internal quotation marks omitted).
[13] *Id*. (internal quotation marks omitted).
[14] *Id*. (internal quotation marks omitted).
[15] *Id*. (internal quotation marks omitted).
[16] *Id*. (internal quotation marks omitted).
[17] *Id*. (internal quotation marks omitted).
[18] Amy B Wang, *Trump Asked for a 'Muslim Ban,' Giuliani Says – and Ordered a Commission to do it 'Legally'*, WASHINGTON POST (January 29, 2017) https://www.washingtonpost.com/news/the-fix/wp/2017/01/29/trump-asked-for-

Against the backdrop of those quoted statements and other nativist declarations,[19] Trump acted shortly after his inauguration to sign Executive Order 13769, entitled "Protecting the Nation From Foreign Terrorist Entry Into the United States."[20] In that Executive Order, he suspended, for 90 days, the entry of all foreign nationals from seven predominantly Muslim countries: Iran, Iraq, Libya, Somalia, Sudan, Syria, and Yemen.[21] In addition, Trump noted that "Christians and others from minority religions [will] be granted priority over Muslims."[22] The Executive Order was temporarily enjoined, nationwide, by the District Court for the Western District of Washington.[23]

With the court in Washington State blocking his efforts, President Trump supplanted the first executive order with a new one, Executive Order 13780.[24] This new order removed Iraq from the list of barred countries, "exempt[ed] permanent residents and current visa holders," and removed language giving preference or

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a-muslim-ban-giuliani-says-and-ordered-a-commission-to-do-it-legally/?utm_term=.90046e42c4f5 (internal quotation marks omitted).

[19] *See* Johnson, *supra* note 6; *see also* Trump v. Hawaii*,* 138 S. Ct. 2392, 2435-38 (2018) (Sotomayor, J., dissenting).

[20] Trump v. Hawaii, 138 S. Ct. 2392, 2403 (2018).

[21] *Id.*; *see also* Michael D. Shear and Helen Cooper*, Trump Bars Refugees and Citizens of 7 Muslim Countries*, NEW YORK TIMES (Jan. 27, 2018) https://www.nytimes.com/2017/01/27/us/politics/trump-syrian-refugees.html.

[22] Id. (internal quotation marks omitted).

[23] *Trump*, 138 S. Ct. at 2403. (The Ninth Circuit Court of Appeals "denied the government's request for a stay.") *Id. (*President Trump signed the Executive Order on January 27, 2017 and Judge Robart from the United States District Court for the Western District of Washington issued a temporary nationwide injunction on February 3, 2017). *See generally* State v. Trump, 2017 WL 462040 (Case No. C17-0141JLR).

[24] *Trump,* 138 S. Ct. at 2403-04.

priority to other religious minorities.[25] Exemptions would be monitored on a "case-by-case" basis.[26] Soon thereafter, federal district courts in Maryland and Hawaii ordered new nationwide injunctions, which were subsequently upheld by their respective courts of appeals.[27] The Supreme Court granted certiorari and stayed the injunctions, which allowed the second executive order to take effect, but permitted entry for those with a "credible claim of a bona fide relationship" to someone in the United States.[28] The time limit on the new executive order ran, and the Supreme Court subsequently dismissed both legal challenges as moot.[29]

In September 2017, Trump issued Proclamation 9645 (Proclamation), the order at issue before the Supreme Court in *Trump*.[30] It is titled "Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry Into the United States by Terrorists of Other Public-Safety Threats."[31] Generally, the Proclamation announced the results of a security review undertaken by the Department of Homeland Security (DHS).[32] DHS developed a

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[25] Glenn Thrush, *Trump's New Travel Ban Blocks Migrants From Six Nations, Sparing Iraq*, NEW YORK TIMES (Mar. 6, 2017) https://www.nytimes.com/2017/03/06/us/politics/travel-ban-muslim-trump.html.
[26] *Trump*, 138 S. Ct. at 2404; *compare Trump*, 138 S. Ct. at 2404 *with Trump*, 138 S. Ct. at 2430-34 (Breyer, J., dissenting) (offering evidence supporting the conclusion that the exemptions were applied in a discriminatory manner).
[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

"baseline" for vetting and information-sharing procedures – the ways in which foreign sovereigns identify and track their citizens.[33] Initially, sixteen countries were deficient when measured against DHS's baseline.[34] For the next fifty days, DHS proceeded to assist those countries to improve their deficient systems.[35] Despite the assistance, half of the sixteen countries—Chad, Iran, Iraq, Libya North Korea, Syria, Venezuela and Yemen—failed to meet DHS's baseline upon subsequent review.[36]

According to the Government, each country remained on the list for specific reasons, and the Proclamation addresses the individual nature of each country.[37] Important to the majority, the Proclamation exempted those individuals who are granted asylum;

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[33] *Id.* The majority opinion in *Trump* described the baseline factors as follows: [F]irst, 'identity-management information,' focused on whether a foreign government ensures the integrity of travel documents by issuing electronic passports, reporting lost or stolen passports, and making available additional identity-related information. Second, the agencies considered the extent to which the country discloses information on criminal history and suspected terrorist links, provides travel document exemplars, and facilitates the U.S. Government's receipt of information about airline passengers and crews traveling to the United States. Finally, the agencies weighed various indicators of national security risk, including whether the foreign state is a known or potential terrorist safe haven and whether is regularly declines to receive returning nationals following final orders from the United States. *Id.* at 2404-05.

[34] *Id.* at 2405.

[35] *Id.*

[36] *Id.*

[37] *Id.* For example, Iran, North Korea, and Syria—who do not share information with the U.S.—all nationals, except for Iranian exchange and student visas, are suspended. *Id.* Because Chad, Libya, and Yemen are "valuable counterterrorism partners," the nationals from those countries seeking "immigrant visas and nonimmigrant business or tourist visas" are prevented entry. *Id.* (internal quotation marks omitted). Only Venezuelan government officials and their families are allowed under the regime and Somali immigrant visas are suspended with scrutinized security checks for nationals applying for nonimmigrant visas. *Id.* at 2405-06.

those who constitute lawful permanent residents; and those who demonstrate undue hardship.[38] Lastly, the Proclamation includes a direction to DHS to implement a continuing review every six months; pursuant to that order, DHS later lifted the restrictions on Chadian nationals.[39]

A. *Establishment Clause Analysis*[40]

The respondents in *Trump* brought suit in the United States District Court for the District of Hawaii and contended that the "Proclamation was issued for the unconstitutional purpose of excluding Muslims."[41] To evaluate whether the Proclamation ran afoul of the Establishment Clause, the District Court applied the "*Lemon* test" from the longstanding, oft-discussed[42] case of *Lemon v. Kurtzman*.[43] In order to remain within the bounds of the Establishment Clause, a governmental action must: (1) have a secular purpose; (2) the principal or primary effect must neither advance nor inhibit religion; and (3) the action "may not foster excessive entanglement with religion."[44] Failure to satisfy any of the

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[38] *Id.* at 2406.
[39] *Id.*
[40] This note will not address the statutory or standing arguments that the Supreme Court discusses.
[41] *Id.* at 2415.
[42] *See* Kenneth Mitchell Cox, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1197 (1984); Lisa M. Kahle, *Making "Lemon-Aid" From the Supreme Court's Lemon: Why Current Establishment Clause Jurisprudence Should be Replaced by a Modified Coercion Test*, 42 SAN DIEGO L. REV. 349 (2005).
[43] Hawai'i v. Trump, 241 F.Supp.3d 1119, 1134 (D. Hawai'i 2017); Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971).
[44] *Hawai'i,* 241 F.Supp.3d at 1134.

three prongs is a First Amendment violation.[45] After a thorough review of the record, including President Trump's comments about Muslims, the District Court concluded that the statements "betray the [Proclamation]'s stated secular purpose[,]" thus failing the first prong of the *Lemon* test.[46] On appeal, the Ninth Circuit Court of Appeals affirmed the injunction issued by the District Court and declined to reach the merits of the Establishment Clause claim.[47]

On appeal to the Supreme Court, Chief Justice Roberts, writing for the majority, remarkably departed from the traditional Establishment Clause jurisprudence (*i.e.*, the *Lemon* test). That departure seemingly derived from the invocation of "national security" interests, which transformed the fundamental nature of the case.[48] The majority found that the case did not involve the "typical [Establishment] suit [with respect to] . . . religious displays or school prayer," but "[sought] to invalidate a national security directive regulating the entry of aliens abroad."[49] Because of this unique intersection between national security and the Establishment Clause, the majority attempted to balance a "number of delicate issues regarding [the] scope of [the] constitutional right and the manner of proof."[50]

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[45] *Id.*
[46] *Id.* at 1137.
[47] Hawaii v. Trump, 878 F.3d 662, 702 (9th Cir. 2017).
[48] Trump v. Hawaii, 138 S. Ct 2392, 2418 (2018).
[49] *Id.*
[50] *Id.*

Rather than addressing the three prongs of the traditional *Lemon* analysis, or engaging in any meaningful Establishment Clause examination, the majority submitted a historical review of the Supreme Court's well-established deference to the Executive branch on issues of immigration and national security.[51] With this substantial deference in mind, Chief Justice Roberts concluded, without citation to any particular precedent, that the Court would apply rational basis review.[52] As a result, so long as the Proclamation was "plausibly related to the Government's stated objective to protect the country and improve vetting processes," it would be upheld.[53] Through the facile lens of rational basis scrutiny, the majority accepted the facial, neutral justifications (*e.g.*, improving vetting and information sharing procedures) and declined to invalidate the Proclamation.[54]

B. *Rational Basis Review*

The majority cited three cases where the Court has invalidated government actions even though they applied the permissive rational basis review:[55] *Department of Agriculture v. Moreno,*[56] *Cleburne v. Cleburne Living Center, Inc.*,[57] and *Romer v.*

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[51] *Id.* at 2418-20.
[52] *Id.* at 2420.
[53] *Id.*
[54] *Id.* at 2421. "[B]ecause there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification." *Id.*
[55] *Id.* at 2420.
[56] Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973).
[57] Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

Evans.[58] Chief Justice Roberts cited those cases in an effort to distinguish them from the facts present in *Trump*, but they are more pertinent and applicable than he claimed.

In *Moreno*, the Court invalidated a provision of the Food Stamp Act that defined "household" to include only members of related individuals in order to qualify for financial assistance.[59] Although the Court applied rational basis review to the legislative definition, the provision was nevertheless deemed unconstitutional because of, among other things, *one* noted statement in the legislative history that the "amendment was intended to prevent so called 'hippies' and 'hippie communes' from participating in the food stamp program."[60] The Court concluded that the definition evinced a "bare . . . desire to harm a politically unpopular group" and that marginalizing "hippies" from the program could not "constitute a legitimate governmental interest."[61]

The next case, *Cleburne*, concerned a zoning ordinance.[62] Respondents wished to build a home for the mentally disabled.[63] However, the City of Cleburne had a zoning ordinance that required a special permit for the construction of a "hospital for the feeble-minded[,]" and after a public hearing on the matter, the city council

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[58] Romer v. Evans, 517 U.S. 620 (1996).
[59] *Moreno*, 413 U.S. at 530.
[60] *Id.* at 534.
[61] *Id.*
[62] *Cleburne*, 473 U.S. at 436.
[63] *Id.* at 435.

denied the special permit.[64] Declining to hold the classification of mentally disabled persons as a suspect class, the Court evaluated the policy via rational basis review.[65] The Court noted that the City of Cleburne:

> Did not require a special use permit in a R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feebleminded or alcoholics or drug addicts), private clubs or fraternal orders . . . . It does, however, require a special permit for [Respondent's proposed home] . . . because it would be a facility for the mentally retarded.[66]

In short, the city's interests—fear of negative attitudes and harassment toward the mentally disabled; potential street congestion; the home's location on a flood plain; and the mere number of people who would be living in the house—did not justify any distinction between mentally abled and mentally disabled persons and invalidated the ordinance.[67]

Lastly, *Romer* focused on an amendment to the Colorado state constitution adopted by a state referendum.[68] Before the adoption of the amendment, large cities in Colorado enacted statutes that prohibited discrimination on the basis of sexual orientation.[69] In response, the Colorado citizenry amended its constitution to,

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[64] *Id*. at 436-37 (internal quotation marks omitted).
[65] *Id.* at 446.
[66] *Id.* at 447-48.
[67] *Id*. at 448-450.
[68] Romer v. Evans, 517 U.S. 620, 623 (1996).
[69] *Id.* at 624.

"prohibit all legislative, executive or judicial action at any level of state or local government designed to protect . . . gays or lesbians."[70] Because the LGBT population did not constitute a suspect class warranting more exacting judicial scrutiny, the Court applied rational basis review to the amendment.[71] The majority noted the unique legal nature of the amendment such that it *narrowly* identified a class of people by a single trait and *broadly* disqualified any legal protection for that class.[72] Notably, the amendment impermissibly led to the "inevitable inference that the disadvantage is born of animosity toward the class of persons affected."[73] The state's interest in respecting the religious objections of employers and landlords, as well as conserving resources to combat discrimination against other groups of minorities, did not justify the sheer breadth of the amendment.[74]

Comparing the Court's analysis in these cases to its analysis in *Trump* elucidates that the Court's failure to similarly critique the president's statements derives significantly, if not entirely, from the government's claimed national security interests. While the majority did not engage in any exacting effort to distinguish the application

[70] *Id.*
[71] *Id.* at 631.
[72] *Id.* at 633.
[73] *Id.* at 634.
[74] *Id*. at 635. In other words, the amendment was "a status-based enactment divorced from any factual context from which we could discern a relationship to any legitimate state interests[.]" *Id.*

of rational basis employed in those cases—because those cases did not concern national security justifications—they are still relevant, and should have imbued the majority's discussion. For example, in *Moreno*, the Court took note of *one* statement of animus toward a politically unpopular group and found that it unconstitutionally infected the motives behind enacting the Food Stamp Act definition of "household." Yet here, there is unequivocal and undisputed evidence of *multiple* vituperative statements against Muslims. In fact, a stated interest of President Trump was to enact a "total and complete shutdown of Muslims" from entering the United States.[75] That interest is not legitimate under any construction of the rational basis test. It is unabashedly motivated by a bare desire to harm a

[75] This statement warrants a brief discussion regarding the significance of statements made by a candidate before and after taking the Oath of Office, an issue briefly discussed at oral argument. Justice Kennedy asked the Solicitor General, Noel Francisco, whether campaign statements made as a candidate were irrelevant, and General Francisco replied by asserting that taking the Oath of Office "marks a fundamental transformation," cleansing a candidate's prior statements. Transcript of Oral Argument at 29-30, Trump v. Hawaii, 138 S. Ct. 1719 (2018) (No. 17-965). Chief Justice Roberts was similarly curious, and inquired as opposing counsel, Neal Katyal's, thoughts on the same question. *Id.* at 60-64. Former Solicitor General Katyal agreed with General Francisco noting that the Court "shouldn't look to campaign statements in general or . . . statements of a private citizen." *Id.* at 62. Moreover, General Katyal signaled to the Court that the President did not disclaim or disavow his previous statements; and further conceded that if the President disclaimed previous comments and reissued the same Executive Order, any disclaimer would have precluded a discrimination argument based on those comments. *See id*; *see also* Brief for Respondents Hawaii, et. al. at 70-71, Trump v. Hawaii, 138 S. Ct. 1719 (2018) (No. 17-965) (filed March 23, 2018) (listing examples of President Trump's comments post-inauguration). However, since the President did not disavow those statements and continued to make comments about the Executive Order post-inauguration, the President, according to General Katyal, had "rekindled" his pre-inauguration comments. Transcript of Oral Argument at 61, Trump v. Hawaii, 138 S. Ct. 1719 (2018) (No. 17-965). The majority, concurring, and dissenting opinions do not address this argument.

politically unpopular minority group. The majority's indifference toward those statements and dismissal of their animosity in order to accept the "national security" justifications is fundamentally flawed, particularly in light of the Court's precedent.

In *Cleburne*, the class at issue consisted of mentally disabled persons, a class not explicitly mentioned anywhere in the constitution. However, Islam, as a *religion*, is enshrined with protections in the First Amendment to the Constitution.[76] Such a conspicuous protection contemplated by the founding fathers should certainly require a more careful and deliberate analysis than that employed by the majority in *Trump*.

Finally, in *Romer*, six justices of the Court found that the context and language of the Colorado constitutional amendment led to the mere *inference* of a desire to harm a politically unpopular group and invalidated the amendment as a result. Here, however, the Court dodges this analysis altogether. The Court does so despite the fact that even a cursory glance at the record reveals deliberately prejudicial and animus-driven statements by President Trump; no inferences need be drawn to determine that the action was based on an unconstitutional desire to injure members of the Muslim community, failing even rational basis review.

[76] *See* U.S. CONST. amend. I, §§ 1 & 2.

In her consummate dissent, Justice Sotomayor also addressed the majority's handling of rational basis application. Primarily, she is not convinced of the legitimacy of the government's interests, namely "preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices."[77] She described in meticulous detail how the Immigration and Nationality Act already provided a "reticulated scheme" that governs admission of foreign nationals in this context.[78] She goes on to describe the stringency of the United States' vetting and information sharing systems viz. the Visa Waiver Program.[79] With the purported interests of the Proclamation adequately addressed, she concluded that "the Government remains wholly unable to articulate any credible national-security interest that would go unaddressed by the current statutory scheme absent the Proclamation."[80] Since Congress already sustained the interests of the government via the Immigration and Nationality Act and Visa Waiver Program, the only remaining governmental interest is to harm a politically unpopular group, which leads to the inevitable conclusion that the Proclamation does not survive rational basis review.

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[77] Trump v. Hawaii, 138 S. Ct. 2392, 2421 (2018) (Sotomayor, J., dissenting).
[78] *Id*. at 2243-44 (Sotomayor, J., dissenting).
[79] *Id.* at 2244-45 (Sotomayor, J., dissenting).
[80] *Id*. at 2244 (Sotomayor, J., dissenting).

Professor Shalini Bhargava Ray has offered further commentary along these lines.[81] She compellingly notes that the majority in *Trump* mischaracterized the nature of animus present in *Moreno*, *Cleburne*, and *Romer*.[82] The majority simplistically glossed over those decisions as cases involving pure animus without any legitimate governmental justifications, but as Professor Ray reports, that is not the case:

> In *Moreno*, the claimed legitimate purpose was limiting the potential for abuse; in *Cleburne*, it was concerns about traffic and overcrowding; and in *Romer*, it was precluding 'special treatment' for sexual minorities. Nonetheless, because of the discernable presence of animus in each case, either from legislative history, zoning commission hearings, or from the text of the enactment itself, the Court refused to accept [the] defendants' post-hoc rationalizations.[83]

It seems evident that the majority, at the very least, mischaracterized the reasoning of those cases. Each of those cases illustrates the Court's willingness to invalidate animus-driven governmental action through rational basis review even when accompanying legitimate interests justify that governmental action. The majority's failure to properly evaluate its own rational basis precedent "will likely produce confusion in the lower courts[.]"[84]

C. *Other Levels of Scrutiny*

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[81] Shalini Bhargava Ray*, Plenary Power and Animus in Immigration Law*, 80 OHIO ST. L. J. __ (forthcoming 2019).
[82] *Id.*
[83] *Id.*
[84] *Id.*

In her dissent, Justice Sotomayor continued to probe the Court's Establishment Clause precedent for a more appropriate level of scrutiny, and cited *McCreary County, Ky. v. American Civil Liberties Union of Ky*.[85] The facts in *McCreary* seem particularly appropriate to compare to *Trump* and ascertain the appropriate level of scrutiny for Establishment Clause claims. Two counties in Kentucky posted copies of the Ten Commandment in the hallways of their respective courthouses.[86] This action was quickly challenged in federal court; and, before the court ruled, the counties implemented a second, similar display, but with provisions explaining the historical importance of the Ten Commandments and other prominently religious displays (*e.g.,* noting the national motto "In God We Trust," as well as a discussion of the National Day of Prayer) to the development of Kentucky law.[87] The District Court issued an injunction ordering removal of the displays and preventing production of future displays, holding that the counties' actions failed the first prong of the *Lemon* test (requiring a secular purpose).[88] While the counties initially appealed that decision, they withdrew the appeal and produced a third display.[89] This third display included the Ten Commandments but also posted "framed

[85] McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844 (2005).
[86] *Id.* at 850.
[87] *Id.* at 853-54.
[88] *Id.* at 854 (citing Lemon v. Kurtzman*,* 403 U.S. 602, 612-613 (1971)).
[89] *Id*. at 855.

copies of the Magna Carta, the Declaration of Independence, the Bill of Rights, the lyrics of the Star Spangled Banner, the Mayflower Compact, the National Motto, the Preamble to the Kentucky Constitution, and a picture of Lady Justice."[90]

On appeal to the Supreme Court, the majority applied the *Lemon* test, and held that the "reasonable observer" standard is appropriate in Establishment Clause cases because "scrutinizing purpose does make practical sense . . . where an understanding of official objective from readily discoverable fact, without any judicial psychoanalysis of the drafter's heart of hearts[,]" can be ascertained.[91] The counties were unable to convince the majority that they possessed a neutral purpose at the time of posting the third display, "which quoted more of the purely religious language of the Commandments than the first two displays had done[.]"[92] Applying the reasonable observer standard, the majority ultimately concluded that "[n]o reasonable observer could swallow the claim that the [c]ounties had cast off the objective so unmistakable in the earlier displays.[93]

The Court's analysis in *McCreary* is particularly cogent when assessing *Trump*, which similarly centered on an

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[90] *Id.* at 855-56.
[91] *Id.* at 862. (citing Wallace v. Jaffree, 472 U.S. 38 (1985)). Moreover, "[e]xamination of purpose is a staple of statutory construction that makes up the daily fare of every appellate court in the country[.]" *Id.* at 861.
[92] *Id.* at 872.
[93] *Id.*

Establishment Clause claim. Instead of discarding the Supreme Court's Establishment jurisprudence, the *Trump* majority should have conducted a straightforward application of precedent. If the majority applied *McCreary*, *Lemon*, *Moreno*, *Cleburne*, and *Romer* (or a combination thereof) it would have reached the conclusion reached by Justice Sotomayor's and Justice Breyer's dissents.[94] The majority had at its disposal ample precedent that allowed it to engage

[94] Justice Breyer's dissent does not address the Constitutional and precedential arguments discussed in this note, but his dissent, joined by Justice Kagan, is worth briefly mentioning.

Justice Breyer entertains a line of reasoning that would find evidence of discrimination in *application* of the Proclamation. Trump v. Hawaii, 138 S. Ct. 2392, 2430 (2018) (Breyer, J., dissenting). He cites various areas of the Proclamation's application that serve as cause for concern. First, since the Proclamation calls for the issuance of guidance for consular officers for the case-by-case waivers and exemptions, it was concerning to Justice Breyer that "no guidance [had been] issued" at the time of litigation. *Id.* at 2431. During the first month after the Proclamation's issuance, only two of 6,555 eligible waiver applicants were granted. *Id.* That number increased to 430 in the subsequent months, but that number was "miniscule" when compared to the number of pre-Proclamation applicants. *Id.* He also cited *amicus curiae* from the Pars Equality Center that "identified 1,000 individuals—including parents and children of U.S. citizens—who sought and were denied entry under the Proclamation, hundreds of whom seem to meet the waiver criteria." *Id.*

Justice He Breyer goes on to note that, even though "the Proclamation does not apply to asylum seekers or refugees[,]" the number of Syrian refugees admitted had decreased from over 15,000 in 2018, to thirteen in 2018. *Id.* Further, the amount of student visas from the selected countries had also decreased, even though the Proclamation exempted student visas (A total of 258 visas were issued in 2018, at the time of litigation, which was "less than a quarter of the volume needed to be on track for 2016[.]"). *Id.* at 2432.

One *amici* highlighted the story of a Yemeni girl with cerebral palsy, who would die if she could not enter the U.S. to receive medication. *Id.* Her case was denied, and she was only admitted after national attention focused on her denial. *Id.* Clearly, Justice Breyer did not (and should not) accept the post-hoc rationalization that the immigration officer "checked the wrong box" when they initially denied her application. *Id.* Lastly, Justice Breyer cited an affidavit from a consular officer who testified that the exemption and waiver programs were "window dressing" and that officers "were not allowed to exercise . . . discretion" when evaluating applications. *Id.* at 2432-33. Justice Breyer would have remanded for more factual findings with respect to the application of the Proclamation, but also would have invalidated the Proclamation for the reasons stated in Sotomayor's dissent. *Id.* at 2433.

in an inquiry of the entire record that led to the enactment the Proclamation. Instead, the majority embarked on a strained endeavor to defer to the Executive Branch. "Deference is different from unquestioning acceptance. Thus, what is 'far more problematic' in this case is the majority's apparent willingness to throw the Establishment Clause out the window and forego any meaningful constitutional review at the mere mention of a national-security concern."[95]

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[95] Trump v. Hawaii, 138 S. Ct. 2392, 2441 n.6 (2018) (Sotomayor, J., dissenting).

The mention of national security leads to the back-and-forth between the majority and Sotomayor with respect to Korematsu v. United States, 323 U.S. 214 (1944). In *Korematsu*, the Court upheld an Executive Order that commanded the internment and forced relocation of American citizens of Japanese ancestry. *Id.* at 215-16. The order justified the action because "the successful prosecution of the war [against Japan] require[d] every possible protection against espionage and against sabotage to national-defense material, national defense premises, and national-defense utilities." *Id.* at 217 (internal quotation marks omitted). In other words, "the Government invoked an ill-defined national-security threat[.]" Trump v. Hawaii, 138 S. Ct. 2392, 2447 (2018) (Sotomayor, J. dissenting). Sotomayor invokes *Korematsu* because the majority's "holding is all the more troubling given the stark parallels between the reasoning" of the two cases. *Id.*

For his part, Chief Justice Roberts forcefully distinguishes *Korematsu* from *Trump*. He asserts that "[t]he forcible relocation of U.S. citizens to concentration campus, solely and explicitly on the basis of race, is objectively unlawful and outside the scope of Presidential authority." *Id.* at 2423. However, as Professor Ray and Justice Sotomayor note, the government argued that the Executive Order at issue in *Korematsu* was not based upon racial animus, but national security concerns. *See* Ray*, supra* note 82.; *see also Trump* at 2448 (Sotomayor, J., dissenting). The justification of national security is unquestionably at the heart of the executive orders at issue in both decisions. Rather than engaging with Sotomayor's objection, Chief Justice Roberts simultaneously denounces Justice Sotomayor's purported use of "rhetoric" to employ his own version of orotundity.

Chief Justice Roberts uses the opportunity to end his opinion by proclaiming: "*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" *Trump* at 2423 (quoting *Korematsu*, 323 U.S. at 248 (Jackson, J., dissenting)). Notwithstanding Chief Justice Roberts' invocation of the ethereal "court of history," scholars have commented that, in deciding *Trump*, the Court did not overrule *Korematsu*. *See* Scott Bomboy, *Did the Supreme Court Just Overrule the Korematsu Decision?*, NATIONAL

II. *Masterpiece Cakeshop*

The other controversial and closely watched decision from the 2017-2018 term was *Masterpiece Cakeshop*.[96] Jack Phillips, the owner of Masterpiece Cakeshop near Denver, Colorado, is a devout Christian who creates custom cakes for all kinds of celebratory events.[97] During the summer of 2015, Charlie Craig and Dave Mullins, a same-sex couple planning on marrying, approached Phillips to create a custom wedding cake for them.[98] The couple was going to get married in Massachusetts because, at the time, Colorado state law did not permit same-sex marriages.[99] Before the couple described their design preferences of their cake, Phillips refused to make a wedding cake for the couple.[100] According to Phillips, his

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CONSTITUTION CENTER, (June 28, 2018), https://constitutioncenter.org/blog/did-the-supreme-court-just-overrule-the-korematsu-decision; *see also* Becky Little, *Korematsu Ruling on Japanese Internment: Condemned but Not Overruled*, History.com, (June 27, 2018), https://www.history.com/news/korematsu-japanese-internment-supreme-court. *Trump* did not involve substantially similar facts, neither party requested that the Court to officially overrule *Korematusu*, and Chief Justice Roberts did not explicitly use language that would overrule the case; he only forcefully criticized it. *See generally Trump* at 2423. While the discussion of *Korematsu* is not central to the religion analysis employed in this note, it is still important to address the Chief's self-aggrandizing and rather hypocritical attempt to discredit Sotomayor's citation of *Korematsu* to gain a "rhetorical advantage." The Chief does not get a "gold star" for criticizing a decision that has as much universal disdain as *Plessy v. Ferguson,* 163 U.S. 537 (1896) (upholding as constitutional the "separate but equal" doctrine). The resulting discussion employed by the majority in this section of the opinion is wholly insincere.

[96] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*,* 138 S. Ct. 1719 (2018).

[97] *Id.* at 1724.

[98] *Id.*

[99] *Id.* These events also took place before the Supreme Court's decision in Obergefell v. Hodges, 135 S. Ct. 2584 (2015), which legalized same-sex marriage for the entire nation.

[100] *Masterpiece*, 138 S. Ct. at 1724.

religious beliefs precluded him from accommodating the same-sex couple because he is religiously opposed to same-sex marriage. Phillips claimed that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into."[101]

Craig and Mullins filed a complaint to the Colorado Civil Rights Division alleging that Phillips discriminated against them because of their sexual orientation in violation of the Colorado Anti-Discrimination Act (CADA).[102] The Civil Rights Division investigates claims of discrimination that potentially violate CADA.[103] The investigation found that Phillips declined to sell wedding cakes to six other same-sex couples based on the same religious objection, and referred the case to the Civil Rights Commission, which transferred the matter to an Administrative Law Judge (ALJ).[104]

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[101] *Id.* (internal quotation marks omitted).
[102] *Id.* at 1725-26. CADA states:
It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation. *Id.* at 1725 (internal quotation marks omitted). The statute defines "public accommodation" to mean any "place of business engaged in any sales to the public and any place offering public services . . . to the public[,]" which means that Masterpiece Cakeshop is undoubtedly a public accommodation. *Id.*
[103] *Id.* at 1725.
[104] *Id.* at 1725-26.

The ALJ found that Phillips' actions constituted discrimination on the basis of sexual orientation, violating CADA.[105] Phillips contended that CADA violates "his First Amendment Right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed," and that "requiring him to create cakes for same-sex weddings would violate his right to free exercise of religion."[106] The ALJ rejected those claims.[107]

In affirming the ALJ's decision, the Civil Rights Commission ordered Phillips to cease and desist discriminating against same-sex couples if he planned to continue selling wedding cakes to heterosexual couples.[108] He was also ordered to attend public accommodations training and provide an accounting of subsequent refusals to serve customers for the next two years.[109] Phillips appealed that decision to the Colorado Court of Appeals, which also ruled against Phillips and his constitutional claims.[110]

Rather than deciding the case on the constitutional claims presented, the majority, per Justice Kennedy, reversed the decision of the Colorado Court of Appeals, because, *inter alia*, "[t]he Civil Rights Commission's treatment of [Phillips'] case has some

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[105] *Id.* at 1726.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*

elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."[111] Justice Kennedy was particularly moved by comments made by certain commissioners. During the public hearing on Phillips's case, one commissioner said that Phillips "can believe what he wants to believe, but cannot act on his religious beliefs if he decides to do business in the state."[112] That same commissioner later said, "[i]f a businessman wants to do business in the state and he's got an issue with the . . . law's impacting his personal belief system, he needs to look at being able to compromise."[113]

During a second public meeting, a separate commissioner stated:

> Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.[114]

The various commissioners' statements are only part of the objectionable actions that illustrate religious hostility. Phillips cited three cases previously handled by the Civil Rights Commission where bakers objected to creating a cake with denigrating messages and imagery that "conveyed disapproval of same-sex marriage."[115]

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[111] *Id.* at 1729.
[112] *Id.* (internal quotation marks omitted).
[113] *Id.* (internal quotation marks omitted).
[114] *Id.* Justice Kennedy noted that none of the other commissioners commented, objected, or disavowed their colleagues' statements. *Id.*
[115] *Id.* at 1730.

According to Justice Kennedy, the Commission's disparate treatment of Phillips and the other three bakers evinced religious intolerance.[116] Further, by addressing that claim in a footnote dismissing the issue, the Colorado Court of Appeals "elevate[d] one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs."[117]

Thus, because "the Commission's treatment of Phillips' case violated the State's *duty under the First Amendment not to base laws or regulations on hostility to a religion*[,]" the Supreme Court reversed the decision of the Colorado Court of Appeals.[118] In doing so, the majority cited one First Amendment case to support its holding—*Church of Lukumi Babalu Aye v. City of Hialeah.*[119]

The dispute in *Lukumi* centered on ritual animal sacrifice, a core tenet of the Santeria religion.[120] To curb fears that Santeria

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[116] *Id.* This line of reasoning is distinguishable from the issue of religious hostility. In all three of the cases that Phillips cites, the respective bakers have been exposed to the message, *i.e.*, they knew what the customer wanted to put on their cake. However, the interaction between Phillips, Craig, and Mullins did not ultimately reach the point of discussing what was going to be put on the cake. Here, when Phillips found out that the wedding cake was for a gay couple, he refused to serve them, based solely on their identifiable characteristic as gay men. This view is echoed in Justice Kagan's concurrence and Justice Ginsburg's dissent. *Id.* at 1732-34 (Kagan, J., concurring) ("The three bakers…did not violate the law…The different outcomes in the [three] cases and the Phillips cases could . . . have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief."); *see id.* at 1750 (Ginsburg, J., dissenting) (The Phillips case and the three other cases are "hardly comparable." *Id.* "Phillips would not sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others." *Id.* (emphasis omitted)).
[117] *Id.* at 1731.
[118] *Id.* (emphasis added).
[119] *Id.* at 1730; Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).
[120] *Id.* at 524.

practitioners were going to open a church in the city of Hialeah, where ritualistic animal sacrifice would occur, the city attorney requested that Florida's Attorney General issue an opinion determining whether the city could pass an ordinance banning the practice.[121] The Attorney General responded that ritualistic animal sacrifice would not violate state law, which led to Hialeah's resolution banning the act, subjecting violators to prosecution.[122] In total, Hialeah passed three ordinances, all three of which focused on animal sacrifice in the context of the Santeria religion.[123] A review of the record as a whole led the majority to conclude that the three ordinances were religiously gerrymandered.[124] The Court further found that the ordinances were discriminatory both in text and application.[125]

In her *Masterpiece* dissent, Justice Ginsburg objected to the majority's reliance on the commissioners' statements.[126] She suggested that the statements should not have distracted the Court from the underlying dispute: the fact that Phillips refused to sell

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[121] *Id.* at 526-27. The city could not, by itself, pass an ordinance that would conflict with Florida's animal cruelty statute, so the question to the Attorney General asked if Hialeah's proposed action could conflict with state law. *Id.*
[122] *Id.* at 527.
[123] *Id.* at 527-28. Ultimately, four ordinances were passed; three of them were "substantive."
[124] *Id.* at 534-35. Reviewing the record beyond the text of the statute was appropriate because, according to the Court, "[t]he Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Id.* at 534.
[125] *Id.*
[126] Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1751 (2018) (Ginsburg, J., dissenting).

Craig and Mullins a wedding cake because they were gay.[127] Assuming, *arguendo*, that the commissioners' statements violated the First Amendment's charge of religious neutrality, any taint in the adjudicative process would have been insulated throughout the many levels of administrative and judicial review.[128] "First, the [Civil Rights] Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips appeal. Fourth, after the Commission's ruling, the Colorado Court of Appeals considered the case *de novo*."[129] This means that the Colorado Court of Appeals could have found that the commissioners' statements violated the First Amendment, but did not do so. In other words, the majority, according to Justice Ginsburg, failed to address whether any "prejudice infected the determinations of the adjudicators[.]"[130]

III. *Reconciling the Two Decisions – Analysis and Conclusion*

How is a legal practitioner, law student, or layperson supposed to reconcile the Court's decision in *Trump* with the Court's decision in *Masterpiece Cakeshop*? For one, Justice

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[127] *Id.* (Ginsburg, J., dissenting).
[128] *Id.* (Ginsburg, J., dissenting).
[129] *Id.* (Ginsburg, J., dissenting). Black's Law Dictionary defines "appeal de novo" as "[a]n appeal in which an appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's findings." *Appeal De Novo*, BLACK'S LAW DICTIONARY (10 ed. 2014).
[130] *Id.*

Sotomayor finds that they cannot be reconciled. She cogently signaled the inconsistencies between the two decisions by characterizing the dispositive question as "whether a government actor exhibited tolerance and neutrality in reaching a decision that affects individuals' fundamental religious freedom." [131] She continued to explain what is now relatively obvious: if the majorities in those cases found three (rather anodyne) statements by government officials regarding religion generally (not specifically Christianity) in *Masterpiece Cakeshop* to be denigrating, impermissible, and violative of the First Amendment, then that same Court cannot just as easily jettison the myriad derisive statements made by government officials in *Trump*.[132]

A. *Were These Cases Correctly Decided?*

Undoubtedly, whether a case was "correctly decided" invokes a multi-faceted discussion. A case could be rightly decided in the way that a person prefers the policy outcome. On the other hand, a case could reach the correct result on the merits but simultaneously create unfortunate precedent. There is no objective criterion to assess the correctness of a decision, but, as this paper illuminates, *Trump* involves a gross misapplication of precedent.

i. *Trump*

[131] Trump v. Hawaii, 138 S. Ct. 2392, 2447 (2018) (Sotomayor, J., dissenting).
[132] *Id*. at 2446-47 (Sotomayor, J., dissenting).

As discussed above, *Trump* has two avenues of dubious reasoning: (1) the level of scrutiny applied; and (2) consistency with First Amendment precedent. With respect to the first avenue, the majority misapplied its rational basis cases: *Moreno*, *Romer*, and *Cleburne.* Those cases are examples of a Court clearly concerned with the protection of a politically unpopular group. That concern apparently ends at *Trump*, however, as the majority declines to engage in a rational basis analysis of the cases that *it cited* for that proposition.

Next, the lack of discussion concerning Establishment Clause precedent is alarming. *McCreary* plainly applies to the claims asserted in *Trump*, but the majority claims that *McCreary* is inapposite because it does not concern immigration or national security like the present case.[133]

Further, if Justice Kennedy had adhered to his own words and personal views of the First Amendment, his reasoning may have affected the outcome of *Trump*.[134] In section II-A-2[135] of *Lukumi*, Justice Kennedy explained his vision of First Amendment jurisprudence such that when assessing the neutrality of government action, claims under the Free Exercise and Establishment Clauses should be evaluated similarly to the Court's Equal Protection

[133] *Id.* at 2420, n. 5.
[134] *Trump* was decided 5-4.
[135] This section of the opinion is not controlling, as only Justice Kennedy and Justice White joined.

analysis. In other words, the Court may consider "direct and circumstantial evidence" of the government's purposes with respect to a specific action.[136] According to Justice Kennedy, "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body." [137] Through this discussion, Justice Kennedy equated Free Exercise and Establishment Clause analysis, bringing *Trump* and *Masterpiece* into the same analytical sphere. There is an argument to be made that the *Masterpiece* decision tracks more with an Establishment Clause claim than a Free Exercise Clause claim because the majority in that case focused on *government actors* (*i.e.*, in each case, the source of the impermissible hostility toward religion is the government, not the individual actor purportedly exercising their religion). Because these cases present a unique and clear view into Justice Kennedy's personal interpretation of the First Amendment, he cannot sincerely reconcile his written decisions in *Trump* and *Masterpiece*.

[136] Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 540 (1993).
[137] *Id.*

Lastly, the majority does not address the use of the *Lemon* test that the District Court employed. The *Lemon* test is the preeminent examination for Establishment Clause claims, and failure to engage in any kind of examination on that front is disquieting. It is, at the very least, likely that the Proclamation in *Trump* would have failed the *Lemon* test.

Perhaps most upsetting to lay observers of Supreme Court decisions is the idea that the President's invective statements are legally irrelevant.[138] After *Trump*, one strains to imagine a scenario where animus is plainly evidenced by the record.

ii. Masterpiece Cakeshop

To be sure, the majority decided *Masterpiece Cakeshop* on very narrow grounds. It refused to address the complex questions presented that involved compelled speech, expressive conduct, and religious exemptions to public accommodations laws. Through its discussion and decision, it seemingly transformed a Free Exercise Clause case into an Establishment Clause case by invalidating the lower court decision based on government action, not individual religious exercise.

Irrespective of the comments that may have warranted reversal, it is unfortunate that the majority did not adequately

[138] *Trump*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting) (noting that the majority discards President Trump's statements as "irrelevant.").

address the source of the claim: the refusal to serve a customer based on their membership in a protected class. Nevertheless, if the Court is going to object to the statements asserted in *Masterpiece*, it is wholly inconsistent not to hold the statements at issue in *Trump* to account. *Masterpiece* was decided before *Trump*, and as such, is binding precedent. "Our Constitution demands, and our country deserves, a Judiciary willing to hold the coordinate branches to account when they defy our most sacred legal commitments."[139] The failure of the respective majorities to reconcile these cases may lead to a further delegitimization of the Court and its decisions.

While it is certainly important to give the Executive branch wide latitude and a moderate amount of judicial deference in the context of fast-changing immigration policy as it relates to international relations, the Court cannot abdicate its role as interpreter of the Constitution in doing so. The outer bounds of the President's executive power cannot surpass the outer bounds of the Constitution. "The First Amendment stands as a bulwark against official religious prejudice and embodies our Nation's deep commitment to religious plurality and tolerance[,]" and the majority's interpretation in *Trump* failed those commitments.[140]

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[139] *Id.* at 2448 (Sotomayor, J., dissenting).
[140] *Id.* at 2446 (Sotomayor, J., dissenting); *see also* Michael H. v. Gerald D., 109 S. Ct. 2333, 2351 (Brennan, J., dissenting) ("We are not an assimilative, homogenous society, but a facilitative, pluralistic one, in which we must be willing to abide by someone else's unfamiliar or even repellant practice because the same tolerant impulse protects our own idiosyncrasies.").