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UDC 342.731(73)

WEDDING CAKES AND MUSLIMS: RELIGIOUS FREEDOM AND POLITICS IN CONTEMPORARY AMERICAN LEGAL PRACTICE

Abstract

This paper offers a critical examination of two recent American Supreme Court verdicts, *Masterpiece Cake Shop v Colorado Civil Rights Commission* and *Trump v Hawaii*. In *Masterpiece* the Court ruled against the state of Colorado on grounds that religious bias on the part of state officials undermines government's authority to enforce a policy that might otherwise be constitutional. In *Trump* the Court ruled in favor of an executive order severely restricting immigration from seven countries, five of which are Muslim majority. Both verdicts raise important issues concerning fairness and religious freedom. After examining some of the central legal issues in these verdicts I offer a critical assessment of the legal arguments, focusing on how political value judgments played a crucial role in determining the legal outcomes.

Keywords: Religious Freedom, Religious Toleration, The First Amendment, Immigration, Counter-Factual Reasoning in Legal Interpretation

In this paper I examine two recent U.S. Supreme Court verdicts in order to highlight ways that political factors impact constitutional law with respect to religious freedom and immigration policy. The focus is selective in the sense that I am not offering a general analysis of religious freedom or immigration policy within American law, but instead consider some important issues raised by the legal arguments in *Masterpeice Cakeshop v Colorado Civil Rights Commission*² and *Trump v Hawaii*.³ Others have written studies on religious freedom⁴ and immigration⁵ that offer more comprehensive and general perspectives. My focus is

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2 No. 16-111, 584 U.S. (2018).

3 No. 17-965, 584 U.S. (2018).

4 Greenawalt Kent, *Religion and the Constitution: Vol 1: Religious Free-Exercise*, Princeton University Press, Princeton, 1994.

5 Carens Joseph, *The Ethics of Immigration*, Oxford University Press, New York, 2013.

on how contemporary political debates impact interpretations of central principles in American constitutional law. I am offering an assessment of contemporary legal debates about religious freedom and immigration from that perspective. At the same time, these recent cases are illustrative of ways that politics impact Supreme Court jurisprudence. These verdicts count as reasons to refrain from endorsing idealized conceptions of legal practice according to which judges merely apply law in light of impartial rules for legal argumentation.

In Part I I present a summary of the legal arguments in *Masterpiece* and *Trump*. Part II examines differences and overlapping issues in these verdicts. I offer a critical assessment of the two verdicts, focusing especially on *Trump* in Part III. Finally, Part IV briefly situates these two Supreme Court cases in the larger context of debates about legal interpretation.

I

The events leading up to *Masterpiece* are as follows. A for-profit business owner was judged by the state of Colorado to have violated Colorado's Anti Discrimination Act (CADA) by refusing to produce a wedding cake for a same-sex couple. CADA prohibits, "discrimination based on sexual orientation in a place of business engaging in any sales to the public and any place offering services to the public..."⁶ As a matter of law, it is important that in this case the business owner runs a private for-profit business, rather than a non-profit organization or a religious institution. Since the business in question is public and for-profit, CADA is clearly applicable.

The decisive legal issues in this case do not bear on the validity of CADA. The Court explicitly claims it is not subjecting CADA to judicial review. Rather, the decisive issues center around the following:

1. Whether agents of the state entrusted to enforce CADA violated the plaintiffs right against religious discrimination in their application of CADA.
2. The First Amendment requirement that government and its agents comply with a general commitment to religious toleration; when those who make or enforce a policy exhibit religious bias government may lose its authority to enforce the law.
3. The relevance of case law—legal precedent—in which citizens challenged a state policy on grounds that the policy or its enforcement is motivated by religious bias.

A summary of the central legal issues can be stated as follows: whether evidence of religious bias counts as a clear violation of neutrality and equal treatment, both of which are central features to First Amendment jurisprudence.

One way to make clear that the issue is not the legality of CADA itself is by

6 *Masterpiece*, p.1.

considering a counter-factual. Suppose members of Colorado's Civil Rights Commission had not been found to be motivated by religious bigotry and yet had still issued a judgment against the plaintiff. Would the Supreme Court have reached a different verdict? Given the legal argument presented by the Court, the answer to that counter-factual question is, 'maybe'. If CADA is constitutional then a fair application of its provisions would force business owners to comply with anti-discrimination law.

In the actual case, upon review it became clear that some members of Colorado's Civil Rights Commission exhibited a "clear...hostility toward the sincere religious beliefs..."⁷ of the owner of Masterpiece Cake Shop. Mainly for this reason, by a seven to two majority the Court overturned the Colorado verdict. Majority argues that since some members of the Colorado Civil Rights Commission expressed hostility towards the religious convictions of the owner of Masterpiece Cake Shop, the state violated the First Amendment requirements of religious toleration and state neutrality towards religious convictions. In the words of Majority legal precedent is also on the side of this judgment, because the Constitution, "commits government...to religious toleration, and even the slight suspicion that proposals for state intervention stem from animosity to religion."⁸

There are clear examples of legal precedent that support Majority's argument. For example in *Church of the Lukumi Babalu Aye, Inc. v Hialeah*⁹ a city ordinance prohibiting the ritual sacrifice of animals within city limits was struck down by the Supreme Court. A central premise in the legal argument was that the city council members who sponsored the law in question were motivated by a bias against a religious minority whose religious practices include the ritual sacrifice of chickens. In the larger context of American law and politics it is also significant that religious dietary laws in Judaism, Kosher, and Islam, Halal, are accommodated. When American courts suspect that one religious group is treated according to a different standard than other religious groups, this sometimes results in a verdict that invalidates the law in question. Equality before the law is supposed to protect citizens from certain forms of bias on the part the state and its agents.

In addition, statutory law, such as the Religious Freedom Restoration Act (1993) imposes an important constraint on policies that impact a religious practice. If a policy is challenged on religious freedom grounds, the state must show that the policy in question not only serves a compelling state interest (e.g. public health, national security), but also that the policy serve that interest in the 'least burdensome' manner with respect to the religious practices affected by the policy.¹⁰

Although the *Masterpiece* verdict was pilloried in many quarters, especially on the American left, it is important to emphasize that the verdict is a narrow

7 *Masterpiece*, p. 2.

8 *Masterpiece*, p. 13.

9 No. 91-948, 1993.

10 Religious Freedom Restoration Act, HR. 1308, 1993.

ruling in the sense that the Court does not rule on CADA. To be sure, champions of this verdict have invoked it as a big win for religious freedom, often by also adding that it shows a Supreme Court that is willing to stem the tide of LGBT rights. Yet that is not a fair assessment of what the Court actually argues. It might be a reasonable prediction that since some Justices are politically opposed to LGBT rights they will in future cases be inclined to erode protections for LGBT citizens. Yet Majority does not tell us whether it would have reached a different verdict in the event that members of Colorado's Civil Rights Commission had not expressed religious animus in their deliberations about this case.

In *Trump* the Court considers an executive order that mostly prohibits migration, including for asylum, student visas, tourism, business visas, etc., from seven countries, five of which (Iran, Libya, Somalia, Syria, and Yemen) are Muslim majority. Given Trump's many anti-Muslim statements, both as a candidate, and as President, one important legal issue in this case is whether evidence of religious animus is a sufficient reason to declare an executive order like this one unconstitutional. For example, as a presidential candidate, Trump explicitly called for "a complete and total shutdown"¹¹ of Muslim migration into the U.S. A second legal issue is whether the fact the two non-Muslim majority states (Venezuela and N. Korea) were added after previous executive orders faced significant political and legal challenges, is relevant, and if so to what extent. In other words one cogent legal question is, 'is the current executive order really just an anti-Muslim immigration policy that is been modified for strategic political reasons?'

Moreover, the fact that presidential authority over matters deemed to be essential to national security has historically not been subject to significant review by the Supreme Court is also relevant to this case. If one argues that in matters of national security presidents ought to be given broad authority that cannot generally be subject to judicial review, then that is a consideration in favor of upholding the executive order. Put one way, this claim is that national security considerations outweigh whatever legal weight can be assigned to the allegation that the immigration policy is motivated by religious bigotry. By contrast, if one argues that shameful policies in America's past, including Chinese exclusion policies in the late 19th and early 20th centuries,¹² and the detainment of Japanese Americans during WWII¹³ are reasons for vigilance against granting too much authority to government in the areas of immigration and national security, then that is a reason to grant more significant weight to president Trump's comments, apparent motives, as well as the symbolic effects of the executive order in question.

By a five to four Majority the Court upheld the executive order on four main

11 Cited p. 27 in *Trump*.

12 Graham Kevin, *The Chinese Must Go: The Racial Oppression of Chinese Americans 1840-1965*, in *Social Philosophy Today*, Vol 24, 2008, pp. 151-161.

13 *Korematsu v United States*, 323, U.S., 214, 1944.

considerations. First, the immigration policy in question falls within the Executive's authority. Second, the policy serves a national security aim in the judgment of the Executive. Third, non-citizens do not have legal standing to make a complaint against the Executive Order on First Amendment grounds. Fourth, the Executive Order need not be based on religious animus. By these criteria, according to Majority, the Executive Order is constitutional.

Examples of claims on behalf of this verdict include Justice Kennedy's statement that, "There are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention."¹⁴ Justice Thomas addresses the First Amendment issue by claiming, "the plaintiffs cannot raise...[a significant] First Amendment claim since the alleged religious discrimination in this case was directed at aliens abroad."¹⁵ In my critical assessment below I will focus mainly on the fourth consideration, which is an interesting counter-factual test; namely, 'could the executive order—without changing its content—be enacted in a way that is not motivated by religious bigotry?'

By contrast, the Dissent considers evidence of religious bias, along with a failure on the part of the Trump administration to provide compelling evidence supporting the policy on national security grounds, to count strongly against the policy. As Justices Breyer and Kagan state, "If the proclamation... was significantly affected by religious animus against Muslims, it would violate the relevant statute [e.g. prohibitions on policy motivated by religious bias] or the First Amendment itself."¹⁶ If the Executive Order is viewed from this perspective, then comparisons between the detainment of Japanese Americans during WWII, along with other government policies in the past that are now regarded as shameful examples of state sponsored bigotry are more apt. Breyer also highlights the fact that in some instances visas were granted in response to public criticisms, which suggests that public relations considerations make a difference to the visa vetting process. This is evidence that national security considerations can in practice be met, because presumably in those cases the vetting process satisfied whatever criteria the consular officials use to determine whether to grant a visa or not.

Before delving further into *Masterpiece* and *Trump* two questions are helpful for framing the context of Majority's arguments in these verdicts. First, in what ways are state neutrality towards religion and equal treatment of religious groups and practices relevant in both cases? Possible answers vary. One might argue that the constitutional requirement that government comply with a principle of religious toleration applies across a range of state policies, in which case *Masterpiece* along with case law on religious freedom are central legal issues in *Trump*. This position takes a stand against Justice Kennedy's claim that in some areas of law, statements by government and its agents do not count as evidence

14 Justice Kennedy, concurring in *Trump*, p. 1.

15 Justice Thomas, concurring in *Trump*, p. 1.

16 Breyer and Kagan, dissenting in *Trump*, p. 1.

in favor of subjecting a policy to judicial review. Or one might argue that non-citizens do not have a reasonable expectation that they will enjoy the First Amendment protections granted to citizens. In that respect, following Justice Thomas' position, one could argue that the fact that the owner of the cake shop is a U.S. citizen, whereas visa applicants are not, is a strong consideration in favor of not strictly applying First Amendment standards to Trump's executive order. And of course one might also claim that immigration law is subject to national security considerations in ways that render anti-discrimination policies in business and commerce less relevant, or perhaps not relevant at all. These are among the issues that need to be sorted out before making all things considered judgments about these two verdicts.

A second important question is, do the different legal issues in the two cases—First Amendment jurisprudence in *Masterpiece* and executive authority to set immigration policy in *Trump*—suffice to vindicate the verdicts as they are argued for in the two cases? It is not enough just to show that these differences are relevant. For example, one could claim that the differences in these two cases are relevant but also that these differences give rise to *prima facie* legal considerations which must be weighed against other considerations before reaching a verdict. On this view, one could concede some of the claims in Majority's argument, while also claiming that there are other salient legal considerations (e.g. religious intolerance is incompatible with American law) that outweigh the *prima facie* considerations enlisted by Majority.

Depending on one's viewpoint, an answer to the first question can determine the answer to the second. For instance, if the two domains of law (First Amendment jurisprudence and immigration policy) are judged sufficiently insulated from one another, then it is easier to make the case that there are no inconsistencies in the two verdicts. By contrast, if fairness and equal treatment hold across domains of law, then the claim that there is an inconsistency between the two verdicts is more compelling.

One way to develop the view that fair and equal treatment of religious persons is a general requirement is to enlist a conception of legal authority famously defended by Ronald Dworkin in *Law's Empire*.¹⁷ On Dworkin's view, one condition for legality, where legality means legitimate enforcement of coercive authority by means of law, is law's integrity. Integrity as a legal value consists of a commitment to consistency in principle over time, across the various areas of law enforced by government. If values such as equality and fairness are included in the idea of law's integrity, then that is a reason to be more sympathetic the dissenting arguments in *Trump*. To be sure, the idea of law's integrity is not so rigid as to entail that when legal principle applies across domains of law it always carries the same bearing on a legal verdict. Rather, the idea is more akin to a commitment to creat-

17 Dworkin Ronald, *Law's Empire*, Harvard University Press, Harvard, 1986.

ing and enforcing law in light of what one imagines is a consistent moral vision for a legitimate government. Dworkin's position is relevant to *Trump*, because one basis for the disagreement between Majority and Dissent in *Trump* hangs on to what extent the principles of religious freedom and religious equality animate all of American law, and whether the legal practice of condemning religious bigotry when expressed by agents of the state should apply more directly in the case of Trump's Executive Order.

II

One way to critically examine *Masterpiece* and *Trump* is consider whether their verdicts are in some important respects inconsistent with one another. To set the stage for that topic it is important to first sort out relevant respects in which the two areas of law, First Amendment jurisprudence and immigration policy, differ. The following sketch is composed with that objective in mind:

Masterpiece:

Trump:

Area of Law:

First Amendment Jurisprudence

Immigration Law (e.g. INA 1965)

Applies to Citizens

Applies to Labor Migrants, Foreign Tourists, Immigrants, International Students

Legal Precedent/Statutory Law:

Evidence of religious bigotry

Deference to executive authority, a reason to subject law or policy to especially in matters of 'national strict scrutiny security'

Examples:

Wisconsin v Yoder (1972)¹⁸

United States v Ju Toy (1905)¹⁹
Church of Lukumi v Hialeah (1993).

Though helpful for setting out some of the central issues in the two cases, this picture of the two cases needs to be qualified. For example, after considering the relevance of case and statutory law to *Masterpiece* and *Trump* we can see that

18 406, U.S., 205, 1974.

19 198, U.S., 253, 1905.

there are in fact significant overlapping issues in the two cases. Multiple areas of American law are guided by the idea that bias towards persons because of their ethnicity, race, or affiliation with a religious tradition is objectionable. This is one respect in which a general commitment to toleration animates American legal practice.

Hileah affirmed that a law that on its face can be construed as neutral towards a religious practice (e.g. a prohibition on animal slaughter within city limits) might count as a violation of religious free-exercise. Any one of the following can count as evidence that a state policy violates a requirement of neutrality towards a religious practice: when lawmakers exhibit animus towards a religious minority in drafting a law; when accommodations are granted to some religious groups (e.g. for Kosher and Halal for Jews and Muslims) but not others (e.g. ritual animal sacrifice of chickens by Santerians); or when a compelling state interest served by the law can be fulfilled in a way less burdensome to a religious group. *Hileah* is not unique; it fits an interpretation of religious free-exercise that sometimes grants religious groups exemptions from generally applicable law. *Wisconsin v Yoder* is the most well known example, and in that earlier case the Court ruled in favor of granting Old Order Amish a partial exemption from state education law.

The Immigration and Nationality Act (INA) ended a quota system in immigration policy according to which preferential treatment and exclusion was often based on nationality (e.g. preference for European immigrants; barriers for non-Europeans). In doing so it also makes a strong statement against some historical injustices in immigration policy, such as the various Chinese exclusion policies in the late 19th-early 20th C. In *United States v Ju Toy*, Majority argued that immigration officials at the port of entry have the authority to deny a person from entering the U.S. even if he or she claims to be a natural born citizen. In this case, an ethnic Chinese who claimed to be a natural born citizen, was denied a right to appeal the immigration official's decision to not let him enter the United States. INA was adopted in part to block policies such as the Chinese exclusion policy that the Court upheld in *Ju Toy*.

Yet INA does include provisions for national security considerations, and on this point, according to Majority in *Trump*, the law is deferential to presidential authority. This point and the fact that the Executive Order, according to Majority, is neutral on its face, count in favor of the constitutionality of the travel ban. This is an important claim, because if plausible, it offers a potential rebuttal to the Dissenting argument. Equal treatment, neutrality towards religious groups, and a general commitment to fairness within the law, according to Majority, must be somehow balanced against the executive authority of a President.

According to Majority, executive authority to make policy in areas deemed important to national security is the most important factor that distinguishes the two cases. This point is worth highlighting, because those who object to the verdict in *Trump* can argue more responsibly against the verdict if they concede that

Majority's position is coherent in this respect. A more fair assessment of *Trump*, as I argue below, can acknowledge the national security consideration yet nonetheless show that Majority presents a bad argument.

III

Among the non-trivial legal values that apply across domains of law, fairness is especially important. Fairness is a general constraint on the rule of law. For example, familiar accounts of what principles are necessary for maintaining the rule of law, including, consistency between laws, transparency, prohibitions on *ex post facto* law, and treating like cases alike claim that law has a kind of internal morality conformity to which is a condition for legality. Lon Fuller famously called these principles, legal excellences, the absence of which will render efforts at lawmaking that comply with the rule of law impossible.²⁰ From this perspective a Supreme Court verdict on one legal question will always bear some relation and have some relevance to other verdicts.

The legal debates over *Masterpiece* and *Trump* depend heavily on judgments about fairness. It is now settled within First Amendment jurisprudence that when law, lawmakers, or law enforcers show evidence of religious bias that counts heavily against the law, or the law's application. By this measure, the verdict in *Masterpiece* is reasonable. One can try to weaken this, as Dissent does, by claiming that an antidiscrimination policy such as CADA mitigates the unfair motives of some of Colorado's state officials.

Were these fairness considerations equally central to *Trump*, we might expect a similar kind of argument in that case, perhaps on grounds that the national security rationale is weakened when evidence of religious bigotry has been established. Evidence of religious bigotry is also a compelling reason to challenge the claim that the policy itself is neutral towards religious persons. Majority does not deny that fairness matters to immigration policy. When an immigration policy seems to identify religious identity as a basis for exclusion that raises the question of whether such policy should be struck down. Rather, Majority claims that national security considerations and related precedent on executive authority are evidence that the Executive Order is constitutional.

One value judgment that is central to the debate between Majority and Dissent in *Trump* is how much weight to give to the requirement that government must treat persons fairly with respect to their religion in the domain of immigration law. I have already noted that Justice Thomas claims that First Amendment religious freedom considerations do not apply to non-citizens applying for entrance into the U.S. On his view, that is another legal reason in favor of the Executive Order. Yet there is another more interesting claim invoked by Majority.

²⁰ Fuller Lon, Eight Ways to Fail to Make Law, in *The Morality of Law*, Yale University Press, Yale, CT, 1977, pp. 33-37.

Majority's argument in *Trump* raises questions about a familiar issue in philosophy of law; namely, the salience of counter-factual claims for constructing legal arguments, and reliance upon counter-factual claims to endorse or rebut interpretations of law.

As noted above Majority in *Trump* insists on evaluating the executive order not on the basis of President Trump's many statements about Muslims but rather on the basis of whether the Executive Order could be enacted and enforced in ways that do not amount to an endorsement of religious bigotry by the state. On this point Majority is committed to the following principle:

If government could adopt immigration policy X without being motivated by religious bigotry, and if X on this counter-factual rendering is constitutional, then X is probably constitutional even if government was motivated (up to a point) by religious bigotry.

I add the 'up to a point' qualifier, because Majority does claim that religious animus is a relevant legal issue in *Trump*—Majority concedes this point when explaining the reasons it agreed to hear the case in the first place. Yet Majority concludes that the Executive Order under consideration satisfies review, because national security prerogatives of the President override concerns stemming from Trump's many anti-Muslim comments. The counter-factual test as I formulate it is thus a fair way to represent a crucial claim Majority's argument. Majority is claiming that the counter-factual test highlights the fact that the Executive Order in its current form could have been created without any religious bias.

There is room for argument on how I am putting this. For example, at one point Majority claims it need not consider whether Trump's public comments amount to bigotry, because the national security perspective is decisive. Yet this seems to count as evidence for ambiguity in Majority's argument. We can ask, are Trump's anti-Muslim statements totally irrelevant? Perhaps they are somewhat relevant, but secondary to the question concerning executive authority over matters of national security. To push his line of thought further, let us consider what Majority might have said in light of the following hypothetical example:

Suppose Trump had said of the most recent Executive Order, 'make no mistake, this is a Muslim ban that I am enacting by executive order. But there are also national security reasons for this order too. At the same time I admit that I added Venezuela and North Korea to the list simply to appease some of my critics'.

Under these conditions would the policy be constitutional? Notice that the policy could have the same content as the real Executive Order, but the political context from which it emerged would be impacted significantly by this sincere

expression of religious bigotry. Under this scenario, would Majority construe the policy as a different policy, because of the anti-Muslim rationale explicitly acknowledged by the state official who adopted the policy? Majority is open to being asked this kind of question, because they invoke the counterfactual test in order to claim that the Executive Order is in principle neutral. In considering this line of investigation, we should carefully examine what this might mean as a general principle for legal interpretation.

These considerations illustrate how the legal status of a law or policy can sometimes vary as a result of judgments about the motives of the lawmaker, and the apparent rationale behind the law. What from a very abstract point of view might look like a policy that satisfies constitutional norms of neutrality and religious toleration could in fact be judged unconstitutional if the political context in which the law was enacted is considered. Even if national security considerations tilt in favor of the policy, concerns about religious bigotry are salient. Put one way, there are *prima facie* considerations that in principle might work against one another so far as the legal bases for an immigration policy are concerned. Too much religious bigotry, and an immigration policy might be struck down; some religious bigotry and significant national security considerations, and that same policy might be upheld. This illustrates an important feature to the legal debate over *Trump*, because it shows that the Majority's claim that the Executive Order meets the 'on its face' neutrality standard cannot reasonably be defended as an absolute principle of law.

In fact, we should be deeply suspicious of attempts by government to defend law that is being challenged on grounds that it represents a form of state sponsored bigotry. Individual persons often deny their biases with various strategies such as, 'I am not anti-Muslim, but...' Government engages in this kind of obfuscation too.²¹ When bigotry is backed by the coercive authority of government the harms are significant and long lasting. Moreover, the wrongs inflicted carry an additional insult for having been officially endorsed by the state. Taking a cue from Corey Brettschnieder²² we can ask, 'how should the government speak and what should it say?' From this vantage point, it is hard to defend the verdict in *Trump*. It is unfortunate that the Majority does not consider these factors in its deliberation about the salience of Trump's anti-Muslim comments.

To summarize this section, I am not claiming that the dispute between Majority and Dissent in *Trump* can be fully explained by differences over the significance of the counter-factual test Majority uses as a tool for judicial review. Yet I have focused on this point for two reasons. First it is a significant point of dispute. Second, it helps to highlight how central value judgments are to a verdict like

21 For a compelling analysis see Alexander Michelle, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness*, The New Press, New York, 2012.

22 Brettschnieder Cory, *When the State Speaks What Should it Say? How Democracies can Protect Speech and Promote Equality*, Princeton University Press, Princeton, NJ, 2012.

the one in *Trump*. The law speaks more clearly about religious bigotry in the domain of First Amendment jurisprudence, in part due to case law, in part due to statutory law. Nevertheless fairness towards religious persons is an issue that cuts across areas of law. One of the central debates is over, ‘how much?’

IV

Many philosophers of law agree that politics impact Supreme Court jurisprudence. On this view political value judgments by Justices on the Court impact their interpretations of legal principles.²³ Among the striking features to the legal arguments in *Masterpiece* and *Trump* is that they show that political value judgments play far more than a nominal role in legal interpretation. Sometimes they are decisive.

The tradition of *legal realism* and more recently *critical legal studies* challenges widely held idealizations about legal practice, for example: that the rule of law is maintained when judges refrain from making value judgments; that there are usually clear legal answers to nearly every legal question; and that reason, respect for precedent, along with proper exercises in judicial restraint or judicial review provide not only a normative perspective on how law should work, but an approximation of how law does work. Though it is beyond the aims of this paper to develop and defend a comprehensive conception of law and legal practice, the two verdicts in this paper illustrate how value judgments impact interpretations of law.

In his recent paper, “Constitutional Law, Moral Judgment, and the Supreme Court as Super-Legislature”²⁴ Leiter demonstrates some of the striking ways that value judgments impact Supreme Court verdicts. In another recent paper, “Phony Originalism”²⁵ Koppleman documents a number of ways that what tries to pass as a neutral, impartial theory of legal interpretation, in fact represents a political position on how law ought to be interpreted. These authors present compelling reasons to reject embracing an overly idealized conception of the rule of law and legal practice.

Supreme Court jurisprudence in the American context is more often than not an exercise in negotiating value judgments with existing law, law that oftentimes does not provide clear guidance for judges. On this view, there is often very little settled law that goes before the Supreme Court—this is true even when there are settled principles, such as equal treatment of religious persons in First Amendment jurisprudence—because value judgments must often be made to decide how these principles apply. Whether the advocate of judicial restraint emphasizes norms such as impartiality and respect for precedent, or a theory of

23 Koppleman Andrew M., Phony Originalism, *Northwestern University of Law Scholarly Commons*, 2011, pp. 1-24.

24 Leiter Brian, *Hastings Law School Journal*, 66, 2015, pp. 1601-1616.

25 Op. ct.

interpretation which claims judges must be guided by the ‘original meaning’ of a law or policy, an examination of legal practice itself offers an alternative perspective.

Some additional recent Supreme Court cases in which it is evident that value judgments made a difference in the opinions of various justices include *Citizens United*, *Heller*, and *Obergefell*.²⁶ Majority verdicts in these cases upheld the right of for-profit corporations to engage in certain forms of political speech, a personal right to bear arms, and the right of same-sex couples to receive official recognition from government for a marriage. One example of a value judgment is the claim that whether the financial resources of corporations will affect public deliberation about politics does not count as a reason for restricting the First Amendment rights of legal persons, whether natural, or in the form of a corporation. Likewise, until *Heller*, the question, ‘does the Second Amendment grant citizens an individual right to own weapons?’ was not settled.²⁷ These cases are clear examples of Leiter’s claim that when the Supreme Court takes a case it considers legal questions for which the law is generally open-ended. *Heller* is a good example for what Kopplemen calls ‘phony originalism’, the view that presents itself as above contemporary politics, but which is invoked by Justices on the Court to defend novel and creative interpretations of law.

If we concede that much of the debate in cases like *Masterpiece* and *Trump* centers on attempts to reconcile law with political value judgments, then it is fair to evaluate such cases from the standpoint of the value judgment that motivate the legal arguments. By that measure, the case against Trump is compelling, because the verdict is a license to the Executive to make immigration policy that is discriminatory towards a religious group. That is not compatible with religious toleration. Moreover, the extreme deference to national security considerations does not undermine the complaint that Trump’s Executive Order is a form of state sponsored discrimination against Muslim visa applicants. Instead, the national security consideration is a state sponsored rationalization that is analogous to the person who says, ‘I am not anti-Muslim but...’. From this perspective, the Dissent is right to point out similarities between *Korematsu*. In *Korematsu*, the bigotry was directed at an ethnic group. In *Trump* the bigotry is directed at a religious group. Both are instances of state sponsored intolerance.²⁸

26 *Citizens United v Federal Election Commission*, No. 8-205, 2010; *District of Columbia et al v Heller*, No. 7-290, 2008; and *Obergefell et al v Hodges*, No. 14-556, 2015.

27 For a good historical overview, see Amar Akhil Reed, *The Bill of Rights: Creation and Reconstruction*, Yale University Press, Yale, CT, 1998.

28 Research for this paper was conducted during a Fulbright Grant to the Kyrgyz Republic, 2018-19. All views expressed are those of the author and do not represent those of the Fulbright Commission. I would also like to thank the organizers and participants at the 2018 Politology of Religion Conference at the University of Belgrade.

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- Religious Freedom Restoration Act, HR. 1308, 1993.
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