Respect

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A DIVERSITY NEWSLETTER

Long-Awaited Decision Not a Piece of Cake *by Maria Wood*

Freedom of religion is a hot button issue for most Americans, and so is the protection of LGBT rights. So when the U.S. Supreme Court agreed to hear *Masterpiece Cakeshop vs. Colorado Civil Rights Commission*, a case in which a Colorado baker declined to bake a cake for a same-sex couple on religious grounds, advocates on both sides of the issue eagerly awaited the decision.

The U.S. Supreme Court issued its ruling on June 4, 2018. Although the decision was 7-2 in favor of the baker, it was narrow in it's applicability. In his **majority opinion**, now-retired Justice Anthony Kennedy pointed to what he interpreted as a negative bias toward the baker's religion expressed by a member of the Colorado Civil Rights Commission.

While ruling for the baker, Justice Kennedy, a champion of LGBT rights, emphasized his support for laws prohibiting discrimination based on sexual orientation. For the most part, the decision left unanswered the main question of whether sincerely held religious beliefs allow for discrimination.

The case

The *Masterpiece* case began in 2012 when David Mullens and Charlie Craig asked baker Jack Phillips to create a cake for their wedding, which was to take place in Massachusetts since Colorado at the time did not allow for same-sex marriage. Phillips declined, saying his religious principles prevented him from supporting same-sex marriage.

Mullens and Craig sued the baker, arguing that Phillips discriminated against them based on their sexual orientation, which is prohibited under Colorado's public accommodations law. The Colorado Civil

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Banning Travel in the Name of Security *by Michael Barbella*

With its promises of political and religious freedom, as well as economic opportunity, the United States has long been the world's most popular haven for refugees. The massive influx of foreigners over the years, however, has also created numerous issues for lawmakers striving to balance the needs of natural-born citizens and immigrants with national interests.

Immigrants have been a vital part of American history, providing both the brains and brawn necessary for economic development and geographic expansion. Over the last two centuries, American immigration laws have evolved with the nation's changing political landscape. Early legislation, for example, tended to favor Europeans until the 1965 Immigration and Nationality Act, which favored family reunification and skilled labor over country quotas. More recent proposed legislation has reflected national concerns about refugees, unauthorized immigration and terrorism.

If at first you don't succeed

Such worries drove the federal government's latest tweaks to U.S. immigration policy—specifically, the three travel bans imposed by President Donald J. Trump during his first year in office.

President Trump issued his first decree within a

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You've Got Bail—If You Have the Cash

by Alice Popovici

The Eighth Amendment to the U.S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." Despite this provision, the U.S. has the highest incarceration rate in the world, due in part to the cash bail system.

According to the American Civil Liberties Union (ACLU), on any given day there are approximately 450,000 people across the U.S. behind bars (about 70 percent of the total jail population) who haven't been convicted of a crime. Many are sitting in jail simply because they could not afford to post bail.

It should be noted that some defendants are detained by the court prior to trial without the opportunity to post bail based on considerations like the nature of the crime and whether the defendant is considered a flight risk. This article, however, focuses on those defendants to whom the court has afforded bail.

History of cash bail

The concept of bail—or releasing someone from prison prior to his or her court appearance—goes back centuries. In the early days of the practice, a family representative often agreed to pay the debt on behalf of a defendant, but in the early 20th Century, the system in the United States shifted to commercial bonds, which has grown to a $2 billion industry.

The way the system works now, a judge sets bail for a certain amount; let's say $50,000, for example. If a defendant is able to pay the total amount and he or she appears for the court date, the amount is refunded in full. If the defendant can't pay the full amount, he or she can buy a bond from a bail bond agent who will charge the defendant a percentage of the bail (usually 10 percent), so in this case $5,000. Whether the defendant appears in court or not, that fee is not refunded. If the defendant can't afford to buy a bail bond, he or she sits in jail awaiting trial.

The problem with the system, justice advocates point out, is that it does not focus on public safety. Many people who are not a danger to their communities sit behind bars simply because they cannot afford bail, while others who might pose more of a threat to public safety are set free because they have the means to post bail.

New Jersey leading the way

In New Jersey, the path to money bail reform began with an observation. In 2012,

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Questions or comments should be directed to Jodi Miller at jmiller@njsbf.org.

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justice advocates working for the Drug Policy Alliance were reviewing court data and noticed that a large number of people charged with minor offenses were sitting in jail for long periods of time.

"Forty percent of them were there solely because they lacked nominal amounts of money bail," Roseanne Scotti, New Jersey state director of Drug Policy Alliance, said in a Q & A published by the Pretrial Justice Institute, an organization that is working to change unfair pretrial practices. In the interview, Scotti discussed the work of a broad coalition—including lawmakers, churches and organizations such as the NAACP and the ACLU—which compiled data, launched a campaign and drafted legislation to reform the state's cash bail system.

"We decided on four changes to advocate for: moving away from money bail, creating a statewide pretrial infrastructure, focusing on non-financial forms of release, and enabling preventive detention for people who are truly a threat to the community," Scotti said. "The whole time it was a two-pronged issue: justice and public safety."

The work culminated in a comprehensive reform package that passed in 2014 and was enacted in January 2017—including a constitutional amendment, legislation and updates to courtroom procedures. Experts say the reforms have led to a statewide decline in jail populations.

Although early data indicates jail populations in New Jersey are down, what remains to be determined is what effect the reforms are having on the rates of court appearance and on public safety, says Rachel Sottile Logvin, vice president of the Pretrial Justice Institute. Communities should be aware that reform is an ongoing process, she says.

"It's not like all of a sudden, everything is going to be perfect," Logvin contends.

Justice by algorithm

Sandra Mayson, a professor at Georgia University School of Law and co-author of an article titled, "Pretrial Detention and Bail" published in *Academy for Justice, A Report on Scholarship and Criminal Justice Reform*, says, "A lot of other states are looking to the New Jersey model as they try to rewrite their state pretrial laws and consider amending their state constitutions."

Among other updates, New Jersey's judges are now using a risk assessment algorithm to help them determine which defendants are eligible for release without bail. The algorithm, which is used in place of a bail hearing—though only as a guide—looks at possible outcomes by comparing information about the defendant with a nationwide database.

In an op-ed for New Jersey's Advance Local Media, former New Jersey Attorney General Christopher Porrino and former New Jersey prosecutor Elie Honig, wrote, "The legislation adopted an objective, data-driven algorithm to assess the risk of flight and the danger posed by each individual arrestee. New Jersey judges now assess risk—not wealth—to determine whether an arrestee should be held without bail or released regardless of ability to post cash bail."

One of the drawbacks of risk assessment algorithms, Professor Mayson says, is that they do not have the capability to weigh interpersonal data, and they cannot evaluate an individual's circumstances on a basic level.

"One of my gripes with risk assessment tools is they tend to predict arrest rather than crime commission, and arrests tend to be skewed by race and class vis-à-vis offending rates," she says.

Reforms sweep the nation

For many people, being detained (even if it is just days) can have devastating consequences, including loss of employment. In addition, many people are pressured into pleading guilty in order to secure their release, and as a result end up dealing with the consequences of having a criminal record.

Momentum for cash bail reform is building in jurisdictions nationwide, fueled in part by outrage over the deaths of Sandra Bland and Kalief Browder, both of whom remained in jail pretrial because they could not afford bail, and according to newspaper accounts, committed suicide as a result.

California is moving ahead with its own reforms—though the measures are controversial. In August 2018, Governor Jerry Brown signed into a law a bill abolishing cash bail as a condition of pretrial release, giving judges the authority to "to choose between releasing defendants or holding them in 'preventive detention,' until their court dates," according to an article published in *The Washington Post*. Groups, such as the ACLU, that initially supported the legislation, are now criticizing it, arguing that judges will likely opt to keep people in prison rather than release them, out of an "abundance of caution."

"What's going to be key in California is to ensure that the implementation done statewide is fair and just and does not diminish equity," says Logvin. "So much of this is culture change... it gets to be very complicated when you're working with jurisdictions at a micro level."

There has also been movement to address cash bail reform on the federal level. Last year, California Senator Kamala Harris and Kentucky Senator Rand Paul introduced the Pretrial Integrity and Safety Act, bipartisan legislation that encourages states to reform their bail systems. In an op-ed published in *The New York Times*, the senators point out that it costs approximately $14 billion a year to imprison defendants, mostly nonviolent, who can't afford bail.

The senators' op-ed stated: "The Pretrial Justice Institute estimates that bail reform could save American taxpayers roughly $78 billion a year, overall. More important, it would help restore Americans' faith in our justice system."

The current momentum we are seeing for cash bail reform combines the insights learned from previous reform movements in the 1960s and 1980s, says Professor Mayson.

"What's driving the nationwide movement toward bail reform is the realization that a system based primarily on cash bail is both irrational and destructive. It just doesn't make sense to condition people's liberty solely on wealth," Professor Mayson says. The idea behind this wave of reform is to "reduce reliance on money bail but also acknowledge the reality that some people, a small number of people, may need to be detained pending trial." •

Convicting With a Divided Jury *by Phyllis Raybin Emert*

John Adams, Founding Father and our second president, once said: "It is the unanimity of the jury that preserves the rights of mankind." The federal justice system operates on this premise, as well as 48 state courts—the other two states, not so much.

Typically in the U.S. court system, all 12 jurors in a criminal trial must vote guilty to convict the defendant. The states of Louisiana and Oregon, however, allow for 10-2 verdicts in felony cases, with the exception of first-degree murder. (First-degree murder cases require unanimous votes to convict even in Oregon and Louisiana).

Historical background

The Sixth Amendment to the U.S. Constitution guarantees in all criminal prosecutions "the right to a speedy and public trial by an impartial jury of the State." Despite John Adams' declaration, the Constitution does not specifically mention unanimous verdicts.

George Thomas, a professor at Rutgers Law School—Newark and a criminal law expert, explains that James Madison, considered the Father of our Constitution, formulated the right to a jury trial from the common law that existed at the time.

"The formulation that was ratified contains no mention of unanimity," Professor Thomas says. "The best implication from the sketchy history is that the Framers probably wanted to leave that to future courts and legislatures. Congress has always required unanimous verdicts; only Louisiana and Oregon do not. Thus, it remains true that unanimity is the norm almost everywhere in the country."

Why Louisiana and Oregon?

Many believe the non-unanimous jury laws of Louisiana and Oregon can be traced to racism and "vestiges of white supremacy."

"Louisiana required unanimous verdicts when it became a territory in 1803," Angela A. Allen-Bell, a professor at Southern University Law Center in Baton Rouge, wrote in an op-ed for *The Washington Post*. "Non-unanimous verdicts became law in 1898 at the Louisiana Constitutional Convention."

The official journal of the proceedings from that convention states: "Our mission was, in the first place to establish the supremacy of the white race in this State to the extent to which it could be legally and constitutionally done." Professor Bell noted that this change resulted in speedy convictions so prisoners could be used as free laborers. Also, the few black jurors that were selected could not block the convictions of other African Americans. Back in 1898, when the state first changed its practice of unanimous verdicts, it only required nine votes for conviction. The state would later amend that to 10-2 verdicts in 1973 after another constitutional convention.

In Oregon, the change from unanimous to non-unanimous juries came in 1934 after rising anti-immigrant and anti-Semitic feelings. There was a large Ku Klux Klan membership in the state in the 1930s, and widespread prejudice surfaced after a jury failed to convict a Jewish man of first-degree murder in the killing of a Protestant. The charge was reduced to manslaughter and the following year, the people of Oregon, through a ballot initiative, passed a law allowing non-unanimous verdicts. A 1933 editorial in the *Oregonian* stated: "The increased urbanization of American life and the vast immigration into America from southern and eastern Europe, of people untrained in the jury system, have combined to make the jury of twelve increasingly unwieldy and unsatisfactory."

Professor Thomas has a different perspective. "I can't speak for Oregon," he says, "but I doubt Louisiana's decision to permit non-unanimous verdicts was chiefly motivated by racism."

Originally owned by France, Louisiana took much of its law from that country, which permitted non-unanimous jury verdicts in criminal cases, Professor Thomas explains.

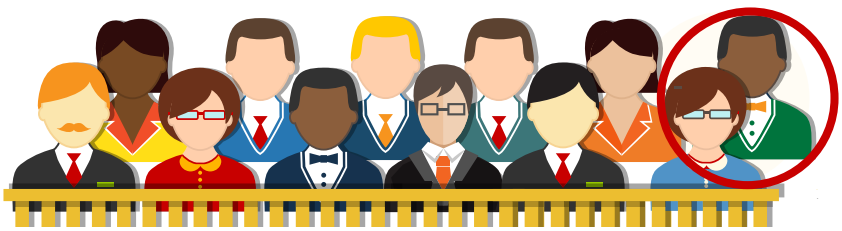
"The Southern states unfortunately had found many ways of keeping African Americans out of jury pools so there would have been little need for a non-unanimous verdict to minimize their effect on Southern 'justice,'" Professor Thomas says. "Louisiana has many differences in its laws from the other 49 states because it relied on the French codes of 1804-1808 when drafting its code."

Because it is easier to convince 10 people rather than 12, prosecutors tend to support non-unanimous juries; deliberations are also quicker and produce less hung juries. When unanimous juries are required, even one holdout can force a mistrial.

"Of course non-unanimous verdicts could shorten deliberation but sometimes more deliberation is good," Professor Thomas says. "There are other studies, however, that show once a vote of 10-2 is achieved, the chance of the two persuading the 10 is very low and the chance of the 10 persuading the two is very high."

Still, Professor Thomas prefers unanimous verdicts.

"We now know that thousands of innocent defendants are convicted at trial," he says. "The least we could do is insist on a unanimous verdict."



What the Supreme Court said

In 1972, the U.S. Supreme Court considered the constitutionality of non-unanimous juries. In *Johnson v. Louisiana* and *Apodaca v. Oregon*, the Court found that non-unanimous verdicts did not violate due process rights or the reasonable doubt standard of the

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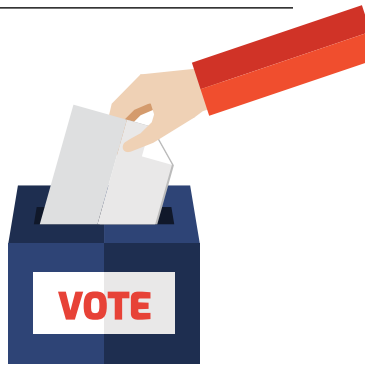
Fourteenth Amendment. In addition, the Court concluded the Sixth Amendment requires unanimity in federal cases but not state ones.

"The issue, for now at least, is settled," Professor Thomas notes, although he would have voted with the dissenters. "The Court made plain in jury cases that a non-unanimous vote is irrelevant to the reasonable doubt issue. If 10-2 is sufficient for a verdict, that 10 jurors find guilt beyond a reasonable doubt satisfies the reasonable doubt requirement."

The Supreme Court recently refused to hear another Louisiana case dealing with non-unanimous juries. However, in November 2018, Louisiana voters will get to decide, through a ballot initiative, whether or not to eliminate non-unanimous verdicts in the state.

In Oregon, state district attorneys originally supported a ballot initiative to require that all verdicts be unanimous. At the same time, the district attorneys also proposed taking away the right of defendants to request a court trial, sometimes called a bench trial, which is a decision granted by a judge instead of a jury. When that proposal failed they withdrew their support for the initiative. Unless the citizens of Oregon vote to amend the state constitution or the *Apodoca* decision is overturned, non-unanimous jury verdicts will stand in the Beaver State.



Study shows bias

The *New Orleans Advocate* did an extensive study of felony trials in the state over a six-year period, reviewing nearly 1,000 trials. The newspaper found that 40 percent of convictions came over the objections of one or two jurors. In other words, they were not unanimous. In addition, when the defendant was black, he or she was 30 percent more likely to be convicted by a split verdict. The *Advocate* concluded that the non-unanimous jury system in the state "becomes more tilted against black defendants at each stage: when jurors are summoned, when they're picked for juries, and in deliberation rooms where voices of dissent can be ignored."

In her *Washington Post* op-ed, Professor Bell wrote, "These non-unanimous jury laws ignore the sage guidance from the American Bar Association, which opposes them. They also ignore all the research on group thinking, which suggests that unanimous verdicts are more reliable, more careful, and more thorough." •

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week of taking office, banning migrants from seven predominantly Muslim countries (Iran, Iraq, Libya, Syria, Somalia, Sudan and Yemen) for 90 days. The order also prevented refugees from entering the United States for 120 days, but made an exception for self-professed religious minorities.

A federal court in Washington State blocked enforcement of the first ban, ruling the president's order adversely impacted American employment, education, business, family relations and travel freedom. "These harms are significant and ongoing," U.S. District Judge James L. Robart wrote in his decision.

The second ban, issued in March 2017, suffered a similar fate, with a federal judge in Hawaii freezing the executive order hours before its scheduled enforcement. That ban was almost an exact replica of the first but for its acceptance of Iraqi migrants and complete boycott of all refugees (no exceptions this time).

The president *appealed* his case to the U.S. Supreme Court, which allowed the ban to take effect until it could rule on the dispute. The justices dismissed the case, however, after the president issued a third executive order in September 2017. The third (and current) incarnation of the travel ban restricts travel from Iran, Libya, North Korea, Somalia, Syria, Venezuela and Yemen—countries that, according to the Trump Administration, provide insufficient information to adequately assess their citizens' overall threat level to America.

Like its predecessors, the third order spawned its share of legal challenges, most prominently from the state of Hawaii, the Muslim Association of Hawaii, and three people with relatives impacted by the travel restrictions. The *plaintiffs* accused the administration of violating both federal law and the U.S. Constitution by discriminating against Muslims while the government contends the president has a constitutional right (and obligation) to restrict or limit immigration for national security purposes.

A federal appeals court sided with the challengers last fall, but the U.S. Supreme Court put that ruling on hold in December 2017 until it could review the case (allowing the travel ban to take full effect). In June 2018, the Court *upheld* President Trump's executive order, rejecting arguments that it was based on religious discrimination and the president's alleged hatred of Muslims.

Determining motivation

The court's conservative majority found no evidence of religious bias in the ban. In fact, justices said the Trump Administration provided more detail and justification for the travel restrictions than previous commanders-in-chief, specifically citing President Jimmy Carter's decision to deny and

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Rights Commission agreed and fined the baker. The Colorado Court of Appeals also sided with the couple and the Commission, finding the baker had been guilty of discrimination.

In its ruling against Phillips, the Colorado Court of Appeals stated: "Masterpiece [Cakeshop] does not convey a message supporting same-sex marriage merely by abiding by the law and serving its customers equally."

Phillips and his attorneys from Alliance Defending Freedom, a conservative Christian nonprofit, took the case to the U.S. Supreme Court, arguing that being forced to bake a cake against his religious principles violated the First Amendment's guarantee of the free exercise of religion, as well as the freedom of expression.

In a brief submitted to the U.S. Supreme Court, Phillips's lawyers said that Phillips "declines lucrative business by not creating goods that contain alcohol or cakes celebrating Halloween and other messages his faith prohibits, such as racism, atheism and any marriage not between one man and one woman." The brief also pointed out that the couple easily obtained their cake from another baker.

The lawyer for the couple stated, "It is no answer to say that Mullins and Craig could shop somewhere else for their cake, just as it was no answer in 1966 to say that African American customers could eat at another restaurant."

The ruling

In the end, the issues of discrimination and First Amendment rights didn't play a major role in the Court's ruling. Instead, the comments of one commissioner appeared to be the basis of Justice Kennedy's majority opinion.

Commissioner Heidi Jeanne Hess reportedly said, "Freedom of religion, and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be Holocaust."

That comment alone was enough for Justice Kennedy to write in the Court's majority opinion, "The neutral and respectful consideration to which Phillips was entitled was compromised here. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."

Angela Carmella, a professor at Seton Hall University School of Law, who teaches courses on religion and the First Amendment, says the outcome of the *Masterpiece* case likely came about because the Court dealt first with how the Colorado Civil Rights Commission handled the case. The Court had to study how the commission processed the case before they could move on to the larger issues, she explains.

"Almost every justice expressed concern for both sides and admitted the difficulty of the

substantive issue, but they still didn't reach the merits," Professor Carmella says. "Seven justices could agree that there had been a failure of fair process before the Colorado Commission. That fair process is a threshold requirement before getting to the merits."

Two Justices—Ruth Bader Ginsberg and Sonia Sotomayor—did not agree with the majority opinion.

"I see no reason why the comments of one or two commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullens," Justice Ginsberg wrote in her **dissenting opinion**. She also added that she agreed with parts of the majority opinion.

This is because although he ruled for the baker's side, Justice Kennedy made clear his continued support for LGBT rights.

"Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth," Justice Kennedy wrote in *Masterpiece*. "For that reason the laws and Constitution can, and in some instances must, protect them in the exercise of their civil rights."

What it means

The Supreme Court's decision set off debate in the legal community about the significance of the decision. Advocates for gay rights and those who support freedom of religion saw language in the majority opinion that could be seen as favoring both sides.

The decision was "the best possible outcome that could have also held for the baker," says Katie Eyer, who is a professor at Rutgers Law School—Camden and an LGBT rights advocate and scholar.

"There is certainly language in the decision that suggests that for the most part, state anti-discrimination laws extending rights to the LGBT community serve important governmental purposes and can be applied even in context where they may conflict with religious rights," Professor Eyer says.

Professor Carmella thinks both sides could claim victory. While the Court backed gay rights laws, it also warned governments not to express any hostility toward religion.

"Government has no authority to voice opinions or judgments about religious beliefs or to tell people or religious communities what they should believe," Professor Carmella says. "Of course, government can regulate conduct, but it cannot do so on the basis of **animus** toward a faith."

Baker back in court

Phillips and the Colorado Civil Rights Commission currently find themselves locked in another legal dispute. This time the issue is the baker's refusal to create a cake celebrating a gender transition in 2017. Not long after the Supreme Court decision, the Colorado Civil Rights Commission ruled there was "probable cause" Phillips had violated anti-discrimination laws.

Phillips now seeks to overturn that decision and alleges the state is interfering with his First Amendment right to practice his faith. In a federal

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lawsuit, Phillips states "the status of being male or female ... is given by God, is biologically determined, is not determined by perceptions or feelings, and cannot be chosen or changed."

What would happen if this second case went before the Supreme Court? Professor Eyer says she believes the *Masterpiece* decision would have little impact on a second lawsuit involving the baker.

"The Court has made clear that prior expressions of bias don't necessarily taint future actions," she says. "If [Phillips] chooses to engage in the same conduct in the future that is a new instance of discrimination, the state is free to **adjudicate** that claim. If they do it without bias then under the reasoning of the opinion, it seems likely it would be **upheld**."

Although the Court avoided the larger questions of anti-gay discrimination and religious freedom of expression, the legal arguments made before the Court may serve as a guide to what each side may claim in a similar lawsuit, Professor Carmella says.

"But with Justice Kennedy off the Court, and a new nominee to be considered, I'm reluctant to offer a prediction," she says.

Respectful of both sides

Legal observers agreed that the message the Court sent with the *Masterpiece* decision was to be respectful of both sides in an increasingly contentious debate.

"The outcome of cases like this in other circumstances must await further elaboration in the courts," Justice Kennedy wrote, "all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."

The Court also appeared to be telling judicial bodies to hear these types of cases without any hint of bias toward a person's faith, Professor Carmella says.

"With increasing polarization on so many topics in our national civil discourse, perhaps the justices focused attention on how that polarization was affecting the commission's process," she says. "Seven justices felt the need to remind government actors everywhere that neutrality toward religion is required under the Constitution."

Professor Eyer agreed. "I do think it's valuable to remind all members of the community in resolving these disputes we should be respectful of each other's point of view," Professor Eyer says. "I think that was the central point of the opinion, and I think that is often lacking from the discourse. In that way, it could be seen as a victory for everybody—a reminder to be respectful of each other's sincerely held beliefs." •

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revoke visas for Iranian nationals, and President Ronald Reagan's order to block U.S. entry of Cuban immigrants.

In upholding the travel ban, the Court nixed allegations of religious **animus** against the president. Yet President Trump's past comments about Muslims did not go unnoticed by the five-justice majority; the ruling mentions many of his negative statements, including his call for a shutdown on Muslim immigration during his campaign and his re-tweeting of three anti-Muslim propaganda videos just last year."But the issue before us is not whether to denounce the statements," Chief Justice John Roberts wrote in the Court's **majority opinion**. "It is instead the significance of those statements in reviewing a Presidential directive, neutral on its face, addressing a matter within the core of executive responsibility. In doing so, we must consider not only the statements of a particular President, but also the authority of the Presidency itself."

A divided court determined that the president's comments were outweighed by the lack of religious bias in the third executive order and the rationale behind it, particularly an administration study that found inadequate traveler vetting in certain countries.

> "An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts."

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"The Proclamation is expressly premised on legitimate purposes: preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices," Justice Roberts wrote. "The text says nothing about religion. Plaintiffs...nonetheless emphasize that five of the seven nations currently included in the Proclamation have Muslim-majority populations. Yet that fact alone does not support an inference of religious hostility, given that the policy covers just eight percent of the world's Muslim population and is limited to countries that were previously designated by Congress or prior administrations as posing national security risks."

Weighing in with a brief **concurring opinion**, Justice Anthony Kennedy sided with the majority, but wrote: "There are numerous instances in which the statements and actions of government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects. The fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise."

Justice Kennedy concluded with, "An anxious world must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts."

Another infamous case

Two of the four dissenting justices, Sonia Sotomayor and Ruth Bader Ginsburg, deemed the majority decision "troubling" and likened it to the Court's infamous 1944 ruling in *Korematsu v. U.S.*, which upheld the internment of Japanese Americans during World War II.

"Today, the Court takes the important step of finally overruling *Korematsu*, denouncing it as 'gravely wrong the day it was decided.' This formal repudiation of a shameful precedent is laudable and long overdue. But it does not make the majority's decision here acceptable or right," Justice Sotomayor wrote in her **dissenting opinion**. "By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group—all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one 'gravely wrong' decision with another."

In her dissent, Justice Sotomayer cited the original dissent in *Korematsu*, written by Justice Robert Jackson, who argued that although the internment order was temporary, "once a judicial opinion rationalizes such an order...the Court for all time has validated the principle of racial discrimination." As with *Korematsu*, Justice Sotomayor concluded of the Court's ruling in *Trump vs. Hawaii*, "History will not look kindly on the Court's decision. Nor should it."

Though several issues divided the court, none were perhaps as polarizing as President Trump's past comments about Muslims and his motivation for the executive orders.

"As I read the decision, the most important practical question was what to make of the President's long series of anti-Muslim statements that lie at the back of the proclamation," says Roger S. Clark, a professor at Rutgers Law School—Camden. "The dissent thought they had to be taken into account and forcefully so; the majority glossed over them. The majority thought there was some plausible national security ground on the face of the proclamation and left it at that. I suppose you can say the judges disagreed about how much deference to give the President—a lot in the case of the majority. I think the dissenting judges made a much more persuasive argument." •

Glossary

adjudicate — to make an official decision about who is right in a dispute. **animus** — hostile feeling or animosity. **appealed** — when a decision from a lower court is reviewed by a higher court. **bipartisan** — supported by two political parties. **concurring opinion** — a separate opinion delivered by one or more justices or judges that agrees with the decision of the court but not for the same reasons. **defendant** — in a legal case, the person accused of civil wrongdoing or a criminal act. **dissenting opinion** — a statement written by a judge or justice that disagrees with the opinion reached by the majority of his or her colleagues. **majority opinion** — a statement written by a judge or justice that reflects the opinion reached by the majority of his or her colleagues. **plaintiff** — person or persons bringing a civil lawsuit against another person or entity. **substantive** — meaningful or considerable. **unanimity** —agreement by all involved; unanimous. **upheld** — supported; kept the same.