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Is One Greater than Fourteen? : The Christian Right, Freedom of Religion, and *Masterpiece Cakeshop*

By

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Abstract: *Obergefell v. Hodges* (2015) epitomized the conflict between the Christian Right and the gay rights movement in the Supreme Court. By acknowledging gay marriage as a fundamental right, the Supreme Court moved away from the traditional definition of marriage and the associated religious liberties. This thesis explores the extent to which the conflict between the Christian Right and the gay rights movement reflects a larger conflict over claims made to the First and Fourteenth Amendments as they relate to religious liberties and equal protection claims, respectively. To contextualize the conflict between religious freedom and equal protection in the Supreme Court, I analyzed four cases, beginning with the first favorable case for the gay rights movement: *Romer v. Evans* (1996), *Lawrence v. Texas* (2003), *Obergefell v. Hodges* (2015), and *Masterpiece Cakeshop v. Colorado* (2018). Using amicus curiae briefs and media coverage, I analyzed the Christian Right as its arguments transform or remain static throughout the period, and then I developed three expectations to assess the likely outcome of *Masterpiece Cakeshop*. Ultimately, I find that the Christian Right repeats arguments from previous cases to prevent further limitation on religious freedom and to introduce new reasoning as case issues evolve, and I find that the Court's response to these arguments indicates an unfavorable outcome for the Christian Right in *Masterpiece Cakeshop*.

Introduction

Following its decision in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the United States Supreme Court acknowledged how equal protection claims outweighed claims to religious freedom advocated for by the Christian Right. Over the last two and a half decades, the Supreme Court expanded protections for sexual minorities and furthered gay rights through three major cases: *Romer v. Evans*, 517 U. S. 620 (1996), *Lawrence v. Texas*, 539 U. S. 558 (2003), and *Obergefell v. Hodges* (2015). Each case produced polarized arguments from the Christian Right and the gay rights movement regarding the extent to which equal protection should take precedent to religious freedom claims. Since the Christian Right continuously failed to convince the Court in each case, this thesis determines the extent to which the Supreme Court has delineated the relationship between religious freedom and equal protection in relation to gay rights. Ultimately, I determine the extent to which the Fourteenth Amendment takes precedence over First Amendment protections and assess the likely outcome of *Masterpiece Cakeshop*.

The relationship between equal protection and religious freedom represents the tensions between the gay right's movement and the Christian Right. For this reason, I examined the Christian Right's arguments during *Romer*, *Lawrence*, and *Hodges* in addition to arguments before *Masterpiece Cakeshop v. Colorado* (2018). The period begins with *Romer v. Evans* (1996) which signifies an ideological shift in the Supreme Court to use the Fourteenth Amendment to protect gay rights (Brewer, et. al. 2000). For the next decade and half, the Court would rule in favor of gay rights expansion, culminating in the creation of a fundamental right to same-sex marriage in *Obergefell*. The final constitutional question is the extent to which freedom of religion allows religious groups exemption from recognizing or supporting gay marriage in a commercial context, which is the focus of *Masterpiece Cakeshop*. I will show that previous case

opinions, amicus curiae briefs, and the arguments wielded by the Christian Right reveal a pattern, which allows for assessment in *Masterpiece Cakeshop* and the implications for First Amendment protections.

To recognize a pattern, I applied data to three individual expectations which would explain how the Christian Right approaches the Supreme Court. Expectation one is that the Christian Right repeats arguments because the Court unclearly explains the relationship between equal protection and religious freedom, thus warranting a further ruling. Expectation two states that the Christian Right repeats arguments to have the Court reconsider or overrule unfavorable precedent. Expectation three states that the Christian Right presents mostly new arguments as issues arise between religious freedom and gay rights following newly established precedent.

The case history leading to *Masterpiece Cakeshop*, the prior three cases in this study, provide a foundation and springboard for analyzing the Christian Right. Given three differing cases involving the expansion and further protection of the gay and lesbian community, each case provides another attempt for religious groups to voice their opposition and reveal their arguments. Before engaging my research, I address the case history and circumstances to provide the base to understand what issue exists between equal protection and First Amendment protections. I then describe how this research contributes to understanding the Christian Right as a political entity in the Supreme Court and to understanding the extent of Fourteenth Amendment protections when compared with the First Amendment. I also combine multiple data gathering methods, bringing together the Christian Right's formal arguments from amicus briefs and the public arguments collected by newspapers to develop a more comprehensive view of how the Christian Right approaches the Court. This dual-pronged approach better represents how an interest group, or several, represent themselves and act both inside and outside the formal legal

setting. Based on the arguments and the argument frequency identified through the dual approach, I determine the pattern that the Christian Right uses to approach the Court and the arguments that the Court both considers and rejects to determine how the Court will likely respond in *Masterpiece Cakeshop*. Together, the Christian Right's approach and the prediction reveal how the Court perceives the relationship between two fundamental rights and the entanglement with anti-discrimination under equal protection.

The results of this thesis extend beyond the scope of the Christian Right due to the ubiquitous nature of First Amendment protections. Although *Masterpiece Cakeshop* stems from an emphasis on religious freedom, the argument heavily relies on considerations about free speech and freedom of expression. First Amendment protections are enjoyed by Americans every day, and an abridgement or new limitation on those rights will tangibly affect everyone's lives. Should the case result in a victory for equal protection and gay rights, then the First Amendment necessarily undergoes a process of limitation, but if the Christian Right and the First Amendment succeed, then denial of service becomes acceptable under freedom of conscience rather than being classed as discrimination. On either side of the argument, there are consequences which will be felt by this case, and this thesis presents a framework to analyze the current issue in the Court and the likely outcome.

Background

The gay rights movement, like similar civil rights movements, took shape during the 1960s, but the conflict with the soon-to-be Christian Right escalated in the 1970s. The Christian Right, or religious right, is a “coalition of right-wing Protestant fundamentalist leaders” rising to prominence after the landmark *Roe v. Wade*, 410 U. S. 113 (1973) (religious right n.d.). Legal battles involving the religious right primarily involve Catholic and Protestant denominations, hence reference to the Christian Right, but the group’s traditionalism and conservatism resonate with other religious groups including conservative Judaism. The Christian Right plays a pivotal role in cases involving the emergence of gay rights, but starting in the 1970s, there would not be a conflict between gay rights and the Christian Right in the Supreme Court for another decade. Despite this delayed encounter, the gay rights movement already had three foci to guide their actions: “(1) anti-discrimination protections in the form of gay rights bills; (2) elimination of police harassment ...; and (3) eliminating the practice of unfair representations of lesbians and gay men” (Fetner 2008). The Supreme Court cases in this study best represent the movement’s anti-discrimination goals because these cases ultimately protected rights that Congress and state legislatures would not. While *Romer v. Evans* (1996) signified a change in the Supreme Court to use the Fourteenth Amendment to protect gay rights and sexual minorities, the earlier *Bowers v. Hardwick*, 478 U. S. 186 (1986) defined no protections for sexual minorities.

Bowers (1986) involved a Georgia anti-sodomy law. Caught in the act of consensual sodomy, Michael Hardwick was charged for engaging in prohibited sexual activity, and he challenged the constitutionality of the law. The case failed in a 5-4 decision in which the majority opinion, written by Justice White, argued that no constitutional right to consensual sodomy existed. The decision entrenched discriminatory legislation because the case ruled

against homosexual sodomy but not against sodomy altogether. The case reinforced the “political power of the traditional moral subjugation of homosexuals” by rejecting “a claim of fair treatment (an argument of basic constitutional principle if any argument is)” which is akin to later equal protection claims (Richards 1999, 100).

Although the Supreme Court would not consider equal protection’s application for sexual minorities until *Romer v. Evans* (1996), state courts relied on the equal protection clause of the Fourteenth Amendment to protect sexual orientation. The equal protection clause in the Fourteenth Amendment states that the State will not “deny to any person within its jurisdiction the equal protection of the laws” (U. S. Const. amend. XIV.) which appears in Supreme Court precedent, especially related to gay rights, to protect a specific minority group. The Supreme Court of Hawaii used the state’s equal protection clause, modelled after the Constitution, to protect sexual minorities in *Baehr v. Lewin* (1993) (later changed to *Baehr v. Miike*). The case arose when three same-sex couples applied for marriage licenses but were denied because the state recognized heterosexual but not same-sex relationships as eligible for marriage. After deliberation, the Supreme Court of Hawaii decided that denying the marriage licenses violated Hawaii’s equal protection clause because it unjustifiably discriminated by sex. *Baehr* influenced Congress’s decision to pass the Defense of Marriage Act (DOMA) in 1996 which would disallow gay same-sex marriage for the foreseeable future.

In the same year, the Supreme Court decided *Romer v. Evans* (1996). The case signified how the Court would use the Fourteenth Amendment to protect gay rights and sexual minorities from government sanctioned discrimination. *Romer* (1996) involved the Colorado Amendment Two which was a state constitutional amendment that prohibited any in-state legal support for homosexuals. The Court ruled that the amendment violated the equal protection clause of the

Fourteenth Amendment by specifically singling out a class of people for active discrimination. *Romer* supported the decision reached by the Supreme Court of Hawaii, since *Romer* extended equal protection to sexual minorities but did not fully realize gay marriage rights nor overrule *Bowers* Hawaii, having already found protection for gay marriage, presented the earliest case for gay marriage legality, but the case for gay marriage in the Supreme Court would take another two decades. In *Romer*, the Court argued that discrimination against sexual minorities was unconstitutional but ambiguously established new precedent protecting sexual minorities without addressing previous precedent that targeted sexual minorities.

In *Lawrence v. Texas* (2003), the Court addressed the relationship between due process and equal protection as they relate to homosexual conduct. Since *Bowers* (1986) maintained that consensual same-sex sodomy was unconstitutional but *Romer* (1996) upheld equal protection for sexual minorities, *Lawrence* clarified the Court's perspective toward gay rights' protections. The plaintiffs were John Lawrence and Tyron Garner who were convicted for violating a Texas law prohibiting same-sex sexual acts. The case simultaneously overruled *Bowers* (1986) but counterintuitively grounded the decision in the due process clause rather than the equal protection clause. The Court expressly determined that equal protection did not apply but due process accorded consenting adults the right to engage in sexual activity independent from government oversight. While a victory for gay rights, the opinion circumvented the equal protection clause despite how the case necessarily involved an equal protection claim because the Texas law specifically outlawed the conduct of a specific minority.

In the most recent case, *Obergefell v. Hodges* (2015), the Court identified the fundamental right to gay marriage under the due process and equal protection clauses. Sixteen same-sex couples engaged in legal battles against statutory same-sex marriage bans, and the

question at the Supreme Court was whether states had to license same-sex marriage and abide by same-sex marriages granted in other states. In a divided and contentious 5-4 ruling, the Supreme Court proclaimed that the Fourteenth Amendment obligates states to allow same-sex marriage, ruling that equal protection requires both sexual minorities and heterosexual couples have the same marriage protections and rights. This case specifically aggravated the tensions between the Christian Right and the gay rights movement by not providing exceptions for public officials to abide by their religious faith nor for religious leaders to not perform same-sex marriage ceremonies. In a one paragraph closing remark, Justice Kennedy wrote for the majority opinion that “religions ... may continue to advocate with utmost, sincere conviction that ... same-sex marriage should not be condoned,” but the opinion does not address whether religious groups may refuse to same-sex couples, who are protected against discrimination (*Obergefell v. Hodges* 135 S. Ct. 2608 2015). Such protections are viewed as licenses to discriminate by gay rights activists, but the Court has yet to rule on religion-based exemption from endorsing or providing services to gay couples.

The looming *Masterpiece Cakeshop v. Colorado* (2018) case will address the questions regarding First Amendment exceptions to gay marriage based on free speech and freedom of religion. The case began in 2012 when a same-sex couple requested a cake from the owner of Masterpiece Cakeshop. The owner, Jack Phillips, refused to create the cake because his religious beliefs did not recognize same-sex marriages, and this led the couple to file under the Colorado Anti-Discrimination Act for sex discrimination. The issue ascending to the Court is whether religious beliefs are sufficient grounds to deny service to same-sex couples when that service forces individuals to implicitly support the institution of gay marriage. The outcome of the case

also decides religious exception in the commercial setting and any basis for sexual orientation discrimination.

While the cases proceed in a consistent manner and progressive manner, scholars vary in whether and how much interest groups impact the Supreme Court through formal or public avenues. To understand where the Christian Right fits into the judicial system, it is necessary to discuss how public opinion influences the Court and how the Court has interpreted freedom of religion and equal protection.

Literature Review

Literature about public opinion especially relates to this thesis because it is a method by which the people reflect on political and issues. Public opinion is a broad concept, however, and to narrow the literature, I emphasize how interest groups influence the Supreme Court through amicus briefs and how they show their arguments in newspapers. Combined, interest groups use both methods to communicate their arguments. Based on these arguments and the Constitution, the Justices decide the extent of religious freedom and equal protection, especially regarding the gay rights and gay marriage cases. In this section, I discuss the relevant literature that analyzes amicus briefs, the significance of newspaper coverage, and how precedent affects First and Fourteenth Amendment interpretation.

Beginning two-and-a-half decades ago, gay rights activism increased, largely due to a change in public opinion regarding gay rights. Over a small period before *Romer*, public opinion recognizably shifted with egalitarians supporting gay rights and moral traditionalists being the main group opposed to gay rights, and increased political knowledge entrenched traditional viewpoints, showing that political knowledge influences conservative public opinion (Brewer 2003). Despite a public opinion shift supporting gay rights, the country remained opposed to gay marriage by majority, but individual states with high percentages that support gay rights are more likely to institute legislation supporting gay marriage protections (Lewis and Oh, 2008). While this establishes a connection between public opinion and state actions, the relationship between public opinion and the Supreme Court is more tenuous. Typically, the Supreme Court rules consistently with relevant public opinion, valuing the federal government's opinion more when it holds a similar view or when there are times of crisis (Marshall 1989). Since the Court decided *Romer* and *Lawrence* while most of the country did not support gay marriage, the Court

conflicted with public opinion by expanding protections but respected the changing ideological face of America as egalitarianism grew.

Shifting to how the Court influences public opinion, any discussion must respond to Rosenberg's (2008) claim that the Supreme Court has no ability to affect social change. His analysis primarily focuses on *Brown v. Board of Education*, 347 U. S. 483 (1954), and the early stages of gay rights victories in the Court, but his writing does not extend to the outcome of *Hodges* and its impact in the aftermath. Since the Supreme Court generally reflects public opinion, interest groups attempt to influence the Court through amicus curiae briefs to influence outcomes and impact social change. Research on judicial impact and amicus curiae has culminated in an acknowledgement that public opinion is an underlying motivator.

Unfortunately, amicus briefs have relatively low impact in the Court despite how they represent public opinion (Marshall 1989), at least in preliminary research. The media is another way for interest groups to interact with the Court in a reciprocal way. Specific research on gay civil rights by Stoutenborough (2006) addresses how the Supreme Court influences public opinion through the media when cases explicitly involve same-sex relationships and rights, showing an opinion shift consistent with the frequent negative or positive portrayals in the media. The media's sway regarding a case partially depends on the outlet's skew and on the interest groups represented in articles. Amicus briefs, however, are the primary method for interest groups to present arguments before justices.

The Christian Right and gay rights movement use counteractive lobbying to combat one another's successes while bolstering their respective group advocacy (Fetner 2008). Both groups vie for recognition in the Court by filing amicus curiae briefs. Amicus curiae briefs have a mixed literature in relation to the Court, but filing briefs is meant to increase the likelihood of favorable

outcomes (Epstein and Rowland 1991). Amicus briefs are written statements by interest groups or government bodies which present arguments supporting a party in a Supreme Court case. How much emphasis justices place on amicus briefs is unknown, but briefs reveal outcome patterns and trends among interest groups. For case outcomes, Songer (1993) finds that litigants win approximately the same number of civil rights and economic cases whether they are or are not supported by amicus curiae briefs which complicates brief significance. However, later research indicates that interest groups that file briefs experience marginally more success especially if the group is prestigious, but the number of groups does not inherently affect the case's outcome (Collins 2004). Moreover, Box-Steffensmeier (2013) corroborates that brief quantity is insignificant but determines that well-connected and influential interest groups have increased success rates at the Supreme Court. This research suggests that the interest groups lobbying for gay rights and gay marriage were more powerful than the Christian Right in each studied case.

Further amicus research illustrates that there is quantitative importance in addition to content. Research by Collins (2007) finds that filing more conservative or liberal briefs in higher quantities, irrespective of content aside from political leaning, results in a higher chance that the court sides with the respective ideology. When groups submit briefs to a case “in that a large number of briefs are filed supporting only one ideological position—the influence of briefs is rather dramatic,” but briefs exhibit diminishing returns to success rates if too many are submitted (Collins 2007). Finally, Solowiej and Collins (2009) find that interest groups counteractively lobby in the Supreme Court by filing more amicus curiae briefs when rival groups file relatively more briefs. Based on content alone, briefs are ineffective, but brief submission reveals trends especially when groups are comparably influential. The research indicates that Court favor shifts toward the side with more ideologically visible briefs from powerful interest groups, and these

results are relevant despite these studies focusing on the latter half of the twentieth century for data and subsequently not involving the gay rights cases in this thesis. Court decisions in the relevant cases could signify respective interest group power and the Christian Right's diminishing power and influence.

After interests reach the Court and it renders a decision, the debate revolves around freedom of religion and equal protection claims. As indicated by the history, before *Romer* (1996), the Court regularly supported precedent limiting sexual minority protections and enforcing religious protections. Kurland (1979) asserts that outcomes were so predictable that merely mentioning establishment clause relevance would decide the case for religious freedom. In a recent reversal, judicial involvement in religious issues related to antidiscrimination and gay rights forces concessions that weaken religious freedom and the Christian Right's willingness to approach the Court (Glendon 2015). Moreover, redefining marriage to include a previously unaccepted class of people and to create a fundamental right to gay marriage weakens the marriage institution and raises concerns that marriage could expand to more unacceptable classes like polygamists or pedophiles (Anderson 2017). Changing the definition of marriage from a religious, traditional, and procreative definition to an expansive definition results, in part, from an economic disadvantage argument which posits marriage as an economic benefit available to everyone (Runions 2016).

Equal protection for marital access and its economic benefits revealed how economic interest influences comparative rights claims after *Obergefell v. Hodges* (2015). Runions (2016) argued that marriage took on economic significance during *Hodges*, but the new definition of marriage did not address future definition changes. The new economic definition of marriage "may also narrow imagined and actual forms of political subjectivity for LGBTQI people" by

confining the terms by which marriage can be defined (Runions 2016). The Court weakened marital norms to prevent discrimination and create a more inclusive marriage definition, but the new definition places public opinion over religious freedom, reinforcing religious privatization and making disagreement a personal issue unworthy of widespread protection (Glendon 2012). Privatization counterintuitively weakens religious freedom and empowers gay rights: restricting public expression for the Christian Right and traditional definitions of marriage while protecting sexual minorities and individual identities.

Although economic discrimination is recognized in an exclusive definition, economic and commercial discrimination based on religious objection are unaddressed in the Court. Before *Hodges*, cases related to denial of service to gay couples by religious storeowners resulted in unfavorable conflicts with antidiscrimination law, leaving owners to decide whether economic interest or religious conviction were more influential incentives (Chain 2016). The *Colorado Cake Baker Case* (2012), now *Masterpiece Cakeshop v. Colorado* (2018), and *Willock v. Elane Photography* (2014) are lower cases that emblemize the conflict since both involve denial of service due to the client's relationship status. Since gay marriage was not established, gay relations were the contentious point, and gay relations evoke antidiscrimination claims based on sexual orientation (NeJaime 2012). Because *Masterpiece Cakeshop* pivots on religion-based commercial discrimination, enough precedent exists to determine that the Supreme Court will decide for equal protection and against such discrimination (Chain 2016). My research addresses a similar question about the outcome of a religion-based discrimination claim, but I analyze the issue through the Christian Right in the Supreme Court rather than by recognizing antidiscrimination law's prominence. Chain's piece identifies the trajectory the Court has

decided in recent cases, but this prediction does not extend to any conflicts arising from non-commercial religious discrimination issues.

Even before expanding the definition of marriage, DaLaet (2008) uniquely situates gay rights as supportable through the First Amendment. Recognizing religious privatization and no religious favoritism, any preference for a religious definition of marriage enshrined in law, by the Defense of Marriage Act of 1996, necessarily violates the “no preference doctrine.” Even using an originalist perspective to consider marriage reveals that while a right for a man and a woman to marry exists, a general marriage right does not exist, which prevents conservatives from arguing that same-sex marriage is unconstitutional without a general right to support heterosexual marriage (Bunch 2005). Therefore, Bunch argues that based on a reading of *Brown v. Board of Education* (1954), which supported racial minority access to public education, a fundamental right to marry extends to sexual orientation minorities when considering a more conservative approach. In the same way antidiscrimination applies to racial groups, antidiscrimination should apply to sexual minorities through equal protection.

A significant impetus for expanding gay rights involves sexual orientation antidiscrimination claims under the equal protection clause. While the traditional definition of marriage conforms to human nature rather than intentionally discriminating (Anderson 2017), restricting gay rights disadvantages a minority. In efforts to protect religious freedom from gay marriage compliance, the proposed “marriage conscience protection” would provide immunities to religious groups but simultaneously would disguise sexual orientation discrimination as religious freedom (NeJaime 2012). However, the Christian Right supports the traditional definition of marriage because it complies with religious beliefs, so forced compliance with a new definition threatens religious autonomy which should be recognizable later in the thesis.

Additionally, when comparing religious freedom and equal protection, “traditionalists and the religiously faithful—must have diminished democratic power” if that power allows them to marginalize a group because the group acts inconsistently with societal norms (Feldman 2015). Thus, the Fourteenth Amendment takes precedence when one group would have unorthodox power over the rights and opportunities of another group (in this thesis the Christian Right over sexual minorities).

Curbing religious freedom’s expansiveness is consistent with critical race theory advocating for restrictions on freedom of speech. Religious restriction when religion impacts sexual minorities negatively parallels restricting free speech which marginalizes and dehumanizes racial minorities (Feldman 2015, Matsuda 1993). Arguments for religious tolerance have paradoxically stigmatized sexual minorities because the Christian Right uses political arguments to create an intolerant social atmosphere (Richards 1999). Both gay rights activists and critical race theorists propose restrictions as a reaction to the prolonged injury to group perception, dignity in life, and the suppression of oppositional voice (Matsuda 1993, Richards 1999, Richards 2005). Richards (1999, 2005) argues that adherence to religious morality is moral slavery for dissenting minority groups which prevents their contribution to rights-based discussion and advocacy. Silencing expression and opinions while dehumanizing minority groups are sufficient incentives to limit First Amendment rights which hinder equality.

This thesis will focus on the arguments that the Christian Right leverages before and after *Romer*, *Lawrence*, and *Hodges*, and before *Masterpiece Cakeshop* through amicus briefs, Supreme Court opinions, and the Christian Right and significant social events related to gay rights in the media. The literature in this section explains how these three areas affect the Supreme Court and conversely how the Supreme Court impacts the public. The literature

provides a foundation to analyze the information in newspaper coverage and amicus briefs as they express the Christian Right's arguments and how they interact with the Court. While some of these academic works discuss the Christian Right's arguments specifically, there is a larger question about when which arguments were more relevant and how the arguments changed after each case. For this reason, understanding how the Supreme Court influences public opinion and newspaper coverage after a decision. I next describe how I plan to incorporate these resources into my case study as a vehicle to analyze the extent to which equal protection takes precedent to religious freedom. I also address how my methods are best to study these topics in an objective sense that still addresses both the Christian Right and the larger Fourteenth Amendment preference in the Court.

Research Design

To study the relationship between the First and the Fourteenth Amendments, I analyzed the Christian Right's arguments supporting religious freedom from 1995 to 2017. Based on the history of gay rights in the Court, this study begins in 1995 when *Romer* entered the docket and ends in 2017 after the U.S. Supreme Court granted certiorari to *Masterpiece Cakeshop*. The approximately two-decade period includes *Romer v. Evans* (1996), *Lawrence v. Texas* (2003), *Obergefell v. Hodges* (2015), and *Masterpiece Cakeshop v. Colorado* (2018) to a lesser extent. The more recent case history engaged the progress made by the gay rights movement and the extension of Fourteenth Amendment protections to sexual minorities. To analyze the Christian Right's contemporary arguments in each case, I examined respective media coverage, amicus briefs, and Court opinions.

To contextualize the analyzed cases, *Masterpiece Cakeshop* extended the analyzed period to the present and engaged the most recent attempt to uphold religious freedom protections. Engaging the recent years since *Obergefell* addressed contemporary arguments from the Christian Right over social controversies, like Kim Davis and *Masterpiece Cakeshop* (before it reached the Court). The longer period also engaged Chain's (2016) conclusion that any case responding to religious discrimination in the commercial setting would weaken religious freedom. Although the Court has yet to rule on *Masterpiece Cakeshop*, the arguments expressed before the case affect perception as to how and why the Christian Right approaches the Court. On the other end, starting before *Romer*'s decision captured the media conversation and portrayals which maintains consistency with the media collection methods for other cases.

Before outlining my data collection methods, I will present the three expectations which identify how the Christian Right could approach the Court and how that reflects the relationship

between equal protection and religious freedom. The first expectation is that repeated arguments reflect areas in which the Court has yet to fully define the relationship between equal protection and religious freedom. Expectation two states that the Christian Right repeats arguments across cases to make the Court reconsider past decisions which ruled unfavorably on that thematic issue. Expectation three states that the Christian Right presents mostly new arguments as new issues arise between religious freedom and gay rights following newly established precedent. Collecting data on public arguments expressed by the Christian Right, from newspapers, supports each expectation due to reflecting how the Christian Right informally perceives conflicts in the Court. Amicus briefs are the formal arguments and best indicate which arguments the Christian Right believes deserve consideration or reconsideration. Lastly, tabulating the mentioned arguments in the Court's opinions verifies whether the Court has genuinely addressed a topic. Each collection method contributes to adequately assessing and understanding which expectation is most representative.

The first expectation requires repeated arguments that reflect issues on which the Court has not directly ruled to clarify the relationship between equal protection and religious freedom. A repeated argument refers to reasoning that the Christian Right uses in different cases, effectively reusing an argument. In confirming this expectation, Court majority opinions should not mention the repeated argument at the beginning (or at all), but dissents could address them which would mean that the justices believe there is some merit to the argument. For instance, if Justice Alito wrote a dissent to *Obergefell* about the Court not adequately considering the possibility for future redefinitions of marriage allowing presently unacceptable unions, then the Christian Right would advocate using this argument in the media and in amicus briefs going forward. If the Court majority and the dissents do not mention an argument and it reappears, then

interest groups believe that argument is still valid and deserves recognition. The Court's opinions gauge the validity of this expectation, and the repeated arguments over time reflect areas in which the Court should explicitly rule. An unresolved argument could portend future political conflicts and confrontation especially at the Supreme Court level. *Masterpiece Cakeshop* gains relevance in this instance because the arguments before the case's resolution would show which questions thus far remain unanswered. To fully explore this expectation, future research would incorporate the Court's opinions after the case to identify the arguments which the Court acknowledges and how the opinions reflect the extent of equal protection afterward.

The second expectation views repeated arguments as opportunities for the Court to reconsider previous rulings and rollback protections or precedent. Since the Christian Right holds a consistent opinion toward gay rights and gay marriage, the Court's support for the Fourteenth Amendment overcomes religious objections but reinvigorates religious groups to convince the Court otherwise. If this holds true, there should be semi-constant participation from religious groups and potentially more newspaper coverage as religious groups vocalize arguments more. At present, arguments to limit gay rights expansion through equal protection require a reversal or limitation on past precedent to institute protections for religious freedom. Repeated arguments would thus appear if the Christian Right believes that the Court overly restricted religious freedom and that previous arguments convincingly explain why precedent should be limited and more freedom restored to religion. In this scenario, Court majority opinions will mention the points in interest groups' arguments and decide against them. Then the Christian Right would push the same argument again in a slightly different way to reengage the Court on previous topic. Furthermore, for this expectation I expect that the Christian Right specifically, rather than semi-related actors, vocalizes arguments for the re-expansion of

religious freedom. I also expect that semi-related actors will not repeat religiously independent arguments because these actors' arguments do not explicitly deal with support for religious freedom. Religious organizations have the most to lose, gaining nothing from continued argumentation in the Court and potentially resigning from argumentation if there continue to be no victories. According to this expectation, the interpretation of the Fourteenth Amendment is overly broad, and the Christian Right is receptive to excess restrictions.

The third expectation states that the Christian Right presents fresh arguments for each new case. This expectation assumes that contemporaneous issues, like Kim Davis, play a significant role in posing new questions about the relationship between religious freedom and equal protection. If this is true, then the Court mentions the Christian Right's arguments in its decisions which are not reexamined in later cases, and I expect that interest groups and the media cover new arguments regarding each case (those arguments can be in the same thematic vein but need to be different). This expectation provides the most forceful depiction of Fourteenth Amendment dominance because the Court rejects each new religious objection in its majority opinions. Thus, new arguments would continually be created and responded to in the following Supreme Court case, creating a linear expansion of the Fourteenth Amendment and sequential restriction of religious freedom. This expectation poses the largest risk to the First Amendment because the ability to tightly restrict religious freedom, and potentially freedom of speech per the nature of *Masterpiece Cakeshop*, has serious implications for expression and the average citizen.

These expectations cover a range of scenarios describing why the Christian Right voices varying arguments through the media and amicus briefs. Although there is not a similar study on an interest group in the context of the Supreme Court, the three expectations logically address the possible ways in which a group could approach the Court. In the context of this thesis, each

expectation indicates a lopsided relationship between equal protection and religious freedom, but the expectations also indicate different levels of certainty with respect to case precedent.

Certainty in the existent case precedent affects whether the Christian Right believes that change can be made which more broadly reflects the extent to which the Court delineates the support for equal protection's and anti-discrimination. The first two expectations should most accurately represent the Christian Right's approach to the Court and the varying degrees to which the Supreme Court has defined limitations to religious freedom. The progressing nature of precedent and new legal issues make it unlikely for the third expectation to be true, but that does not preclude the possibility that the Court commits to expanding equal protection. If *Masterpiece Cakeshop* is any indication, then the Court has not yet discussed commercial discrimination related to religious beliefs, so I expect repeated arguments in hopes to restore religious freedom's expansive protections and to clarify the extent of equal protection.

Now, as for methods to gather the media's coverage for each case, I tabulated and organized newspaper coverage based on the thematic issue addressed. I used *The New York Times* in this study because scholarship identifies this newspaper as a reliable standard for studying case salience and for studying media's relevance in response to the Court (Epstein and Segal 2000, Collins and Cooper 2012, Sill et. al. 2013) The inclusion of more papers, for instance the *Washington Post* or *Los Angeles Times* do provide a more diverse and regional perspective (Collins and Cooper 2015), but it was not necessary in this study to collect more diverse perspectives, especially when those papers are ideologically comparable to *The New York Times*. Other papers such as *The Boston Globe* and the *New York Post*, while reputable, receive little scholarly attention and will remain unaddressed here due to the literary gap.

In each of these newspapers, I searched for themes expressed by the Christian Right such as arguments about protecting children, maintaining a proper social order, or promoting religious freedom over forced secular interests. The timeline for inclusion in this case was within one year of a case being granted certiorari and subsequently being decided. I measured the frequency of these arguments, employing a frequency-based approach, to determine the importance and popularity of each argument. The relative frequency of an argument, both within a specific case and among the four cases revealed how impactful the Christian Right believed that argument was. I collected articles using the ProQuest *The New York Times* database, which includes articles from 1980 to the present. I used descriptive terms and appropriate keywords for each case while searching. Terms included case name, theme (for instance gay rights, religious freedom, equal protection, discrimination, marriage), key figures in the case (e.g. Justice Kennedy in *Obergefell* for his swing vote, John Lawrence or Tyron Garner for *Lawrence*), and topical issues (including sodomy, marriage, discrimination, family). I specifically captured when an argument appeared and its relation to a Supreme Court case or social event to temporally isolate the usage. When the Christian Right used an argument affects whether that argument appeared in a justice's opinion and how the Court addressed or ignored it.

A frequency-based approach to newspaper coverage avoided issue salience complications associated with the location of an article within the newspaper. Epstein and Segal (2000) proposed a popular measure for determining case salience based on front page coverage in *The New York Times*, but this method overstated its usefulness because of the paper's political leaning and the demonstrated overrepresentation of liberal Supreme Court outcomes as opposed to conservative outcomes (Unah and Hancock 2006). While not initially a concern because each Court case resulted in a liberal outcome, essentially ensuring coverage, a more inclusive

approach to article selection caught any articles where conservative opinions appeared which could have shifted the article onto later pages. Since these Supreme Court cases involved civil rights and First Amendment issues, there is a greater likelihood that journalists wrote about outcomes regardless of the politics involved (Sill et al. 2013). By checking the entirety of the newspaper, the frequency-based approach ensured objectivity by avoiding reporting bias and the limitations in analyzing front page coverage. The pure frequency-based approach also ensured maximum case coverage and inclusion for the Christian Right's public arguments and responses to each Supreme Court case.

In choosing how to assess the Christian Right's changing arguments against gay rights, a research method must respond to public opinion, which can determine whether support for gay marriage increased or decreased throughout the period. Previous research found that the Court influences public opinion through the media when the case involves same-sex relations (Stoutenborough 2006) and that the Christian Right can be specifically analyzed through a measure for moral traditionalism (Brewer 2003). Despite these studies which favorably support incorporating public opinion polls or direct measures, the Christian Right has been markedly consistent in opinion throughout this period. General public opinion increasingly shifts in favor of gay rights and gay marriage (Stoutenborough 2006), but the Christian Right consistently maintains a socially conservative perspective which does not support gay rights. Determining their contemporary approval would provide a static approval measure that would contribute little additional information aside from a proportional measure for the size of the Christian Right. However, size would merely influence the quantity of arguments presented, but quantity does not reflect ability to influence the Court since political influence is an independent measure (Box-Steffensmeier 2013). Rather, analyzing the arguments that the Christian Right wielded engages

their dynamic capability to change how and why they disagree rather than whether they disagree with increasing the scope of gay rights. Public opinion only assesses current mood and does not acknowledge interest groups' logic, so this is a less useful method to study the Christian Right's consistent opinion yet varied reasoning against gay rights and gay marriage.

Not incorporating public opinion into this analysis has a drawback because of the relationship between public opinion, amicus briefs, and case outcome. Interest groups submit amicus briefs which describe their opinion on a topic, and research suggests that justices are more receptive to interest groups with more significant connections and public support (Box-Steffensmeier 2013), indicating that each decision calls into question the relative strength of the Christian Right. However, this thesis focuses on the extent of religious freedom's limits rather than the strength of the Christian Right as an interest group. This concern would also require consideration of groups which support gay rights, including more liberal religious groups such as liberal Protestant denominations. The thesis's scope, focused on the Christian Right, limited consideration of other religious groups and the tangential argument and research question of interest group strength. I examined the strength of arguments used by the Christian Right but not necessarily the groups wielding them. As such, public opinion would be a topic for future study, analyzing how the Christian Right and pro-gay rights interest groups have shifted in terms of strength and support, but public opinion was irrelevant here.

In addition to the statements in newspapers, I analyzed amicus curiae briefs submitted to the Court by groups belonging to the Christian Right or that had similar thematic or ideological leanings. I gathered Supreme Court amicus briefs via the Westlaw legal database and organized petitioners' or respondents' arguments based on central theme. Amici can contain multiple arguments, sometimes inherent to a desired conclusion, which I counted once even if they

recurred multiple times in the same brief. A special note about *Masterpiece Cakeshop* (2018) amicus briefs: since the case was not yet decided when I conducted my study, it was not officially included in the Westlaw database, so I gathered relevant briefs from www.SCOTUSblog.com, which doubled as a second resource for briefs from *Obergefell*. I replicated the frequency-based approach used for newspapers but only for Supreme Court cases as there are no amici for social controversies. I did not consider appellate briefs or briefs submitted to lower courts unless groups submitted similar briefs to the Supreme Court. I included groups with similar ideological briefs to those argued by the Christian Right's interest groups because actors making similar claims (a state government, for instance) indirectly associate themselves with the Christian Right. Some arguments used by the Christian Right were not even religion-exclusive, so any group using those arguments similarly situated itself. I then sorted the arguments from amicus briefs by respective case and by frequency in that case.

In determining arguments advanced in amicus briefs, I recognized additional arguments that are not mentioned during oral argument nor in Court opinions. Amicus briefs can contain more nuanced and varied arguments than Court opinions address. A textual analysis for amicus briefs recognizes the unique arguments that briefs often provide but that are not mentioned in the Court's majority or dissenting opinions (Spriggs and Wahlbeck 1997). Thus, amicus briefs provided additional arguments which were less recognized and potentially unaddressed entirely by the Court. If opinions mention fewer arguments than briefs, then analyzing opinions alone restricts which arguments are analyzable. However, while opinions include fewer interest group arguments, opinions describe which arguments are relevant to the justices (Spriggs and Wahlbeck 1997), and the opinions describe which arguments are valid and which are no longer valid based on the case's outcome. As such, I also addressed Court opinions and dissents for the

three decided Supreme Court cases because the opinions address specific arguments and their future viability. I gathered Court opinions from Cornell Law School's Legal Information Institute which provides open access to case opinions. Reading Court opinions informed whether the Christian Right repeats any previously addressed arguments and the potential reasoning for resubmission.

After reviewing arguments in newspapers and amicus briefs, I created a total of seventeen ideological categories which summarize the relevant arguments used by the Christian Right. "Rational basis test / legitimate state interest" referred to a lower level of scrutiny for review in the respective case. "Not fundamental right (not substantive due process)" means that the case did not involve what is or what should be considered a fundamental right. "Not suspect class / discrimination" means a party was not culpable for any discrimination because sexual orientation was not considered a suspect class, so there was no breach of equal protection. "State legislation / sovereignty / public opinion" arguments involved discussion of states' rights or allowing the people to decide the outcome rather than the Supreme Court. "Religious exemptions inadequacy / necessity" means there were not sufficient exemptions for religious groups which ideologically differed or that they should exist to protect associated groups. "Weakens Religious Freedom" indicates that there were concerns over how much the decision would negatively impact freedom of religion and ability to practice. "Protect / weaken Free Speech" was a similar argument as for religious freedom but in the context of freedom of speech. "Political / federalism / democratic process consequences" referred to damaging perception of the Court, of a state's ability to self-govern, of legal complications from conflicting precedent or laws, and other legal consequences.

Continuing, "Insufficient grounds for certiorari" indicates that the Court should have rejected the respective case because there were issues with relevance or standing. "Historical

precedent / original intent” means that previous cases, legal tradition in the United States, or the original understanding of sexual orientation or equal protection supported the Christian Right.

“Moral / social / health consequences/importance” involved concerns over sexually transmitted diseases, the impact on children, protecting or changing traditional moral values, the importance of the definition of marriage, and other similar arguments. “Compelling state interest / strict scrutiny” was a call for the highest level of scrutiny to decide the current case. “Inconclusive / biased research” referred to how the other party wielded research which was purportedly faulty, erroneous, misleading, or biased and that should be disregarded. “First Amendment outweighs other fundamental rights” means that some argued for First Amendment protections (speech or religion) being superior or worthy of more consideration than other fundamental rights.

“Heightened scrutiny / important interest met” was an argument for a higher level of scrutiny in the case. “Foreign nation has similar policy / research” means that a foreign country conducted supporting research into the issue or that they instituted a similar federal policy with unknown effects. Finally, “Reverse discrimination against religion” referred to arguments that the ruling could lead groups to discriminate against religious groups and have a legal basis for it.

The two-pronged frequency-based approach to assess the Christian Right’s arguments benefits from addressing both public statements in the media and refined statements submitted to the Supreme Court. As media coverage for an issue or looming case increases, membership-based interest groups are increasingly likely to submit briefs which allow them to contribute to the public discourse (Hansford 2004). A dual approach captures both the media discussion and the subsequent amicus curiae briefs which interest groups draft in response. The frequency-based measures lend themselves to a qualitative discussion of the ideological progression of the Christian Right as it loses each case. One dimension of the thesis recognizes the public response

of the Christian Right and the other accounts for their formal reasoning to protect religious freedom. Based on an argument's frequency, I analyze which issues the Court has decided and which are still relevant or unanswered. Repeated arguments affect the analysis for potential expectations. Repeated arguments are any arguments that the Christian Right uses in multiple cases. When arguments reappear and for how long interest groups use them are crucial factors to develop a comprehensive reason for why the Christian Right uses specific arguments.

These three expectations capture the Christian Right's claims and reception, and they reveal the degree to which the Supreme Court recognizes arguments for limiting equal protection. Complete dismissal signifies unwillingness to curtail equal protection, while attention toward the Christian Right's arguments indicates that there is careful consideration to avoid unnecessarily limiting religious freedom. Comparing argument frequency and recognition by the Supreme Court allows for in-depth analysis for how receptive the Court is to First Amendment concerns when claims involve equal protection.

Data and Analysis

Amicus Briefs

Table 1 shows the arguments found in amicus briefs submitted to the Court for each relevant case. For the latter two cases, much of the increased frequency relates to the sheer increase in briefs submitted. The upward swing in briefs places less significance on the raw frequencies, so I include the associated percentage (out of all arguments in that case, not for all arguments across cases) which better encapsulates how frequently an argument appears comparatively. Additionally, there are underrepresented arguments which appeared so infrequently that they contributed to less than 1% of all arguments across all cases (614 total arguments). I exclude those minor arguments which act more like outliers and contribute little to developing an argumentation pattern.

Based on argument percentages, the Christian Right consistently wields arguments about political consequences (i.e. improper perception of judicial review, usurping public argumentation and resolution, weakening the federalist structure by ruling from the bench, increasing legal conflict between religious or opposed groups and supporters), historical precedent that precludes a certain outcome (American legal history or cultural history). The moral or social implication arguments (i.e. definition of traditional marriage, promoting family stability and appropriate environment for child-rearing, preventing spread of STDs) exhibit less consistent representation than political concerns, but there is a marginally greater emphasis on socio-moral arguments altogether.

To determine how this information reflects argumentation patterns with respect to repetition, the Justices' decisions and the arguments they specifically address are shown in Table 2. This includes the statements made in opinions, concurrences, and dissents. Since *Masterpiece*

Cakeshop is presently unresolved, the respective opinions neither exist nor are included.

Additionally, arguments left completely unmentioned by any Court opinions are removed. A “1” indicates that the opinion mentioned that argument as overlooked or as the proper method by which to assess the case. A “-1” means that the opinion specifically denies the applicability of that arguments, suggesting that a decision is possible without it or that it is unnecessary.

Table 1: Frequency and Percentage of Christian Right’s Arguments in Amicus Curiae

Arguments	<i>Romer v Evans</i>		<i>Lawrence v Texas</i>		<i>Obergefell v Hodges</i>		<i>Masterpiece Cakeshop v Colorado</i>	
	<i>F</i>	<i>P</i>	<i>F</i>	<i>P</i>	<i>F</i>	<i>P</i>	<i>F</i>	<i>P</i>
Not fundamental right (not substantive due process)	8	16%	10	12%	10	4%		
Not suspect class / discrimination	8	16%	12	14%	26	10%	14	7%
State legislation / sovereignty / public opinion	8	16%	9	11%	46	17%	3	1%
Rational basis test / legitimate state interest	5	10%	10	12%	20	7%		
Political / federalism / democratic process consequences	5	10%	8	9%	26	10%	20	9%
Historical precedent / original intent	5	10%	6	7%	30	11%	18	8%
Moral / social / health consequences/importance	5	10%	15	18%	47	18%	21	10%
Inconclusive / biased research			1	1%	10	4%	2	1%
First Amendment outweighs other fundamental right	2	4%	4	5%	7	3%	26	12%
Compelling state interest / strict scrutiny	1	2%	2	2%	11	4%	22	10%
Religious exemption inadequate / necessary	1	2%			2	1%	8	4%
Weakens Religious Freedom	1	2%			12	4%	33	15%
Insufficient grounds for certiorari			8	9%				
Heightened scrutiny / important interest met					6	2%	1	0%*
Protect / weaken Free Speech					9	3%	32	15%
Foreign nation has similar policy / research					5	2%		
Reverse discrimination against religion							13	6%
Total	49	100%	85	100%	267	100%	213	100%
Note: <i>F</i> stands for frequency and <i>P</i> stands for percentage Empty frequency and percentage pairs indicates that the argument was not found in any briefs for that case * Argument was not significant for given case but contributed to at least 1% for total use of given argument among all cases								

Table 2: Coverage of Christian Right’s Arguments by Supreme Court Justices

Arguments	<i>Romer v Evans</i>		<i>Lawrence v Texas</i>				<i>Obergefell v Hodges</i>				
	<i>O</i>	<i>D</i>	<i>O</i>	<i>C</i>	<i>D 1</i>	<i>D 2</i>	<i>O</i>	<i>D 3</i>	<i>D 1</i>	<i>D 2</i>	<i>D 4</i>
Not fundamental right (not substantive due process)			1	-1	1		1	1	1	1	
Not suspect class / discrimination	1	1	1	1			1	1			
State legislation / sovereignty / public opinion	1	1	1	1	1	1	1	1	1	1	1
Rational basis test / legitimate state interest	1	1	1	1	1			1			
Political / federalism / democratic process consequences	1	1			1		1	1	1	1	1
Historical precedent / original intent	1	1	1				1	1	1	1	1
Moral / social / health consequences/importance		1	1	1	1		1	1			1
Compelling state interest / strict scrutiny					-1		-1	-1			
Weakens Religious Freedom							1	1		1	
Heightened scrutiny / important interest met					-1						
Foreign nation has similar policy / research			1		1						1
Reverse discrimination against religion											1
Total	5	6	7	3	4	1	6	7	4	5	6

Key: *O* – Majority opinion, *C* – Concurrence, *D* – Only dissent in case, *D 1* – Scalia, *D 2* – Thomas, *D 3* – Roberts, *D 4* – Alito, 1 indicates that issue addressed, -1 indicates that issue specifically dismissed

The decline in the Christian Right’s supporting amicus briefs between *Obergefell* and *Masterpiece Cakeshop*, from 72 to 49, warrants attention. A quick conclusion is that the Christian Right recognizes the increasingly egregious losses in the Court and believes that the justices will decide unfavorably regardless, which is consistent with Glendon’s statements that religious groups will be less likely to approach the Supreme Court (2015). This cursory analysis fails to recognize how significantly the *Obergefell* decision predicates which arguments will likely receive favorable treatment in the Court. In the majority opinion, Kennedy wrote that when “sincere, personal opposition becomes enacted law and public policy, the necessary

consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes,” which indicates that the Court will unfavorably receive arguments that perpetuate any further exclusion with religious foundations (*Obergefell v. Hodges* 135 S. Ct. 2603 2015). As such, an argument for any sense of state power to decide whether economic or service discrimination is acceptable for religious reasons immediately conflicts with this statement, which would not receive full consideration from the Court. Over the course of three cases, the Court consistently ignored claims about states’ rights, and the dissents in *Obergefell* present little support for further argumentation about public debate because the case forecloses the discussion about same-sex marriages. As such, the argument contribution for state-based and public legislation arguments drop from a high of seventeen percent to one percent. The three remaining arguments emphasize that a state should be able to decide whether its citizens have any claim to exemption which ties into another category.

There is a slight increase in arguments for religious exemptions specifically, from one percent in *Obergefell* to four percent in *Masterpiece Cakeshop*, since exemptions already exist for religious groups to not perform same-sex marriage ceremonies. By extension, the Christian Right, in both amicus briefs and in the media, advocates for further exemptions in terms of conscience and expression. The increasing reliance on arguments to protect freedom of speech and expression (seven percent in *Obergefell* and fifteen percent in *Masterpiece Cakeshop*) is a new shift after the rejection of arguments related to legitimate interests in protecting the traditional definition of marriage. An evident shift appears as all arguments for rational basis review end completely after *Obergefell*, and there is a significant increase in arguments supporting strict scrutiny, up to ten percent in *Masterpiece Cakeshop*. Advocates argue that “business run on religious principles sometimes be exempted from generally applicable laws” in

accordance with *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ____ (2014) (Liptak 2017). In comparing two fundamental rights, strict scrutiny is the most appropriate method to determine which right has a greater case relevance, but religious groups did not heavily rely on higher levels of scrutiny until 2017. While there is minor reliance on compelling interests as far back as *Romer* (at one mention), the argument is not seriously considered until *Hodges*. While rational basis review is the ultimate standard the Court uses in *Romer* and *Lawrence* as shown by majority mention in Table 2, some amici address rational basis and then extend further to argue that there is a compelling interest. The Christian Right is unfazed by negative reception of this argument, only mentioned in one dissent by Scalia and then rejected in the opinion in *Obergefell*, the increased emphasis in the latter case is a significant shift. However, there is no evidence that the Court would favorably receive this argument based on the previous rejection of strict scrutiny to prevent same-sex couples from engaging in the institution of marriage, never mind any sort of public accommodation.

In a similarly counterintuitive maneuver, the Christian Right shifts from showing how it does not discriminate against homosexuals to how supporting homosexuals discriminates against religious groups. The discrimination and abridgement of equal protection appears in every opinion and occurrence from the Court, to varying degrees. In Justice O'Connor's concurrence in *Lawrence*, she wrote that while a "law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual" (*Lawrence v. Texas* 539 U. S. 583 2003), so the law breaches equal protection by targeting a specific class. In reverse, the Christian Right argues that any decision further limiting the First Amendment would allow discrimination toward religious groups that speak unfavorably about same-sex marriage. Because this argument

is unique and case-specific, it aligns with the third expectation as a reframing of opposition to gay marriage.

The case for reverse discrimination is one of the few completely new arguments to emerge, since most arguments change support rather than theme. For instance, the moral and social significance argument is semi-consistent but varies in some interpretations. For instance, *Lawrence* amici emphasized a dangerous precedent that overruling *Bowers* would inevitably lead to a case dismantling the traditional definition of marriage, whereas amici in *Obergefell* emphasized the importance of family stability for the proper rearing of children and the forced imposition of children in same-sex homes would create unknown and potentially damaging effects. A common theme is that marriage benefits children who “will be reared by their biological mother and father in a committed bond” which benefits family and society (Brief for 47 Scholars 2015). The opinion engages this idea but then changes to focus to an argument about how children raised by non-married parents are detrimentally affected and believe themselves lesser, but this confirms that the Court is conscious of the arguments about the youth. However, there is a deeper issue, not mentioned in briefs, about the future education of children and the cyclical nature of gay marriage acceptance. A very direct quotation in a *NYT* article claims that acceptance of new gay-themed TV shows is ““acceptable for that element in our culture that’s already earning an advanced degree in Sin Acceptance”” (Bernard Weinraub 2003). The danger is that accepting gay marriage and believing it to be normal will influence the future generation which will crave or be comfortable consuming entertainment that presents gay relationships. This train of thought does not appear in any of the amici analyzed, but they do appear in the media as a unique argument against same-sex marriage.

Newspaper Coverage

Having mentioned newspaper coverage several times, I must address the limited coverage given to the Christian Right in *The New York Times*. While research indicates that liberal Supreme Court opinions receive more front-page coverage (Unah and Hancock 2006, Sill 2013), there is a distinct lack of information about religious groups and their interaction with Court cases, even though this is outside the scope of the cited media research. Most comments by religious or socially conservative groups are confined to short sentences or are summed up as general feelings about a case rather than providing any indication about reasons to not support same-sex relationships. As already shown though, there are articles which display arguments by the Christian Right, but the number is low. Consider *Lawrence*: Out of 109 articles that match a search for Lawrence and sodomy, only thirty-two are inside the range from 2002 to 2004, and out of those, only eighteen present relevant information about the Christian Right or conservative groups. The lack of more media coverage produces a basic familiarity with public arguments by Christian groups, but the information lacks detail. By combining the media arguments with amicus curiae arguments, greater clarity exists as the two explain or reinforce one another. For this study, there is enough consistent information to generalize the public arguments, but the explanations are not specific enough to tabulate like amici arguments. Instead, I will summarize the arguments espoused by the Christian Right in the media for the relevant period.

As previously identified, arguments for protecting youth perception of homosexuality are unique to media coverage. This extends all the way to coverage before *Romer* entered the Court. In a similar resolution to prevent special status for homosexuals, Lon T. Mabon, chair of the Oregon Citizens Alliance, argued that homosexual behavior is not “a basis on which minority status should be granted” and that the idea should not “be taught to our kids” (Dunlap 1994). Educating future generations remains important through *Lawrence* due to expansion of same-sex

protections for sexual practice, but this argument ceases by *Obergefell*, shifting toward more family-related concerns than education-related concerns. Oddly, there is an argumentation gap in *Lawrence* because none of *The New York Times* articles commented on children or statements about protecting educational circle. This is especially odd because as Table 1 shows, there is an increase in arguments about the social ramifications of ruling against the Texas sodomy law (increasing from ten percent in *Romer* to eighteen percent in *Lawrence*), but the media portrayal of the Christian Right is absent in this line of argument.

The major shift after *Lawrence* in the media expresses fear and concern about the opened door for gay marriage cases. Shortly after the case concluded on June 26, a judge in New Jersey Superior Court heard a case for gay marriage. The consensus among the Christian Right in these articles is that “any change in the definition of marriage ... was not open to interpretation” (Jacobs 2003). The focus shifts to the threat for the traditional definition of marriage which supports the increase in arguments about moral significance because this argument starts to appear in amicus curiae. Justice Scalia further supported concern for moral consequences because the opinions in the case leave “on pretty shaky grounds state laws limiting marriage to opposite-sex couples” (*Lawrence v. Texas* 539 U. S. 601 2003), but Scalia lumped the marriage definition into a political consequence rather than engaging the moral or social consequences of expansion. The overall idea is that *Lawrence* opened the door for same-sex marriage arguments, and a member of the Court notes that the issue will likely reappear as a result. The public declaration favored the Christian Right though, narrowing discussion about marriage to how it is “essentially a religious institution intended explicitly for a man and a woman” (Bumiller 2003) which would mean that to change the traditional definition would infringe on religious groups. The immediate discussion about the potentiality for a gay marriage case supports the continued

argumentation for the moral importance of marriage leading into *Obergefell*. As shown in Table 1, the social and moral arguments in *Obergefell* remain proportionately consistent with those in *Lawrence*, remaining at eighteen percent frequency.

Media arguments about state sovereignty in the domain of sexual relations and influence in marriage remain prominent until after *Obergefell*. Shortly after *Romer*, the American Center for Law and Justice (an advocate for religious rights) emphasized that the case “undercut the right of citizens to preserve their view of sexual morality” (Dunlap 1996). At an early stage, the Christian Right defended state’s rights and the people’s ability to decide which special protections the state bestows. However, argumentation slightly shifts after *Lawrence* to warn against the danger that weaker state control over sexuality could have to allow unacceptable forms of sexual behavior. The Christian Right publicly agreed with Justice Scalia’s dissent which “suggested that the ruling opened the way for judicial sanctioning of other sexual activities that have been traditionally outlawed by states” (Lewis 2003). Relating to moral and social consequences in addition to states’ rights, the Christian Right begins to warn against further degradation of state control because it removes all control over sexual behavior despite the voices of its residents. Table 1 supports this argument, showing an emphasis on state’s rights and influence in both *Romer* (sixteen percent frequency) and *Obergefell* (seventeen percent frequency).

Shortly after the decision in *Obergefell*, the same-sex service denial by Kim Davis brought religious idealism to the forefront of American politics. As a microcosmic representation of the conscience conflict in *Masterpiece Cakeshop*, the case caused a slight divide in the Christian Right as non-enforcement heralded praise from many religious groups. On the other hand, Mormons voiced disapproval in an official statement that citizens have “a duty to follow

the law, despite their religious convictions” (Healy 2015), but this sentiment is not echoed among other socially conservative religions in the Christian Right. This was the first public sign of discord by Mormons, but outside this sudden declaration, the response by other religious organizations was sympathetic toward Davis and other “public employees who say sanctioning same-sex marriage undermines their religious freedom” (Sheryl 2015). This argument is consistent whenever *The New York Times* mentions Kim Davis and religious groups or social conservatives. Interestingly, the Supreme Court opinions in *Obergefell* said that religious groups could still hold and advocate their beliefs about same-sex marriage, but the conflict ignited immediately with Davis. Her demonstration and the issue it presents coincide with the increase of amicus briefs arguing for the primary position of the First Amendment and the dangerous erosion of religious freedom that could result from *Masterpiece Cakeshop*. Whether the Court agrees with this conclusion is yet to be officially seen, but the analysis of the progressing argument used by the Christian Right provides sufficient information to determine the argumentative pattern.

Based on the three sources of data and arguments, there is support for each expectation about argumentative pattern. However, for each expectation to hold true requires that the Christian Right primarily adds new arguments during each case and primarily repeats previous arguments, which is not possible. For reference, the three expectations are as follows: 1) repetitive arguments to address issues which the Court has not addressed, 2) repetitive arguments are the Christian Right’s attempt to reverse precedent or regain ground on already decided issues, and 3) the arguments are always new which means that previous arguments were specifically addressed by the Court.

From the outset, some arguments are never discussed by the Court or are negated as unnecessary to the case. In *Lawrence*, the arguments about improvidently granting certiorari are not engaged by the Court nor are mentioned in media arguments, which indicates this argument was completely ineffective, and no future arguments relate to improper certiorari nor to *Lawrence* being based on faulty review. The arguments for heightened scrutiny present a mixed relationship with the expectations. Justice Scalia broached the idea that heightened scrutiny could even be considered before the Christian Right ever mentions it, but he ultimately concludes that, like in *Bowers*, “criminal prohibitions of homosexual sodomy are not subject to heightened scrutiny” (*Lawrence v. Texas*, 539 U. S. 594 2003). That is the sole mention of heightened scrutiny in an opinion, and the dissent rejected the applicability of this level of scrutiny, but the Christian Right asserts this argument in the following two cases. This appears to be running into a precedent brick wall since the argument is completely unsupported by a justice, opinion, or previous case in this study. The sudden inclusion of heightened scrutiny arguments thus appears counterintuitive given the Court’s negative stance toward rational basis review which is a lower level of scrutiny. The Justices likewise ignore arguments about biased research, which studied the potential yet unknown effects of same-sex parents on child development. Neither the majority nor the dissent addressed research validity claims, reflecting how these claims had little impact on the decision. These three themes, while producing a percentage of total arguments in these cases, produce no effect nor have any measurable influence.

Prominent Explanations

In support for the second expectation, the Christian Right consistently relies on rational basis review to defend state actions toward homosexuals. These arguments typically relate to those for state legislative power and states’ rights, and both themes substantially drop after

Obergefell. Due to the decisive statements against state power and for a swift end to public debate which continues to marginalize a suspect class, the support for states' rights drops to nearly less than one percent. The same is true for rational basis review arguments which receive completely end after *Obergefell*, influenced by the establishment of a fundamental right to gay marriage which places the subject outside the purview of rational basis to infringe on a fundamental right. Rational basis arguments end completely, but the earlier continuance despite continued rejection to legitimate state interest arguments suggests that the Christian Right intended to change the Court's set opinion about the applicability of a lower level of review. Even though the arguments increased in frequency, the reliance on the method did decrease and then cease. The accompanying argument for gay rights being a state issue also stopped with rational basis review after an equally shaky track record. Of course, the shift to arguments for compelling state interests shifts the argumentation to strict scrutiny which necessarily ends arguments supporting lower review. However, the three-case reliance on continually rejected arguments (which are always addressed by the Court) supports the second expectation.

The historic arguments based on culture and American history also support the second expectation. The majority and dissenting opinions conflict in terms of how to apply historical tradition. Justice Kennedy wrote in the majority on *Lawrence* that "there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter" (*Lawrence v. Texas* 2003), but Scalia wrote in his dissent in *Obergefell* that the states have always had exclusive power over domestic relationships, which includes sexual conduct. Historic arguments likewise fluctuate in amicus briefs, remaining around ten percent inclusion and are continuously used despite being countered in majority opinions. The persistence to argue for a historic disapproval of same-sex relations and state control over defining marriage defines an attempt to

convince the Court that the historic approach has merits and should compel a reconsideration of precedent revoking control from the states. As such, historic arguments likewise support the second expectation as the Christian Right repeats arguments to undo precedent.

The arguments for compelling interest would support the third expectation had they not been argued during every case, making them more supportive of the first expectation. The rejection of rational basis necessarily rejects strict scrutiny arguments, so the persistent increase in such arguments indicates that the Christian Right increasingly saw justification for limitation on equal protection when considering compelling state interests. However, the interaction between the amici and Court opinions indicates a closer connection with repetition for the sake of reversal. Justice Roberts writes in his *Obergefell* dissent that while “the policy arguments for extending marriage to same-sex couples may be compelling, the legal arguments for requiring such an extension are not” (*Obergefell v. Hodges* 135 S. Ct. 2612 2015). Considering such a statement, the increased argumentation for compelling interests to protect religious freedom and freedom of speech in *Masterpiece Cakeshop* liken to the rationale that Justice Roberts uses in his dissent. However, per the definition of the first expectation, the majority opinions should not mention the argument and the dissents support readdressing the topic. Therefore, the strict scrutiny argument supports the first expectation.

As mentioned earlier, one of the only strong, new arguments is about reverse discrimination toward religious groups. However, there is also a significant increase in arguments for protecting religious freedom against further limitation and for protecting free speech, but these necessarily increase per the nature of *Masterpiece Cakeshop* involving freedom of religion and freedom of speech claims. The emergence of a new issue and new approaches to argue for protecting religious freedom do support the third expectation though. The dissents in

Obergefell warned that conflicts would arise between religious exercise and a fundamental right to gay marriage, and *Masterpiece Cakeshop* is the first attempt to argue for religious protections after the establishment of that right. The previous claims for free speech and a significant weakening of religious freedom going unheeded would support the first expectation, but the overwhelming increase in frequency in *Masterpiece Cakeshop* indicates that the arguments gained an increased and foundational importance rather than being minor supporting arguments. The arguments for the danger in weakening religious freedom and for protecting freedom of speech therefore apply to the third expectation.

Based on these relationships between the arguments and the three expectations, the most significant expectation is the second, followed by the third. The Christian Right continuously exercises arguments that are addressed and rejected by the Court to no new effect. These failed arguments drop considerably or completely after *Obergefell* to make room for new arguments and approaches to the Court which emphasize the importance of First Amendment protections in the face of anti-discrimination precedent. Although all arguments are not new in every case, *Lawrence* and *Masterpiece Cakeshop* present many fresh arguments which dramatically increase and refocus before the Court officially addresses them. While expectations two and three are most common, there are repeated arguments which appear and are not initially addressed (compelling interests), but as discussed, that argument closely aligns with the criterion for the third expectation.

The prominence of previously rejected arguments and the unrecognized nature of new arguments indicate that the Court is unreceptive to arguments currently used by the Christian Right. Due to the new arguments, there is no concrete evidence in the current cases about whether the justices will find the new arguments more convincing, but the response pattern from

the Court indicates that the Christian Right's arguments will either be ignored or summarily dismissed. In either case, First Amendment precedent is detrimentally set, limiting freedom of religion and expression, but further restriction would crush any future argumentation in the Court regarding equal protection and religious freedom. As Chain (2016) discusses, the Supreme Court just needs to rule on religion-based economic discrimination and few questions regarding religion and discrimination will remain.

Conclusion

The goal of this thesis was to clarify the relationship between the Christian Right and the Supreme Court and between freedom of religion and equal protection. Given the precedent related to gay rights and the establishment of same-sex marriage, the Supreme Court ignores or disregards argumentation by the Christian Right. The majority rejects the repeated arguments submitted and leaves unanswered questions which would indicate a more definitive outcome in *Masterpiece Cakeshop*. However, I established through the analysis of media, amicus briefs, and Court opinions that the Christian Right employs two main strategies to influence the Court through its arguments: by repeating arguments to have the Court readdress unfavorable precedent to overrule it and by developing completely new arguments which the Court has not previously addressed. The results imply that the Court will continue to rule against the Christian Right because of the pattern that has developed, and this has implications for other First Amendment protections. Freedom of speech is a significant target because of recent controversy over the use of hate speech and the negative and discriminatory impact it has on minorities (Matsuda 1993).

A ruling in favor of equal protection when the Court is also addressing First Amendment protections opens the door for other concerns about freedom and access versus discrimination. The ruling would be a death knell for religious freedom as well because any situation involving religion and any type of discrimination would disfavor religious groups automatically despite their beliefs. While this is not necessarily a negative consequence, there is a danger that religious groups will face reverse ideological discrimination. However, this wholly depends on the outcome of *Masterpiece Cakeshop*, so there will be a wealth of information to further analyze the relationship between the First Amendment and equal protection after the case resolves later this year. In all likelihood, the Court will rule against the Christian Right and First Amendment

exemptions in favor of anti-discrimination and equal protection, given the track record that the Christian Right has in the Court.

As I have mentioned throughout the paper, I eschewed certain topics to narrow the thesis's scope and to preserve ideological focus, but future study into the relationship between equal protection and religious freedom could address the following topics. Regarding newspaper selection, there is an argument to make for inclusion of the big four: *The New York Times*, *The Washington Post*, *Los Angeles Times*, and *Chicago Tribune*. The combination provides ideological variety and a regionally inclusive perspective (Collins and Cooper 2012, Collins and Cooper 2015, Segal and Cover 1989). Further study could also isolate the Christian Right in the media and analyze the specific relationship between arguments in the media and public sphere as they compare to Court decisions. A specific study of religious representation in media could also include religious newspapers or news sources, which while potentially biased would provide the most comprehensive and direct arguments from the Christian Right.

Public opinion also warrants revisiting because of the connection among opinions, amicus curiae, and Court decisions. Including public opinion would provide a direct linkage between the people state protections or restrictions for gay rights. The vacillate nature of public opinion as it shifts based on Court verdicts and arguments would complement an analysis of the socially liberal outcomes in the Court. For instance, a Gallup poll after the ruling in *Lawrence* revealed a retrenchment on gay marriage: it “found that 57 percent opposed gay civil unions” but earlier that year “a similar Gallup poll found that only 49 percent were opposed” (Bumiller 2003). A public opinion shift also influences perception of the Court and amicus briefs by gay rights supporters which claim that public opinion generally favors the expansion and protection

of gay rights. Public opinion provides a deeper, people-focused analysis of the past two-and-a-half decades in gay rights precedent.

A two-pronged approach is also not necessary. The multifaceted method I used including the media, public arguments, and amicus briefs, formalized arguments, comprehensively encompasses the Christian Right and the arguments believed most salient in both domains. These arguments can differ, and, as with media, focusing on one source of arguments would develop a deeper understanding about how the Christian Right utilizes that medium to its fullest and how those included arguments specifically interact with the Court. Studying federal cases and the amicus briefs in those cases would provide an additional insight into how the Christian Right initially prepared arguments which may evolve before reaching the Supreme Court level. Including federal cases better captures how arguments change, especially in the large expanse between Supreme Court cases.

By the end of this year, the Supreme Court should rule in what will be the monumental *Masterpiece Cakeshop v. Colorado*, but until that decision, scholars can only theorize which way the case will swing. In this thesis, I outlined the arguments and interactions the Christian Right uses and how they interact with the Supreme Court, and I showed how the pattern is unfavorable for any argument that they use. Only time will tell, and the implications for religious freedom and free speech are undoubtedly significant, either providing a solid defense for religious believers or eroding the religious freedoms which have been a significant part of America's history and foundation. Either way, the implications for strengthening or weakening religious freedom extend beyond the scope of religious groups specifically. Only time will tell, but at present, one remains less than fourteen.

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