A License to Discriminate?

The Market Response to Masterpiece Cakeshop

Netta Barak-Corren*

What is the impact of a Supreme Court decision in favor of a wedding vendor who refused service to a same-sex couple? This Article investigates the effect of the *Masterpiece Cakeshop v. Colorado Civil Rights Commission* decision in a field experiment (N=1,155 businesses) that measured discrimination towards same-sex couples in the wedding industry shortly before and after the decision was rendered. The results reveal that *Masterpiece* reduced vendors' willingness to provide wedding services to same-sex couples (as compared with heterosexual couples), even for vendors that provided these services prior to the decision. Following *Masterpiece,* the odds that a same-sex couple would experience discrimination in the organization of a wedding are estimated at 88%.

These results discredit the frequently made argument that the effect of religious exemptions is negligible and that exemptions will not expand discrimination. Instead, what the *Masterpiece* experiment shows is that even a narrowly construed, case-specific exemption can have a significant impact on an industry and its customers. These results have profound implications for the doctrine of religious accommodations and for ongoing legislative debates on exemptions from antidiscrimination law. The troubling consequences of *Masterpiece* are also a warning sign for the Supreme Court as it sets to decide the sexual orientation discrimination cases in its 2019 term and any religion-equality conflict in the future.

---

* Assistant Professor of Law, Hebrew University of Jerusalem. For helpful comments and suggestions I thank Oren Bar Gill, Stephanie Barclay, Hanoch Dagan, Michael Freedman, Rick Garnett, Fred Gedicks, Noam Gidron, Michael Helfand, Ehud Kamar, Kobi Kastiel, Amir Khoury, Jeff Rachlinski, Alexander Stremitzer, Nelson Tebbe, and participants at the 2019 Annual Roundtable on Law and Religion, the 2019 Workshop on Behavioral Legal Studies: Cognition, Motivation and Moral Judgments, Hebrew University public law workshop, Humboldt-Minerva Human Rights Under Pressure seminar, and Tel Aviv faculty workshop. A team of dedicated assistants, including Tamir Berkman, Yechiel Oren, and Tani Shimoff assisted with data collection and coding; Tamir Berkman also provided outstanding research assistance. Responsibility for any errors is my own. This project was approved by the Hebrew University's IRB. Data and R code will be available at [journal's website].

INTRODUCTION

The conflict between religious liberty and marriage equality is escalating. Last term, the Supreme Court decided *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, ruling (7:2) that a baker who refused to create a wedding cake for a same-sex couple was treated unfairly by the Colorado Civil Rights Commission.[1] Writing for the majority, Justice

[1] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (U.S. 2018) [Hereinafter *Masterpiece Cakeshop*].

Kennedy decided that the adjudicative hearing held by Colorado was tainted by "elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated [the religious] objection."[2] Shortly after the decision, the Court granted, vacated, and remanded two similar cases, involving a florist who would not create flower arrangements for a same-sex wedding[3] and another wedding cake case.[4] An impressive number of similar cases are currently making their way through the courts, involving photographers and video artists,[5] a web-designer,[6] a t-shirt store,[7] a calligraphy studio,[8] and a bed & breakfast,[9] all of whom religious vendors who object to serving same-sex couples and seek exemptions from applicable anti-discrimination laws.

This state of affairs causes anxiety and controversy amongst lawmakers, activists, and legal scholars. One of the primary concerns is the potential consequences of religious exemptions from antidiscrimination laws. Opponents of religious exemptions warn that granting exemptions will escalate the number and significance of faith claims and could extend LGBTQ discrimination to all facets of public life.[10] Proponents of religious exemptions reject these claims as factual nonsense, arguing that religious objectors are a negligible minority in a society growing ever more affirming of LGBTQ equality, and that exempting religious objectors will not expand discrimination against same-sex couples.[11]

The relationship between religious exemptions from antidiscrimination

---

[2] *Id*. at 1729.

[3] *Arlene Flowers, Inc. v. State of Washington*, 138 S. Ct. 2671 (U.S. 2018) (remanded for further consideration in the Court of Appeals of Washington in light of *Masterpiece Cakeshop*). [Hereinafter *Arlene Flowers*]

[4] Klein v. Or. Bureau of Labor & Indus., 2019 U.S. LEXIS 4150 (remanded for further consideration in the Court of Appeals of Oregon in light of *Masterpiece Cakeshop*).

[5] Telescope Media Grp. v. Lindsey, 2017 U.S. Dist. LEXIS 153014 (D. Minn. 2017) (appeal pending at the 8th Cir.).

[6] 303 Creative LLC. v. Elenis, 2017 U.S. Dist. LEXIS 203423 (D. Colo. 2017) (Denied, with leave to review, in light of *Masterpiece Cakeshop*).

[7] Lexington-Fayette Human Rights Comm'n v. Hands-On Originals, 2017 Ky. LEXIS 462 (Ky. Super. Ct. 2017) (pending judgment).

[8] Brush & Nib v. Phoenix, 2018 Ariz. LEXIS 375 (Ariz. Super. Ct. 2018) (pending judgment).

[9] Aloha Bed & Breakfast v. Cervelli, 139 S. Ct. 1319 (U.S. 2019) (cert. denied).

[10] *Infra* footnotes 62-65.

[11] *Infra* footnotes 70-76.

law and the actual consequences for same-sex couples and for religious objectors is thus a central question. Yet there is almost no evidence that could help clarify which of the contradictory factual premises is actually true. Such evidence is required to inform legislators debating whether to enact religious exemptions, and courts deliberating whether to grant such exemptions. Underscoring the importance of the consequential consideration, Justice Kennedy asked the U.S. Solicitor General[12] during the *Masterpiece* oral arguments, "what would the government's position be if… the baker prevails in this case, and then bakers all over the country received urgent requests: Please do not bake cakes for gay weddings. And more and more bakers began to comply. Would the government feel vindicated in its position that it now submits to us?"[13] The Solicitor General responded that the case for antidiscrimination "would be much stronger [then]" because states would be able to show "that the application of the law is narrowly tailored to the government's interest in ensuring access [to public accommodations]."[14] Justice Kennedy was not alone on the bench in considering the consequences of religious exemptions as the key for the decision to grant them. From *Employment Division v. Smith*[15] to *Burwell v. Hobby Lobby Stores, Inc.*,[16] the Court has always cited consequential concerns (or lack thereof) in rejecting (or granting) petitions for religious exemptions.

This article contributes to the consequential debate on religious exemptions by studying, for the first time, the effects of religious exemptions on sexual orientation discrimination. Part I begins with surveying the relevant legal background and mapping the consequential debate. Next, I describe a large-scale field experiment I designed that measured the impact of the *Masterpiece* decision (rendered on June 4th, 2018) on sexual orientation

---

[12] Who argued as amicus curiae supporting the baker, *Masterpiece Cakeshop*, *supra* note 1, Tr. of Oral Arg. 3.

[13] *Id.* at 44-45.

[14] *Id*. at 45.

[15] 494 U.S. 872, 879 (quoting from Reynolds v. United States, 98 U.S. 145 (1879) the concern that permitting an exemption is "in effect to permit every citizen to become a law unto himself.")

[16] 134 S. Ct. 2751, 2760 ("our holding is very specific. […] We certainly do not hold or suggest that 'RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have' […]. The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero.")

discrimination in the weddings industry shortly before (May 8th-15th, 2018) and after (June 13th-20th, 2018) the decision. Wedding vendors were sampled from the four legal regimes currently existing in the United States, that differ based on whether they prohibit sexual orientation discrimination (AD law) or not, and on whether they provide a heightened level of protection for religious freedom via a Religious Freedom Restoration Act (RFRA) or not.[17] This resulted in a 2 (AD law/no AD law) by 2 (RFRA/no RFRA) matrix from which 1,155 businesses were sampled to the study. In each legal regime, wedding businesses (bakers, florists, and photographers) were contacted via email by a same-sex or an opposite-sex couple asking for wedding services. Each business was contacted by the two types of couples both before and after the decision, resulting in four observations per business and a rich dataset that allows for both within-business and across-businesses comparisons. The outcome of interest was whether businesses agreed to provide the requested service to the couples.

Part III discusses the results of the *Masterpiece* field experiment. Briefly, the decision significantly and substantially increased discrimination towards same-sex couples—just as Justice Kennedy feared. On the first week after *Masterpiece*, 77% of the businesses randomly contacted by heterosexual couples responded favorably, as compared with only 68% who responded favorably to same-sex couples (a 9% gap). On the second week after *Masterpiece*, 74% of the businesses randomly contacted by heterosexual couples responded favorably, as compared with only 65% who responded favorably to same-sex couples (again a 9% gap). These results are found both in the entire sample of businesses *and* in the 'gay-friendly' sample (i.e., businesses that agreed to provide service to same-sex couples prior to *Masterpiece*). Probing into the differences between the four legal regimes, I find that the negative *Masterpiece* effect appears in all regimes, except that which enacted *both* an AD law and a RFRA. The effect is robust in all analyses, including those that control for county-level conservatism and those that are limited to businesses located in big cities (where, exemptions proponents often argue, there is no problem of same-sex discrimination).

A back of the envelope calculation demonstrates the broader significance

[17] These are broad distinctions. Additional nuances are discussed *infra* Part II.B.

of these results. Provided that couples of all identities typically contract with about 10 types of vendors in the organization of their wedding (reception venues, wedding planners, bakers, florists, photographers, videographers, bridal/groom salons, jewelers, DJs, and calligraphers—a partial list), and that the average risk of experiencing discrimination across business types is about 9%, I find that the aggregate risk of same-sex couples to experience discrimination in the process of organizing their wedding is 88%.[18] This means that, subject to the observed differences between legal regimes, the vast majority of same-sex couples are likely to encounter discrimination somewhere in the organization of their wedding, post *Masterpiece*.

These results discredit the argument that the effect of religious exemptions is negligible and that exemptions will not expand discrimination. Instead, what the *Masterpiece* experiment shows is that even an intentionally narrow and case-specific exemption can have a significant, robust, and substantial impact on an industry and its customers. Furthermore, the results establish a pillar of the strict scrutiny doctrine of religious burdens, by showing that states have a compelling interest to enforce antidiscrimination law without exemptions to ensure access to public accommodations. Antidiscrimination laws thus satisfy strict scrutiny (and lower thresholds, where applicable). The troubling effects of *Masterpiece* are also a warning sign for the Supreme Court as it deliberates the sexual orientation discrimination cases in its 2019 term and any additional religion-equality conflicts that will come before the Court in the future.

At the same time, I find variation between legal regimes that suggests that there is still room for legislative efforts to explore ways to protect *both* equality and religious freedom, at least under some legislative designs. I discuss the implications of these results for debates held in legislatures across the nation and suggest specific ways in which legislators could improve the regulation of religion-equality conflicts. Most importantly, I argue that new laws should be pre-tested empirically to inform lawmakers on their likely consequences. I demonstrate how such pre-testing could be performed and I explain its advantages.

---

[18] *Infra* Part III.C. This is arguably a conservative estimate, because couples often contact several different vendors in each category in their market search.

As any one empirical work, this article does not purport to exhaust or conclude the debate about the consequences of religious exemptions. Indeed, this would be impossible. As many empirical observations, this article is a snapshot of reality in a specific point in time and place, and is limited in what it can reveal and explain about society—particularly when it comes to complex phenomena such as the relationship between law and behavior. Notwithstanding these important limitations, the prevalence and centrality of empirical assumptions to the resolution of current debates requires us to grapple with the empirical questions rather than treating them as axioms. The current debate illustrates this need well. Opponents and proponents of religious exemptions rely on contradicting assumptions regarding the consequences of exemptions, largely talking past each other. While there is no assurance that the opposing camps will digest empirical evidence willingly and without bias, there is always hope that at least some will (indeed, this is the underlying premise of all scientific work). At the very least, disagreements about the relevance of the data could increase the sophistication of legal arguments and generate new questions for debate.

The remainder of this paper proceeds as follows. The next part provides background on the tension between marriage equality and religious liberty. I survey the legal developments that culminated in *Masterpiece*, explain the current state of the law across the U.S. and address the potential implications of *Masterpiece*. Part II then presents the setting of the study and its methods. Part III describes the results, and Part IV explains the results and discusses their significance and implications for legislators and courts.

I. THE TENSION BETWEEN MARRIAGE EQUALITY AND RELIGIOUS LIBERTY

The tension between marriage equality and religious liberty has been there from the inception of the movement towards marriage equality. Some courts foreshadowed the tension by way of declaring their commitment to relieve it. When Massachusetts became the first State to recognize same-sex marriage in 2004, the Supreme Judicial Court intertwined this recognition with the assertion that the "decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage

others to disapprove of, same-sex marriage."[19] Similarly, when the Iowa Supreme Court recognized same-sex marriage—the fourth high court to follow this route, after Massachusetts, California and Connecticut—it assured that "[r]eligious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views."[20] In 2015, when the U.S. Supreme Court legalized same-sex marriage across the nation in *Obergefell v. Hodges*, it emphasized that "religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."[21]

Other courts expressed reservations about the possibility of relieving the tension between religion and sexual orientation equality. When the Connecticut Supreme Court recognized same-sex marriage in 2008, it dedicated a lengthy paragraph to describe the religious condemnation of homosexuality and present it as one of the roots of discrimination towards gay people in society. The court then observed that "[f]eelings and beliefs predicated on such profound religious and moral principles are likely to be enduring, and persons and groups adhering to those views undoubtedly will continue to exert influence over public policy makers."[22] Several years later, Justice Alito dissented from the Court's decision in *Obergefell* with the opposite prediction, expressing concern that "those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and schools."[23]

Whether relieving the tension is possible or not remains to be seen. What is clearly evident, however, is that religion-equality conflicts are rapidly gaining legal momentum and public attention. As the primary origin of these

---

[19] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 965 n.29 (Mass. Super. Ct., 2003).

[20] Varnum v. Brien, 763 N.W.2d 862, 906 (Iowa Super. Ct. 2009).

[21] Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (U.S. 2015); Notably, any reference of a potential tension between religious liberty and marriage equality was omitted from the previous marriage-equality decision, United States v. Windsor, 570 U.S. 744 (U.S. 2013), in which the Court struck down the Defense of Marriage Act, a federal law defining marriage as an act between a man and a woman.

[22] Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 198–9 (Conn. Super. Ct. 2008).

[23] *Obergefell*, 135 S. Ct. 2584, 2642.

conflicts has been state law, it is necessary to understand the variation between states to assess the background against which religious exemptions are debated.

A. Anti-Discrimination laws and claims for religious exemptions

At present, federal law does not prohibit discrimination on the basis of sexual orientation in public accommodations. Title II of the Civil Rights Act does not prohibit discrimination on the basis of either sex or sexual orientation[24] and it limits "public accommodation" to hotels, restaurants, gas stations, and places of exhibition or entertainment.[25] This definition does not include most of the businesses currently refusing service to same-sex couples, in particular most wedding vendors.[26]

Acting to fill the void, twenty-two states, the District of Columbia, and numerous local governments (See Figure 1) passed legislations prohibiting discrimination based on sexual orientation and gender identity in employment, housing, and public accommodations (hereinafter, AD laws).[27] Most of these laws contain no exemptions on the basis of religion.[28] These laws are the underpinnings of the lawsuits against wedding vendors that refused to provide service to same-sex commitment ceremonies and weddings, citing religious reasons.[29] Concomitantly, and particularly after the

---

[24] 42 U.S.C. § 2000a(a). Therefore, the anticipated decision in the consolidated cases involving the interpretation of "sex" in Title VII is unlikely to bear on the matter, *see* Bostock v. Clayton Cty. Bd. Of Comm'rs, 723 Fed. Appx. 964 (11th Cir. 2018), Zarda v. Altitude Express, Inc. 883 F.3d 100 (2nd Cir. 2018), rev sub nom Altitude Express, Inc. v. Zarda, *cert. granted*, 139 S. Ct. 1599 (U.S. 2019) (the cases are consolidated). A related case set for argument with *Altitude Express* is R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, (6th Cir. 2018) (Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping).

[25] 42 U.S.C. § 2000a(b).

[26] *Supra* cases cited in notes 1-8.

[27] Twelve additional states prohibit sexual orientation discrimination against public employees (but not in the private market). Eight of those states also prohibit discrimination based on gender identity. *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/state-maps/public-accomodations (June 11, 2018).

[28] The Utah Antidiscrimination Act, UTAH CODE ANN § 34A-5-106, includes several religious exemptions. The act only protects from employment discrimination and does not cover public accommodations.

[29] See cases brought in New Mexico (Elane Photography, LLC v. Willock, 309 P.3d 53 (N.M. Super. Ct. 2013), Washington (*Arlene Flowers*, *supra* note 3), Colorado (*Masterpiece Cakeshop*, *supra* note 1; *303 Creative*, *supra* note 6), Oregon (*Klein*, *supra* note 4),

recognition of marriage equality in *Obergefell*, conservative faith groups began calling for religious exemptions from AD laws.[30] On the legislative front, some states took steps to advance these calls.[31] In courts, most wedding-vendor cases ended in defeat for the vendors.[32]

Masterpiece Cakeshop was the first case in which the Supreme Court granted a petition for certiorari.[33] Rising under Colorado's AD law, the case presented a conflict between Jack Phillips—the owner of Masterpiece Cakeshop—and Charlie Craig and David Mullins, a same-sex couple who entered his cakeshop to inquire about a wedding cake, unaware of Phillips' beliefs. Phillips declined to make the cake citing his objection to same-sex unions. The parties dispute whether Phillips offered the couple to purchase other products at his store. Phillips argues that he "offered to make any other cake for them"[34] but the couple argues that Phillips said that "while the bakery would sell baked goods to gay and lesbian customers for other purposes, it would not sell them baked goods for weddings"[35] and that "the bakery has repeatedly refused to provide any baked goods—even cupcakes—for

---

Minnesota (*Telescope media*, *supra* note 5), Hawaii (Aloha B&B, *supra* note 9), Phoenix, Arizona (*Brush & Nib*, *supra* note 8).

[30] Erik Eckholm, *Conservative Lawmakers and Faith Groups Seek Exemptions After Same-Sex Ruling*, N.Y. TIMES www.nytimes.com/2015/06/27/us/conservative-lawmakers-and-faith-groups-seekexemptions-after-same-sex-ruling.html (June 26, 2015) (Politicians and faith groups in number of states including Texas, Louisiana, Idaho and Utah suggest wider religious exemptions laws); John Stonestreet, *Christian Leaders Respond to Obergefell vs. Hodges : A Symposium*, BREAK POINT, http://www.breakpoint.org/2015/06/christian-leaders-respond-to-obergefell-vs-hodges-a-symposium (June 26, 2015) ("Congress needs to pass the First Amendment Defense Act, which would protect 'those individuals and institutions who promote traditional marriage from government retaliation").

[31] *Infra* Part I.C.

[32] With the exception of *HOO*, *supra* note 7 (finding that the HOO, did not violate Lexington-Fayette Urban County's public accommodation's ordinance; notably, the vendor in the case was a printer and the denial of service was unrelated to a wedding).

[33] Previously SCOTUS denied cert. in Elane Photography, LLC v. Willock, 572 U.S. 1046 (U.S. 2014). After *Masterpiece*, SCOTUS granted cert. in Arlene's Flowers, *supra* note 3, and *Klein*, *supra* note 4, vacating and remanding both case for further consideration in light of *Masterpiece Cakeshop*.

[34] Petition for Writ of Certiorari at 6, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

[35] Brief for respondents Charlie Craig and David Mullins at 4, Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111).

wedding receptions or commitment ceremonies of same-sex couples."[36]

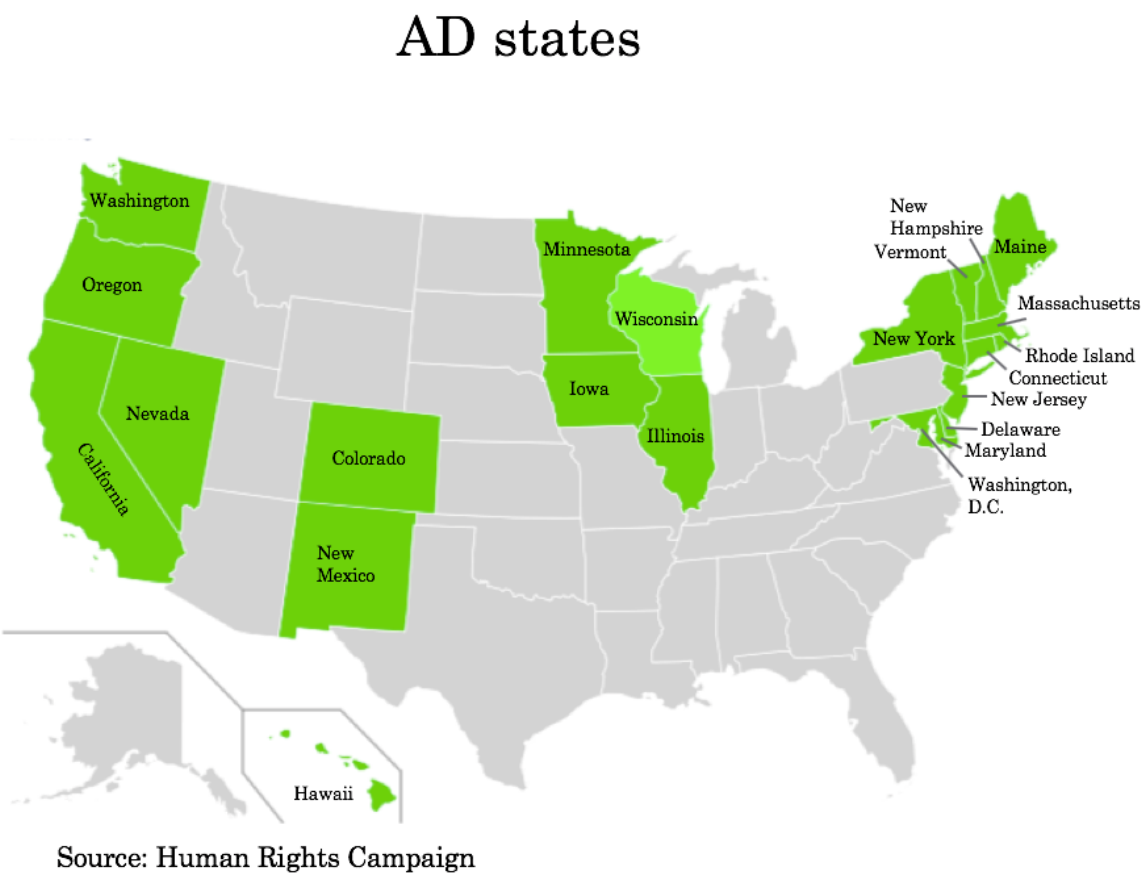


Figure 1. States prohibiting sexual orientation and gender identity discrimination in public accommodations. Notes: Wisconsin prohibits only sexual orientation discrimination. The map does not include local governments that prohibit discrimination within their boundaries.

The Colorado Civil Rights Commission, the administrative body that adjudicates claims under the Colorado Anti-Discrimination Act, found that the baker discriminated against the couple based on their sexual orientation. During the proceedings, a member of the Commission stated that "to me it is one of the most despicable pieces of rhetoric that people can use to—to use

[36] *Id*. at 1,5.

their religion to hurt others."[37] Ultimately, these and related comments were among the primary reasons that led the Supreme Court to reverse and invalidate the Commission's decision, writing that the Commission failed to treat the baker neutrally and fairly, and instead showed unconstitutional religious hostility.[38] Two of the majority justices, Justices Thomas and Gorsuch, opined that the baker should have also prevailed on free speech grounds, stating that creating and designing custom wedding cakes is a form of expressive conduct.[39]

While the baker won the case on free exercise grounds, the decision also affirmed the need in AD laws to protect LGBTQ people in the marketplace. The majority acknowledged that "if [religious] exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws."[40] For these reasons, the Court did not rule out the possibility that Colorado could eventually rule against Phillips and similarly situated vendors on the basis of its AD law, as long as the state guarantees a neutral and respectful process to all parties. More generally, the majority's opinion did not expressly solve the bigger issue of the relationship between religious liberty and sexual orientation equality.

B. Religious Freedom Laws and claims for religious exemptions

Thus far the tension between marriage equality and religious liberty was surveyed from the standpoint of AD legislation. Another type of legislation that bears on the legal status of religion-equality conflicts is Religious Freedom Restoration Acts (RFRAs).

RFRA was first enacted as a federal law in response to *Smith*, that held that neutral laws of general applicability that do not intentionally target

---

[37] *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

[38] *Id.* at 1723. The Court also finds another "indication of hostility in the difference in treatment between Phillips and other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission." These bakers refused to create cakes with images that conveyed disapproval of same-sex marriage, and the commission found their refusal legal because the bakers deemed the messages offensive. The Court criticizes this differential treatment as a show of hostility towards Phillips' faith.

[39] *Id.* at 1742 (Thomas, Gorsuch Concurring).

[40] *Id*. at 1727.

religion are constitutional—period—even if they substantially burden the free exercise of religion.[41] Until *Smith,* laws that imposed a "substantial burden" on religious objectors were held to strict scrutiny, a test requiring that such laws would be the least restrictive means of serving a compelling government interest.[42] Congress sought to restore that standard by enacting RFRA, that provided that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the burden serves "a compelling government interest" and is "the least restrictive means" to further that interest.[43] But RFRA was partially invalidated as applied to the states,[44] and 21 states followed by enacting RFRAs to ensure that their governments are subject to the same high level of scrutiny as the federal government (See Figure 2).[45] Ten additional states interpreted their constitutions to require strict scrutiny.[46]

---

[41] Emp't Div. v. Smith, 494 U.S. 872 (U.S. 1990).

[42] Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

[43] 42 U.S.C.S §§ 2000bb–2000bb-4 (2012), *invalidated in part* by Boerne v. Flores, 521 U.S. 507 (U.S. 1997) (as applied to states).

[44] *Id.*

[45] *State Religious Freedom Restoration Act*, NCSL, http://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx (May 4, 2017) (an up-to-date survey of all RFRAs).

[46] Eugene Volokh, *1A. What Is the Religious Freedom Restoration Act?*, THE VOLOKH CONSPIRACY, http://volokh.com/2013/12/02/1a-religious-freedom-restoration-act/ (Dec. 2, 2013) (surveying state RFRAs and states interpreting their constitutions to require strict scrutiny; since then, AR, IN, and MI also enacted RFRAs).

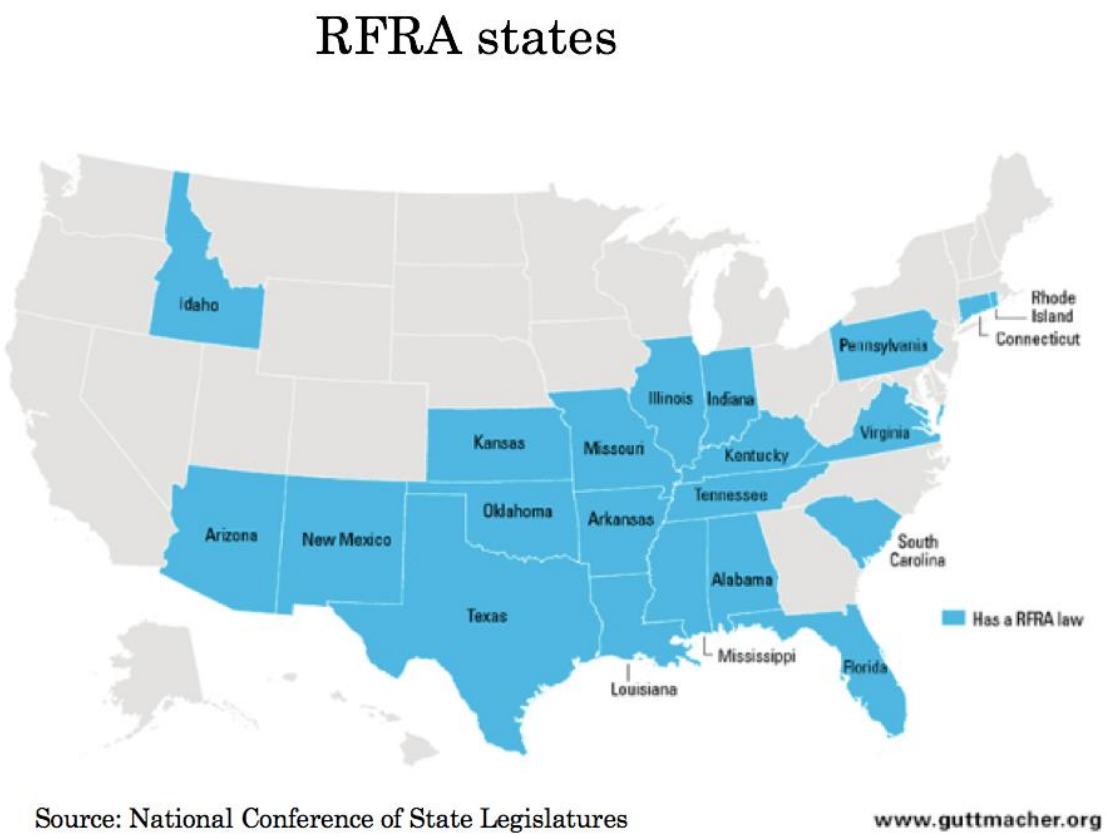


Figure 2. States that enacted Religious Freedom Restoration Acts. Note: The map does not include states that interpreted their constitutions to require a RFRA-like protection of religious freedom: AK, MA, ME, MI, MN, MT, NC, OH, WA, and WI.[47]

With the legalization of marriage equality, conservative legislators in RFRA-less states began pushing for the enactment of RFRAs as a shield (for some, a sword for others) against potential duties to recognize same-sex marriage as valid. Mississippi passed a RFRA in 2014, and Indiana and Arkansas in 2015.[48] Yet in other states, such as Iowa and Georgia, RFRA bills failed due to public concerns about their implications for LGBTQ rights and fears from commercial boycotts.[49] In the process, RFRAs became the

[47] *Id*.
[48] *NCSL*, *supra* note 45.
[49] Kathleen Foody, *Georgia Lawmakers Leave without Vote on Religious Freedom Bill*, WASH. TIMES, https://www.washingtontimes.com/news/2015/apr/3/religious-freedom-

legislative antonym of AD laws.[50]

C. The implications of the "legislative mismatch"

Figures 1 and 2 show that the distribution of AD laws and RFRAs across states is a "legislative mismatch" (Chip Lupo's phrase) with a relatively narrow overlap. As Professor Lupo notes, the overlap consists of four states that enacted both laws (Connecticut, Illinois, New Mexico, and Rhode Island), a maximum of seven states that have both AD laws and extended protections on religious freedom in their constitutions (though no RFRAs; these are Maine, Massachusetts, Minnesota, New York, Vermont, Washington, and Wisconsin);[51] and a considerable number of local governments in RFRA states that enacted municipal AD laws. This last category includes a number of major cities in conservative states, such as Dallas (Texas), Indianapolis (Indiana), Phoenix (Arizona), and Atlanta (Georgia).[52]

The legal variation that results from the "legislative mismatch" potentially entails very different outcomes for otherwise identical cases. Imagine a photographer refusing to take the engagement photos of a same-sex couple. In solely AD states, a discrimination claim will likely result in victory for the couple. In solely RFRA states, such claim will likely fail. In states that enacted neither type of law (e.g., North Carolina), the claim's fate

---

measure-focus-of-ga-lawmakers-la/ (Apr. 3, 2015).

[50] *See, e.g.*, David Ferguson, *LGBT rights amendment proves to be 'poison pill' for Georgia's 'religious freedom' bill*, RawStory, https://www.rawstory.com/2015/03/lgbt-rights-amendment-proves-to-be-poison-pill-for-georgias-religious-freedom-bill/ (Mar. 27,2015) (reporting how the passage of an amendment preventing the bill from affecting the state's civil rights laws collapsed support in the bill).

[51] Ira C. Lupo, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1, 48–9 (2015) (classifying states into categories; since then, no new laws were enacted that changed this classification). Some disagreement exists as to which states have interpreted their constitutions to require a RFRA-like standard of review. Contrary to Lupo, Volokh, *supra* note 46, classifies Hawai'i and Vermont as states where courts explicitly noted uncertainty about whether their constitution entails such standard, and declined to resolve it, and New York as a state with weak intermediate review. At least with respect to Hawaii, a recent directly relevant decision proves Volokh correct, Cervelli v. Aloha Bed & Breakfast, 415 P.3d 919, 934 (Haw. Ct. App. 2018), *cert. rejected* (July 10, 2018) ("We need not decide whether a higher level of scrutiny should be applied to a free exercise claim under the Hawai'i constitution… because we conclude that [Hawaii AD law] satisfies even strict scrutiny as applied to Aloha B&B's free exercise claim.").

[52] *Lupo, id.* at 49. No local government in an AD state has enacted a municipal RFRA thus far.

will likely be similar to RFRA states, if only because there is no vehicle to bring an antidiscrimination claim forward. And in the overlap category, where both sexual orientation and religious freedom are afforded legislative protections, the claim's fate would depend on how courts interpret the relationship between the two laws, including their potential application of strict scrutiny to the state's AD law.

Although one may assume that the conflict is strongest in the overlap states, it is not necessarily the case. For example, the four states with both AD laws and RFRAs construed their RFRAs to apply only to government agencies, excluding legislatures and courts; or limited reliefs to be against the government, excluding private parties.[53] This structure led the New Mexico Supreme Court to reject the claim that the state's RFRA prevents the application of the state's AD law to a photographer declining service to a same-sex couple.[54] Supreme courts in Washington[55] and Hawai'i,[56] states that Lupo classifies as hybrid because of RFRA-like constitutional norms, reached a similar result, each ruling that the state's AD law survives strict scrutiny.[57] Overall, a large part of the overlap category appears to be more similar to the AD-only category when it comes to religion-equality conflicts.

The potentially more conflicted overlaps are where RFRAs are construed to apply to state laws (not only executive agencies), without excluding reliefs

---

[53] Rhode Island (42 R.I. GEN. LAWS §80.1 (2010)) defines "government" to exclude the legislature and the courts and sets the remedies to be "injunctive and declaratory relief against any governmental authority which commits or proposes to commit a violation of this chapter"; Connecticut (CONN. GEN. STAT. §52-571b (1993)) defines "state or any political subdivision of the state" to exclude the legislature and the courts and sets the right for an appropriate relief only against the state; New Mexico (N.M. STAT. ANN. §28-22 (2000)) is very similar to both, as explained below; Illinois (775 ILL. COMP. STAT 35 (1998)) defines "government" to include "a branch" but sets the right for an appropriate relief in section 20 only "against a government."

[54] Elane Photography, LLC v. Willock, 309 P.3d 53, para. 72–8 (N.M. Super. Ct. 2013) (ruling that because the NMRFRA does not apply to the legislator and the courts, and sets remedies only against government agencies, it does not insulate businesses from the legislature's prohibition on discrimination and does not shield them from discrimination lawsuits by private parties, including same-sex couples).

[55] Washington v. Arlene's Flowers, Inc., and Ingersoll & Freed v. Arlene's Flowers, Inc., No. 13-2-00871-5 (Wash. Super. Ct. 2015) (ruling that the Washington's AD law survives strict scrutiny).

[56] *Aloha B&B*, *supra* note 51 (ruling that even if the Hawai'i constitution requires strict scrutiny, the Hawai'i AD law survives it).

[57] Lupo, *supra* note 51.

against private parties. Such are the Texas and Indiana RFRAs[58] and new RFRA bills have followed this model.[59] At the same time, both Texas and Indiana RFRAs include language stating that the Act does not authorize or establish a defense for discrimination or breach of civil rights laws, except for religious non-profits.[60] As both states do not have AD laws that prohibit discrimination on the basis of sexual orientation, these reservations appear to be relevant only in municipalities within these states that enacted local AD protections.[61] These clauses are yet to be interpreted by courts as to whether they resolve the tension or not.

In summary, the contemporary regulation of the tension between marriage equality and religious liberty divides into four legal categories: regimes (state or local) with both AD laws and RFRAs; regimes that only have AD laws; regimes that only have RFRAs; and regimes that have none. This patchwork is the background against which *Masterpiece Cakeshop* was decided, and against which the debate on religious exemptions is raging.

D. Opposing arguments about the consequences of religious exemptions

The legislative mismatch and the inconsistent patchwork of protections of same-sex couples and religious objectors across the nation yielded two forceful and opposite responses.

At one camp are advocates and scholars that emphatically object to the legislation of new RFRAs and to most types of religious exemptions from

---

[58] TEX. CIV. PRAC. & REM. CODE ANN § 110.011 (1999) ("A person whose free exercise of religion has been substantially burdened… may assert that violation … without regard to whether the proceeding is brought in the name of the state or by any other person."); IND. CODE § 34-13-9-0.7 (2015) ("regardless of whether the state or any other governmental entity is a party to the proceeding").

[59] In addition to the newly enacted Indiana and Mississipi RFRAs, MISS. CODE § 11-61-1 (2014), many recent RFRA bills followed the same structure, including SB 898 in Oklahoma, HB 55 in New Mexico, SB 180 in Kentucky, SB 1062 in Arizona, etc.

[60] *Id.*

[61] Currently it these RFRA provisions are understood in the public media: David S. Cohen & Leonore Carpenter, *The "Fix" to Indiana's Law Still Doesn't Protect Hoosiers From Anti-Gay Discrimination*, SLATE, https://slate.com/human-interest/2015/04/indiana-religious-freedom-law-the-fix-still-doesnt-protect-gay-hoosiers-from-discrimination.html (Apr. 2, 2015) (a suggested fix in Indiana's RFRA is relevant only to the few cities that passed AD bills); Robbie Owens, *Texas Has Its Own Religious Freedom Law*, CBS DFW, https://dfw.cbslocal.com/2015/03/31/fifteen-year-old-texas-law-similar-to-new-indiana-law/ (Mar. 31, 2015) (Texas RFRA "can't be misused to disregard civil rights protections").

AD laws. Much of the concern voiced by this group is about harm and consequences, perhaps most strongly articulated in Mark Stern's argument that if there is any religious accommodation, "inevitably, it will soon stretch to restaurants, hotels, movie theaters—in short, to all facets of public life. A religious right to discriminate against gay people will lead directly to anti-gay segregation."[62] Professors Douglas NeJaime and Reva Siegel take the view that claims for religious exemptions reflect the same effort to preserve traditional gender norms that characterized the religious objection to enacting these laws from the first place, what they call "preservation through transformation."[63] Hence, they argue that religious accommodations "may continue democratic conflict in new forms"[64] and faith claims would escalate in number and significance.[65] Law professors also expressed these concerns to legislatures deliberating new RFRAs, urging them to reconsider the bills.[66]

At the opposing camp are advocates and scholars, some of whom supportive of same-sex marriage, who support religious exemptions. This group, which has also been active in communicating with legislators and pushing forward draft proposals for religious exemptions,[67] rejects the consequential concerns as detached from reality. Professor Koppleman cites

---

[62] Mark Joseph Stern, *Anti-Gay Segregation May Soon Be Coming to Oregon*, SLATE, https://slate.com/human-interest/2014/02/oregon-anti-gay-referendum-the-initiative-is-homophobic-segregation.html (Feb. 4, 2014).

[63] Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L. J. 2516, 2552–54 (2014).

[64] *Id.* at 2521.

[65] *Id*. at 2520. *See* also Douglas NeJaime & Reva Siegel, *Conscience Wars in Transnational Perspective: Religious Liberty, Third-Party Harm, and Pluralism*, *in* THE CONSCIENCE WARS: RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY 187 (Susanna Mancini & Michel Rosenfeld eds., 2018).

[66] Letter from Katherine Franke, Isidor & Seville Sulzbacher Professor of Law, Columbia University et al., to Ed DeLaney, Representative of Indiana, http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/law_professors_letter_on_indiana_rfra.pdf (Feb. 27, 2015) (criticizing the original Indiana RFRA). Letter from Ira C. Lupu et al., F. Elwood & Eleanor Davis Professor of Law Emeritus, George Washington University, to Governor Nathan Deal, http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/georgia-religious-freedom-letter.pdf (Jan. 21, 2015) (criticizing the Georgia RFRA proposal)

[67] For a collection of letters to state legislators making these and similar proposals, *see* Thomas Berg, *Archive: Memos/Letters on Religious Liberty and Same-Sex Marriage*, MIRROR OF JUSTICE (Aug. 2, 2009). For the model exemption law advanced by this group, *see* Letter from Edward McGlynn Gaffney, Jr., Professor of Law, Valparaiso Univ. Sch. of Law, et al., to Rosalyn H. Baker, State Senator, Haw. 4–5 (Oct. 17, 2013).

data from polls indicating that the majority of Americans, and the vast majority of young Americans, now support same-sex marriages. Reflecting on the volume of court cases, he then claims that instances of discrimination are extremely rare, "a handful in a country of 300 million people."[68] Reasoning that discrimination against same-sex couples is no longer pervasive, he argues that "If gay people are generally protected against discrimination, then a few outliers won't make any difference."[69] Similarly, Professors Berg and Laycock argue that states do not have a compelling interest in enforcing their antidiscrimination laws against religious objectors where "ample alternative providers exist (as they nearly always do)".[70] *Masterpiece*, in their view, is exactly such case because other bakers were readily available to provide the service.[71] Yet the premise that exemptions should be allowed where market alternatives exist is under-developed in these arguments. How many other available bakers would justify an exemption? And how many refusing bakers might invalidate an otherwise-justified exemption?

The question of when quantity becomes quality, or what quantity of refusing vendors begins to erode the proponents' position, is left unanswered. Koppelman concedes that in some areas in the country many businesses might invoke an exemption; but he immediately undermines the strength of this concern, assuming that these areas do not have anti-discrimination protections in the first place.[72] With respect to *Masterpiece*, Berg and Laycock simply note that the couple accepted an offer of a free wedding cake after being refused by Phillips.[73] They do not consider other potential

---

[68] Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 643 (2014).

[69] *Id.* at 627.

[70] Douglas Laycock & Thomas C. Berg, *Here is What You Missed in the Supreme Court Ruling in Same-Sex Wedding Cake Case*, DALLAS NEWS, https://www.dallasnews.com/opinion/commentary/2018/06/14/missed-supreme-court-ruling-sex-wedding-cake-case (June 2018).

[71] Thomas C. Berg & Douglas Laycock, *Masterpiece Cakeshop and Reading Smith Carefully: A Reply to Jim Oleske*, TAKE CARE. https://takecareblog.com/blog/masterpiece-cakeshop-and-reading-smith-carefully-a-reply-to-jim-oleske (Oct. 30, 2017) ("The case would be different … if no other baker were readily available."). DOUGLAS LAYCOCK, 3 RELIGIOUS LIBERTY 962 (2017) ("we should exempt vendors… so long that another vendor is available without hardship to the same-sex couple.")

[72] Koppelman, *supra* note 67 at 644.

[73] Brief of Christian Legal Society et al. for Petitioners at 30, Masterpiece Cakeshop,

scenarios—for example that a couple would encounter repeated refusals until finally securing a cake—or considerations—for example that the risk of refusal might be multiplied by the no small number of vendors that a couple typically contracts with to organize a wedding. Finally, proponents of religious exemptions do not consider the question of how religious exemptions might *themselves* shape market alternatives. If religious exemptions encourage more refusals, or expand to other facets of public life, as Seigel, NeJaime, and others worry, then the premise of market alternatives could erode further.[74]

It is possible that the proponents of exemptions are not worried about the potential expansion of faith-based claims because they assume that no religious objector would shy away from expressing their objection under current legal prohibitions, and thus the only live question is how the authorities choose to treat these inevitable objections. This type of thinking is implicit in Berg and Laycock's description of religious objectors:

> "Those bakers willing to turn away good business for religious reasons believe that they are being asked to defy God's will, disrupting the most important relationship in their lives, a relationship with an omnipotent being who controls their fates. They believe that they are being asked to do serious wrong that will torment their conscience for a long time after. Petitioner said he would be 'dishonoring' and 'displeasing' 'the sovereign God of the universe.'"[75]

Berg and Laycock further write that "[t]he harm of regulation on the religious side is permanent loss of identity or permanent loss of occupation."[76] But is the assumption that religious objection is an inevitable and fixed position necessarily true? Or might different legal arrangements influence believers to either tolerate or object to same-sex marriage? This,

---

Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) [hereinafter Berg and Laycock's Brief].

[74] Koppelman, *supra* note 69 at 644, is aware of this concern, but he dismisses such "cascade" as unlikely given what he considers to be the irreversible trend in social attitudes towards gay couples.

[75] Berg and Laycock's Brief, *supra* note 73, at 31.

[76] *Id*. at 32.

again, is an open empirical question. If religious objection fluctuates in response to the availability of religious exemptions, and individuals who were willing to provide service to same-sex weddings become unwilling to do so once an exemption is announced, it is unclear that the vigor of Berg and Laycock's argument regarding the harm to religious objectors remains intact. More nuanced questions would then need to be explored: What, really, is the magnitude of harm from not being able to refuse service to same-sex weddings? To what extent is refusal the only available religious response? And is it justified to exempt objectors for whom serving same-sex couples would truly disrupt the most important relationship in their lives, if such exemption also causes many other vendors to refuse service that they would have otherwise provided willingly?

II. THE *MASTERPIECE CAKESHOP* EXPERIMENT

A. The motivation and setting for the experiment

The primary purpose of the project is to examine the contradicting empirical assumptions regarding the effects of religious exemptions on discrimination towards same-sex couples. These assumptions lie at the heart of the debate on religious exemptions, particularly in the context of the wedding industry, yet neither side has directly relevant data on the consequences of religious exemptions in this domain, or even on the more basic question—the scope of discrimination towards same-sex couples in the industry. These omissions have made it impossible to assess the merits of the opposing positions and leave the debate hanging in the air.

Masterpiece Cakeshop created an opportunity to evaluate these arguments in their most pressing setting. Based on the oral arguments, I anticipated that the decision would yield an exemption of sorts.[77] As "one of the most anticipated decisions of the term,"[78] the decision was also likely to

[77] This expectation was formed based on the comments of Justice Anthony Kennedy, the Court's swing seat, who hinted that the Court thinks that there was "a significant aspect of hostility to a religion in this case", *Masterpiece*, *supra* note 1, Tr. of Oral Arg. 53, what became a dominant line of questions for the conservative judges on the bench, *id*. at 53-59. Justice Kennedy also said unequivocally, "Counselor, tolerance is essential in a free society. […] It seems to me that the state in its position here has been neither tolerant nor respectful of Mr. Phillips' religious beliefs." *Id.*, at 63.

[78] Amy Howe, *Opinion Analysis: Court Rules (Narrowly) for Baker in Same-Sex-*

draw extensive coverage and discussion in the public media (as it did), thus to potentially have an impact on public attitudes and conduct.

When the decision was finally rendered on June 4th, 2018, it received broad coverage and mixed responses. National, state and local news outlets covered the decision and sought comment from local advocacy groups and politicians.[79] All mainstream outlets, including the New York Times, NBC News, and CNN, titled the decision a victory for the baker; they also called the decision "narrow," explaining that it did not resolve the big constitutional questions at issue.[80] At the same time, many conservative leaders and religious liberty advocates hailed the decision as a victory, expressing significantly less reservations about its scope.[81] Fox News held a supportive

---

Wedding-Cake Case (Update), SCOTUSBLOG, https://www.scotusblog.com/2018/06/opinion-analysis-court-rules-narrowly-for-baker-in-same-sex-wedding-cake-case/ (June 4, 2018).

[79] *See, e.g.*, Katie Simpson, *New Supreme Court Ruling May Affect Indiana Religious Freedom Lawsuit*, WFYI INDIANAPOLIS, https://www.wfyi.org/news/articles/new-supreme-court-ruling-may-affect-indiana-religious-freedom-lawsuit (June 4, 2018) (describing *Masterpice* as a victory for religious exemptions which may assist conservative groups to challenge Indiana's "weakening religious freedom protections"); Emma Platoff, *What the U.S. Supreme Court's Masterpiece Cakeshop Decision Means for Religious Refusal Laws in Texas*, TEXAS TRIBUNE, https://www.texastribune.org/2018/06/05/us-supreme-court-masterpiece-cakeshop-gay-ruling-religious-freedom-tex/ (June 5, 2018); Lauren McGaughy, *Supreme Court Sides With Baker Who Refused to Make Wedding Cake for Gay Couple*, DALLAS NEWS, https://www.dallasnews.com/news/lgbt/2018/06/04/supreme-court-sides-baker-refused-make-wedding-cake-gay-couple (June 2018).

[80] Adam Liptak, *In Narrow Decision the Supreme Court Sides With Baker Who Turned Away Gay Couple*, N.Y. TIMES, https://www.nytimes.com/2018/06/04/us/politics/supreme-court-sides-with-baker-who-turned-away-gay-couple.html (June 4, 2018) ("The court passed on an opportunity to either bolster the right to same-sex marriage or explain how far the government can go in regulating businesses run on religious principles"); Pete Williams, *In Narrow Ruling, Supreme Court Gives Victory to Baker Who Refused to Make Cake for Gay Wedding*, NBC NEWS, https://www.nbcnews.com/politics/supreme-court/narrow-ruling-supreme-court-gives-victory-baker-who-refused-make-n872946 (June 4, 2018) ("the opinion was a narrow one, applying to the specific facts of this case only"); Mark Goldfeder, *How the Supreme Court (Respectfully) Kicked the Can Down the Road*, CNN, (June 6, 2018) https://edition.cnn.com/2018/06/04/opinions/supreme-court-masterpiece-cakeshop-goldfeder/index.html ("Initial reviews … mostly imply that it was a very narrow ruling and is therefore somewhat unremarkable.").

[81] Emilie Kao, *Why the Supreme Court's Ruling for a Christian Baker Was Not 'Narrow'*, THE DAILY SIGNAL, https://www.dailysignal.com/2018/06/12/why-the-supreme-courts-ruling-for-a-christian-baker-was-not-narrow/ (June 12, 2018) ("the decision… [exposed] a huge fallacy in the ACLU's main argument in the case… The court's clear rejection of the discrimination argument has implications for many of the other conflicts currently brewing between religious freedom and sexual orientation."); *Victory for Colorado*

interview with Phillips, who defined the decision as a "big win."[82] Leaders of the U.S. Conference of Catholic Bishops released a joint statement applauding the decision, saying that it "confirms that people of faith should not suffer discrimination on account of their deeply held religious beliefs, but instead should be respected by government officials" and emphasizing the decision's expression of pluralism and tolerance.[83] The Family Research Council released a statement that the decision "made clear that the government has no authority to discriminate against Jack Phillips because of his religious beliefs" and that the "ruling means that Jack will remain free to live according to his beliefs whether he is at work, at home, or in his place of worship."[84] These statements do not betray any doubt about the scope of the decision or mention its recognition of the important role of AD laws in protecting LGBTQ people.

Some LGBTQ advocates and progressive commentators observed these enthusiastic responses and voiced concerns that *Masterpiece* will grant objectors a license to discriminate. GLAAD president said that "it leaves the

---

Cake Case, LIBERTY COUNSEL, https://www.lc.org/newsroom/details/060418-victory-for-colorado-cake-case (June 4, 2018) ("Though the Court focused on the explicit hostility exhibited by the Colorado Civil Rights Commission in this specific instance, this significant decision will have a wide impact regarding the clash between free speech and the LGBT agenda, including laws that add 'sexual orientation' and 'gender identity.'")

[82] *Colorado Baker Reacts to 'Big Win' in Same-Sex Wedding Cake Case*, FOX NEWS INSIDER (June 5, 2018), https://insider.foxnews.com/2018/06/05/same-sex-wedding-cake-case-colorado-baker-jack-phillips-supreme-court-ruling-was-big-win; *See also,* Todd Starnes, *A win for Masterpiece Cakeshop but it ain't over yet*, FOX NEWS, https://www.foxnews.com/opinion/todd-starnes-a-win-for-masterpiece-cakeshop-but-it-aint-over-yet (June 4, 2018) ("Monday's ruling should give some comfort to Christian business owners who primarily service the wedding industry – gay rights do not necessarily trump everyone else's rights"). Other coverage by Fox News was more careful in discussing the limitations of the decision, *e.g.* Bill Mears, Judson Berger, *Supreme Court sides with Colorado baker who refused to make wedding cake for same-sex couple*, FOX NEWS LIVE, https://www.foxnews.com/politics/supreme-court-sides-with-colorado-baker-who-refused-to-make-wedding-cake-for-same-sex-couple (June 4, 2018) ("The narrow ruling here focused on what the court described as anti-religious bias on the Colorado Civil Rights Commission when it ruled against baker Jack Phillips.").

[83] *Religious freedom groups praise Supreme Court's Masterpiece ruling*, CATHOLIC NEWS AGENCY, https://www.catholicnewsagency.com/news/religious-freedom-groups-praise-supreme-courts-masterpiece-ruling-57089 (June 4, 2018).

[84] *Supreme Court Ruling A Victory for Freedom of Colorado Baker to Live By His Faith, says Family Research Council*, FAMILY RESEARCH COUNCIL, https://www.frc.org/newsroom/supreme-court-ruling-a-victory-for-freedom-of-colorado-baker-to-live-by-his-faith-says-family-research-council (June 4, 2018).

door wide open for religious exemptions to be used against LGBTQ people." The president of LGBTQ Victory Institute further warned that "Homophobic forces will purposefully over-interpret the ruling and challenge existing non-discrimination laws by refusing service to LGBTQ people in even more situations."[85] NBC's Think columnist Scott Lemieux wrote that the decision "presents a serious risk of undermining civil rights law in the name of religious freedom, especially given that it invites yet further suits for the court to consider."[86]

This combination of factors—a highly anticipated decision, a court that appeared positioned to exempt the religious objector, and the massive coverage that followed the decision and communicated the above messages—created a favorable setting for an empirical test of the effects (or lack thereof) of religious exemptions. In a previous study, Professors Linos and Twist found that Supreme Court decisions can increase support for controversial policies that were vindicated by the Court (e.g., Obamacare), even when the court was divided and the decision was nuanced.[87] Similarly, three recent studies that measured the effect of the legalization of same-sex marriage on public attitudes documented increase in perceptions that social norms support same-sex marriage[88] and in support for same-sex marriages[89] post-*Obergefell* and sharper decrease in antigay bias in states that legalized same-sex marriage compared with those that did not.[90] All of these studies were based on attitudinal surveys conducted shortly before and after the decisions or acts of legislation, sometimes with an additional experimental

---

[85] Both statements are cited at: Nico Lang, *Hate Groups Want to Exploit Masterpiece Cakeshop Ruling As a License to Discriminate*, INTO, https://www.intomore.com/impact/Hate-Groups-Want-to-Exploit-Masterpiece-Cakeshop-Ruling-As-a-License-to-Discriminate/42029e64e2ca4a08 (June 4, 2018).

[86] Scott Lemieux, *How the 'Narrow' Ruling in Masterpiece Cakeshop Could Undermine Future Civil Rights Cases*, NBC NEWS, https://www.nbcnews.com/think/opinion/how-narrow-ruling-masterpiece-cakeshop-could-undermine-future-civil-rights-ncna879976 (June 5, 2018).

[87] Katerina Linos & Kimberly Twist, *The Supreme Court, the media, and public opinion: Comparing experimental and observational methods*, 45(2) J. LEGAL STUD. 223 (2016).

[88] Margaret E. Tankard & Elizabeth Levy Paluck, *The effect of a Supreme Court decision regarding gay marriage on social norms and personal attitudes*, 28(9) PSYCHOL. SCI. 1334 (2017).

[89] Emily Kazyak & Mathew Stange, *Backlash or a Positive Response?: Public Opinion of LGB Issues After Obergefell v. Hodges*, 65(14) J. HOMOSEXUALITY 2028 (2018).

[90] Eugene K. Ofosu et al., *Same-sex marriage legalization associated with reduced implicit and explicit antigay bias*, 116 PNAS 8846–8851 (2019).

component that randomized the framing of the decision or the information provided on the decision. Yet none of these studies examined the implications of Supreme Court decisions on the behavior of decision-makers pertinent to the subject matter of the decision (in the present case, how wedding vendors are influenced from a decision pertinent to the wedding industry).

In addition, these studies did not investigate whether the effect of the Supreme Court varies between background socio-legal regimes. As Part II explained, the variation in how states regulate sexual orientation discrimination and religious freedom is highly important in the present case, as these background regimes yield very different predictions for the outcomes of otherwise identical cases. These predicted legal outcomes could, in turn, provide different guidance to wedding vendors operating in each regime and impact their response to the *Masterpiece Cakeshop* decision in different directions. The present study is the first to provide concrete behavioral evidence on the response of the pertinent population of decision-makers, while accounting for the different socio-legal regimes in which they operate that could influence their behavior.

B. Research design and methods

A field experiment was designed to assess potential changes in sexual orientation discrimination in the wedding industry in response to *Masterpiece*. The experiment was fielded during two periods: before (May 8th-15th) and after (June 13th-20th) the decision was rendered on June 4th, 2018.

1. Sample

Sample construction began with a preliminary comparison of all states, to find those that were most comparable in their overall characteristics yet differed in their legal regime. The comparison included GDP per capita, the importance of religion for state residents, the share of Evangelicals in the state, the share of the conservatives, attitudes towards homosexuals, and attitudes towards same-sex marriage. After matching demographic resemblance against legal regime variation, four states were selected for sampling: Indiana, Texas, Iowa and North Carolina. Table 1 shows that these states have roughly the same attitudinal and economic characteristics, that are either at the national average or more conservative.

Table 1: Comparison Between Sampled Regimes

Criterion	Definition	Iowa	North Carolina	Indiana	Texas	Dallas Metro, TX	Houston Metro, TX
GDP per capita ($)		59,978	54,442	55,173	61,168		
Importance of religion	% for whom religion is Somewhat or Very Important	79%	84%	78%	86%	85%	83%
% Conservative	(National average: 36%)	41%	40%	41%	39%	41%	38%
% Evangelicals	(National average: 25%)	28%	35%	31%	31%	38%	30%
Attitudes towards homosexuals	% thinking that homosexuality "should be discouraged" (National average: 31%)	36%	36%	37%	36%	35%	39%
Attitudes towards same-sex marriage	% Opposing or Strongly Opposing (National average: 39%)	41%	45%	45%	46%	44%	51%
State RFRA		No	No	Yes	Yes	Yes	Yes
State/Local AD law in public accommodations		Yes	No	Some	Some	Yes	No

Notes: GDP per capita is calculated based on data from 2018, Q2. Sources: GDP: THE U.S. BUREAU OF ECONOMIC ANALYSIS, GROSS DOMESTIC PRODUCT BY STATE, SECOND QUARTER 2018 (2018) https://apps.bea.gov/regional/histdata/releases/1118gdpstate/index.cfm; Population: U.S. CENSUS BUREAU, 2018 NATIONAL AND STATE POPULATION ESTIMATE (2018) https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html; All other data (including metro areas): PEW RESEARCH CENTER, RELIGIOUS LANDSCAPE STUDY (2014) http://www.pewforum.org/religious-landscape-study.

Alongside their demographic and attitudinal similarity, the sampled states vary in how they regulate religious freedom and public accommodations. North Carolina has no RFRA and no AD law at any level of government. Iowa has no RFRA (at no level of government) but has a state AD law.[91] Both

[91] IOWA CODE § 216.7; Notably, Iowa Supreme Court has been a trailblazer for gay rights, striking down Iowa's anti-sodomy law in State v. Pilcher, 242 N.W.2d 348 (Iowa Super. Ct., 1976), twenty-seven years before the U.S. Supreme Court did the same in Lawrence v. Texas, 539 U.S. 558 (U.S. 2003). Iowa Supreme Court was also the fifth court

Indiana and Texas have state RFRAs and no state AD laws, yet some local governments within these States have AD laws.[92] Sampling from all of these regimes produced a 2 (+/- AD) by 2 (+/- RFRA) sampling matrix (Table 2).

Two reasons were responsible for the choice of Texas and Indiana as models of the overlap category (+RFRA,+AD) and the +RFRA-AD category. As Part II describes, there are three versions of the overlap between RFRAs and AD laws: (1) states that enacted both laws; (2) states that enacted an AD law and their courts interpreted their constitution to provide a RFRA-like standard; and (3) local AD laws within RFRA states. The primary reason for choosing the third version to model the overlap category was that the demographic and attitudinal characteristics of the four states that enacted both laws (RI, CN, NM, IL) and the states that only had RFRA, without an AD law, too widely differed than the states populating the three other matrix categories. Second, as Part II discusses, the particular RFRA design in the first overlap category was not conductive for the examination of the tension between RFRA and AD laws and the second overlap category raised considerable uncertainty regarding the existence of the same tension. Texas and Indiana provided an adequate demographic and attitudinal comparison to the other legal categories, as well as clarity regarding the classification of their legal regimes.

Table 2. The Legal Regime Matrix and Sampled States

	RFRA	No RFRA
AD	Specific governments in Indiana and Texas[93]	Iowa
No AD	Specific governments in Indiana and Texas[94]	North Carolina

in the nation to legalize same-sex marriage in Varnum v. Brien, 763 N.W.2d 862 (2009). RFRA has been repeatedly proposed and rejected in the state legislature, *infra* note 111.

[92] IND. CODE § 34-13-9 (2015); TEX. CIV. PRAC. & REM. CODE ANN § 110.011 (1999). A list of local AD laws is included in the Appendix.

[93] Indiana: Indianapolis, Fort Wayne, Evansville, Bloomington, Muncie, South Bend, Terre Haute. Texas: Dallas, San-Antonio, Austin, El-Paso, Plano, Fort Worth.

[94] Indiana**:** West Lafayette. Texas: Houston, Irving, Arlington, Corpus Christi, Lubbock, Garland, Amarillo, Grand Prairie, Brownsville, McKinney, Killeen, McAllen, Waco, Denton, Round Rock, College Station.

A power analysis (via G*Power) determined that a sample size of 179 businesses per legal category is needed to detect a medium-size effect (.25) with 80% power (assuming four legal regime groups and two covariates—see below). The detection of within-subject effects (sexual orientation of the couple and the effect of *Masterpiece*—see below) required a considerably smaller sample. Yet due to anticipated pitfalls that could result in sample reduction (e.g., inactive businesses; inactive email addresses; technical failures with email communication) the sampling aimed for 250 businesses per legal category.

The wedding industry includes a variety of vendors and services, such as photography, videography, flower arrangement, dresses, suits, wedding cakes, wedding planning, venues, and more. Recent cases in which businesses refused service to same-sex couples involved bakers (e.g., *Masterpiece*), photographers (e.g., *Elane Photography*), and florists (e.g., *Arlene Flowers*), among others. We were particularly interested in bakers and photographers, because these businesses represent different models of involvement in the wedding: photographers typically spend many hours with the couple, take an active part in the event and are present throughout the wedding, often for 9-10 hours. Typically they also create the couple's wedding album, requiring continued relationship with the couple. In contrast, bakers typically have a more limited interaction with the couple (during tastings and order), do not play an active role in the event and are not present in the wedding. These differences in personal involvement could bear on vendors' willingness to serve couples. Therefore the sampling focused on these two groups of vendors, supplementing them with florists in one legal category (Iowa) where not enough vendors of the first two categories were found.[95]

The sample was built by collecting all vendors in each legal regime that could be found on a simple Google search and published an email address as

[95] Iowa contained smaller populations of both bakeries and photographers compared with the other regimes (and particularly bakeries). Florists were chosen to augment the sample because of prior conflicts involving this industry (e.g., *Arlene Flowers*, *supra* note 2) and because florists' involvement in the wedding was assumed to be intermediate: florists do not fill an active role in the event and are not present throughout the event, similar to bakers; and they do not appear to be offering shelf products, similar to photographers.

a form of communication.[96] Notably, contacting wedding vendors via email is very common, if not the most common method of communication today. There is ample guidance online on how to write an email to potential wedding vendors and multiple websites assume that email is the default or best form of communication with vendors.[97] After mapping states and cities/counties that fitted into the legal regime typology, businesses were sampled based on regime size, from large to small. Thus, the sampling gave preference to large political units (e.g., big cities) over small political units (e.g., small cities and rural counties) and ended when the designated sample size was obtained.[98] Each business included in the sample was individually checked and verified to be a relevant business (e.g., a bakery rather than a coffee shop). The final sample includes the entire population of bakeries that met the search criteria in each legal regime, and a large sample of the respective photographers' population.[99]

---

[96] The search words were "[profession] in [jurisdiction]" (e.g., "wedding photographers in Indianapolis, IN").

[97] *See, e.g.*, Kim Forrest, *7 Ways to Effectively Communicate With Wedding Vendors*, WEDDINGWIRE, https://www.weddingwire.com/wedding-ideas/7-ways-to-effectively-communicate-with-wedding-vendors (Feb. 13, 2017) (assuming communication is done vie email); Adair Currey, *How to Email Potential Wedding Vendors*, EVERY LAST DETAIL https://theeverylastdetail.com/email-potential-wedding-vendors/ (Feb. 3, 2019) (providing guidance on how to write emails to potential wedding vendors);Kelsey Malie, *How to Successfully Communicate With Your Wedding Vendors*, http://www.kelseymaliecalligraphy.com/blog/2018/3/29/how-to-successfully-communicate-with-your-wedding-vendors (Mar. 29, 2018) ("An email is usually the preferred method for inquiries as it allows the vendor to keep track of your conversation, respond in length and from a desktop, and allows them to easily attach files, reference links, and more."). Vendors that did not publish an email address typically had an online application form on their website, reducing the potential concern that the sample is biased towards technology-oriented vendors.

[98] If the search yielded more results than needed, only the first valid results were included. The rational for including top results rather than a random sample of search results was based on the Google search algorithm, which prioritizes relevant results, and also on the researchers' experience that first result pages include more relevant results than advanced pages. Top results were typically within the geographic boundaries we searched for, whereas later results were often in suburbs or other cities/counties; in addition, top results typically met the definition of the searched business, whereas later results sometimes belonged to other types of businesses (e.g., a Starbucks coffee shop that came up in a wedding bakeries search).

[99] In Iowa (+AD – RFRA), the sample also includes the entire photographer population (Iowa was the only category in which the search was not able to collect 250 businesses and exhausted all business types at 218 businesses). In North Carolina (- RFRA - AD) the sample exhausted 89% of relevant photographers. In the +RFRA -AD regime (Texas and Indiana) the sample exhausted 88% of the population. In the +RFRA +AD regime (Indiana and Texas)

In addition to the main experiment sample, we also constructed a "control" group of 251 vendors which was only contacted after *Masterpiece.* The control group was composed of photographers and florists from three of the four legal regimes (as all businesses in Iowa and bakers in all jurisdictions were exhausted in the experimental group). The control exhausted the relevant photographers population in each regime in addition to 45 florists from each regime. As explained in more detail in the procedure, the control group was not designed to test differences between regimes or business types, but to evaluate the effect of the experimental procedure on vendors' behavior.

2. Procedure

Sixteen fictitious email profiles were created to facilitate the experiment. In order to assess the baseline discrimination pattern, each business received two emails prior to *Masterpiece* from two different 'couples': a same-sex couple (1st wave) and a different-sex couple (2nd wave). The couples' sexual orientation was made evident by their names. The name of the sender, appearing in the profile information and the signature, was a generic white American male name (John, Robert, Dylan, Scott). The name of the prospective spouse appeared inside the body of the email and was a generic name for a white American male or female, depending on the couple's identity (Adam, Paul, Ashley, Rebecca, Jessica). The emails had similar properties, including similar information about the fictitious couple and the service requested from the vendor, and they were written in the same level of cordiality. Small, meaningless changes were inserted to diminish suspicion (including variations in font size, font color, signature style, and profile pictures).[100] The emails were sent one week apart, about the same time during the week and day, with an intentional hour lag to reduce suspicion.[101]

A week after *Masterpiece,* on June 13th, all businesses were randomized to receive an email from a same-sex or a different-sex couple (3rd wave); and on the following week, each business received an email from the opposite-orientation couple (4th wave). In each wave, the two emails had similar

---

our sample exhausted about 50% of the relevant population (the photographer population in this regime was bigger than other regimes).

[100] All email versions are included in Appendix A.

[101] A small group of subjects received each email 24 or 48 hours after the main group, due to logistic issues.

properties and were different from the two pre-*Masterpiece* emails. Each email was always sent from a profile that has not contacted that business before; altogether, each business received four different emails from four different profiles.

Following the same post-*Masterpiece* procedure and during the exact same dates and times used in the experimental group, control group businesses were contacted in the 3rd and 4th waves. These businesses were contacted for the first time after the decision. The object of their inclusion in the study was to evaluate the possibility that the repeated measurement of the experimental procedure had an independent effect on business behavior. In particular, I aimed to assess whether the effects of *Masterpiece* are similar or not among businesses that were contacted in both period I (pre-*Masterpiece*) and period II (post-*Masterpiece*) and businesses that were freshly-contacted in period II. Such comparison provided an independent reference for response rate and attrition rates, which allowed for an additional robustness check.

In order to reduce suspicion and fatigue, the research team answered each responding business manually once, soon after the response was received, and before the next wave of emails. The answers were personal and varied based on each business' response. Typically, the responses requested more time to think or mentioned a reason for not continuing the correspondence which was unrelated to the details of the offer. Several vendors had to be excluded from the sample because of email communication failures (typically, not receiving one of the four emails), and a handful were omitted due to explicit suspicion and other factors.[102] The final sample size per legal regime, after exclusions, remained significantly larger than that required to detect the minimal effect based on the power analysis:

	RFRA	No RFRA
AD	N = 212 Photographers: 125 Bakers: 87	N = 210 Photographers: 93 Bakers: 35; Florists: 82
No AD	N = 244 Photographers: 179 Bakers: 65	N = 238 Photographers: 155 Bakers: 83

[102] *See* Appendix B for reasons for exclusions and the number of vendors excluded.

Two RAs coded the entire dataset of emails, closely supervised by the PI. The research team conducted numerous meetings throughout the coding process to discuss the coding method, resolve open issues, and fine-tune the coding scales.[103]

Between the 3rd and 4th email waves a phone survey was conducted with a random sample of wedding vendors to gain insight on non-response patterns observed in waves 1 and 2 (See below). The appendix describes the phone survey sample, procedure, and results.

C. Findings

1. Strategy of analysis

The goal of the field experiment was to estimate the effect of *Masterpiece* on business behavior. One obstacle I came across involved an unpredicted attrition of businesses between waves, and particularly between wave 1 and wave 2 (both occurring before *Masterpiece*). In wave 1, an average of 64% of the businesses responded to the email. In wave 2, on average 53% of the businesses responded to the email. This pattern hindered the ability to detect discrimination in the pre-*Masterpiece* period, as the first wave of emails was from same-sex couples and the second wave of emails was from opposite-sex couples. A random phone survey suggested that this attrition was due to some businesses being generally less communicative than others, rather than more suspicious or email fatigued.[104] Nevertheless, I concede that wave 2 attrition prevents the evaluation of the existence and extent of discrimination towards same-sex couples before the decision. I dealt with this pitfall using several strategies of analysis.

The first analysis includes the entire sample of businesses (N=904 businesses * 4 observations per business, resulting in 3616 observations). This analysis provides a complete picture of the results, yet because of the

---

[103] *See* Appendix D for further information regarding the coding process.

[104] *See* Appendix C, reporting that businesses that did not response to the 2nd wave email were also less likely to answer the phone than businesses that did reply to that email (36% vs. 52%, respectively). In addition, no 'phone favoritism' was found among email non-responders, *id*. The design of waves 3 and 4 that included a randomization of couples' identity in each wave and alternations of email style and formatting minimized the impact of individual differences in communicativeness on the robustness of the design.

attrition between waves 1 and 2, I consider it less indicative than the second and third analyses and thus spend more discussion on these analyses.

The second analysis includes only businesses that agreed to provide service to same-sex and opposite-sex couples equally before *Masterpiece* (N=422 businesses * 2 post Masterpiece observations per business, resulting in 844 observations). This analysis examines the impact of *Masterpiece* on non-discriminating businesses by examining their behavior after the decision. The third analysis focuses on all businesses who agreed to provide service to same-sex couples before *Masterpiece* (N=575 businesses * 2 post-*Masterpiece* observations, resulting in 1150 observations). The sample of the third analysis is larger because of the noted attrition between the first two waves. The assumption underlying this analysis is that any attrition between wave 1 (same-sex couples) and wave 2 (opposite-sex couples) is not due to reverse discrimination against opposite-sex couples, but due to the problem of attrition. Therefore, businesses who responded favorably to same-sex couples before *Masterpiece* are presumably equal treatment businesses. A different formulation of the third analysis is that it simply includes all businesses who agreed to provide services to same-sex couples before *Masterpiece*, whether or not they acted the same towards heterosexual couples. Similar to the second analysis, the third analysis then examines the behavior of these businesses after the decision.

Both the second and third analyses overcome the attrition problem by evaluating the impact of *Masterpiece* on businesses that agreed to serve same-sex couples before the decision. This results in a smaller sample, but still large enough to detect the effect in question.[105] The self-selection of businesses into this sample is not a concern since these are exactly the businesses that require our focus. Businesses that discriminated against same-sex couples both before and after the decision would not influence the results. In contrast, businesses that shifted from equal treatment to discrimination are precisely the object of the inquiry. As the post-*Masterpiece* intervention is conducted both within and between businesses (as businesses were randomized to receive an inquiry from either a same-sex or an opposite-sex couple after the decision), it is possible to estimate the effect of *Masterpiece*

[105] As the effect size ultimately exceeded the conservative assumptions of the power analysis, it was detectable also in analyses that relied on smaller samples.

on the group of interest.

For each analysis, I estimate five models: The *first* model analyzes the impact of sexual orientation on businesses' willingness to serve the couple. The *second* model adds the impact of legal regime. The *third* model adds the impact of business type.[106] The fourth and fifth models are robustness analyses, exploring potential boundaries or other explanations of the results. The *fourth* model limits the analysis only to cities with population larger than 80,000 people. This robustness check evaluates the potential concern that the results are driven by rural areas (typically around 20,000 people) that hold more conservative attitudes towards same-sex marriage and thus could tilt the results towards discrimination of same-sex couples. In addition, it is commonly argued that sexual orientation discrimination is less of a problem, if at all a problem, in larger cities. To examine these questions, the fourth model focuses only on businesses located in larger cities. The *fifth* model accounts for the conservativeness of the social environment by controlling for the Republican Presidential candidate vote rate in each business' county (average of the last three elections, 2008-2016).[107] This additional robustness check examines whether the effects are actually explained by the socio-political environment. In the third analysis (focusing on businesses that served same-sex couples before *Masterpiece*), I also break down the results by legal regime, allowing for a more descriptive observation of the differences.

Finally, the fourth and last analysis evaluates the potential concern that any detected effect could arise from the repeated measurement of businesses rather than the *Masterpiece* decision. Therefore, it compares the impact of *Masterpiece* on the experimental sample to its impact on a group of businesses that were contacted for the first time after the decision following

[106] The analyses contrast photographers with bakers and florists. Because of the small number of florists included in the sample (N=82), their concentration in one regime (*supra* note 95), and an analysis that did not find them to be significantly distinguished from bakers, I did not include a covariate for florists except in the separate analysis of the +AD-RFRA regime.

[107] Data was taken from *U.S. General Election Presidential Results by County From 2008 to 2016*, GITHUB, https://github.com/tonmcg/US_County_Level_Election_Results_08-16 (last modified Sep. 7, 2018).

the same exact procedure (the "control" group). This analysis also helps evaluating the effect of within-subject attrition in the experiment group on the results (see below).

The main interest in each analysis is whether the business agreed to provide service to the couple. I had two measures for this outcome, binary and nuanced.[108] As the two measures yielded very similar results, I report the results of the binary measure in the main text to increase the interpretability of our results. The results of the nuanced measure are reported in the online appendix.

2. The impact of *Masterpiece* on the entire sample of businesses

Table 1 plots the analysis of the entire sample, which yielded a highly significant and negative coefficient on the interaction between the court's decision (Post Court=0 if the business was measured before the decision and 1 if it was measured after the decision) and sexual orientation (Same Sex=0 if the inquiry was from a heterosexual couple and 1 if it was from a same-sex couple). Namely, wedding businesses were less likely to agree to serve same-sex couples after *Masterpiece*. This is despite the fact that businesses were, on average, more likely to respond positively to couples after *Masterpiece* and that the coefficient of Same Sex was positive (both these effects are artifacts of the attrition problem in week 2).[109] More descriptively, the rate of positive responses to same-sex couples dropped after *Masterpiece* in 7-10%. Specifically, in the first week after *Masterpiece*, 60% of the vendors who randomly received an inquiry from a heterosexual couple agreed to provide service to that couple as compared with 50% of those who randomly received an inquiry from a same-sex couple (a 10% gap). On the second week after *Masterpiece*, the randomization flipped such that each vendor received an email from the counter-orientation couple. Of the businesses now contacted by heterosexual couples, 55% responded favorably, as compared with 48%

[108] The Nuanced Response scale: 1 'positive response', 0.5 'asks for more information (date/location)', 0 'no response', -0.5 'refuses and refers to other providers/services', -1 'negative response'. Binary Response coded responses above 0 as 1 and responses 0 and below as 0. More information on coding is in Appendix D.

[109] The sharp attrition in week 2 both reduced the average rate of response before *Masterpiece* as compared with after *Masterpiece*, and simultaneously reduced the overall rate of response to heterosexual couples as compared with same-sex couples, because all emails in week 2 came from heterosexual couples. As a result, both the Post Court and Same Sex coefficients were significant and positive.

of those contacted by same-sex couples (a 7% gap). Note that this pattern indicates both between-subject differences (in each week, between the random groups) and within-subject differences (across weeks, within each group). Weekly attrition cannot explain the within-subject pattern, as the rate of response went *up* in in the group that received the first message from a same-sex couple and the second message from a heterosexual couple.

The first analysis indicates a pattern of discrimination following *Masterpiece,* but it cannot evaluate this pattern against the pre-*Masterpiece* period, due to the problem of attrition from before the decision. Therefore, we proceed to the results from the next analyses.

Table 3. Impact of *Masterpiece* on Agreement to Provide Service to Same-Sex and Heterosexual Couples (All businesses)

	Agreement to Provide Service			
	(1)	(2)	(3)	(4)
AD		-0.145***	-0.162***	-0.096
		(0.036)	(0.036)	(0.062)
RFRA		-0.129***	-0.122***	-0.147***
		(0.035)	(0.035)	(0.042)
Post Court	0.045***	0.045***	0.045***	0.046**
	(0.017)	(0.017)	(0.017)	(0.020)
Same Sex	0.105***	0.105***	0.105***	0.114***
	(0.017)	(0.017)	(0.017)	(0.020)
Photographer			-0.080***	-0.105***
			(0.027)	(0.032)
AD*RFRA		0.237***	0.242***	0.172**
		(0.051)	(0.051)	(0.071)
Post Court*Same Sex	-0.189***	-0.189***	-0.189***	-0.190***
	(0.024)	(0.024)	(0.024)	(0.028)
Constant	0.531***	0.608***	0.660***	0.695***
	(0.016)	(0.027)	(0.032)	(0.042)
Business Fixed Effects	Yes	Yes	Yes	Yes
Only cities (80k+)	No	No	No	Yes
Businesses	904	904	904	632
Observations	3,616	3,616	3,616	2,528
Akaike Inf. Crit.	4,215.228	4,213.357	4,211.837	2,924.932

Bayesian Inf. Crit.	4,252.400	4,269.115	4,273.790	2,983.284

Notes: ***Significant at the 1 percent level.
**Significant at the 5 percent level.
*Significant at the 10 percent level.
Models are explained in "analysis strategy".

3. Impact on pre-*Masterpiece* equal treatment businesses

The second analysis estimates the impact of *Masterpiece* on business conduct by focusing exclusively on businesses who, prior to the decision, responded favorably to both same-sex and heterosexual couples. To conduct this analysis, we created a dataset of all equal treatment businesses (N=422) and then examined their responses to same-sex and heterosexual couples after *Masterpiece.* This analysis overcomes the attrition problem that impacted analysis 1, because we only examine businesses who were not affected by attrition and were willing to provide service to both types of couple in the period preceding the decision (therefore this analysis only has two observations per business).

Table 4. Impact of *Masterpiece* on pre-Masterpiece Equal Treatment Businesses

	Agreement to Provide Service				
	(1)	(2)	(3)	(4)	(5)
AD		-0.089*	-0.097**	-0.163**	-0.107**
		(0.046)	(0.046)	(0.072)	(0.046)
RFRA		-0.059	-0.059	-0.074	-0.059
		(0.042)	(0.042)	(0.047)	(0.042)
Same Sex	-0.069***	-0.069***	-0.069***	-0.066**	-0.069***
	(0.024)	(0.024)	(0.024)	(0.029)	(0.024)
Week4			-0.050**	-0.026	-0.050**
			(0.024)	(0.029)	(0.024)
Republican Vote Rate					-0.199
					(0.149)
Photographer			-0.055*	-0.082**	-0.063*
			(0.032)	(0.037)	(0.032)
AD*RFRA		0.161**	0.163**	0.220***	0.162**
		(0.064)	(0.064)	(0.084)	(0.063)

Constant	0.825***	0.855***	0.914***	0.938***	1.018***
	(0.020)	(0.031)	(0.038)	(0.048)	(0.087)
Business Fixed Effects	Yes	Yes	Yes	Yes	Yes
Only cities (80k+)	No	No	No	Yes	No
Businesses	422	422	422	302	422
Observations	844	844	844	604	844
Akaike Inf. Crit.	859.640	872.964	880.200	630.687	882.388
Bayesian Inf. Crit.	878.593	906.131	922.843	670.320	929.770

Notes: ***Significant at the 1 percent level.
**Significant at the 5 percent level.
*Significant at the 10 percent level.

Table 4 plots the results, showing that the coefficient for sexual orientation (Same Sex) is significant and negative in all models. These results are particularly striking given that this group of businesses provided *the same treatment* to same-sex and heterosexual couples before *Masterpiece*. Indeed, the overall rates of positive response in this group were higher than the average of the general sample, such that on the first week after *Masterpiece*, 77% of the businesses contacted by same-sex couples responded favorably and in the second week, 74% responded the same. However, these response rates were considerably lower than the 86% who responded favorably to heterosexual couples on the first week (9% gap) and the 79% who responded the same on the second week (a 5% gap). The effect of sexual orientation on the previously egalitarian businesses was independent from the effect of between-week attrition (Week4 coefficient).

In addition to the effect of sexual orientation on business conduct, we see significant effects of the coefficients for legal regime. To be sure, we do not argue for any causal relationship with respect to legal regime, as it is tremendously difficult to separate the legal regime from the political and social climate in any given political unit. However, it is interesting that opposite to what one could have expected, a regime which enacted a prohibition on discrimination on the basis of sexual orientation was not associated with less discrimination, but with *more* discrimination, and that this relationship flipped in regimes that enacted, in addition to AD laws, special protections on religious freedom. Accounting for the political

conservativeness of the county (Republican vote rate) did not change these results. We revisit this finding in the next analysis.

We also note differences between business categories, such that photographers were more likely to refuse service than bakers. This finding fits our preliminary expectations given the different scope of involvement and intimacy characterizing the two professions and is robust throughout our analyses.

4. Impact on pre-*Masterpiece* providers of service to same-sex couples

We now turn to expand the analysis to include all businesses who agreed to provide service to same-sex couples before *Masterpiece*, regardless of how they responded to heterosexual couples. The underlying assumption is that any effect on these businesses, who did not discriminate against same-sex couples before the decision, is indicative of the court's influence on discrimination. A dataset of all relevant businesses was compiled (N=575) and post-*Masterpiece* responses to same-sex and heterosexual couples were examined (two observations per business). Similar to the second analysis, the third analysis overcomes the attrition problem that impacted analysis 1, because we examine businesses based on their first measurement only. As Table 5 indicates, the results are the same as in the second analysis. On the first week after *Masterpiece*, 68% of the businesses randomly contacted by same-sex couples responded favorably, as compared with 77% who responded favorably to heterosexual couples (9% gap). On the second week, 65% of the businesses contacted by same-sex couples responded favorably, as compared with 74% who responded favorably to heterosexual couples (9% gap). Between-week attrition had no significant effect on the results (Week4 coefficient).

Table 5. Impact of *Masterpiece* on pre-Masterpiece providers of service to same-sex couples

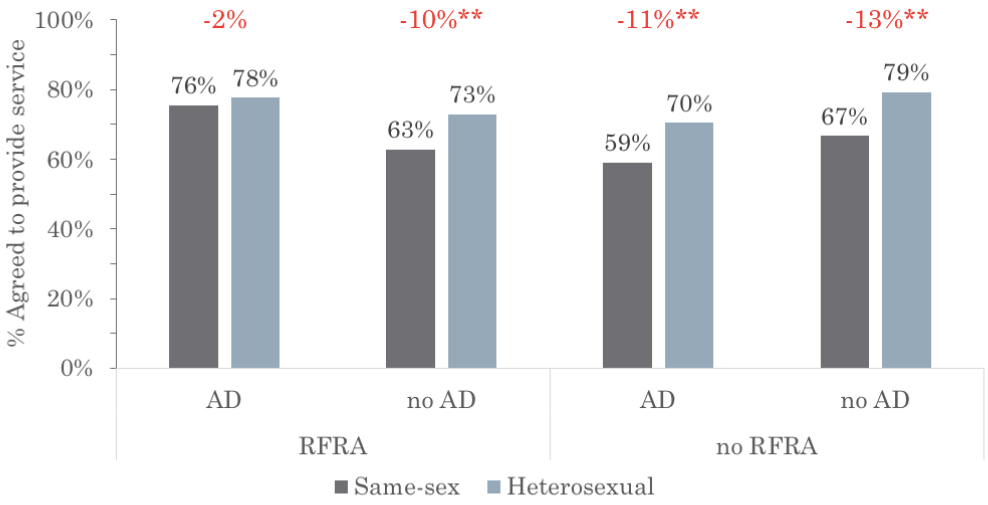
	Agreement to Provide Service				
	(1)	(2)	(3)	(4)	(5)
AD		-0.082*	-0.100**	-0.237***	-0.108**
		(0.045)	(0.045)	(0.059)	(0.045)
RFRA		-0.051	-0.049	0.051	-0.049
		(0.041)	(0.041)	(0.047)	(0.041)

Same Sex	-0.092***	-0.092***	-0.092***	-0.084***	-0.092***
	(0.021)	(0.021)	(0.021)	(0.024)	(0.021)
Week4			-0.029	-0.020	-0.029
			(0.021)	(0.024)	(0.021)
Republican Vote Rate					-0.150
					(0.144)
Photographer			-0.085***	-0.087**	-0.089***
			(0.032)	(0.037)	(0.032)
AD*RFRA		0.169***	0.176***	0.310***	0.175***
		(0.062)	(0.062)	(0.074)	(0.062)
Constant	0.755***	0.776***	0.846***	0.737***	0.924***
	(0.019)	(0.030)	(0.038)	(0.046)	(0.085)
Business Fixed Effects	Yes	Yes	Yes	Yes	Yes
Only cities (80k+)	No	No	No	Yes	No
Businesses	575	575	575	485	575
Observations	1,150	1,150	1,150	932	1,150
Akaike Inf. Crit.	1,382.301	1,394.275	1,400.267	1,177.830	1,403.220
Bayesian Inf. Crit.	1,402.498	1,429.620	1,445.710	1,221.366	1,453.712

Notes: ***Significant at the 1 percent level.
**Significant at the 5 percent level.
*Significant at the 10 percent level.

We probe further into the differences between legal categories in the Table 6, which estimates model 3 for each regime in separate. Sexual orientation had a negative effect on businesses' agreement to provide service in all regimes, except those that enacted *both* an antidiscrimination law and a religious freedom law (Figure 1). Again, the political conservativeness of the county did not explain these results.

Impact of *Masterpiece* on Providers of Service to Same-Sex Couples, by Legal Regime



Businesses = 576, Observations = 1,152

The first notable contrast is between column 1 (RFRA+AD) and column 2 (RFRA-AD) in Table 6/Figure 1, each including businesses from Indiana and Texas. Both states enacted religious freedom restoration laws, yet antidiscrimination laws were enacted, if at all, only at the municipal level. Consequently, the state of the law varies *within* those states. Against this backdrop, we find that sexual orientation had a non-significant effect in political units that enacted both laws, yet had a negative and significant effect in units that did not enact AD laws.

The second notable contrast is between column 1 (RFRA+AD), and column 3 (-RFRA +AD), the first including businesses from Indiana and Texas and the second including businesses from Iowa. Both regimes have enacted AD laws (Iowa has a State-level AD law), yet Indiana and Texas also enacted State RFRAs, whereas Iowa did not enact a RFRA or a similar statute at any level of government. Yet it is the first category where sexual orientation does not substantially impact results for same-sex couples, and in the second category—which should have been, theoretically, most favorable of all four to same-sex couples—we see a negative effect of sexual orientation on business service post *Masterpiece*.

Table 6. Impact of *Masterpiece* on pre-Masterpiece Providers of Service to Same-sex Couples, by Legal Regime

	Agreement to Provide Service			
	(1)	(2)	(3)	(4)
Same Sex	-0.021	-0.101**	-0.108**	-0.127***
	(0.042)	(0.043)	(0.049)	(0.039)
Week4	-0.006	0.004	-0.126**	-0.014
	(0.042)	(0.043)	(0.049)	(0.039)
Republican Vote Rate	0.188	-0.276	0.059	-0.351
	(0.275)	(0.351)	(0.389)	(0.217)
Photographer	-0.088	-0.190***	-0.121	-0.039
	(0.059)	(0.067)	(0.093)	(0.057)
Florist			-0.154	
			(0.099)	
Constant	0.745***	0.995***	0.840***	1.003***
	(0.137)	(0.194)	(0.196)	(0.125)
Business Fixed Effects	Yes	Yes	Yes	Yes
RFRA	Yes	Yes	No	No
AD	Yes	No	Yes	No
Businesses	139	148	115	173
% of Regime Businesses	65%	61%	55%	73%
Observations	278	296	230	346
Akaike Inf. Crit.	323.648	386.222	320.693	426.432
Bayesian Inf. Crit.	349.041	412.055	348.198	453.398

Notes: ***Significant at the 1 percent level.
**Significant at the 5 percent level.
*Significant at the 10 percent level.

5. Comparing the experiment and the control groups post-*Masterpiece*

Finally, I conduct a comparison between the experiment and the "control" group, which was contacted for the first time after *Masterpiece*. Although the makeup of the control group (N=251 businesses) is not identical to that of the experiment group (and is not powered to detect differences between legal regimes), the control group was sampled and measured following exactly the same procedures as the experiment group (post *Masterpiece*) and it is large enough to detect the two effects of interest in this analysis. First, the effect of the repeated measurement on the experiment group. Did it cause more

attrition? Second, and most importantly, whether any such effect influenced the results. Put differently, had the experiment itself caused the pattern of discrimination we see post-Masterpiece? In particular, we sought to evaluate the concern that the results are driven by unobservable factors relating to the repeated measurement, such as increased fatigue or suspicion. Therefore, in all models in Table 7 the two coefficients of interest are Control (0 if experiment and 1 if control) and the interaction between Control and Same Sex, which indicates whether the findings of same-sex discrimination post *Masterpiece* are unique to the experiment group or extend to the control group.

The analysis indicates that the repeated measurement affected the results, such that businesses in the control group were significantly more likely to respond favorably to couples of all identities as compared with businesses in the experiment group—although this result was not robust and disappeared in models 4 (including the legal covariates), 5 (only cities) and 6 (including Republican vote rate). Importantly, this effect did not interact with sexual orientation: although the baseline response rate in the experiment and control groups was somewhat different, businesses in the control group were just as likely to discriminate against same-sex couples post-*Masterpiece* as businesses in the experiment group (Experiment average: 57% favorable response to heterosexual v. 49% to same-sex couples; Control average: 66.5% versus 57%, respectively).

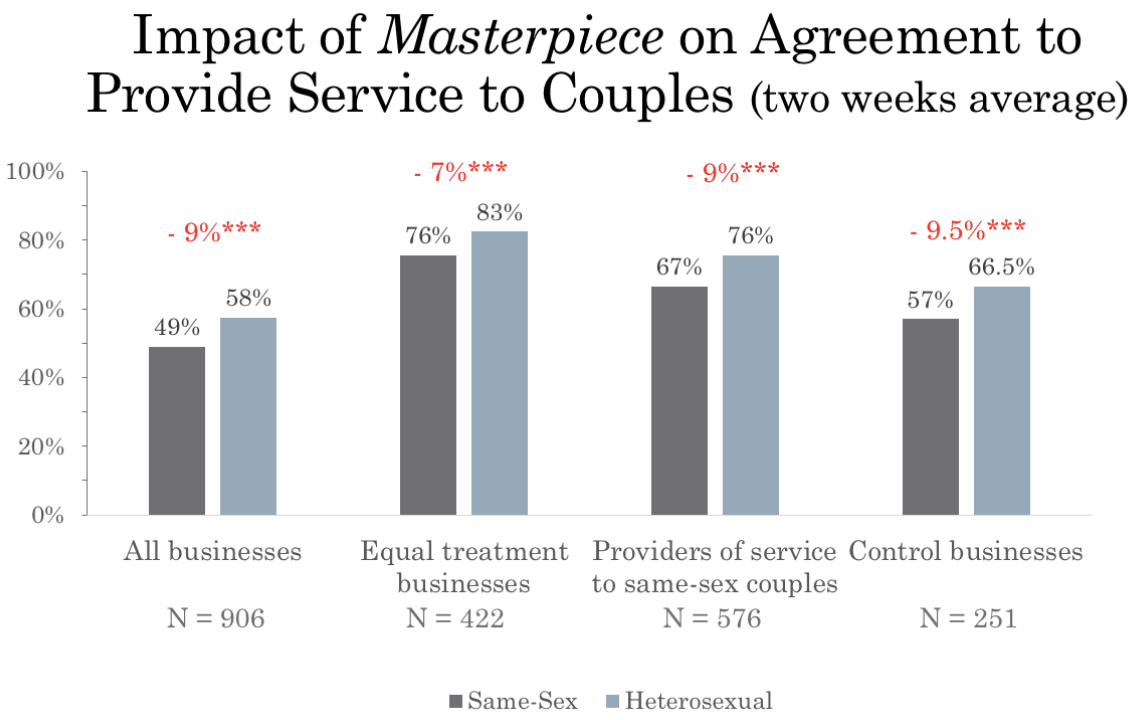
Table 7. Impact of *Masterpiece* on Agreement to Provide Service in Experiment and Control Groups

	Agreement to Provide Service					
	(1)	(2)	(3)	(4)	(5)	(6)
AD		-0.142***		-0.152***	-0.106	-0.156***
		(0.039)		(0.039)	(0.066)	(0.039)
RFRA		-0.136***		-0.132***	-0.142***	-0.132***
		(0.034)		(0.034)	(0.040)	(0.034)
Same Sex	-0.084***	-0.084***	-0.084***	-0.084***	-0.076***	-0.084***
	(0.017)	(0.017)	(0.016)	(0.016)	(0.020)	(0.016)
Control	0.089**	0.062*	0.083**	0.052	0.040	0.049
	(0.035)	(0.036)	(0.035)	(0.036)	(0.039)	(0.037)
AD*RFRA		0.257***		0.265***	0.217***	0.262***

		(0.052)		(0.052)	(0.075)	(0.052)
Week4			-0.025*	-0.025*	-0.015	-0.025*
			(0.015)	(0.015)	(0.017)	(0.015)
Republican Vote Rate						-0.074
						(0.113)
Photographer			-0.048*	-0.055**	-0.071**	-0.057**
			(0.026)	(0.026)	(0.030)	(0.026)
SameSex*Control	-0.012	-0.012	-0.012	-0.012	-0.018	-0.012
	(0.035)	(0.035)	(0.035)	(0.035)	(0.038)	(0.035)
Constant	0.576***	0.651***	0.618***	0.697***	0.712***	0.736***
	(0.016)	(0.027)	(0.024)	(0.032)	(0.040)	(0.068)
Business Fixed Effects	Yes	Yes	Yes	Yes	Yes	Yes
Only cities (80k+)	No	No	No	No	Yes	No
Businesses	1155	1155	1155	1155	866	1155
Observations	2,310	2,310	2,310	2,310	1,732	2,310
Akaike Inf. Crit.	3,014.951	3,010.766	3,024.641	3,019.338	2,264.962	3,023.433
Bayesian Inf. Crit.	3,049.432	3,062.486	3,070.614	3,082.552	2,324.989	3,092.394

Notes: ***Significant at the 1 percent level.
**Significant at the 5 percent level.
*Significant at the 10 percent level.

The summary of all general analyses, across legal regimes, is presented in Figure 2. As shown, the baseline response rate differs between the entire population of businesses and the population of 'friendly' businesses, with a track record of responsiveness. However, all populations respond to *Masterpiece* in exactly the same way: with more discrimination towards same-sex couples.



III. THE *MASTERPIECE* EFFECT: EXPLANATIONS AND IMPLICATIONS

A. Explaining the Masterpiece discriminatory effect

The *Masterpiece* field experiment finds a consistent and robust pattern of stronger discrimination towards same-sex couples after the *Masterpiece* decision. This discrimination is evident in the entire sample of businesses drawn from four different legal regimes in different US States, as well as in the population of businesses that prior to *Masterpiece* were willing to provide service to same-sex couples. We see the causal effect of *Masterpiece* both within businesses over time and between businesses randomly contacted by same-sex or heterosexual couples after the decision was rendered. The negative effect of *Masterpiece* is not an artifact of the experiment as it is identically found in the control group.

The *Masterpiece* findings exposed the highly consequential effect of law on public behavior. These findings extend previous work, that had documented the effects of the Supreme Court on public attitudes regarding

LGBTQ people, but did not document behavioral change.[110] A methodological strength of the field experiment is that it tests the effect of *Masterpiece* directly before and after the decision was rendered and is therefore able to isolate its causal effect. It would have been desirable to continue examining *Masterpiece*'s effect later in time, but subsequent legal and political developments have severed the causal link between *Masterpiece* and the market, making such examination impossible. Shortly after the decision, legislatures in several states have proposed or revived new religious liberty bills[111] and two states surveyed in the experiment—Texas and North Carolina—recently passed legislation related to religious liberty or LGBTQ rights.[112] Given the constantly dynamic legal and political landscape on these issues, whatever has been the conduct of businesses during the intervening period, it can no longer be linked to *Masterpiece*. The *Masterpiece* field experiment therefore provides the cleanest test of the decision's impact and speaks for the consequences directly stemming from the decision itself.

What explains the general effect of the *Masterpiece* decision on wedding vendors? One may suggest that *Masterpiece* was interpreted by vendors as a relief of previously-anticipated penalties for discrimination, or as a signal that the Court has little or less intention to enforce antidiscrimination law. In terms of the economic analysis of law, *Masterpiece* could have influenced perceptions regarding the probability of sanction and/or the likelihood of enforcement. However, this explanation appears less plausible. First, the *Masterpiece* decision was careful not to make any explicit determination along these lines. Although the decision was certainly presented as

---

[110] Tankard & Paluck, *supra* note 88; Kazyak & Stange, *supra* note 89; Ofosu et. Al, *supra* note 90.

[111] Including Iowa, *see* Barbara Rodriguez, *Controversial 'religious freedom' bill gets another look at Iowa Capitol*, https://www.desmoinesregister.com/story/news/politics/2019/02/18/iowa-republicans-religious-freedom-restoration-act-capitol-rfra-discrimination-bill/2909230002/ (Last updated Feb. 19, 2019); and Texas, *see* Emma Platoff, *Texas Senate approves occupational licensing bill LGBTQ advocates call a "license to discriminate"*, https://www.texastribune.org/2019/04/02/texas-senate-religious-refusal-LGBTQ-occupational-licensing/ (Reporting on S.B. 17 that would allow occupational license holders to cite sincerely held religious beliefs as a defense for license-threatening conduct or speech) (April 2, 2019).

[112] *Infra* note 116; Tim Fitzsimons, *N. Carolina is first in South to ban state funding for conversion therapy*, https://www.nbcnews.com/feature/nbc-out/n-carolina-first-south-ban-state-funding-conversion-therapy-n1038846 (Aug. 3, 2019).

potentially more expansive than its holding suggests by conservative and religious speakers, and even by concerned progressives, many media outlets did convey to the public that the decision was narrow and case specific.[113] Second, even if wedding vendors understood the decision to change their cost-benefit analysis of engaging in discrimination, it is unclear why this should have influenced the behavior observed in the field experiment. After all, the experiment was conducted over email. Vendors could have opted to ignore emails from same-sex couples or find excuses for their inability to provide service to same-sex couples also before *Masterpiece*; their responses to couples were under no threat of enforcement or sanction from the first place. Unlike face-to-face communication, where vendors must provide an answer on the spot and could be caught unprepared, emails make it much easier to avoid the detection of discrimination. Third, the negative effect of *Masterpiece* was found even in regimes where there is no prohibition on the discrimination of same-sex couples (no AD law regimes) and hence, no legal cost is associated with discrimination from the first place. For all these reasons, it is unlikely that the rise in discrimination post-*Masterpiece* is explained by its influence on the costs of engaging in discrimination, even if these costs indeed dropped.

An alternative explanation is that *Masterpiece* had an expressive effect on wedding vendors, changing their perceptions of the social norm regarding service refusal or their support of same-sex marriage. The *Masterpiece* decision is infused with messages about values and norms. The majority opinion particularly emphasizes the importance of tolerance in a free society and the need for pluralism and respect for the views of religious objectors. These parts of the decision were frequently cited by conservative and religious commentators on the decision.[114] Changes in social norm perceptions and/or personal support of same-sex marriage following the decision could explain why the decision strengthened the impetus of discrimination even if the probability of detection had not changed. This explanation is also supported by the evidence on the impact of the Supreme Court on social norms and support of same-sex marriage in *Obergefell*.[115] Both Tankard and Paluck and Kazyak and Stange found that individuals

[113] *Supra* note 80.
[114] *Supra* notes 81-84.
[115] Tankard & Paluck, *supra* note 88; Kazyak & Stange, *supra* note 89.

shape their perceptions of the prevailing social norm and where it is headed, as well as their support of same-sex marriage, in line with the message communicated by the Court. Whereas the *Obergefell* court sent a strong message of LGBTQ and marriage equality, the *Masterpiece* court stressed the importance of tolerating and respecting religious objection to same-sex marriage. The attitudinal effect of the two decisions appears to have been similar, only opposite in direction.

The results encourage further studies of the effect of *Masterpiece* and of religious exemptions and additional legal changes more generally—including statutory exemptions. One question that the current article leave open is the specific effect of *Masterpiece* on religious vendors. The field data does not include information on the religiosity of vendors and the strength of their belief in traditional marriages, and is therefore unable to conclude how the decision influenced religious vendors in particular. Future studies, including potentially survey experiments, could answer this question by measuring religiosity and specific beliefs and controlling for these factors in measuring religious exemptions' effects.

B. Implications for legislators

The legislative mismatch between the protections of LGBTQ people and religious objectors across the country is a cause for worry and concern on both ends of the political spectrum. The two most common regulatory vehicles to afford such protections—AD laws and RFRAs—have been mostly stalled in recent years due to heightened anxiety about the consequences of AD laws for religious objectors and of RFRAs for LGBTQ people. Just recently in May 2019, during a heated debate on the floor of the Texas House about an amendment of the Texas RFRA, members of the LGBTQ caucus questioned the bill's sponsors extensively about how the bill might spark discrimination and tearfully warned that the bill "perpetuates the rhetoric that leads to discrimination, to hate and ultimately bullying that leads to the consequence of people dying."[116] The last states to have enacted a new RFRA were Arkansas and Indiana in 2015, and the resulting backlash

[116] Emma Platoff, *Texas House passes religious liberty bill amid LGBTQ Caucus' objections*, THE TEXAS TRIBUNE, https://www.texastribune.org/2019/05/20/texas-religious-liberty-bill-passes-lgbtq-caucus-fear-hateful-rhetoric/ (May 20, 2019).

deterred about 10 other states from following that route.[117] The last state to have enacted an AD law prohibiting sexual orientation discrimination in public accommodations was Delaware in 2009.[118] Twenty-eight states have not yet enacted such laws.[119]

The *Masterpiece* field experiment conducted a first of its kind examination of the implications of the AD-RFRA mismatch by testing the behavior of wedding vendors from states that are highly similar in terms of their economic, social, and political climate, yet model four different legal regimes: with or without a RFRA; and with or without an AD law. The findings revealed that the introduction of a federal religious exemption—in the form of *Masterpiece*—had the same negative impact on same-sex couples in three of the four regimes, but not in regimes that were regulated by both a RFRA *and* an AD law. Intriguingly, the differential effect of *Masterpiece* was sometimes observed between cities within the same RFRA state that differed in whether they had an AD law or not (e.g., Dallas versus Houston), and these differences were associated with significant consequences for discrimination.

Before I discuss the potential implications of these results, several caveats are due. To be sure, no causal inferences can be drawn from the results. Therefore, I am not arguing that the (in)existence of one law or the other is the cause for the *Masterpiece* effect. First, legal regimes are considerably richer and more nuanced than the letter of the law can reveal, and they are influenced, among other factors, from local administrative and judicial decisions that were not captured in the analysis of the results. Second, legal differences between otherwise similar political units could be the result of unobservable variables that could be the actual causes of differences in

---

[117] *2016 State Religious Freedom Restoration Act Legislation*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/civil-and-criminal-justice/2016-state-religious-freedom-restoration-act-legislation.aspx (Dec. 31, 2016). The trend persisted in the following year and ever since, *Id.*

[118] DEL. CODE tit. 6, §4504, S.B. 121 (2009) (amending 28 sections in the Delaware Code to include sexual orientation).

[119] Out of which, two states—Michigan and Pennsylvania—recently interpreted the prohibition on 'sex' discrimination in their law as including sexual orientation and gender identity. *See, Public Accommodations Non-Discrimination*, MOVEMENT ADVANCEMENT PROJECT (Jan. 15, 2019) https://www.lgbtmap.org/img/maps/citations-nondisc-public-accom.pdf

discrimination. For example, the social and political climate that produced a certain legislation might have *also* shaped the conduct of local businesses; and such explanation is probably more likely than the assumption that wedding businesses are familiar with the laws of their political unit.

The underlying causes of the findings aside, the results carefully suggest two observations about the implications of the legislative mismatch: First, that antidiscrimination laws do not necessarily safeguard LGBTQ equality or protect from increase in discrimination. Second, that RFRAs are not necessarily detrimental to the operation of LGBTQ equality on the ground.

1. The push for federal and state AD laws should not forsake local AD laws

That antidiscrimination laws do not necessarily ensure equality is not, on its own, novel. Extensive empirical research has repeatedly exposed and documented the failures of antidiscrimination law to prevent and remedy discrimination in practice.[120] Yet it is interesting to observe that regimes that enacted an AD law no RFRA fare *worse* than comparable regimes that enacted both laws. Iowa, for example, has a long tradition of protection and advancement of LGBT rights. Iowa led the way for other states in invalidating its sodomy law already in 1976 and being one of the first states to recognize same-sex marriage.[121] The state enacted a state-wide ban on sexual orientation discrimination and failed efforts to enact a RFRA in Iowa several times, including recently, due to concerns about the potentially detrimental effects of such act on LGBT discrimination.[122] Against this background, one could expect that the social and political climate that produced Iowa's legal regime would be the most favorable to same-sex couples of all four regimes. Instead, business behavior in Iowa is found to be indistinguishable from regimes that neither have an AD nor a RFRA (North Carolina) and even from regimes that have no AD but do have a RFRA (certain localities in Texas and Indiana). In contrast, regimes that have both

[120] For a comprehensive review based on comprehensive data see ELLEN BERREY, ROBERT L. NELSON & LAURA BETH NIELSEN, RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY (2017).

[121] *See* note 91.

[122] *See* Legislative Tracker, Iowa Religious Freedom Restoration Act (HF 258), https://rewire.news/legislative-tracker/law/iowa-religious-freedom-restoration-act-hf-258/ (Feb. 19, 2019) (documenting the failure of several bills in 2016 and 2018 and the stalling of a 2019 bill).

an AD and a RFRA (other localities in Texas and Indiana) did not show the negative *Masterpiece* effect.

This pattern raises the question whether AD laws vary in their effectiveness based on the level of their enactment—namely, whether municipal AD laws are more effective than state AD laws. This possibility runs counter to the intuition of LGBT advocacy groups in many AD-less states. Some of these groups intensified their struggle for state-level AD legislation following *Masterpiece*, claiming that municipal legislation is insufficient and "do not carry the force that a state law would".[123] Clearly, enacting a series of municipal ordinances is less efficient than enacting one law that covers all municipalities and provides legal recourse for 100% of the state population. Yet there are two potential reasons for why local AD legislation fares better in reducing discrimination than state-level legislation. First, legislation at the local level may better represent the preferences and behavioral intentions of the political community.[124] Therefore, the enactment of a municipal AD law by a certain community likely provides a more reliable commitment to equality and nondiscrimination than the enactment of a state AD law. Second and relatedly, because municipal legislation is more representative, it could be more successful in persuading residents that have not yet bought to the norm to revise their practices. According to the expressive theory of law, "[a]s long as legislation is positively correlated with popular attitudes or opinions, then it will cause individuals to revise their beliefs about the expected approval or disapproval and to act accordingly."[125] If this proposition holds in the present case, the fact that a municipal AD law represents the norm of the immediate community increases its ability to influence individuals from that community to conform with the norm. This ability could be compromised the higher up the ladder a certain legislation 'climbs' (namely, we could expect state law to succeed less in revising behavior than municipal law, and federal law to have even less success than state law). The decrease in effectiveness is especially likely in diverse states,

[123] *See* Platoff, *supra* note 79, and the sources she cite.

[124] For a discussion of how cities promote democratic self-governance and representation better than states, *see* Yishai Blank, *City Speech*, 54 HARV. C.R-C.L. L. REV. 365 (2019).

[125] Richard McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 343 (2000). *See also* Cooter, *Expressive Law and Economics*, 27 J. L. STUD. 585: 595 (1998) (hypothesizing that enacting a norm can increase the number of people who follow it).

where communities that adhere to different norms could respond to law very differently.[126]

Given that the findings with respect to state differences are correlational and could be influenced from a variety of additional factors, these conclusions are tentative and should be further examined in future studies.

One implication for the interim period is not to abandon local initiatives to enact AD laws or prioritize them as less urgent or important than state-level initiatives. Assuming that equality movements care not only about the law on the books but also (and perhaps more so) about law on the ground, including the prevention of actual discrimination and the improvement of people's lives and opportunities, local AD laws appear to contribute greatly to achieving these goals.

2. RFRAs are not necessarily recipes for discrimination and should be pre-tested to that effect

The second important finding that emerges from the comparison of legal regimes, is that RFRAs are not necessarily detrimental to the operation of LGBTQ equality. This finding is arguably is more surprising and potentially of broad relevance. The enactment of RFRAs and other protections of religious liberty has been the focus of intensive debate in recent years, and one of the major concerns had been that such laws would increase discrimination against sexual minorities. I already alluded to the levels of anxiety and controversy that characterize this issue. States that enacted or considered to enact RFRAs were threatened with high-impact boycotts, and Indiana itself was the subject of such boycott after passing its RFRA in 2015, losing 12 conventions and $60 million in revenue.[127] The Indiana legislature quickly passed a "fix" that clarified that the new Act does not trump local AD laws,[128] a provision very similar to the one that has been part of the Texas

[126] In such cases opposing communities could react against the law. *See* Netta Barak-Corren, Yuval Feldman and Noam Gidron, *The provocative effect of law: Majority nationalism and minority discrimination*, 15(4) JELS 951 (2018).

[127] James Briggs, *RFRA 'Fix' Was Enough to Keep Tourists Coming to Indianapolis*, DES MOINES REGISTER, https://www.desmoinesregister.com/story/money/2017/02/03/briggs-rfra-fix-enough-keep-tourists-coming-indianapolis/97146094/ (Feb. 3, 2017).

[128] *See supra* notes 60, 61.

RFRA from its inception.[129]

The results from the *Masterpiece* field experiment indicate that the combination of religious liberty protections of the Texas-Indiana type with AD laws (at the local level) was resistant to the negative effect of *Masterpiece* on discrimination towards same-sex couples. One potential explanation is that the tension built into these hybrid regimes led businesses to reflect and contemplate their positions in advance—prior to *Masterpiece*—more, perhaps, than businesses in regimes where the tension was less salient. Having already formed a position, businesses in hybrid regimes were possibly more resistant to the influence of *Masterpiece*.[130] Notably, these businesses were not merely more consistent in their behavior; they were also the least discriminatory of same-sex couples post-*Masterpiece* (see Figure 3). Seventy-six percent of hybrid regimes businesses agreed to provide service to same-sex couples, compared with 59-67% of businesses in other regimes.

As with the findings regarding AD regimes, the relationship between hybrid regimes and sexual orientation discrimination should be further examined. In particular, RFRAs come in many shapes and forms—e.g., with or without recourse against local governments, private lawsuits, and civil rights law.[131] Different RFRA designs could have different impact on discrimination, especially as these designs interact with existing or inexistent AD laws. To be sure, businesses in RFRA regimes that had no AD laws showed strongly the negative *Masterpiece* effect. Caveat is required before enacting a new RFRA or amending an existing act.

Alongside this caveat, the findings regarding hybrid regimes provide tentative hope for scholarly and political efforts—most notably, Professor Wilson's and others' work—that marriage equality and religious liberty could be reconciled in legislation somehow.[132] An important implication of the *Masterpiece* field experiment is that such efforts should rely on reliable and robust empirical evidence regarding the likely consequences of the

---

[129] *Id*.

[130] I thank Stephanie Barclay for proposing this point.

[131] *Supra* notes 53-60 and the adjacent text.

[132] *See, e.g.*, Robin Fretwell Wilson & Anthony Michael Kreis, *Embracing Compromise: Marriage Equality and Religious Liberty in the Political Process*, 15 GEO. J. GENDER & L. 485 (2014).

proposal on sexual orientation discrimination.

To do that, I propose pre-testing RFRAs (and any other similar mechanism). Lawmakers and law professors must not speculate the outcomes of their proposals or treat them as self-evident. As the findings of the *Masterpiece* field experiment teach us, speculations and assumptions that do not rely on directly relevant data are no good. The discipline of empirical legal studies have advanced to offer a variety of methods—including experimental surveys and qualitative in-depth interviews—that could facilitate testing the likely effects of proposed policies in advance.

For example, a legislature in any given state could collect a representative sample of the state population, and then randomly expose different groups of the population to alternative bills and examine whether exposure to one bill (compared with the others, or no bill) generates more or less antigay bias in the population, or produces more or less accurate understanding of the appropriate and inappropriate behavior. Lawmakers could either devise their own decision-making dilemmas to probe citizens' understanding of the proposed law, or they could rely on one of the many measures established in psychological research to capture bias and social norms perceptions that could develop in response to the proposed law.[133]

Clearly, pre-testing laws requires collaboration between lawmakers and empirical legal scholars, or even the establishment of an in-house research department that could execute empirical studies for legislatures. Yet the benefits of such approach greatly exceed its costs.

First, basing legislation on data, rather than on speculations, is a positive good which improves the quality of the legislative process. Second, the fears and anxiety that accompany religion-equality conflicts prevent the advancement of both AD laws and RFRAs all around the nation and exacerbate cultural divides and political polarization. Were the opposing parties to suspend their assumptions about the consequences of proposed policies and subject them to a rigorous empirical test, they might have been able to approach the proposals more openly. In addition, the interim phase of

[133] The literature is huge, but see for instance Ofosu et. al, *supra* note 90 and Tankard & Paluck, *supra* note 88.

subjecting bills to an a-priori empirical test, before legislating them, will create bipartisan collaboration in designing the research. Pro-religion and pro-LGBTQ legislators will have to sit down and decide what bills they want to test and what measures are needed to capture the consequences they fear, if these are real. For example, they will need to draft together the vignettes (or scenarios) they are interested in probing citizens' reactions to. This deliberation could clarify the stakes for both parties, get the parties to think more clearly about their goals and concerns, and concretize the debate going further. The results would hopefully resolve the debate in one direction or the other and provide informed ground for any decision regarding the legislation.

C. Implications for courts

The findings of the *Masterpiece* field experiment answer several legal questions preoccupying the courts.

First, courts today are the arbitrators of the debate on the consequences of religious exemptions. Complainants of discrimination and supporting amici frequently warn from the expansion of discrimination towards same-sex couples if religious exemptions are granted. Religious objectors and supporting amici consistently argue that this concern should be dismissed because "ample alternative providers exist".[134] As a result, courts ask what the consequences of their decisions are likely to be—as did Justice Kennedy, who penned the majority opinion in *Masterpiece*[135]—but thus far they had no data to answer this question.

The *Masterpiece* field experiment provides this data for the first time, documenting the scope of refusals to same-sex couples as compared with opposite-sex couples in response to the *Masterpiece* decision. Courts now have concrete evidence from different legal regimes in the U.S., data that was thus far the object of concerns and speculation. Importantly, these data are

---

[134] Douglas Laycock & Thomas C. Berg, *Here is What You Missed in the Supreme Court Ruling in Same-Sex Wedding Cake Case*, DALLAS NEWS, https://www.dallasnews.com/opinion/commentary/2018/06/14/missed-supreme-court-ruling-sex-wedding-cake-case (June 2018); *Masterpiece Cakeshop*, *supra* note 1, Tr. of Oral Arg. 45 (U.S. AG arguing in support of the baker that "products are widely available from many different sources").

[135] *Supra* note 13.

not drawn from liberal strongholds but from states that are either at the national average or more conservative than average. They show courts that markets alternatives *do* exist, *and* that granting a religious exemption encourages discrimination towards same-sex couples nevertheless. Justice Kennedy's concern that more wedding vendors would refuse to provide service to same-sex couples following *Masterpiece* is answered in the affirmative.

Now that data are available, we can also conduct more nuanced analyses of the consequences of exemptions. Take the 9% gap in willingness to serve same-sex and opposite-sex couples that was documented in most analyses. Now consider the typical couple, that contacts about 10 vendors in the process of organizing the wedding, including photographers, bakers, florists, videographers, venues, DJs, bridal/groom salons, calligraphers, jewelers, wedding planners, and more. (One could argue that this is a conservative estimate as couples typically contact several potential vendors in each category). Although photographers were generally less responsive (to all couples) than other businesses, the negative effect of sexual orientation was robust across business types. It therefore appears that the negative *Masterpiece* effect applies generally across different types of wedding vendors. Each vendor-couple interaction presents an independent risk of incurring discrimination.[136] Therefore, the aggregate risk that same-sex couples would encounter discrimination at least once in their business interactions post-*Masterpiece* is a function of the average risk posed by each vendor and the overall number of interactions. This results in an 88% risk of discrimination[137] and this risk would be higher if the couple eventually

[136] Clearly, independent vendors in one locality could be different than independent vendors in another locality, as each locality could have different levels of antigay bias and demonstrate different levels of discrimination. In that sense, the risk per vendor is not entirely independent from the risks posed by close-by vendors. However, the regression analyses controlled for county-level conservativeness and city size and the negative effect of *Masterpiece* on couple's identity were robust to the inclusion of these variables. Therefore, on average, the assumption of independent risks holds.

[137] In probabilistic terms, the question is: what is the probability that at least one of the vendors will discriminate against the couple, given 10 vendors and that the average vendor poses a 9% discrimination risk? To answer the question, one needs to calculate the odds that *all* 10 vendors do *not* discriminate (81% per vendor) and subtract that from 1. P(at least one vendor discriminates) = $1-0.81^{10} = 0.88$.

interacts with more vendors.

These troubling consequences establish a pillar of the strict scrutiny doctrine of religious burdens. Under this doctrine—which was backtracked in *Smith* but revived by federal and state RFRAs and in some states' constitutions[138]—a law that substantially burdens the free exercise of religion must be the least restrictive means to further a compelling governmental interest. This is the reason why judges are rightfully concerned about the consequences of exemptions. To know whether the enforcement of AD laws generally and without exemptions is the least restrictive mean to ensure access to public accommodations, courts need to know whether religious exemptions detract from this compelling goal. The results of the *Masterpiece* field experiment establish that the decision substantially detracted from this goal by expanding discrimination against same-sex couples in most regimes. Hence, the evidence vindicates states that insist on enforcing their AD laws without providing exemptions.

The second implication for courts involves the specific reasoning of the *Masterpiece* decision. The majority justices, and particularly Justice Kennedy, clearly wished to avoid settling the larger tension between religious liberty and marriage equality and only carve a narrow decision that would not grant wedding vendors a license to discriminate against same-sex couples. This strategy did not serve its own goals. In contrast, *Masterpiece* increased discrimination in the wedding industry and bolstered pro-religion legislators and advocates in their attempts to expand religious protections and narrow the scope of antidiscrimination protections.[139] The two subsequent unreasoned decisions in *Arlene Flowers*[140] and in *Klein*[141] that vacated and remanded other wedding vendors cases despite very different factual circumstances might have strengthened the impression that *Masterpiece* was not so narrow after all. Assuming the Court did not intend to expand

[138] *Supra* notes 41-46. In 29 states, the standard of scrutiny is intermediate scrutiny or even rational basis review.

[139] S*ee* Simpson, *supra* note 79 (citing the head of the Indiana AFA saying he sees *Masterpiece* as a green light to push forward litigation against local AD laws in Indiana); Platoff, *supra* notes 112 and 116 (describing bills in Texas expanding protections for religious professionals and corporations).

[140] *Supra* note 2.

[141] *Supra* note 3.

discrimination against same-sex couples, could other judicial strategies have fared better?

This question is of crucial importance considering the challenges facing the Court in its upcoming terms. This term, the Court will decide a group of cases involving the interpretation of the term 'sex' in the Civil Rights Act and will decide whether 'sex' includes sexual orientation and gender identity.[142] One of these cases invoked a RFRA claim in lower courts (although this claim will not be addressed by the Supreme Court).[143] Given the poor outcomes of the avoidance strategy used in *Masterpiece* and the Court's proven ability to shape public attitudes and public behavior in the direction of less or more bias and discrimination,[144] the Court should opt for a clearer and less subversive decision that will provide specific, unambiguous behavioral instructions. The Justices should not mislead themselves to think that evading the big questions will avoid the undesirable outcomes.

Finally, the expansion of discrimination post-*Masterpiece* requires courts to develop a better account of the burden that AD laws place on religious objectors. The dominant theory of the relationship between religious exemptions and religious objection that has been put forth in litigation is that the only effect of exemptions is to relieve devout individuals, who would have not provided service to same-sex couples in any event, of state penalties. Under this theory, the availability of exemptions should not change the scope of religious objection, only its consequences for the objectors.[145]

But this theory appears to be contradicted as a matter of fact. Instead, the seeming availability of a religious exemption changed the scope of refusal to same-sex couples. To the extent that this effect is due to *Masterpiece*'s encouragement of religiously motivated objection, the data unsettle the theory that religious objection is a result of permanent and fixed features

---

[142] *Supra* note

[143] R.G. Harris, *supra* note 24 (arguing that Title VII should not be enforced against a funeral home and compel the employment of a transgender woman because this would constitute an unjustified substantial burden upon the owner's sincerely held religious beliefs, in violation of RFRA).

[144] Compare the Masterpiece results with Ofosu et. al, *supra* note 90 and Tankard and Paluck, *supra* note 88.

[145] As argued in Berg and Laycock's brief, *supra* note 73 at 32.

stemming from the objectors' religious identity. Clearly, there is always the possibility that some religious objectors in no-exemption regimes would decide that they cannot afford the penalties that would attach to acting in accordance with their religious conscience despite the harms these penalties cause them.[146] But what the *Masterpiece* field experiment shows is that wedding vendors changed their behavior in the absence of any state penalty and any likelihood of enforcement. The option to ignore an email from a same-sex couple was identically available to all vendors before and after *Masterpiece*, without anyone ever knowing their reasons for doing so.[147] Wedding vendors changed their behavior not because *Masterpiece* relieved them of a penalty associated with their behavior, but due to other reasons—more likely, the expressive effect of the decision (see Part III.A). These findings require courts to probe deeper into the characteristics of religious objection and explore more carefully the assumptions regarding the magnitude of the harm caused to religious objectors from the *un*availability of exemptions.

Clearly, this is a highly sensitive issue, and posing the question by no means underestimates the possibility that such harm is real and grave for some religious objectors. At the same time, law in general and the Supreme Court in particular always navigate two different levels of generality: the specific case and the general rule. In specific cases involving specific objectors, the harm from not providing an exemption could be enormous. Yet because each decision also contributes to the formation of a general rule, courts cannot ignore how specific decisions eventually create precedents that influence the availability of rights and remedies for everyone, including individuals who do not necessarily share the features of the specific objector. The *Masterpiece* effect indicates that there are wedding vendors in this broader category who would be willing to provide service to same-sex weddings with relative ease, but become unwilling to do so once an exemption is announced. We therefore need a better theory of religious objection, one that would allow us to consider different types of objections and potentially distinguish between them, given the consequences that religious exemptions entail for society. Future analyses would need to consider how to provide justice in particular cases without creating inadvertent and unjust consequences across the board.

---

[146] I thank Rick Garnett for offering this valuable insight.

[147] *Supra* the discussion of the economic explanation for the *Masterpiece* effect in Part III.A.