

## THE ICING ON THE CAKE: HOW BACKGROUND FACTORS AFFECT LAW FACULTY PREDICTIONS IN *MASTERPIECE CAKESHOP*

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### I. INTRODUCTION

In *Craig v. Masterpiece Cakeshop, Inc.*, a Colorado cake shop and its owner sought review of the Colorado Civil Rights Commission's issuance of a cease and desist order for refusing to make a custom wedding cake for a same-sex wedding.<sup>1</sup> The case brings up issues involving compelled expressive speech and the Free Exercise Clause of the First Amendment.<sup>2</sup> The Colorado Court of Appeals held that neither of these constitutional rights was violated by the Colorado Civil Rights Commission's actions.<sup>3</sup> The Supreme Court of the United States granted the shop owner's petition to review the case.<sup>4</sup> Supreme Court oral arguments were heard on December 5, 2017.<sup>5</sup>

This article provides the results of an online survey of U.S. law school faculty. *Masterpiece Cakeshop* was selected for this survey because it is likely to evoke emotion. Therefore, it is an ideal case to assess how background factors affect Supreme Court predictions among law school faculty.

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1. 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 137 S. Ct. 2290 (2017).
2. U.S. CONST. amend. I.
3. *Masterpiece Cakeshop*, 370 P.3d at 285–86.
4. *Id.* at 276.
5. Transcript of Oral Argument, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, No. 16-111, 2017 WL 6025739 (Dec. 5, 2017).

## II. METHODOLOGY

The survey was sent to over 800 law school faculty members. Law schools were selected alphabetically within each law school tier.<sup>6</sup> Faculty email addresses were obtained using each law school's faculty directory. Four different survey links were utilized in order to stratify results based on law school tier. From December 11–31, 2017, 93 law school faculty members responded to the survey (collectively, the “respondents”). The survey consisted of the following eight questions.

1. Which best describes your prediction of how the Supreme Court will rule in the *Masterpiece Cakeshop* case?
  - A. The Supreme Court will not allow bakers to refuse to make custom wedding cakes for same-sex weddings.
  - B. The Supreme Court will allow bakers to refuse to make custom wedding cakes for same-sex weddings under free exercise of religion grounds.
  - C. The Supreme Court will allow bakers to refuse to make custom wedding cakes for same-sex weddings under free speech (compelled speech) grounds.
2. Which best describes how you would personally rule in the *Masterpiece Cakeshop* case?
  - A. The Supreme Court will not allow bakers to refuse to make custom wedding cakes for same-sex weddings.
  - B. The Supreme Court will allow bakers to refuse to make custom wedding cakes for same-sex weddings under free exercise of religion grounds.
  - C. The Supreme Court will allow bakers to refuse to make custom wedding cakes for same-sex weddings under free speech (compelled speech) grounds.
3. What is your level of awareness of this case?
4. Which best describes your primary area of study?
5. How would you describe your political affiliation?
6. How would you describe your level of religious involvement?

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6. The traditional four-tier structure was implemented using the U.S. News & World Report 2018 rankings. See *Best Law Schools*, U.S. NEWS & WORLD REPORT, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?int=alld108> (last visited Feb 6, 2018).

7. Have you ever attended a same-sex wedding or same-sex union celebration?
8. Have you ever owned a business that was your primary source of income?

### III. RESEARCH QUESTIONS

1. Will law school faculty be able to separate their personal opinions about *Masterpiece Cakeshop* from their predictions?
2. Will predictions and personal opinions about *Masterpiece Cakeshop* be correlated with the following background factors: case awareness, area of study, political affiliation, religious involvement, business ownership experience, same-sex union celebration participation, and law school tier rating?

### IV. RESULTS

1. Will law school faculty be able to separate their personal opinion about *Masterpiece Cakeshop* from their prediction?

The participants' answers to how they personally would rule in the case corresponded to their answers to how they predicted the Supreme Court would rule in the case. However, it was not as significant as initially expected. Out of the 67% of those who predicted that the Supreme Court would rule in favor of the baker, 70% of them personally would rule *against* the baker.

2. Will predictions and personal desires about *Masterpiece Cakeshop* be correlated with the following background factors: case awareness, area of study, religious involvement, business ownership experience, same-sex union celebration participation, and law school tier rating?

#### A. Case Awareness

Respondents with a low awareness of *Masterpiece Cakeshop*<sup>7</sup> were significantly more likely to predict that the baker would win on free speech grounds (44.4%, as compared with 32.6% overall). Interestingly,

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7. Defined as respondents who answered 1 to 3 out of 10 on the awareness question.

no respondent in this group personally would rule in favor of the baker on free speech grounds. Respondents who said they had a high awareness of the case<sup>8</sup> did not deviate far from the overall Supreme Court prediction or desired outcome averages.

### B. *Area of Study*

Respondents who primarily teach constitutional law, the area most closely associated with *Masterpiece Cakeshop*, were more likely to predict that the Supreme Court will rule in favor of the baker on free speech grounds (40%, as compared with 30% for non-constitutional law faculty). However, there was far from a consensus among constitutional law faculty; 35% predicted the baker would lose, and 25% predicted the baker would win on free exercise of religion grounds.<sup>9</sup> Not surprisingly, faculty who teach in the area of constitutional law reported an overall higher level of awareness of *Masterpiece Cakeshop* than the average respondent.

### C. *Political Affiliation*

Perhaps the largest disparity in the survey was found in analyzing the differences between conservative and liberal respondents. While 91.8% of liberals would personally rule against the baker, 0% of conservatives would.<sup>10</sup>

### D. *Religious Involvement*

It appears that religious involvement affects not only the respondent's desired outcome of the case, but also his or her prediction. Respondents who identified as having low-to-no religious involvement<sup>11</sup>

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8. Defined as those respondents who answered 8 to 10 out of 10 on the awareness question.

9. Unfortunately, the sample size in this survey does not allow any further analysis beyond that of faculty in the constitutional law field. There were twenty respondents who identified as primarily teaching constitutional law. No other category had enough responses. The survey offered the following options: civil procedure/torts, constitutional, contracts, corporation/taxation, criminal, family, intellectual property, international, legal writing, professional responsibility, and property. The option for write-in responses was also provided. Here, twenty additional areas of study were produced by respondents.

10. Although beyond the primary purpose of this survey, I will point out that conservatives were more likely to have owned a business (25%, as compared with 16% respectively) and less likely to have attended a same-sex celebration (22.2%, as compared with 64.5% respectively). Also, conservatives were, on average, more religiously involved than liberals.

11. Defined as those respondents who answered 1 to 4 out of 10 on the level of religion involvement question.

were less likely to predict the baker would win on free exercise of religion grounds (26.9%, as compared with 34.4% overall). They were also less likely to personally favor that result (5.9%, as compared with 14.1% overall).

Conversely, respondents with a higher level of religious involvement<sup>12</sup> were more than twice as likely to personally favor the outcome of the baker winning on free exercise of religion grounds (30.8%, as compared with 14.1% overall). Unexpectedly, 61.5% of this group would personally rule against the baker. This is still significantly less than the 86.3% from the religiously uninvolved group.<sup>13</sup>

Surprisingly, the moderately-religiously involved participants<sup>14</sup> were the largest outliers in some respects. For example, only 26.9% of the low-involvement group and 34.6% of the high-involvement group predicted that the baker would win on free exercise of religion grounds, while 60% of the moderately-involved group did.

The moderately-religiously involved group also had the largest disparity between how they would personally rule and how they predicted the Supreme Court will rule. In the moderate group, 80% predicted an outcome other than what they personally wanted, compared to 53% of the low-involvement group and only 46.2% of the high-involvement group.<sup>15</sup>

#### *E. Business Ownership Experience*

Business ownership experience, or a lack thereof, had no significant affect with respect to how the respondent would personally rule in the case. Predictions on how the Supreme Court will rule, however, did deviate based on business ownership experience. Those with business ownership experience were 22.5% more likely to predict the baker would win than those without business ownership experience.

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12. Defined as those respondents who answered 7 to 10 out of 10 on the level of religion involvement question.

13. The reason over 60% of the highly religiously involved group would personally rule against the baker is unclear. Perhaps they don't want to be associated in the same group as Jack Phillips, the baker in the *Masterpiece Cakeshop* case. It is also possible that "religious involvement" is simply too broad a category.

14. Defined as those respondents who answered 5 or 6 out of 10 on the level of religion involvement question.

15. For purposes of this statistic, only the ultimate conclusion of the baker winning or losing was considered. Whether the baker wins on free exercise or free speech grounds was not considered. This survey did not probe any further into religion. It would be interesting to see a further breakdown within this group including exactly what religion is being practiced. Even among those who identify as "Christian" there is wide disagreement regarding same-sex marriage.

It is not surprising that those with business ownership experience would be more likely to predict that the Supreme Court would rule in favor of the business owner in *Masterpiece Cakeshop*. However, if this is the result of their bias in favor of fellow business owners, then it is peculiar why this group does not correspondingly desire for the baker to win; 72.2% of those with business ownership experience said they wanted the baker to lose which is comparable to the 78.3% overall on this question. Perhaps these respondents were concerned with how being grouped together with owners who discriminate would affect their reputation. More in-depth research would need to be conducted in order to better understand this seemingly contradictory result.

#### F. *Same-Sex Union Celebration Participation*

Those who have attended a same-sex celebration are more likely to personally prefer that the baker lose than those who have never attended a same-sex celebration (88.5%, as compared with 68.4% respectively).<sup>16</sup> However, with respect to Supreme Court predictions, those who have attended a same-sex celebration were more likely to predict that the baker would win than those who have not attended a same-sex celebration (69.8%, as compared with 60.5% respectively).<sup>17</sup>

#### G. *Law School Tier*

Surprisingly, tiers 1 and 4 are more similar than any other tier pairing when it comes to predicting the Supreme Court's outcome. Around 30% of both tier 1 and tier 4 faculty predicted the baker would win on free speech grounds while tiers 2 and 3 averaged 34.75%. Also, 29.4% of tier 1 faculty and 24.1% of tier 4 faculty predicted the baker would lose, while tiers 2 and 3 averaged 40.4% on this issue.

As for the desired outcome, a slight trend emerges when respondents are identified by their law school tier. The outcome of the baker losing is most desired among tier 1 respondents (87.5%), lowest among tier 4

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16. It is beyond the scope of this survey to analyze the reason for this difference. Further research could be conducted to determine if this difference is due to whether people who happen to have more associations with same-sex couples evolve into proponents of same-sex marriage or if people who are already proponents of same-sex-marriage are therefore more likely to associate with same-sex couples.

17. Although beyond the scope of this survey, further research into why people who have attended a same-sex celebration are more likely to predict that the same-sex couple in *Masterpiece Cakeshop* will lose would be enlightening. Perhaps more time spent with same-sex couples and hearing of their experiences leads to a more pessimistic view of how they will be treated at the Supreme Court.

respondents (62.1%), and the middle two tiers are between, averaging 85.1%.<sup>18</sup>

## V. PREDICTING SUPREME COURT DECISIONS

The overall results of this survey are indicative of how difficult it is to predict Supreme Court decisions. Respondents were almost perfectly split in their predictions with 33.3% saying the baker would lose, 34.4% saying the baker would win on free exercise of religion grounds, and 32.3% saying the baker would win on free speech grounds. Therefore, 66.7% of respondents predicted that the Supreme Court would rule in favor of the baker. However, the ability of legal specialists to predict Supreme Court outcomes is not impressive. A 2004 study that measured Supreme Court predictions for the 2002 Term found that the experts accurately predicted the outcomes of only 59.1% of the cases.<sup>19</sup> Additionally, this mediocre prediction rate was attained utilizing an overall higher qualified pool of participants than did this survey.<sup>20</sup> Finally, this figure is even less impressive when contrasted with the 73.6% success rate for this same Term by simply predicting the petitioner would win in every case.<sup>21</sup>

Mathematical models have also been utilized to predict Supreme Court outcomes and consistently result in a higher success rate than expert predictions. One such model averaged 70.2% accuracy when applied to

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18. Similar surveys in the future could implement more customized links that would allow for comparisons not only among law school tiers, but also between public/private, religious/secular, large/small metropolitan area, predominantly Republican/Democrat location, etc.

19. Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1150 (2004).

20. *Id.* at 1152, 1168. (For example, 46% of their participants were former Supreme Court law clerks and they were only asked to make predictions in cases involving their specific area of legal expertise). Participants in my study, however, included faculty who specialize in areas unrelated to *Masterpiece Cakeshop* such as contracts, criminal law, family law, intellectual property, international law, property, etc.

21. For this analysis, the 83 Supreme Court cases for the 2002 Term were selected. Per curiam opinions were removed from consideration. *See Ruger, supra* note 16, at 1170 (Nat'l Park Hosp. Ass'n. v. Dep't of Interior, 538 U.S. 803 (2003), was also removed because it was held to not be ripe and therefore ruled neither for the petitioner nor respondent). This resulted in seventy-two remaining Supreme Court decisions. Of these, the Supreme Court ruled in favor of the petitioner 53 times and the respondent 19 times. This disparity is to be expected because the Supreme Court is more likely to issue certiorari to correct an error from a lower court, not to affirm a lower court. *See also*, Daniel Martin Katz, Michael J. Bommarito II & Josh Blackman, *Crowdsourcing Accurately and Robustly Predicts Supreme Court Decisions* (Dec. 11, 2017), <http://dx.doi.org/10.2139/ssrn.3085710> [<https://perma.cc/NW5C-CJTV>]. (Over the last 35 Supreme Court Terms, 63% of case outcomes have ruled in favor of the petitioner).

nearly 200 years of Supreme Court decisions using only data available prior to each decision.<sup>22</sup> Another statistical model designed to compete against the previously mentioned experts for the 2002 Term accurately predicted 75% of the outcomes (compared to 59.1% by the experts).<sup>23</sup>

An online fantasy Supreme Court prediction league, started in 2009, allows for “crowdsourcing” predictions to be analyzed.<sup>24</sup> Beginning with the modern contest rules for the 2011 Supreme Court Term and continuing through the most recently completed 2016 Term, the average prediction success rate is 66.4%.<sup>25</sup> The success rate is even higher when models are applied that factor in the experience and past performance of participants.<sup>26</sup> For the record, 54% of those on this crowdsourced website predict the baker will win in *Masterpiece Cakeshop*.<sup>27</sup>

## VI. CONCLUSION

Overall, this survey shows how differences in the lives of law school faculty members can influence not only how they personally would rule in *Masterpiece Cakeshop* but also in predicting how the Supreme Court will rule. Furthermore, the ability of law school faculty to set aside their personal beliefs and view legal issues with a neutral mindset is a valuable trait. This survey provides evidence that, overall, law school faculty are capable of exercising this discernment even in a case that can evoke strong emotional reactions.

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22. Daniel Martin Katz, Michael J. Bommarito II & Josh Blackman, *A General Approach for Predicting the Behavior of the Supreme Court of the United States*, (Apr. 12, 2017), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0174698> [<https://perma.cc/S78W-PUMN>].

23. Ruger, *supra* note 19, at 1155.

24. Fantasy SCOTUS, <https://fantasyscotus.lexpredict.com/> [<https://perma.cc/8V83-CTGJ>] (last visited Apr. 19, 2018). (The site is run similar to a fantasy sports league. Each Supreme Court Term (season), players participating individually and in leagues predict the outcomes of Supreme Court decisions. Predictions are made at the case and Justice level; for purposes of this article only the case-level predictions are examined). *See also* Daniel Martin Katz, Michael J. Bommarito II & Josh Blackman, *Crowdsourcing Accurately and Robustly Predicts Supreme Court Decisions* (Dec. 11, 2017), <http://dx.doi.org/10.2139/ssrn.3085710> [<https://perma.cc/NW5C-CJTV>].

25. Katz, *supra* note 22, at 8, Table II.

26. *Id.*

27. Fantasy SCOTUS, *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission*, <https://fantasyscotus.lexpredict.com/user-predictions/case/masterpiece-cakeshop-ltd-v-colorado-civil-rights-commission/> [<https://perma.cc/FPN8-NPTZ>] (last visited Feb. 7, 2018) (Prediction results as of 2/7/2018).