

A RESPONSE TO PROFESSOR RAMSEYER, PREDICTING COURT OUTCOMES THROUGH POLITICAL PREFERENCES

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Two quotations derived from Professor Ramseyer’s article provide a point of departure. One is from Judge Harry Edwards who, apropos of a study correlating appointing presidents with voting patterns on the D.C. Circuit, remarks on “the heedless observations of academic scholars who misconstrue and misunderstand the work of . . . judges.”¹ The other is Professor Ramseyer’s reply that Judge Edwards “misses the point” because the (alleged) fact that judges “act politically in political cases simply reflects their essential independence”; this, Professor Ramseyer said, in an earlier draft, should not “embarrass” the judges but “should engender pride.”²

Figuring out why judges decide cases the way they do is a worthy enterprise; not so scoring judicial results as “political.” True, a layman might be surprised were he to listen in on a *semble*—the meeting in which judges, after oral arguments, meet to discuss their tentative views. Discussion is not confined to abstract rules or the parsing of precedents. But the balance of considerations even in highly charged cases could hardly be described as “political” in the common sense of reflecting partisan politics. The charged term “political” could be used only by extending it to include almost any kind of practical consideration—as opposed to pure precedent.

Practical considerations are likely to get weight whenever the law allows some latitude for judgment—as it typically does in cases any lawyer thinks worth appealing. Examples might be whether the

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1. J. Mark Ramseyer, *Predicting Court Outcomes Through Political Preferences: The Japanese Supreme Court and the Chaos of 1993*, 58 DUKE L.J. 1557, 1558 (2009) (quoting Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1335 (1998)).

2. J. Mark Ramseyer, *Predicting Court Outcomes Through Political Preferences: The Japanese Supreme Court and the Chaos of 1993*, at 3 (Harv. John M. Olin Ctr. for L., Econ., & Bus., Discussion Paper No. 624, 2008), available at <http://ssrn.com/abstract=1326548>.

defendant is clearly guilty or arguably innocent, whether the trial judge competently conducted the proceedings below, whether (in a lay sense) the result is just or unjust, whether further litigation (for example, by a remand) would be a waste of time and money, and whether an issue is well-enough briefed to be safely decided. The list could go on and on.

These considerations are often connected to legal rules. Thus, the weight of evidence as to guilt or innocence may bear on whether an error was prejudicial; adequacy of briefing may be relevant to forfeiture of an issue in the appeal. In all events, common-sense assessments of this kind are inherent: deciding cases is not about abstractions but about getting real-world controversies resolved with such fairness and predictability as fallible beings and imperfect institutions can manage.

Leeway is often present in cases in which public policy issues are at stake. Statutes, often unclear in their wording, may also be unclear in their purpose and legislative history. Constitutional provisions are often cast in vague terms (“freedom of speech” or “equal protection”). Common law doctrine evolves in light of experience and expectations. Canons that purport to reflect public policy conflict with one another. Judges ought to put aside personal preferences, but they can hardly avoid bringing a worldview to the choices that many such cases present.

How one thinks that the world works—for example, how reliable is eyewitness identification or how widespread is discrimination against a type of disability—may be as important as any value judgment in framing rules or making decisions in cases. On both scores, predictions are possible as to an individual’s outlook. So *some* correlation between the views of an appointing president and the outlook of an appointed judge is hardly surprising, although Theodore Roosevelt was famously unhappy with Holmes and Eisenhower with Warren.

But to call judges’ subsequent choices in public policy cases “political” is mere provocation. One can reply blandly that these decisions are political in the sense that they relate to public policy, but few lay readers (or judges) will take it that way. Policy often matters in deciding cases, but it is usually policy attributable to Congress or to public policy reflected in case law, common sense, and the values of the community. Where exactly should judges look when existing law stops short?

There is blame enough to go around. Judicial decisions often convey the sense that the result reached follows mechanically from clear and fixed legal rules. Sometimes this is so, but difficult cases are as much about creating law as discovering it. Judges may feel uneasy at the freedom open to them, but choice is inevitable in judging and the public's confidence could well be enhanced by decisions that face up this necessity and offer reasons that most would think sensible for whatever choice is made.

Among judges most admired for the quality of their work are those, like Robert Jackson and Learned Hand, who most fully and often in highly practical terms explained just how they came to their conclusions. It is no wonder that decisions like *Youngstown Sheet & Tube Co. v. Sawyer*³ and *United States v. Carroll Towing Co.*⁴ retain their force even today. Law is assuredly based on rules, but the rules are often unclear and perpetually incomplete or (like sand castles at the beach) are perfected and then undermined by new conditions.

On balance, more candor from the courts would likely be a good thing—not only about how judges think and what they rely upon in deciding cases, but also about workload, time pressure, isolation, use of law clerks, and other aspects of the job. Disclosure, like everything else, has reasonable outer limits but they have not yet been approached. On the scholars' side, a little more care in how their conclusions are packaged and explained might also be in order.

3. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

4. *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).