Two Worlds, Neither Perfect: A Comment on the Tension between Legal and Empirical Studies

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RESPONSE

Two Worlds, Neither Perfect: A Comment on the Tension Between Legal and Empirical Studies

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The initial study[1] and response[2] by Professors Lee Epstein, Christopher M. Parker, and Jeffrey A. Segal along with the critique[3] by Professor Todd E. Pettys provide a good example of the tension between traditional legal studies and empirical studies that are common in the behavioral social sciences.[4] Broadly speaking, empirical studies tend to reject

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1. Lee Epstein, Christopher M. Parker, & Jeffrey A. Segal, *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment*, *available at* http://epstein.wustl.edu/research/InGroupBias.pdf (last visited Feb. 2, 2015) [hereinafter Epstein et al., *In-Group Bias*]. The authors presented the study at the 2013 Annual Meeting of the American Political Science Association.

2. Lee Epstein, Christopher M. Parker, & Jeffrey A. Segal, *A Response to a Critique of Our Study on In-Group Bias* (Sept. 30, 2014), *available at* http://epstein.wustl.edu/research/InGroupBiasResponse.pdf [hereinafter Epstein et al., *Response*].

3. Todd E. Pettys, *Free Expression, In-Group Bias, and the Court's Conservatives: A Critique of the Epstein-Parker-Segal Study*, 63 BUFF. L. REV. 1 (2015).

4. The term *empirical* can take on slightly different meanings depending on the context. It might generally mean a rejection of theory for experience. The notion of an empirical legal study might very well reject traditional legal theories, but is likely to replace them with theories common to the behavioral sciences, such as rational actor theory or the ideologically driven decision-maker. It is

traditional legal factors such as precedent and legal reasoning as a basis for explaining case outcomes and judicial behavior. At the extreme, some behavioral social scientists would reject precedent and legal reasoning all together, characterizing them as little more than a "veneer of objectivity."[5] A second difference between the two types of studies is the reliance on the power of large datasets and statistical analysis in many empirical studies. Judges may very well tell us, for example, that they only decide cases based on the law and precedent, but it is hard to argue against a study involving hundreds or thousands of cases that shows a statistically significant basis for believing otherwise.

Although I could write at some length regarding concerns I have with either the study or the critique, given the need to keep this Response short I will focus on only two points: use of the Supreme Court Database[6] and coding the variables.

I am very familiar with the Supreme Court Database as I have used it extensively for many years. It is an immensely valuable resource for those doing research on the Supreme Court. It does, however, have its limitations.[7] For the most part, those limitations only become a problem when researchers do not recognize the database's limitations, use the database for purposes beyond its capabilities, or when those interpreting a study's results do not understand the underlying limitations. One such limitation is that the vast majority of cases only have a single entry in the database. A single entry per case results in most of the variables only being given a single code. This is appropriate for simple variables such as the docket number or the immediate lower court.[8] Such single codes can, however, be a problem when

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usually the differing theoretical bases that tends to cause the tension between adherents of the two approaches.

5. HAROLD J. SPAETH, SUPREME COURT POLICY MAKING: EXPLANATION AND PREDICTION 63-64 (1979).

6. SUPREME COURT DATABASE, http://scdb.wustl.edu/index.php (last visited Feb. 2, 2015).

7. *See, e.g.*, Pettys, *supra* note 3, at 74-75 nn.375-80 and accompanying text.

8. *See Online Code Book*, SUPREME COURT DATABASE, http://scdb.wustl.edu/documentation.php?s=1 (last visited Feb. 2, 2015).

there are multiple parties involved in the litigation, as Pettys points out.[9] The codes for the litigants in a case will nearly always be based on the named party, regardless of other parties that join the litigation, not to mention those who file as *amici*. This is important in a study such as that of Epstein et al., where the litigants are to be characterized as either liberal or conservative.[10] This can create a problem in instances where parties on one side or the other of the litigation may appropriately be characterized as both liberal and conservative.[11]

Along similar lines, the vast majority of cases in the database only have a single entry for the issue or legal provision being considered by the Supreme Court. Reasons for a case to have multiple entries include more than one issue being coded for a case, more than one legal provision being considered by the Court, or a split vote among the justices on a single issue.[12] Regardless of how many entries a case has, or how many parties join the case, at some level we must rely on the judgment of the researchers to make the appropriate coding decisions. That leads us to the second point.

Pettys spends a great deal of his critique pointing out what he sees as problems in the basic coding of the cases by Epstein et al.[13] In essence, part of his criticism has to do with the multidimensionality of some of the cases.[14] Another aspect of Pettys's critique has to do with forcing what might be an indeterminate vote or outcome into a binary liberal/conservative coding structure.[15]

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9. Pettys *supra* note 3, at 27 n.130 and accompanying text.

10. Epstein et al., *In-Group Bias*, *supra* note 1, Figure 1 & Table 1.

11. Pettys, *supra* note 3, at 27 nn.130-31 and accompanying text.

12. *See Current Dataset: 2014 Release 01*, Supreme Court Database, http://scdb.wustl.edu/data.php (last visited Feb. 2, 2015). The current online version of the database offers four different versions of case centered data based on either Supreme Court citation, docket number, multiple issues or legal provisions, or split votes.

13. *See* Pettys, *supra* note 3, Part II.

14. *See id.* Part II.A.

15. *See id.* Part II.B.

More generally, the problem is that characterizing litigants or votes as liberal or conservative requires a subjective judgment. It is true, of course, that many litigants and votes can clearly be labeled as liberal or conservative.[16] There are, however, times when the appropriate label is not so clear.[17] This is particularly so when, as in the Epstein et al. study, one is essentially attempting to code what a justice perceives the ideological orientation of the litigants to be.[18] Explicit coding rules can help, but even these can be subject to interpretation. Incorporating such interpretations into the coding can detract from the objective value of the empirical study, perhaps even introducing bias on the part of the coders.[19]

Researchers can take steps to avoid overly subjective coding or bias on the part of the coders, but this does not guarantee that all such problems are eliminated. At the very least, we may still be left with differences of opinion as to whether the coding rules are appropriate or whether they have been correctly followed in particular instances. Epstein et al. made a few corrections based on the challenges by Pettys,[20] but they dismiss most of Pettys's challenges as "coding disagreements."[21]

Perhaps without realizing it, Epstein et al. have put their finger on the precise problem. What constitutes a coding disagreement that can be easily dismissed as opposed to something more serious? To the extent such disagreements exist, whose view should we accept: that of the original

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16. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). For First Amendment issues, if a justice supports the person or entity claiming a First Amendment right, that vote is coded liberal. If the justice supports the restriction or limitation imposed by the government, the vote is considered conservative. Thus, in *Tinker* the votes of the seven justices who voted in favor of the students' speech rights are coded liberal and those of dissenting Justices Black and Harlan are coded conservative.

17. *See, e.g.*, Pettys, *supra* note 3, Part II.B–D.

18. *See, e.g.*, *id.* Part IV.

19. *See id.* at 70 n.367 and accompanying text (Pettys speaks of this in terms of confirmation bias.).

20. *See* Epstein et al., *Response*, *supra* note 2, at 1; *see also* Pettys, *supra* note 3, at 80 n.404 and accompanying text.

21. Epstein et al., Response, *supra* note 2, at 1.

researcher or the critic? I am not sure that all such disagreements can be eliminated regardless of how careful the researcher is or how clear the coding rules are. Nevertheless, it is always important to be aware of measurement limitations and to not oversell the results.

Of course, researchers cannot be held responsible for the interpretations placed on their research, particularly by those outside the academic community who may not be well versed in interpreting results of such studies. It is also true that not all social science studies are done with the rigor that would allow them to be considered reliable efforts. Nevertheless, even the best researchers must guard against bias in their own procedures and analysis.

Unfortunately, few empirical studies get an examination as thorough as the Epstein et al. study did by Pettys. Even when a study makes its dataset available for examination, few reviewers or others interested in the results would be inclined to dig deeply into it. In most instances, this might not matter if the study receives minimal attention. On the other hand, when the study gets an unusual amount of attention, particularly beyond the usual academic audience,[22] it may be worthwhile to take a closer look at it. Along these lines I am reminded of the use of DNA testing as evidence in trials. Once the scientific basis for DNA testing was established and accepted by courts it became very hard to argue against the statistical power of such tests. Nevertheless, one can still question the procedures used by those gathering DNA evidence or by the labs processing the samples. The power of large datasets and statistical analysis to uncover patterns in case outcomes and judicial behavior cannot be denied, but the procedures used to construct those datasets can—and should—be examined to ensure a proper level of rigor. This is not a criticism of Epstein et al., but rather a recognition that regardless of how accomplished a researcher is, it is still worthwhile to closely examine the data and methods of the research.

Returning to the tension between empirical studies and traditional legal studies, empiricists might complain that

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22. *See, e.g.*, Pettys, *supra* note 3, at 70 n.366 and accompanying text (where Pettys notes how the results of the Epstein et al. study received attention from a national media outlet).

traditional legal scholars cannot see the forest for the trees, meaning that too much attention to individual cases or votes can blind one to considerations that emerge on a larger scale. Although I believe this to be true, in at least a partial defense of traditional legal studies, I would say that to understand the forest, one also needs a solid working knowledge of the trees.