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Activists Vote Twice

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with the explanation that "there is no constitutional tribunal to which he is amenable," in contrast to the President of the United States, who is subject to impeachment for crimes. For Story, however, as filtered through the Supreme Court in *Clinton v Jones*, the "official inviolability" of the President's person in "civil cases" apparently means "except in private tort actions."

It may seem to you that I overstate the Supreme Court's misapprehension of Story's meaning. But there is confirmation of the different meaning I ascribe to Story's comment in a contemporaneous pronouncement of the Supreme Court itself. In an 1838 decision, *Kendall v United States*, 37 US (12 Peters) 524 (1838), the majority opinion contains the matter-of-fact observation, as though self-evident, that

> [t]he executive power is vested in a President; and as far as his powers are derived from the constitution, he is beyond the reach of any other department, except in the mode prescribed by the constitution through the impeaching power (p 610).

This is the same point as Story's, with the explicit corollary that impeachment is the only form of official power that can be imposed directly on the President. And Story himself was in on it. Justice Story participated in the decision of the *Kendall* case, subscribing to the majority opinion without demur.

My point here, I should underscore, is not that the Supreme Court was bound to follow Story's *Commentaries* or its own dictum from *Kendall v United States* as talismanic authority, or even that *Clinton v Jones* was wrongly decided (although I am quite sure that it was). What the Court's handling of Story's comment reveals is that Story does not function in the opinion as authority, but only as a forensic hurdle to be knocked over. Story may have come for analysis, but got a massage.

Which brings me to my actual point. The Court could brush off Story's comment with the back of the hand (and suppress entirely its own dictum from *Kendall*) because it was unnecessary to assert compelling grounds in *Clinton v Jones*. There was no other side in this case, no contest of preferences among the Justices. *Clinton v Jones* is about the boundaries of judicial power. When judges of differing preferences participate in the same cases the boundaries of their respective power are shaped by their propensity to activism. A neutralist who is so unguarded as to stay that particular course accords to the activists an extra vote or two. In a case like *Clinton v Jones*, which frames the boundaries of the judicial power in relation to *other* powers of government, they are all activists. In choosing between more power or less, preference leans heavily toward more. Perhaps I should call this meta-activism, because it overrides different preferences on other

matters. The Justices may not agree on whom they want as President of the United States, but they all want the President to say "how high?" when they say "jump!"

Before closing let me draw out for the reader a few of the ironies that teem in these two cases. *Bush v Gore* was viewed by many as a case in which the Supreme Court decided a presidential election. But in the end it probably made no difference. The vote count might still have gone for Bush. What is more, in any course of events in which the final say on the outcome of the Florida vote went to the Florida legislature, Bush was a sure winner. It may not have struck you right off, but the effect of *Clinton v Jones* on presidential destiny—including Al Gore's—quite likely was greater. Imagine for a daydreaming moment that the Supreme Court decided *Clinton v Jones* with a sober and appropriately restrained appreciation of the legitimate bounds of its power, and denied the possibility of a civil tort action against a sitting President. There followed, perforce, no deposition by the defendant, no loaded question fed to Jones's lawyers by a trippster, no perjury, no impeachment, no nothing. Then, perhaps—who knows?—Gore wins clean in 2000. So, while Bush may have won Florida five to four, *Clinton v Jones* may have set Gore up nine to nothing. If I were Al Gore I would be plenty sore at the Supreme Court, but no less for *Clinton v Jones* than for *Bush v Gore*.

I have noted elsewhere the irony that the judicial instrument giving President Nixon the final push from office in 1974, to the great glee of Clintons and future Clintonites, molted into the deposition ordered by a court in *Clinton v Jones* over which the President tripped. As a connoisseur (or at least avid consumer) of irony I could hardly have hoped for a third act: a close vote in Florida, ending in near-equipoise (quite plausibly as a remote effect of *Clinton v Jones*) and giving the Supreme Court another bite at unmaking a President.

I could go on, but by now surely you've gotten my drift. For those who decry *Bush v Gore* as judicial activism unbridled, however, I do have two more words: nobody cares. And least of all, you. If Florida had gone narrowly for Gore in 2000 and the Supreme Court had upheld the win against the exact mirror image challenge from Bush—invoking equal protection of the laws not to ox your Gore but to anoint him—I am sure I could count on you to extoll the Court's action as one of high judicial statemanship.[1]

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[1] Note to Justice Stevens: For an extension of judicial power beyond reasonable (and constitutional) bounds, see *Clinton v Jones*, 520 US 681 (1997).

The Empirical Side of Law & Economics

William M. Landes†

When I joined the Law School faculty almost thirty years ago, I already had published several empirical papers on law and economics but I knew little law. I was hired as an economist. My friends were economists. My wife was an economist. I knew Richard Posner because of his enthusiasm for economics, but knew none of the other law professors at Chicago. Although my appointment continued the Law School's long tradition of having an economist on its faculty, the faculty and most law students had little interest in economics. Unlike other law schools, Chicago was not hostile to economics. But outside the field of antitrust law, most of its faculty believed that economics had little to contribute to understanding the law. This may surprise many readers because Ronald Coase had been a member of the Law School faculty since 1962 and had published his celebrated article *The Problem of Social Cost* in 1960.[1] That article, which is the foundation of the modern application of economics to all fields of law, was cited by the Nobel committee in awarding Coase the Nobel Prize in economics in 1991.

Things are different today. Economics has become a central part of legal education, scholarship, and practice. All major law schools have one or more economists on their faculty; many young legal scholars have both law degrees and Ph.D.'s in economics (for example, three members of the Chicago Law School faculty have both law degrees and advanced degrees in economics); economic analysis of law is widely considered the most important development in legal thought in the last fifty years;[2] economics has been systematically integrated into most areas of law, including even art law; and economic evidence has played an increasingly important role in the practice of law not only in antitrust but in contracts, intellectual property, securities, environmental law, and discrimination law. Other indicia of the growth of law and economics include the formation of The American Law and Economics Association in 1991, which now has more than one thousand

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1 See R.H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1 (1960).

2 See generally William M. Landes and Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J L & Econ 385 (1993), for an attempt to measure the importance of economics on legal scholarship.

members, and the presence of five scholarly journals that specialize in economic analysis of law. Two of these journals are housed at the University of Chicago Law School: the Journal of Law and Economics (started in 1958 under the editorship of Aaron Director, an economist who had a Law School appointment) and the Journal of Legal Studies (started in 1972 under the editorship of Richard Posner). It should be noted, however, that the Journal of Law and Economics (JLE), notwithstanding its name, has become a journal that is edited by economic professors from the business school, and read mainly by economists, not lawyers. The JLE is widely regarded as one of the leading journals in the field of industrial organization, which focuses on the behavior of firms, industries, markets, and how laws and economic regulations affect the workings of the economic system.[3] In contrast, the Journal of Legal Studies (JLS) appeals to both lawyers and economists and mainly publishes articles that use economic analysis to illuminate legal rules and doctrines. The JLS began as an interdisciplinary journal in the application of economics and other social sciences to legal studies, but over time evolved into the leading law and economics journal.

This Essay relates to a particular aspect of law and economics; namely, the use of empirical methods to study the law. I claim that empirical analysis plays a much smaller role in economic analysis of law than in economics in general. Moreover, I believe this can be explained on economic grounds. In the academic marketplace, scholars select research projects based on a comparison of returns and costs. It follows, therefore, that law and economics scholars are more likely to choose theoretical projects because they hold out the prospect of greater rewards and lower costs than empirical projects.[4] Before con-

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[3] Although I have no direct empirical evidence on readership, data support the claim that the JLE is a leading economics journal (and, therefore, likely to be read mainly by economists). In one paper, the authors compiled a list of the twenty-seven leading scholarly journals in economics based on citation data from the Social Science Citation Index. See M.P. Burton and E. Phimister, *Core Journals: A Reappraisal of the Diamond List*, 105 Econ J 361, 366 Table 1 (1995). The JLE consistently ranks among the top ten economic journals using a variety of different citation measures. Id. In another study the authors include the JLE in the top half of the forty-two leading economic journals. See R. Pieters and H. Baumgartner, *Who Talks to Whom? Intra- and Interdisciplinary Communication of Economic Journals*, 40 J Econ Lit 483, 492–93 (2002). In neither study is the JLS listed or mentioned as an economics journal.

[4] What constitutes "empirical work" is not self-evident in law and economics. It clearly includes presentation and analysis of data but arguably it might also include studies in positive law and economics that attempt to test models against legal rules that have developed from the outcome of hundreds or thousands of cases. In this Essay, I do not count as empirical-analysis articles those that have examined legal rules or precedents unless the authors have tabulated the outcomes of many cases. A good example of such empirical work would be Richard Posner's paper on negligence that examined a sample of more than 1,500 appellate decisions from 1875–1905 to test the consistency of the economic model of torts against actual case outcomes. Richard A. Posner, *A Theory of Negligence*, 1 J Legal Stud 29, 95 Table 14 (1972). A more recent example

sidering why the returns are greater and costs lower for theoretical rather than empirical research in law and economics, I begin Part I appropriately with an empirical question: Does the evidence support the claim that there is relatively little empirical work in law and economics? I present data on the frequency of empirical articles in different subject matter areas of law and economics that have been published in the Journal of Legal Studies since its inception in 1972. My analysis focuses on the JLS because it is the leading law and economics journal, and, therefore, the types of articles it publishes should track the law and economics field in general. As a rough check, I also survey articles published in the American Law and Economics Review (ALER), which began publication in 1999 as the official journal of the association. Next I compare these results to articles published in the Journal of Law and Economics for the same time period. Because the JLE is a leading economic journal, the types of articles it publishes should be representative of the broad economic subject area of industrial organization. I also consider data on articles published in the Journal of Political Economy (JPE), which is among the most prestigious general-purpose economics journals.[5] To anticipate my results, I found that the frequency of empirical articles that appear in the JLE (and JPE) is substantially greater than the number that appear in the JLS (or ALER). In Part II, I consider several reasons why there is relatively little empirical work in law and economics. Not surprisingly, these reasons reflect equilibrium outcomes in the market for legal scholarship in which both demand and supply factors influence the types of scholarship that are published.

I. THE DATA

My sample covers all articles published in the JLE and JLS during the period 1972 (the initial publication year of the JLS) to 2002. I classify articles by subject matter (for example, common law, procedure, industrial organization, and so forth) and by empirical content. I define an article as empirical if it analyzes data but not, as noted earlier, if it only examines legal doctrines or precedents without tabulating the results of cases. That is, I count as empirical an article that analyzes and tabulates the characteristics or outcomes from a relatively large sample of cases but not one that discusses some cases or presents anecdotal data or other evidence gleaned from a few cases. Al-

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is William M. Landes and Richard A. Posner, *Harmless Error*, 30 J Legal Stud 161, 181–92 (2001), which tests a formal model of harmless error against data from 963 appellate decisions in which the majority opinion discusses harmless error.

5 See Pieters and Baumgartner, 40 J Econ Lit at 492–93 (cited in note 3); Burton and Phimister, 105 Econ J at 365–72 (cited in note 3).

though the typical empirical article in the JLS and JLE begins with an economic model and then proceeds to test its hypotheses using multiple regression analysis, I also count as empirical any paper that presents and discusses a body of data even if no formal statistical tests are performed. I exclude from my sample articles that appeared in special or supplementary journal issues (typically conference volumes) because they are more likely to reflect the interests of the organizers of the conference than the general subject matter areas of law and economics. Table 1 summarizes the data.

TABLE 1

Articles Published in the Journal of Law & Economics (JLE), Journal of Legal Studies (JLS), and American Law and Economics Review (ALER)[6]

	JLE			JLS			ALER		
Subject Matter	Total	Emp	%	Total	Emp	%	Total	Emp	%
All	604	437	72.4	571	220	38.5	40	18	45.0
Ind.Org.	292	235	80.5						
Pub.Choice	62	61	98.4	36	18	50.0			
JLS	122	75	61.5						
Common Law				163	34	20.9			
Crime				60	33	55.0			
Procedure				111	58	52.3			

Table 1 indicates that of the 604 articles published in the JLE in the 1972–2002 period, 437, or 72 percent, were empirical.[7] Over the same period, 220, or about 39 percent of the 571 articles published in the JLS were empirical.[8] In short, although both journals published

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6 Brief descriptions of the subject matter categories are as follows: industrial organization (articles on economic regulation and behavior of economic markets), public choice (articles that focus on the political marketplace and collective decisionmaking from the perspective of self-interested individuals), JLS (articles published in the JLE that fit the subject area of the JLS), common law (mainly articles in torts, contracts, and property), crime (articles on law enforcement and deterrence), and procedure (articles on legal decisionmaking, such as why cases settle and the impact on settlement of different procedural rules).

7 As a check on the claim that the JLE is primarily an economics journal that appeals to economists, I computed the percentage of empirical articles in the past twelve issues of the Journal of Political Economy, another prominent economics journal (from August 2000 to August 2002). Of the 96 articles in these twelve issues, 66, or 69 percent, were empirical. This is about the same percentage as I found for the JLE.

8 The difference between the two journals in the average ratio of empirical articles is

about the same number of articles during the past thirty years, the JLE (an economics journal) published twice as many empirical articles as did the JLS. The difference between the two journals is even greater when one looks at the major subject areas. Nearly 50 percent of JLE articles were in the field of industrial organization, and more than 80 percent of those articles involved empirical analysis. By contrast, economic analysis of the common law and procedure have been the two main subject matter areas of the JLS. About 30 percent of the articles in the combined fields (21 percent in the common law and 52 percent in procedure) employed empirical analysis.[9]

Two other differences between the two journals are worth mentioning. One relates to the 122 articles in the JLE that overlap the subject matter area of the JLS. Typically, the subject matter of these articles concerned property rights, liability rules, and crime. More than 60 percent of the 122 JLE articles used empirical analysis compared to 39 percent for the JLS, and this difference is statistically significant. The other difference is the public choice category in both journals. Within public choice, nearly 100 percent of JLE articles (61 of 62) used empirical analysis compared to 50 percent of the JLS articles (18 of 36). (Again, the difference between the two journals is statistically significant.) These two points taken together suggest that the higher frequency of empirical studies in the JLE does not simply reflect differences in subject matter because large differences occur within similar subject matter areas.[10]

Table 1 also includes information on articles published in the eight issues of the ALER (two per year starting in 1999). Of the 40 articles (excluding 9 survey articles and 3 presidential addresses), 18, or 45 percent, involved empirical analysis. This figure is slightly higher than 38.5 percent figure for the JLS but lower than the JLS over the past four years (41 of 74 articles, or 55 percent, were empirical from 1999–2002).

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highly statistically significant (a t-statistic greater than seven).

9 The main reason why there is a greater fraction of empirical articles in the procedural category than the common law category for the JLS is probably that data are more readily available in the procedural category. Many procedural papers involve litigation models that can be tested against data from federal and state court agencies. In contrast, empirical analysis of common law subjects usually requires the researcher to collect data from cases because pre-existing data are not available.

10 The JLS is not exclusively a law and economics journal. It has on occasion published articles in legal history, jurisprudence, law and sociology, and law and political science. Since I did not distinguish these fields from law and economics, I may be biasing downward the fraction of empirical articles in law and economics. Although legal history and jurisprudence are unlikely to include empirical analysis, that is not true for the other two fields. Hence, it is unclear whether I have understated the relative importance of empirical analysis in law and economics by looking at all articles published in the JLS rather than just economic articles.

FIGURE 1

The Proportion of Empirical Articles in the Journal of Law & Economics, Journal of Legal Studies, and American Law and Economics Review: 1972–2002

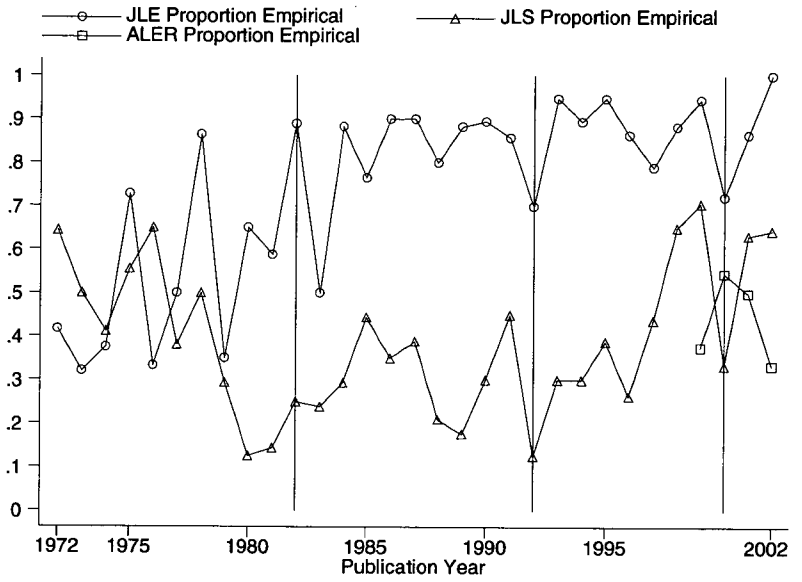

Figure 1 shows that the JLE has published a greater percentage of empirical articles than the JLS each year except for the first five years of publication of the JLS. I explore why the JLS published relatively more empirical articles in its early years and then reversed course, as well as other differences between the two journals in the regression analysis presented in Table 2.

Equation 2.1 indicates a statistically significant increase of about 2.7 percent per year in the fraction of empirical articles published in the JLE over the 1972 to 2002 period. In comparison, I find no significant time trend in empirical articles in the JLS (see equations 2.3–2.5), although Figure 1 and equation 2.5 suggest a significant increase of about 60 percent in the last six years for the JLS (the regression coefficient on the variable Dum97 equals .68 and is statistically significant). It is too early to tell, however, whether this reflects a permanent increase in the relative frequency of empirical articles in law and economics or a temporary though statistically significant upsurge. The low rate of empirical articles in the ALER (45 percent in the 1999 to 2002 period), however, suggests that the JLS increase since 1997 does not reflect a permanent increase in empirical analysis in law and economics.

How does one explain the changes that have occurred in the publication of empirical articles in the two journals? Two competing hypotheses are worth considering. One is that the fraction of empirical