



The role of party politics in medical malpractice tort reforms



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ABSTRACT

The U.S. tort system has experienced various reforms over the last three decades. While there is an extensive literature on the consequences of these reforms, very little is known about their determinants. In this study, we investigate the role of party politics in the reform process across U.S. states. In order to test whether any party effect goes beyond voter preferences, we apply the idea behind regression discontinuity studies based on close electoral outcomes to semi-parametric proportional hazards models. We find that in states with close election outcomes, a narrow Republican majority in the lower house is associated with a 50 to 150% higher risk of tort reform enactment compared to a narrow Democratic majority. Our results indicate that party politics plays a role in tort reforms over and above potential underlying preferences in the constituency.

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1. Introduction

Since the 1980s the reform of tort law² has become an increasingly important political issue in the United States. Many state legislatures have passed statutes to reshape their mainly common-law-based law of torts. While the nature and extent of these reform efforts vary significantly across U.S. states, the reforms generally point in the same direction and aim at a reduction in the number of tort suits as well as the amount of damages awarded. The reform process as well as the expansion of tort liability and damages preceding it in the 1960s and 1970s are difficult to understand as an evolutionary process towards an efficient system. They reflect, rather, a complicated interaction of interest representation in the compensation of injured parties that has become big business.³

In this paper, we study the role of party politics in legislative tort reforms in U.S. states. It has been argued that tort reforms became a highly partisan topic, with Republicans taking sides with the business community and being in favor of reforms and Democrats being pro plaintiff and against reforms (Sugarman, 2002), although these positions are historically and ideologically

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² Tort law deals with situations where one party's behavior causes another party to suffer a loss or harm. The law allows the party who is harmed to recover its loss. The aims of tort law, however, are not confined to insurance and compensation but damages may also be awarded for deterrence. The economic analysis of tort law emphasizes this latter aim based on the argument of an efficient distribution of risk in order to provide optimal incentives for cost minimizing precautions in the presence of transaction or litigation costs (for basic contributions, see Coase, 1960, Calabresi, 1970 and Shavell, 1987).

³ Estimates of the total transactions generated by the American tort law system amount to USD 265 billion in 2010; i.e., 1.82% of GDP. This indicates a decline from 2.21% of GDP (or USD 246 billion in current prices) in 2003 (Towers Watson, 2012). Expenses in terms of fees and administrative costs, i.e., money not flowing as compensation to injured parties, account for more than half of the amount (U.S. Council of Economic Advisers, 2004).

unclear (Sugarman, 2006). The two parties channel many different politico-economic forces. The Democrats' opposition to tort reforms goes along with generous campaign contributions from trial lawyers (Zywicki, 2000). It has also long been argued that special interest groups shape U.S. tort law in their pursuit of economic rents (e.g., Epstein, 1988, Rubin and Bailey, 1994, Rubin, 2005, Zywicki, 2000). The legal changes that expanded tort liability were mainly brought about by litigation and judicial action favored and supported by organized groups of attorneys (see Rubin et al., 2001 for theoretical arguments as well as observational evidence).⁴ In response, defense interests began to form around groups of businesses and medical doctors.⁵ For them, the legislative process was relatively more accessible than the judicial process, and tort reform became an important issue in the political arena (Campbell et al., 1995). Lobbying for changes in tort law led to many reform proposals over the last 30 years, and these were put forward and decided on in state legislatures. We want to understand whether there is a systematic partisan component to this process that can at least partly explain the patchwork of tort reforms across U.S. states.

In this empirical analysis, we are particularly aiming at identifying any partisan effect that goes beyond potential underlying voter preferences for reforms in statutory tort law. One might well argue that greater support for and a stronger presence of the Republican Party in the legislature or when holding the governorship reflects voters' demand for tort reforms. Indeed, if reforms were to be found more likely under a Republican majority or governor, this would be evidence for a systematic influence of politico-economic forces. However, the evidence would not allow distinguishing between underlying voter preferences and a specific partisan effect. In the empirical analysis, we therefore, first, take citizens' general political attitudes into account when we test whether at any point in time a reform restricting tort liability in a U.S. state is introduced earlier with a stronger representation of Republicans in state politics. Second, we concentrate on the enactment of reforms when either party holds the legislative majority or the governorship with a close margin.

In our analysis of the reform process, we refer to the area of medical malpractice.⁶ We analyze data from the Database of State Tort Law Reforms (Avraham, 2011a), which contains the most prevalent medical malpractice tort reforms between 1980 and 2008. Avraham (2011a) distinguishes between eleven different types of non-wrongful death medical malpractice tort reforms. We concentrate on the five types of reforms that are most intensively discussed in the literature; i.e., caps on punitive damages, punitive evidence reform, caps on non-economic damages, reforms of the collateral source rule and reforms of the joint and several liability rule. Our empirical strategy combines the idea of regression discontinuity studies based on close electoral outcomes with methods of survival analysis in order to empirically disentangle the politico-economic forces outlined above. Specifically, we estimate different specifications of semi-parametric proportional hazards models to calculate the effects of a Republican majority in the legislature as well as of a Republican governor on the hazard of tort reform passage, given the relative strength of the parties. This approach allows us to exploit the cross-sectional as well as the longitudinal variation in the data. We adopt a broad view of the reform process and look jointly at repeated reform events across different domains of medical malpractice tort law in each state.

We find that the reform process overall can be well described as a partisan fight between the Republicans and the Democrats, whereby a narrow Republican majority in a state's lower house is associated with a 50 to 150% higher instantaneous risk of reform enactment in any given year than a narrow Democratic majority. A multiplicative effect on the hazard that is larger than one is also estimated for Republican governors. However, the result is not statistically significant in all specifications. These effects hold independently of differences in the liability risk in the early 1980s, the political orientation of the population, and a number of other control variables. Furthermore, the evidence regarding the reform process at the macro level complements recent evidence on individual voting behavior on single tort reform proposals in various tort areas at the micro level. In Matter and Stutzer (2015), we find that Republicans are more likely and lawyer-legislators less likely to support reforms that restrict tort litigation.

This paper proceeds as follows. Section 2 discusses related work and reviews the literature on the consequences of (medical malpractice) tort reforms. In Section 3, we develop our politico-economic hypotheses regarding the legislative reforms in medical malpractice law. Section 4 outlines the empirical strategy based on survival analysis. The data for the empirical tests is described in Section 5. Section 6 presents the results. Concluding remarks are offered in Section 7.

2. Related work and literature review

We see our analysis as a complement to the literature on the consequences of alternative tort regimes and specific regulations. This literature has accumulated an interesting body of empirical findings, whereby the design of tort law is considered an exogenous factor.

It might thus be interesting to understand the conditions under which reforms are more likely. Moreover, reform enactments might well reflect specific politico-economic constellations that affect the legal environment in areas that are complementary to tort law. We are not aware of many systematic empirical analyses that try to explain the reform process so far. In related work, Klick and Sharkey (2009) examine the effect of jury awards on the passage of damage caps. They find no statistical relationship between these two factors. Miceli and Stone (2013) restrict their study to caps on punitive damages and focus on parametric hazard analysis. They observe a positive relationship between legal services employment and the hazard of cap enactment as well as that rather liberal states have a lower hazard of cap enactment. In our analysis, we look at reforms in five domains and

⁴ The most important player is the American Association for Justice (AAJ), formerly the Association of Trial Lawyers of America (ATLA).

⁵ From the numerous business groups involved in pushing reforms, the U.S. Chamber of Commerce is a prominent one. Many businesses support the American Tort Reform Association (ATRA).

⁶ The other main areas are automobile accident law and product liability law.

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