The Effect of Judicial Elections on California Tort Law: A Study in Public Choice

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The Effect of Judicial Elections on California Tort Law: A Study in Public Choice

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Abstract

This thesis examines the relationship between contested judicial elections and the value of total damages in product liability trials. For years, legal scholars have argued that judicial elections pose a direct threat to a judge's impartiality, but this thesis is one of only a few studies to observe judicial elections' quantitative effects on the application of law. Narrowing the focus of this thesis to a set of particularly competitive California Superior Court elections in 1982, this thesis evaluates judicial behavior through difference-in-differences (diff-in-diff) analysis. The major findings of this study are as follows: 1) Controlling for relevant variables, contested judicial elections are associated with a statistically significant increase in product liability awards stemming from Californian jury trials. 2) I conclude that legal economists must tailor empirical analysis to the practical as well as institutional incentive structures facing elected judges. 3) Finally, I suggest a theoretical model of judicial vote-maximization to inform future research.
Introduction

This paper is concerned with the relationship between contested judicial elections and the value of tort awards within product liability cases in the United States. More specifically, this study seeks to observe whether major players in the tort industry, trial attorneys and corporate defendants, can influence the course of civil proceedings through traditional rent-seeking in state judicial elections. This topic has important economic and legal implications. Since the 1980s, the role of the tort system in the United States’ economy has been increasing in both scope and scale. According to Viscusi et al. (1993), the value of general liability claims arising from tortious malfeasance has sextupled between 1975 and 1988. Presently, Rubin (2005) estimates that the tort system now consumes over $233 billion per year, or 2.2% of GDP as of 2002. At this size, the U.S. tort industry features many well established players that use a variety of tools to diminish costs and maximize profit.

This study seeks to integrate analysis of judicial decision-making into the larger economic debate surrounding tort law. As a result, the structure of this paper is as follows. First, I examine previous literature on the subject of tort law and explain its shortcomings with respect to the role of judges. Second, I outline the data and methodology I use to analyze this research question. Third, I discuss the implications and limitations of my results, and finally, I point to future avenues of research in the economic analysis of judicial elections.

Literature Review

In order to weigh the effect of rent-seeking in judicial elections on tort awards, this section presents the traditional framework used by previous economists in
considering the tort system. The role of judges has largely been neglected in modern theoretical considerations, and empirical investigations into the tort system are noticeably absent. I seek to expand both over the course of this thesis.

The discussion of the economic effects of legal systems has appeared only recently in academic research. Early analyses on legal economic efficiency compared different types of legal systems altogether. More specifically, researchers sought to compare the British common law system, which relies on binding written precedent and broad judicial power, to Latin Civil Law, ecclesiastical law, and even socialist conceptions of law. These earlier researchers emphasize a legal system's ability to push governing rules and procedures towards efficiency. Priest (1977) argues that common law systems are efficient because unclear and inefficient legislative rules are theoretically more likely to compel litigation. This attribute forces judges to give more precise and predictable rulings, resulting in increased efficiency through binding precedent. Terrebonne (1981) suggests a critical model of efficient legal evolution. Empirically, Carlsson and Lunström (2002) find that common law zones face greater rates of growth in per capita income, more political freedom, greater adherence to the rule of law, and greater market allocation of goods through property rights when compared to other types of legal systems. These findings indicate a large consensus on the "macro" level efficiency of common law systems (Rubin 2005).

More recently, however, research has gravitated towards "micro" level rules within the common law system that could affect social welfare. Within this "micro" level

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1 See also, Scully (1992); Elliot (1985); Zywicki (2003). In particular, Zywicki argues that, historically, when litigants have a choice among several different common law systems, such as royal law vs. mercantile law or more recently state courts vs. federal courts, administrators face greater incentives to provide efficient contract and commercial laws. He calls this the "supply side" aspect to legal administration.
of analysis, researchers can find the economic analysis of tort law. Landes & Posner (1982) posit a "positive economic theory of tort law," where tort law exists as a means to force producers to internalize social costs associated with product liability, medical malpractice, and other fields where courts routinely delegate rulings within unlegislated elements of the legal system. In this sense, the authors argue, tort law is a system of Coasean bargaining that allows tortfeasors and injured parties to settle negative externalities arising from the consumption of goods and services. ² While this view of tort law certainly is plausible, it has come under significant scrutiny in recent years. According to Rubin (2005), an efficient tort system requires two characteristics. First, those who award tort damages (i.e., juries and judges) must be able to identify negative externalities and assign a monetary value to them. Second, these individuals must be willing to apply these measures of social cost to cases at hand. Under the framework of public choice, Rubin concludes, these outcomes seem very unlikely. Individuals that engage in strictly personal utility-maximizing behavior rarely have an interest to act in favor of public welfare; this is especially true within the field of tort law.

In order to explain the importance of public choice theory to the execution of tort law, economists must give proper consideration to the relevant players at hand. Previous research studied the relationship between tort attorneys and their clients. Priest (1991) explains that tort systems derivative of British common law incorporate a necessary element of ambiguity in its language as it appears in a state or country's system of rules. In the U.S. until the 1990s, legislatures have had neither the resources nor the willpower to specify the meaning of obscure legal terminology. As a result, legislatures often leave

² Tort law only applies to injuries that courts can ascribe a monetary value. Landes & Posner (1982) warn that it does not address higher questions of justice, such as imprisonment for a crime.
the precise meaning of these terms to be decided by courts through written precedent. Over time, this results in wide variation in the meaning of these rules across state lines, and consequently, attorneys organize around these interstate differentials to maximize their chances of winning and receiving large sums of cash. Utilizing the tools of common law, such as the class action lawsuit, attorneys play a significant role in matching large pools of lawsuits with favorable tort jurisdictions (Rubin 2005). In this respect, plaintiffs face a classic principal-agent problem. The interests of the utility-maximizing attorney, whose goal is to extract income from clients in the form of attorney's fees, does not always align with those of the people he or she represents. This results in areas within the United States that experience a disproportionate amount of litigation. The American Tort Reform Association has identified these districts as "judicial hellholes" (ATRA 2014).

On the other side of these strings of litigation are corporate entities and medical practitioners. Vulnerable as defendants to liability arising out of faulty production processes, negligent designs, or malpractice, these individuals have an incentive to minimize the amount of money they pay to plaintiffs through two major tools. First, they can pursue a strategy similar to plaintiff attorneys, disputing the validity of accused torts through litigation. According to Epstein (1988), Curran (1992), and Rubin (2005), this decision is unlikely to yield its intended result. Plaintiff attorneys choose where to file their lawsuits, and this gives them the advantage of picking a county and court that will be most sympathetic to their claims. As a result, Rubin (2005) concludes tort attorneys have a comparative advantage in litigation, forcing firms to minimize vulnerability through rent-seeking. More specifically, corporate entities actively engage in state
politics to elect individuals that pass statutory limits on tort awards through legislation (Browne & Puelz 1999). The result has been a surge in recent decades of corporate involvement in state elections and so-called “tort reforms.”

Thus, most existing literature has revolved around the distribution of power between plaintiff attorneys, who wish to extract wealth from firms through litigation, and defendants, who wish to avoid costly litigation through more traditional lobbying efforts. Browne & Puelz (1999) find that these statewide statutory reforms effectively reduce both a plaintiff’s expected income from auto-accident litigation as well as the probability that a plaintiff will file a claim at all. Avraham (2007) replicated these results in the medical malpractice industry.

Noticeably absent, however, is the role of a third and most likely equally important player: the judge. Under the common law system, judges in the United States retain broad latitude to limit the size of tort awards, in the form of punitive, economic, and non-economic damages (Champagne 2005). Additionally, they can use the position to influence the types of evidence a jury is permitted to hear. One example is the collateral source rule, which if enforced, forbids defense attorneys from presenting evidence of alternative methods of recourse that a plaintiff has received for a tort outside of trial, such as contractual worker’s compensation (Browne & Puelz 1999). As such, both plaintiffs and defendants have a substantial interest in swaying the opinion of a judge.

Recent literature has only skimmed the surface of the incentives that influence the behavior of judges. Differing institutions for the appointment of judges complicates the subject even more. Epstein et al. (2013) explain that predicting the behavior of judges
appointed by executives and confirmed by legislatures is exceedingly difficult. Given the fact that appointed judges face no risk of losing their job as a result of "good behavior" tenure, their rulings tend to vary unpredictably along political, emotional, and circumstantial lines. However, Shepard (2013) notes that over 90% of tort cases in the United States appear before some kind of elected judge. Furthermore, Champagne (2005) finds that corporate expenditures on judicial elections have been increasing in the second half of the twentieth century. Clearly the behavior of elected judges should not be ignored by students of tort reform.

Despite these findings, the impact of greater involvement in judicial elections is presently unclear. Public choice theory suggests that elected judges, concerned about securing reelection, must consider campaign prospects when rendering a decision. Similarly, corporate players, which have much to lose from an expensive tort system, should organize resources and lobbying efforts to elect sympathetic judges in tandem with existing efforts to influence state legislatures. Shepard (2013) concludes that elected judges on the appellate level are much more likely to rule in favor of business litigants in business-related cases. While this study supports the general conclusions of public choice models, Shepard's findings omit any data concerning state courts at the lowest level, where judges and juries determine the initial level of tort damages. Researchers must analyze the role of these judges because these individuals oversee the vast majority of tort cases. Furthermore, CJAC (1998) found that plaintiff attorneys dominate campaign finance donation within Californian Superior Courts. Therefore, empirical research can determine whether these various lobbying efforts have resulted in their
intended effects. Only then can economists hope to integrate the role of judges into the greater dynamics of tort reform theory.

**Methodology**

**Scope**

The central concern facing researchers of judicial behavior is the intrinsic problem of isolating the actions of judges among the multitude of other variables that factor into the amount of money transferred from a tortfeasor to a successful plaintiff. The final value of a tort award represents not only the summation of expenses experienced by a plaintiff, but also the subtle influences of judges and attorneys in the presentation and interpretation of evidence. Consequently, such behavior, by its nature, is difficult to quantify. This thesis proceeds on the notion that elected judges, in the name of self-preservation, consider the relevant effects of their decisions on campaign prospects in addition to their normal duties and, thus, behave accordingly.

As such, an understanding of the incentive structures facing judges is essential to explaining their behavior. In the broadest sense, incentives should vary with the institutional mechanisms of each state. Theoretically, a judge from Delaware, where judges are appointed by the governor and confirmed by the state assembly, should face very different circumstances than, for example, an elected judge from Alabama. From this perspective, a methodological framework that compares judges state-by-state seems like the logical choice. However, the practical realities of judicial electioneering make such a model ill-suited for valid empirical analysis. While the vast majority of states incorporate some form of electioneering into judicial selection, not all lower level judges face a serious threat from competitive candidates during election season. Therefore, a
model that only addresses differences along state lines could face potential bias from elected judges that are not constrained by political considerations.

To address this concern, this thesis narrows its scope to observations that take place within a single state's borders. This distinction allows empirical analysis to account for differences between judges that face the potential risk of unemployment during elections and those that do not. Consequently, the state of California offers the ideal context to explore this nuance. Among the most active legal systems in the developed world, the California judiciary reflects a microcosm of the circumstances troubling the country's elected judges. For decades, researchers have expressed concern over the growing role of campaign contributions in Californian judicial elections, which are conducted every six years with a requirement of non-partisanship (CJAC 1998).[^3]

Furthermore, as one of the tort capitals of the country, California offers researchers the opportunity to reconcile developments in state judicial elections with trends in civil liability (ATRA 2014).

**Data Sources**

Data for this study originate from several remarkable sources. I received individual case data through the *Jury Verdicts Database for Cook County, Illinois and All Counties in California, 1960-1984*.[^4] Initially compiled by the RAND Corporation in 1994, the dataset is available to the public through the National Archive of Criminal Justice Data, a branch of the Inter-university Consortium for Political and Social Research (ICPSR). Each observation represents a civil lawsuit and indicates important

[^3]: California law prohibits judicial candidates from formally declaring a political affiliation.
[^4]: The original source of information, according to the publishers of the data, were two reputable court reporter publications. These private services compile important facts for a wide variety of cases across California, and, for a fee, they offer the data to practicing attorneys hoping to research successful litigation techniques (Dunworth and Pace 1994).
quantitative variables, such as total damages (i.e., economic, non-economic, and punitive) awarded in trial, as well certain qualitative variables, such as case type and geographic location. Another important benefit to this dataset is that it identified the presiding judge in each case, which allowed me to isolate judicial performance over an extended period of time.

With respect to judicial electioneering, I relied on two main sources. First was a campaign archive provided by the National Institute for Money in State Politics, a non-partisan organization that tracks state-level campaign finance and competition. Equally important, however, was Kathy Morris Wolf's *California Courts and Judge* (1996). Although published in print, Wolf (1996) catalogues the career and election history of every California Superior Court judge over the past half-century.

*Model*

The model presented in this section seeks to interpret a comprehensive set of Californian trial data through difference-in-differences (diff-in-diff) regression analysis. The diff-in-diff framework offers several important benefits to this study. First, it allows researchers to isolate the behavior of judges among a multitude of other variables that factor into a tort award. Second, because the diff-in-diff model tracks individual judges over time, the line of causality between contested judicial elections and jury awards is far easier to observe than, for example, a simple OLS regression. In this case, I am concerned with the treatment effect of competitive judicial elections on the dependent variable, product liability awards stemming from jury trials. To simulate an experimental setting, the treatment group is defined along the experience of Californian Superior Court judges between 1980 and 1983. In particular, I am interested in observing judicial
behavior during the 1982 elections, an infamous year for electoral competition among electoral scholars (Wolf 1996). Cases tried before a judge that ran in a contested election during this time period are considered the treatment group. Similarly, cases that reached a verdict in front of a judge that ran unopposed in 1982 are the control group. Fortunately, there is little reason to fear for a violation of the common trend assumption as broad, structural changes over time in the interpretation and administration of tort law only occur on the state level, which means, thanks to the common law system, that any of these changes in jurisprudence in higher courts will be reflected in both the control and test groups.

Beyond that concern, this model adjusts for several important control variables. One of the primary determinants of the value of tort awards will naturally be the severity of the plaintiff's injury. Instead of listing all the possible harms that can affect an individual, this model employs the initial claim that the plaintiff, in consultation with his or her attorney, files with the court. This number will internalize the level of injury the plaintiff has sustained and state that injury in an easily interpreted dollar amount. One possible problem with using this term is the threat of omitted-variable bias. An attorney's valuation of a claim could, in theory, relate to certain unobservable characteristics, such as the character and demeanor of the judge. To address this problem, I have included several variables. First, I include the percent difference between the value of the final jury award and the claim. Second, the model incorporates the average product liability award historically given in front of each observed judge. Finally, I add time-constant fixed effects for each judge. Next, I include control variables for certain quantitative measures that are likely to increase the cost of trial and, therefore, the final verdict.
These variables include the number of plaintiffs, the length of the trial measured in days, and a binary variable that equals 1 if the plaintiff requests the jury to consider the application of punitive damages.\footnote{Unfortunately, the data does not include the value of attorney’s fees in each case.}

Taking into account these variables, I have produced the following model, $y_i = \beta_0 + \delta_0 D81_i + \delta_1 D82_i + \delta_2 D83_i + \delta_3 (\text{Treatment}_i \times D81_i) + \delta_4 (\text{Treatment}_i \times D82_i) + \delta_5 (\text{Treatment}_i \times D83_i) + \beta_1 \text{Treatment}_i + \beta_2 \text{Claim}_i + \beta_3 \text{Plaintiffs}_i + \beta_4 \text{PercentDifference}_i + \beta_5 \text{LengthofTrial}_i + \beta_6 \text{DPunitive}_i + \alpha_i + \varepsilon_i$

where (for observations $i=1,...,k$) $y_i$ equals the final value of product liability awards stemming from Californian jury trials. For all coefficients, I expect the sign to be positive. The testing period, which lasts from 1980 to 1983, is indicated by time-specific dummy variables. I include 1980 as the base year, 1981 as a pre-treatment period, as well as 1982 and 1983 as post-treatment periods. One important caveat to note is the limited predictive value of the diff-in-diff model. The purpose of this study is not to provide a definitive predictor of tort outcomes; rather, the goal is to isolate judicial agency among the many influences on jury verdicts.\footnote{In fact, an economic model that purports to predict tort litigation outcomes based on jury trials would be inherently misleading seeing as the vast majority of claims are settled out of court (Rubin 2005).}

In this vein, the primary concern is the coefficient $\delta_4$, the average treatment effect. This model is designed to test the following null hypothesis:

$H_0$: $\delta_4 = 0$.

In other words, the null hypothesis, which I intend to reject, states that during the 1982 election year, holding all else constant, tort damages overseen by a judge facing a
contested judicial election on average do not differ significantly from damages under
a judge running unopposed.

**Summary Statistics**

In accordance with the methodology outlined above, the final dataset includes
702 product liability trials over the course of the four-year testing period. In each of these
cases, the jury found in favor of the plaintiff and, consequently, awarded tort damages.  
The summary statistics produced in *Table 1* illustrate the high-risk nature of expensive
and protracted product liability tort litigation.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Mean</th>
<th>Standard Deviation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jury Award</td>
<td>$795,783.50</td>
<td>$4,064,492</td>
</tr>
<tr>
<td>D81</td>
<td>0.210177</td>
<td>0.4076597</td>
</tr>
<tr>
<td>D82</td>
<td>0.255531</td>
<td>0.4364007</td>
</tr>
<tr>
<td>D83</td>
<td>0.289823</td>
<td>0.4539312</td>
</tr>
<tr>
<td>(TreatmentxD81)</td>
<td>0.070797</td>
<td>0.2566265</td>
</tr>
<tr>
<td>(TreatmentxD82)</td>
<td>0.094027</td>
<td>0.2920272</td>
</tr>
<tr>
<td>(TreatmentxD83)</td>
<td>0.108407</td>
<td>0.311059</td>
</tr>
<tr>
<td>Treatment</td>
<td>0.357301</td>
<td>0.4794698</td>
</tr>
<tr>
<td>Claim</td>
<td>$75,258.10</td>
<td>$266,403.50</td>
</tr>
<tr>
<td>Plaintiffs</td>
<td>1.314159</td>
<td>0.8183788</td>
</tr>
<tr>
<td>Percent Difference (%)</td>
<td>98.66544</td>
<td>2190.99</td>
</tr>
<tr>
<td>Average Award</td>
<td>$335,333.28</td>
<td>$30,001.10</td>
</tr>
<tr>
<td>Length (days)</td>
<td>29.7906</td>
<td>17.7853</td>
</tr>
<tr>
<td>Punitive Damages Requested</td>
<td>0.097345</td>
<td>0.2965912</td>
</tr>
</tbody>
</table>

As indicated in the table, the average verdict surpasses three-quarters of $1 million.  
Similarly, with an average length of approximately 30 days, these cases feature extended
periods of intense litigation. An important feature to note is the *Percent Difference* variable.
On average winning plaintiffs receive close to 100% more money than they

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7 Because I am only concerned with the effect of judicial elections on the awards received by plaintiffs, I removed all cases that ruled in favor of the defendant.

8 However, one should note that with a standard deviation of $4.06 million, this distribution of jury awards skews significantly to the right.
initially claimed in damages. Whether or not this large difference is due in part to judicial elections is the subject of the next section.

**Results**

The results of the diff-in-diff estimation are reported in Table 2. Reported alongside each estimated coefficient is the respective robust t-statistic to account for heteroskedasticity. I have included stars (*) to indicate each coefficient's significance level.\(^9\) As expected, the sign of the coefficient on *Claim* is positive and extremely significant. Interestingly enough, for every $1 of damages claimed, the plaintiff receives approximately $2.5 in awards, holding all else equal. This term suggests that plaintiffs during these extended periods of litigation reap a far higher award than their own original estimation of the tort. One possible explanation for this occurrence is the dollar value of

\(^9\) * for 10%; ** for 5%; and *** for 1%. Given the skewness of some variable distributions, I ran log-linear specifications for each iteration of the model. This did not affect the significance of any terms. Therefore, for the sake of convenient interpretation, I chose only to publish the original regression table.
attorney's fees. Attorneys naturally play a large role in determining the initial claim as well as convincing the jury and judge to be sympathetic to their case. Thus, one would expect the absence of attorney's fees, which are reasonable replacements for attorney quality, would result in some bias in the coefficient on Claim. Nonetheless, given this coefficient's statistical significance and consistency over various iterations of the model, the claim seems to be an appropriate proxy for severity of injury.

As discussed with the methodology of the study, the most important estimated parameter is the coefficient on \((Treatment \times D82)\). Across three different iterations of the model, the diff-in-diff regression has predicted a statistically significant positive average treatment effect. Ranging on average from approximately $750,000 to over $1.5 million, this treatment effect also implies extreme economic significance. Furthermore, the estimation fails to reject the null hypotheses on pre-period 1981 and post-period 1983 in the treatment group. This suggests that during the slew of contested judicial elections in 1982, product liability plaintiffs received more favorable rulings from judges facing election than those who did not. Additionally, after the election, judicial behavior appears to have returned to pre-election levels.

Finally, the significance of the control variables deserves brief discussion. Generally, these controls proved statistically insignificant on the final valuation of the jury award. This could be for several reasons. Most likely, these estimates suffer from omitted-variable bias. Some unobserved variable in the error term may skew the parameter away from its theoretically true value. Another plausible explanation is non-linearity with the dependent variable. Some variables may still have a positive, but
diminishing effect, on the jury award. Nonetheless, because these terms are merely controls and not the subject of this thesis, they hold little relevance to the final findings.

Discussion

Implications

The diff-in-diff estimation suggests that during the 1982 contested elections, judges and juries awarded significantly higher damages to plaintiffs. After judges no longer face a serious threat, product liability awards appear to have returned to pre-election levels, all else held equal. In light of previous scholarship, these results may seem counter-intuitive. After all, Rubin (2005) predicted that, given corporations' comparative advantage in rent-seeking, elected officials are generally more likely to favor defendants within the U.S. tort industry. Furthermore, Shepard (2013) found that appellate-level elected judges are more likely than appointed judges to rule in favor of businesses on business-related issues. Thus, the results of this study seem to conflict with these findings.

However, if economists thoroughly consider the incentive structure facing trial judges during elections, they can see that my findings are sufficiently consistent with the higher body of literature. For example, CJAC (1998) illustrates the unique composition of state trial-level judicial elections. The report finds that during the last decades of the twentieth century, California Superior Court candidates on average raise 51% of campaign funds through their personal finances. The next biggest faction comes from attorneys, which comprise 49% of non-candidate contributions. Of this 49%, 64% identified as plaintiffs attorneys. Furthermore, the study shows that candidates who raised more money than opponents won their elections 87% of time. What this report
shows is the fact that judicial campaigns attract participation from plaintiffs interested in high jury awards as well as defendants that favor toughness on torts.

To illustrate this point, consider the following function:

\[ V = XU_P(R(Q)) + YU_D(R(Q)) + ZU_C(R(Q)). \]

Assume a judge oversees a case where various plaintiffs sue a defendant. This defendant is the producer of some good. In the equation above, \( V \) equals the number of votes a judge expects from his or her constituents during election times. The constituents are plaintiffs' attorneys (P), the defendant (D), and the represented plaintiffs (C). Each constituent's vote is determined by that individual's utility derived from perceived judicial performance (\( U \)), which is a function of the rent transfers resulting from tort litigation (\( R \)). As this is a wealth transfer, the rent must be a fraction of the consumer and producer surplus. Therefore, \( R \) must be a function of the defendant's income or simply its quantity of output in the market (\( Q \)).

Finally, \( X, Y, \) and \( Z \) are constants that indicate the marginal effect of utility on judicial votes. I expect \( Y \) to be negative, because as \( L \) increases, defendant's utility will decrease and so will its likelihood to lobby in favor of a judge.\(^\text{10}\)

To maximize votes through the award of an optimal lawsuit, the judge under the public choice model must simply take the derivative of the function with respect to \( Q \) and set it equal to zero:

\[ \frac{dV}{dQ} = X(\delta U_P/\delta Q) + Y(\delta U_D/\delta Q) + Z(\delta U_C/\delta Q) = 0. \]

Thus, the optimal tort value for a judge (assuming a positive sign on \( Z \)) would occur when:

\[ X(\delta U_P/\delta Q) + Z(\delta U_C/\delta Q) = -Y(\delta U_D/\delta Q). \] \(^\text{11}\)

\(^{11}\) Because \( (\delta U_D/\delta L) < 0 \), the right side of the equation will be a double negative.
This equation demonstrates a simple comparison of marginal benefit (the left side) to marginal cost (the right side). The judge will raise the value of the tort award to benefit plaintiffs until the negative utility of defendants will reduce his or her net expected votes. The level of this raise depends on the relative magnitudes of X, Y, and Z. The larger the benefit for rewarding plaintiffs, more willing a judge is to penalize defendants, and vice versa. 12

Upon applying this explanation to an empirical analysis of the 1982 judicial elections, it is clear that the electoral influence of plaintiffs far outweighed that of defendants. This is observed through a positive average treatment effect. Conversely, in Shepard (2013), it may simply be the case that during the relevant time period, the influence of defendants outweighed those of plaintiffs, thus explaining the apparently conflicting findings of the two studies. Regardless of this fact, both of these studies conclude that in the face of competitive elections, vote-maximizing judges tend to alter their behavior to suit campaign prospects.

Limitations

Despite the major findings of this study, research into the role of judicial elections on state-level tort law is far from complete. Though moderately robust, the estimated average treatment effect presented in this paper should undergo further robustness testing to clarify its exact magnitude. This is aided only through more detailed and more comprehensive datasets. For example, studies must indicate what other factors could possibly influence the presence of contested judicial elections as well as the final value of

12 This mathematical model is an alteration of the popular rent-maximization model for elected officials, see Tullock (1967) and Krueger (1974). In many respects, this model overstates the ability of judges to influence a tort award. However, it accurately relays, albeit simplistically, how an unbridled judge would respond to the incentive structure of an election.
product liability awards. Furthermore, future studies, must delve deeper into the political composition of judicial elections. Empirical analysis should consider the influence that plaintiffs hold over a judge compared to defendants. Next, taking into account the practical composition of these elections (i.e., contested vs. uncontested), future research can then begin to conduct interstate analysis. That is, compare judges by institution type. Do retention vote states, such as Colorado, produce judges similar to appointment states, such as Alaska, or rather, are these judges closer to partisan elected judges (e.g., Louisiana)? Unfortunately, the present study cannot provide a sufficient answer.

Finally, the findings of this study are limited to a very specific time period in the history of the United States. Since 1982, California has placed significant restrictions on its non-partisan judicial elections. For example, these restrictions include new developments in statutory tort reforms as well as more recent requirements for judges to recuse themselves in conflicts of interest (Abramson 1994). While this study supports the notion that judicial elections tend to operate under the umbrella of public choice economics, perhaps more recent developments can influence the exercise of a judge’s rational choice.

Conclusion

For decades, legal scholars have warned the public of the danger judicial elections pose to impartiality in the administration of justice, but until recently, few researchers have actually tested this premise through the rigor of econometric analysis. By observing the role of the 1982 contested elections in California tort law, this thesis takes the first step in absorbing judicial decision-making into a higher body of debate in law and economics. Through difference-in-differences analysis, this study finds with statistical
significance that judges and juries on average tend to award higher damages to plaintiffs during contested judicial elections. Furthermore, this thesis argues that a valid empirical analysis must first reflect the practical realities of judicial electioneering in addition to institutional structure. Finally, I present a basic theoretical model of judicial vote-maximization that should serve to inform future inquiry. While these results do not provide the definitive answer on judicial elections, they support the broad notion that when considering the relevant players in the formulation and execution of tort law, the incentives influencing judges are a crucial piece of information.

References


