



HARVARD Kennedy School
JOHN F. KENNEDY SCHOOL OF GOVERNMENT

The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Politicize the Judiciary

Faculty Research Working Paper Series

Adam Bonica

Stanford University

Maya Sen

Harvard Kennedy School

January 2015
RWP15-001

Visit the **HKS Faculty Research Working Paper Series** at:
<https://research.hks.harvard.edu/publications/workingpapers/Index.aspx>

The views expressed in the **HKS Faculty Research Working Paper Series** are those of the author(s) and do not necessarily reflect those of the John F. Kennedy School of Government or of Harvard University. Faculty Research Working Papers have not undergone formal review and approval. Such papers are included in this series to elicit feedback and to encourage debate on important public policy challenges. Copyright belongs to the author(s). Papers may be downloaded for personal use only.

The Politics of Selecting the Bench from the Bar: The Legal Profession and Partisan Incentives to Politicize the Judiciary*

Adam Bonica[†] and Maya Sen[‡]

January 5, 2015

Abstract. The American judiciary has increasingly come under attack as polarized and politicized. Using a newly collected dataset that captures the ideological positioning of nearly half a million judges and lawyers who have made campaign contributions, we present empirical evidence showing politicization through various tiers of the judicial hierarchy. We show that the higher the court, the more conservative and more polarized it becomes, in contrast with the broader population of attorneys, who tend to be liberal. These findings suggest that political actors not only appear to rely on ideology in the selection of judges, but that they strategically prioritize higher courts. To our knowledge, our study is the first to provide a direct ideological comparison across tiers of the judiciary and between judges and lawyers, and also the first to document how—and why—American courts are politicized.

JEL classification code: K490

Word Count: 11,202 (including references)

*Comments and suggestions welcome. Many thanks to Matt Baum, Matt Blackwell, Tom Clark, Justin Grimmer, Jonathan Nash, Alexandra Pagano, Michael Peress, Jenny Shen, and Arthur Spirling for helpful feedback. We are also grateful to conference or seminar participants at UC-Berkeley Law, NYU, Princeton, Rochester, and Stanford.

[†]Department of Political Science, Stanford University (bonica@stanford.edu).

[‡]John F. Kennedy School of Government, Harvard University (maya_sen@hks.harvard.edu, <http://scholar.harvard.edu/msen>).

1 Introduction

Bush v. Gore (2000) was a seminal case for the Supreme Court. The ideologically split 5-4 ruling halted the recounting of Presidential votes in the 2000 Election, ending a protracted struggle. But not only did the decision put George W. Bush in the White House, it also cast an immediate pall over the Court's reputation as a non-partisan actor. One observer wrote that the Justices' actions "suggested that their partisanship was so thorough and pervasive that it blinded them to their own biases" (Balkin, 2001), while another complained that they "decided as they did because of the personal identity and political affiliation of the litigants" (Dershowitz, 2001, p. 174). In terms of public opinion, there is little question that the ruling immediately damaged the Court's reputation (Nicholson and Howard, 2003).

Although the Court's standing has arguably recovered from *Bush v. Gore* (Semet, Persily, and Ansolabehere, 2014), attacks on the Court as being both politicized and polarized have only increased in recent years (e.g., Liptak, 2014; Stone, 2014). Contributing to mounting criticisms are 5-4 partisan splits on cases involving religious freedoms, campaign finance, and gay rights (Devins and Baum, 2014). In addition, in tandem with these perceived politicized rulings, public support for the Court appears to be declining (McCarthy, 2014). Many feel that such perceived politicization could cause long-term damage to the courts' institutional legitimacy—particularly worrisome for a branch of government that relies on neither the power of the sword nor of the purse.

Although the trend of increased politicization and polarization in the courts appears to be accepted, very few studies have examined these issues among tiers of the judiciary. While many studies have explored polarization among political actors (McCarty, Poole, and Rosenthal, 2006), members of the public (Hetherington, 2001; Layman and Carsey, 2002; Fiorina and Abrams, 2008), and the media (Prior, 2013), many fewer studies have explored these issues within the courts (Devins and Baum, 2014; Clark, 2009). This gap is surprising. America's courts address questions of significant public importance, which could be affected by ideological divisiveness on the courts (Epstein and Knight, 1998; Maltzman, Spriggs, and Wahlbeck, 2000; Binder and Maltzman, 2009). In turn, as many believed happened with *Bush v. Gore*, this could negatively impact perceptions of the courts.

In this paper, we address these issues through the lens of *judicial politicization*, or the degree to which politics and ideology matter in the composition of the American judiciary. We do so by linking together two novel sources of data. The first is a newly collected data set that includes nearly all of the nation's attorneys, gathered from online legal directory Martindale Hubbell.

The second is the Database on Ideology, Money in Politics, and Elections (DIME) (Bonica, 2013). Combined together, these data allow us to identify the campaign contributions—and corresponding ideological common-space scores—for 395,234 U.S. lawyers and judges. This figure includes 377,427 attorneys in private practice, 3,966 law professors, 2,726 government attorneys, and 11,115 state and federal judges. These data represent the first comprehensive, consistently measured data that capture the ideologies of judges across the judicial hierarchy without relying on the identities of appointing political actors. These data further allow us to compare the ideologies of various tiers of the American judicial system and to compare judges to U.S. attorneys, who represent the candidate pool for the nation’s courts.

We use these data to make several contributions. First, we show that lawyers are quite liberal compared to the general U.S. population. Second, we show that judges as a whole are more conservative than the population of attorneys. This is particularly the case among judges who sit in higher, more politically important courts—such as state high courts and the U.S. Courts of Appeals. This in turn suggests that political actors not only rely on ideology in the selection of judges onto courts, but that they do so (1) where it benefits their party the most and (2) when it concerns the most important courts. On the former point, we explore how politicization and polarization vary by jurisdiction: we find that some states show signs of politicization while others do not, and that the federal courts are among the most politicized. In addition, in states where courts are not currently politicized, we see increasing attempts to bring politics into the selection of judges. In evidence of the latter point, we provide evidence showing that, conditional on education, conservatives are the most likely to be tapped to become judges, and higher court ones at that. We also show that federal and higher courts are also the most polarized. Taken together, our results suggest that strategic motivations to politicize appear to play a more pronounced role at federal or higher court levels, or perhaps where one party has the most to gain.

We motivate and explain these findings by proposing a theory of judicial politicization. This theory models the ideological composition of the judiciary as a function of two inputs: (1) the ideological distribution of the pool of attorneys eligible to serve as judges and (2) the external political forces (e.g., politicians) attempting to shape the judiciary via selection. Left to a judicial selection method devoid of ideological considerations, America’s courts should, after controlling for relevant demographic characteristics, closely resemble the population of attorneys from which they are drawn. As judicial selection becomes more politicized, and politics become an increasingly important consideration in judicial selection, the courts will more closely resemble the ideological preferences of politicians. The model reveals how asymmetries in the ideological distribution of lawyers can explain differences in

partisan strategies and rhetoric regarding judicial selection. At a more fundamental level, the model provides a straightforward explanation of the underlying causal mechanisms behind efforts to politicize American courts.

This paper proceeds as follows. Section 2 presents a theoretical framework for judicial politicization, which we use to generate testable hypotheses. In Section 3 we discuss the two newly collected data sets used. We use these data in Section 4 to demonstrate that U.S. lawyers as a whole are quite liberal. We present evidence showing that judges are more conservative than U.S. lawyers in Section 5, followed by a comparative analysis of jurisdictions in Section 6 and of high courts in Section 7. Section 8 shows that federal and high courts are the most polarized. We conclude in Section 9 by noting how this research reshapes our understanding of judicial politicization.

2 A Theory of Strategic Judicial Politicization

There is no question that lawyers have come to dominate American politics. Beyond being overrepresented among the ranks of elected office-holders, all state supreme court justices are lawyers, and 48 states explicitly *require* that their high court justices be lawyers (Barton, 2010, p. 29). All judges currently serving on the federal courts are lawyers, as are all nine justices sitting on the Supreme Court. There is no other profession that has so effectively captured an entire branch of government.

We therefore take as a starting point the fact that *U.S. attorneys* represent the potential candidate pool for the nation's judges. The basic theoretical framework we present below thus characterizes the ideological composition of the judiciary as a function of (1) the ideology of attorneys, (2) the ideology of political actors, and (3) the level of politicization of judicial selection. We use the model to generate several testable predictions about the incentives and consequences of efforts to politicize the judiciary.

A Simple Illustration of Possible Politicization. Consider a simple hypothetical configuration of preferences across (1) political actors and (2) attorneys, shown in Figure 1. Given the uncontroversial assumption that judges affect policy and policy implementation, the parties have incentives to seat judges that share their preferences (Ferejohn, 2002; Epstein and Knight, 1998; Maltzman, Spriggs, and Wahlbeck, 2000). This provides us with a functional definition of judicial politicization, which is *the extent to which judges are selected on the basis of their partisanship or ideology*. In this simple example, moreover, the parties' ideologies follow a bimodal distribution, with Republicans on the conservative side and Democrats on the liberal side. In terms of the bar's interests, we consider as a starting prior the sentiment among many

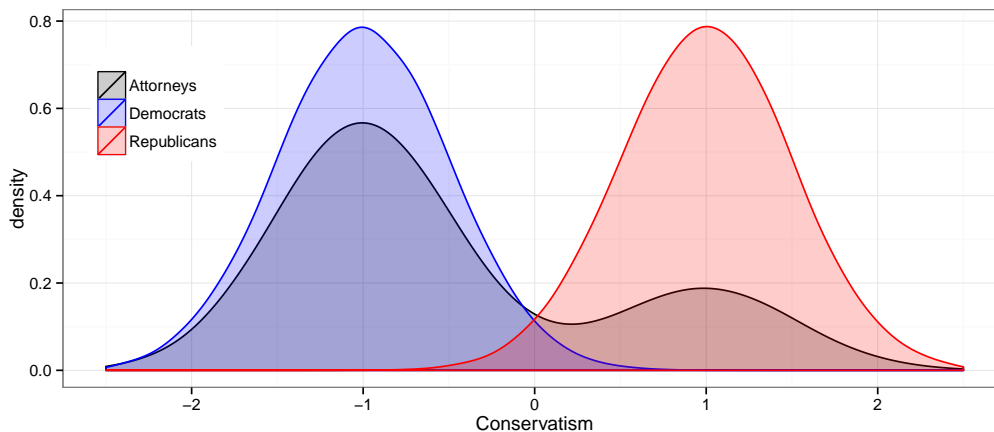


Figure 1: Hypothetical ideological distributions of the attorneys and partisan elites.

that lawyers—particularly trial lawyers—are more to the left than the general population. Some of this is borne out in empirical analysis conducted by advocacy organizations (e.g., *Report on the Lawsuit Industry of America*, 2013). Within the scholarly literature, McGinnis, Schwartz, and Tisdell (2004) show that campaign contributions made by law professors at elite institutions overwhelmingly go to Democrats, a finding echoed by Chilton and Posner (2014).

In terms of judicial selection, we also consider a scenario where judicial politicization is minimal and judges are drawn more or less randomly (or for reasons orthogonal to ideology) from the population of attorneys shown in Figure 1. Such a non-politicized mechanism would be consistent with claims made by the American Bar Association (ABA), which maintains that judges should be selected on the basis of “temperament,” “integrity,” and “competence” (American Bar Association, 2009), and numerous other legal commentators and political actors (e.g., Carter, 1994). Under such minimal politicization, a liberal skew in the preferences of attorneys would result in a judiciary that more closely resembles the preferences of Democrats. In effect, any liberal bias in the attorney pool gives Democrats an advantage in control over the judiciary. This in turn is likely to influence the parties’ incentives and strategies regarding the judiciary. As we show below, this simple example captures what we see across many jurisdictions.

A Model of Judicial Politicization. We now turn to formalizing the relationship between (1) the ideology of attorneys, (2) the ideology of politicians, and (3) judicial politicization.

Let $a(\cdot)$ represent the ideological distribution of attorneys eligible to serve on the bench. Let $d(\cdot)$ and $r(\cdot)$ represent the ideological distributions of polit-

ical elites from the Democratic and Republican parties, with $p(\cdot)$ representing the combined distribution of politicians from both parties. Suppose judges are drawn from the distribution $j(\cdot) = (1 - \omega)a(\cdot) + (\omega)p(\cdot)$, where ω is a **mixing parameter representing the level of politicization**. Under no politicization ($\omega = 0$), judges will be randomly drawn from the pool of attorneys, or at least are drawn for reasons orthogonal to ideology. On the other hand, under the scenario of complete politicization ($\omega = 1$), judges are strategically sampled such that the judiciary perfectly resembles the population of politicians.¹

We define the payoffs for each party as the ideological overlap between its members and the judiciary. Given two densities, $f(\cdot)$ and $g(\cdot)$, the overlap coefficient is calculated as the ratio of the shared area between them.

$$\Delta(f, g) = \int \min \{f(x), g(x)\} dx \quad (1)$$

A party attains the maximum payoff when the distribution of judges perfectly overlaps the distribution of its members. However, efforts to politicize the judiciary can be costly. First, the parties pay a private cost, $c(\cdot)$, associated with the opportunity cost of the organizational resources expended on recruitment efforts and navigating the nomination process and/or supporting the campaigns of judicial candidates. These resources would need to be diverted from other party building activities. Moreover, efforts to politicize judicial selection in the party's favor may also incur reputation costs for the party, as the standard tactics and potential disruption to the courts might be viewed unfavorably by voters (Caldeira, 1986; Binder and Maltzman, 2009). Politicization also incurs a public cost, q , in weakening the independence and the institutional legitimacy of the courts through judicial vacancy and other consequences of partisan conflict, in line with the substantive literature. The public and private costs are assumed to be strictly increasing with ω . For simplicity, we assume that ω is set by the party for which the optimal value of ω is greatest, as determined by the point at which marginal costs equal the marginal benefits.

The utility function for each party can be expressed as an additive function of the overlap coefficient and the combined private and public costs.

$$U_d = \Delta(d, j(\omega|a(\cdot), p(\cdot))) - c_d(\cdot) + q(\omega) \quad (2)$$

$$U_r = \Delta(r, j(\omega|a(\cdot), p(\cdot))) - c_r(\cdot) + q(\omega) \quad (3)$$

¹Note that the assumption that efforts to politicize judicial selection are drawn from a joint distribution of politicians, $p(\cdot)$, reflects that, once politicized, outcomes will reflect the partisan balance of power in the legislative and executive branches.

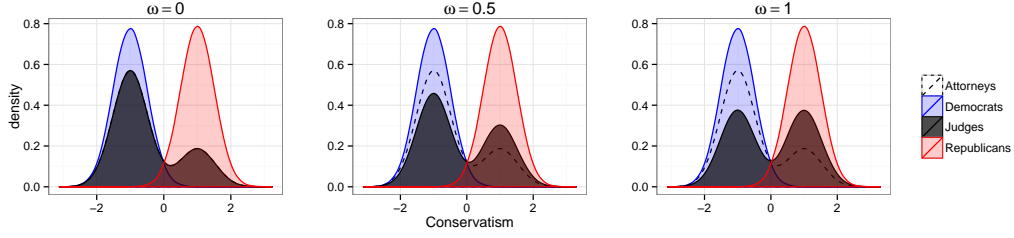


Figure 2: Distributions of judges at varying levels of ω .

The setup above provides a simple framework for conceptualizing the strategic asymmetries in the partisan struggle to shape the judiciary. To illustrate further, Figure 2 shows three distributions of $j(\cdot)$ at different levels of ω and with a more left-leaning underlying attorney pool. As evidenced by the noticeably higher overlap at $\omega = 0$, a strictly non-politicized judicial selection process yields a better payoff for Democrats than it does for Republicans. In fact, Democrats obtain their best possible outcome when $\omega = 0$ and $c(\cdot) = q = 0$. That is, they do best when external political forces are kept out of the judicial selection process entirely. Republicans, on the other hand, have strong incentives to politicize the judiciary. They are faced with the optimization problem,

$$\arg \max_{\omega \in [0,1]} : \{ \Delta(r, j(\omega | p(\cdot), a(\cdot))) - c_r(\cdot) + q(\omega) \} \quad (4)$$

As we discuss in more depth below, these simple results go far in explaining observed differences in partisan rhetoric on the judicial selection process. The left has taken a distinctly defensive position in vocally opposing efforts to further politicize the judiciary while the right has campaigned against “judicial activism.”

Empirical Predictions from the Model. The model generates simple predictions about the distributional effects of judicial politicization. In addition, as we show below, the empirical distributions of $a(\cdot)$, $r(\cdot)$, and $d(\cdot)$ actually correspond closely to the stylized distributions used in the example. A subsequent implication is that politicization efforts will result in a rightward shift in the distribution of judges away from $a(\cdot)$. This forms our first proposition:

Proposition 1: Given left-leaning attorneys, politicization will result in a rightward shift in the judiciary compared to attorneys if $\Delta(d, a) \geq \Delta(d, p)$ and $\Delta(r, a) < \Delta(r, p)$.

A corollary is that efforts to politicize the judiciary would strategically be directed toward courts higher in the judicial hierarchy—such as state high courts and federal courts of appeals. These would naturally be where ideology matters most for decision making (Weiden, 2010; Sunstein et al., 2006).

The consideration of possible strategic politicization forms our second proposition:

Proposition 2: The distributional shifts will be greatest at the higher courts and diminish moving down the judicial hierarchy.

Lastly, the model generates several comparative implications, which we explore below. For example, given the empirical distributions of $p(\cdot)$ and $a(\cdot)$, it reveals how the partisan incentives to politicize the judiciary compare across states and across tiers of the judiciary and how the mapping of politicization, ω , onto $j(\cdot)$ characterizes the theoretical relationship between politicization and polarization. It also provides general indicators for the level of politicization by examining whether judges in a state more closely resemble the respective populations of attorneys or politicians.

3 Lawyers and Campaign Contributions Data

We conduct our empirical analysis using data from two sources: (1) the Database on Ideology, Money, and Elections (DIME) and (2) the Martindale-Hubbell lawyers' directory. Additional discussion of how we linked records across databases is provided in the Appendix.

3.1 Database on Ideology, Money in Politics, and Elections

A detailed discussion of the Database on Ideology, Money, and Elections is provided in Bonica (2014); we provide only a quick overview. The database reports DIME scores (also known as “common-space CFscores”) for all individuals and organizations making campaign contributions to state and federal candidates from 1979–2012. The scores are calculated by leveraging the fact that someone contributing to a conservative candidate is more likely to be conservative herself, while the opposite is true for someone making a contribution to a liberal candidate. They provide estimates of how liberal/conservative individual donors are and place them in a common space with other candidates and organizations spanning local, state, and federal politics.

The primary advantage of DIME is in the breadth of data. In this regard, we note the existence of several high-quality measures, including ide-

ological scores for the Supreme Court (Clark and Lauderdale, 2010; Bailey, 2007; Martin and Quinn, 2002; Segal and Cover, 1989), lower court judges (Boyd, 2011; Epstein et al., 2007; Giles, Hettinger, and Peppers, 2001), and state-court judges (Brace, Langer, and Hall, 2000). Measuring judicial ideology does, however, become more difficult at the lower-court level, owing to the fact that judges more infrequently sit together—which in turn makes relative scaling difficult. Estimates of lower-court ideology have therefore relied on the identity of the appointing President, or, in instances where Senatorial courtesy applies, the ideology of the senior home-state Senator (e.g., Boyd, 2011; Epstein et al., 2007; Giles, Hettinger, and Peppers, 2001). However, there is no consistent measure across tiers of the judiciary; neither do these measures allow us to compare the ideologies of attorneys, who represent the candidate pool from which judges are drawn. DIME scores, which are available for any individual that has made a large enough contribution from 1979–2012, provide an appealing solution. Not only does DIME allow the estimation of the ideological positioning of any lawyer in the database, but it also provides a consistent measure across tiers of the judiciary, including across federal lower-court and state judges, for whom standard common space score measures might have more error.

We note one possible source of concern in using the DIME data, which is that donors may vary in meaningful ways from non-donors (Tausanovitch and Warshaw, 2013) or that donors could donate strategically. We discuss these concerns in Sections 3.3 and 3.4.

3.2 Martindale-Hubbell Lawyers' Directory

Our next task is to identify individual lawyers and judges in the DIME data. As neither the federal government nor the ABA maintains a centralized national database of licensed attorneys, we turn to the Martindale-Hubbell Law Directory.² Martindale-Hubbell is a comprehensive database of U.S. Attorneys that has been published continuously since 1931. The Martindale-Hubbell data draw on state bar directories, law firm listings, professional organizations, and other publicly available data sources to maintain its database. The directory is widely viewed as the most authoritative and comprehensive source of information on the nation's attorneys. Although historical data are available, the database used here represents a snapshot of the population of active legal professionals as of 2012.

While the amount of information available varies by attorney, even the most basic entries in the directory include information on (1) name, (2) professional address, (3) date of bar admission, (3) law school attended, and (4)

²Some states (e.g., California) have online databases of lawyers admitted to the state's bar; however, disclosure of names varies across states.

employer type.³ In addition, nearly all of the listings include (5) name of law office/firm or employer, (6) position/professional title, (7) undergraduate institution, and (8) specialty/practice areas. Each individual in the directory is also assigned an international standard lawyer number (ISLN), a unique identifier that does not vary over the course of a lawyer’s career.

In total, the Martindale-Hubbell contains entries for 974,448 individuals. This includes 890,039 attorneys in private practice, 42,510 serving as in-house counsel at corporations and other private institutions, 10,527 government attorneys, 25,929 judges, and 5,444 law professors. We explain the algorithm by which we linked these Martindale-Hubbell data to the DIME data in Section A in the Appendix.

3.3 Self-Selection into the Donor Population

A potential concern is selection bias due to some attorneys contributing (and therefore being included in DIME) but not others. However, attorneys are extremely active contributors, even compared to similar professions. In an exhaustive search of the contributor database, we identified 422,362 attorneys listed in the Martindale-Hubbell database, which corresponds to a participation rate of 43.3%, an order of magnitude greater than the participation rate among the voting age population (Bonica, 2014).^{4,5}

Regarding judges who are donors, a potential selection problem concerns regulations that bar federal and some state judges from making political contributions.⁶ Fortunately, a majority of judges were active donors prior to joining the bench. With regard to state high courts, of the 70 state justices first elected to office between 2001 and 2011, 66 (or 94%) appear in DIME as campaign contributors. The pattern is more muted, but still apparent for federal

³The database includes labels for four types of employment: (1) in-house counsels at corporations and non-profit institutions, (2) government attorneys, (3) law professors, and (4) a catch-all category, which is primarily composed of lawyers at small and large firms and solo practices.

⁴A fraction of these donors (around 6.5%) gave only to corporate or trade groups and thus were not assigned ideal point estimates.

⁵We deliberately calibrated the algorithm to be less “greedy” in identifying matches so as to minimize false matches at the expense of reducing the overall linkage rate. Given the large sample size, this decision reflects our attempt to prioritize minimizing bias over increasing the sample size. In general, false matches are more likely to introduce bias than are missed matches. (Missed matches would be more or less random, whereas false matches would incorporate more people who could be confused with the population of interest.) As a result, the number of lawyers identified by the record-linkage algorithm represents a conservative estimate of the percentage of attorneys making contributions.

⁶Federal judges currently on the bench are barred from making political contributions by the Code of Conduct for U.S. Judges, Canon 5. However, the code of conduct does not bar political activity earlier in their careers.

judges. Nearly 65% of sitting U.S. Court of Appeals judges are found in the DIME database as contributors, with the share rising to 79% when subsetting to those appointed since 2011.

Despite the high participation rates, however, self-selection into the donor population could still bias results. To address these concerns, we employ a Heckman correction, which under certain conditions can estimate model parameters even in the face of non-random selection into the donor population (Heckman, 1979). The first stage of the Heckman correction models the probability of selection into sample, while the second stage incorporates the transformed predicted probabilities from the first stage as additional covariates. Table 1 displays results from probit models that we use as the first stage of a Heckit model. (Second-stage results are presented in our results discussion, below.) Here, the outcome variable, donor status (i.e., an indicator of whether the individual appears in the DIME data), is regressed on variables that capture gender, age, geography, area of employment, career status, and some basic measures of quality of legal education.⁷ Model 2 further includes the Democratic vote share in the last Presidential election for the individual's Congressional district, which captures how liberal (or conservative) the jurisdiction is.

Both models raise the possibility of selection bias: several of the variables are predictive of the propensity to donate. For example, those who are partners in law firms or those who graduated from top ("T14") law schools are *more* likely to make political contributions than are other kinds of attorneys. Women, government lawyers, prosecutors and public defenders, corporate (in-house) counsel, and those who attended law schools not ranked in the top 100 are *less* likely to contribute. Being located in more liberal Congressional districts is also associated with an increased propensity to donate, as seen in Model 2.

To aid with the identification of the Heckman correction model, we rely on an exclusion restriction assumption involving a single variable, the number of top state executive offices (attorney general, lieutenant governor, secretary of state, state treasurer, and auditor) that are elected in the individual's state.⁸ The logic of using this variable is as follows. When selected via elections, races for these state executive offices are typically high-profile events

⁷For legal education, we group together law schools that are in the top 14 (or "T14"). The composition of these has remained stable ever since rankings have been kept. For career status, we identify the largest law firms (a.k.a. "Big Law" firms) by tabulating the number of lawyers in the Martindale-Hubbell database listing each law firm as their employer. We define Big Law as the top 100 firms by number of employees as determined from the Martindale-Hubbell data.

⁸Fifteen states have appointed secretaries of state (AK, DE, FL, HI, MD, ME, NH, NJ, NY, OK, PA, TN, TX, UT, VA), six states have appointed attorneys general (AK, HI, ME, NJ, TN, WY), 12 states have appointed treasurers (AK, GA, HI, MD, ME, MI, MN, MT, NH, NJ, TN,

fueled by intense fundraising efforts that often attract a sizable number of new donors. However, whether a state holds elections for executive office is an institutional feature typically determined closer to the state's founding and does not appear to be related with variation in contemporary partisan leanings across states. Whereas increased campaign activity is likely to slightly increase the probability that an individual donates, there is no obvious mechanism whereby holding competitive elections for state executives would bias latent ideological preferences of donors in the state.⁹

3.4 Robustness of Measures to Strategic Giving

Another possible concern is that donors give for strategic reasons, rather than due to genuine ideological leanings. Detailed discussion of the robustness of DIME scores to strategic giving can be found in [Bonica \(2014\)](#) for donors in general and [Bonica and Woodruff \(2014\)](#) specifically in the context of state judges. Borrowing from those papers, we note several points that address the concern of strategic giving here. First, the scores for individual donors and recipients have been shown to be robust to controlling for candidate characteristics related to theories of strategic giving, such as incumbency status. Second, there is a strong correspondence between contributor and recipient scores for candidates who have both fundraised and made donations to other candidates, indicating that independently estimated sets of ideal points reveal similar information about an individual's ideology. Third, the DIME scores are strongly correlated with vote-based measures of ideology such as DW-NOMINATE scores, providing strong evidence of their external validity. Lastly, estimated scores for candidates that have campaigned for judicial and non-judicial office are robust to changes in office type.

[Bonica \(2014\)](#) and [Bonica and Woodruff \(2014\)](#) further note that the estimation model does not strictly assume that ideological proximity is the sole determinant of contribution behavior, given that it allows for error. While the model "operates on the assumption that contribution decisions are spatially determined, strategic giving will only bias the candidate estimates if the resulting spatial errors violate normality assumptions" ([Bonica and Woodruff, 2014](#)). Indeed, most accounts of strategic behavior are actually largely compatible with ideological giving. That is, strategic incentives would serve

VA), 25 states have no elected auditors or comptrollers (AK, AZ, CA, CO, CT, FL, GA, HI, ID, IL, KS, LA, MD, ME, MI, NH, NJ, NV, OR, RI, SC, TN, TX, VA, WI), and seven states have no elected lieutenant governors (AZ, ME, NH, OR, TN, WV, WY).

⁹The F -statistic for the number of elected executives is 553.9, which easily exceeds the F -statistic > 10 rule of thumb for exclusion restrictions. However, the number of elected executives only weakly correlates with donor status at $r=0.026$. On the other hand, it is all but unrelated with DIME scores at $r=0.006$.

	Model 1	Model 2
Female	-0.334*** (0.003)	-0.338*** (0.003)
Years since Admitted	0.069*** (0.0003)	0.069*** (0.0004)
Years since Admitted ²	-0.001*** (0.00001)	-0.001*** (0.00001)
Government Lawyer	-0.461*** (0.014)	-0.568*** (0.014)
Corporate (in house counsel)	-0.305*** (0.007)	-0.263*** (0.007)
Big Law Firm (top 100)	0.244*** (0.006)	0.203*** (0.006)
Solo-practice	-0.017*** (0.003)	-0.009*** (0.003)
Law Professor	-0.029** (0.014)	-0.022 (0.014)
Partner	0.314*** (0.007)	0.300*** (0.007)
Prosecutor/District Attorney	-0.232*** (0.012)	-0.222*** (0.012)
Public Defender	-0.296*** (0.021)	-0.292*** (0.021)
Top 14 Law School	0.291*** (0.004)	0.266*** (0.004)
> 100 Ranked Law School	-0.091*** (0.003)	-0.083*** (0.003)
CD Dem. Pres. Vote Share		0.319*** (0.009)
N. Elected State Execs.	0.028*** (0.001)	0.023*** (0.001)
Constant	-1.302*** (0.007)	-1.482*** (0.009)
N	959484	955726
Chi-square	109251.000*** (df = 14)	109401.000*** (df = 15)

***p < .01; **p < .05; *p < .1

Table 1: First-stage Results: Probit regression, whether an individual contributes (is in DIME database) as outcome variable.

largely to motivate contributors to engage in *more* funding activity but would not necessarily influence *which* candidates to support.

Lastly, as our analysis focuses on donor DIME scores recovered for attorneys and judges who have personally contributed to other candidates and campaigns, we consider whether there are any specific reasons to expect lawyers and judges to meaningfully differ from other types of donors. For example, it may be the case that lawyers face pressure to contribute to the campaigns of sitting judges. When we re-estimate the DIME scores for lawyers with contributions to judicial candidates excluded, however, the resulting scores correlate with the original scores at $\rho = 0.99$. Moreover, re-estimating the scores with all contributions to state elections excluded (i.e. federal contributions only) produces scores for lawyers that correlate with the original score at $\rho = 0.97$. As a result, it seems highly unlikely that any analysis would be sensitive to these concerns.

4 Ideology of U.S. Attorneys

As illustration of the measures, Table 2 presents results from the second-stage OLS models corrected for selection bias, with estimated ideology as the outcome measure. A negative coefficient indicates increased liberalism, while a positive coefficient indicates increased conservatism. We again include two models, with Model 2 including the district-level Democratic vote share in the 2008 Presidential election, a proxy for geographically based liberalism.

As the table shows, the distribution of attorneys varies in meaningful ways across areas of employment, demographic characteristics, and geography. For example, female lawyers are more likely to be liberal leaning, as are law professors, public defenders, and government lawyers. On the other side, those who work in Big Law firms as well as those who are identified as partners are more conservative. We also see increased conservatism associated with more time since bar admission. The ideological distributions of lawyers also vary meaningfully from state to state, an important point for our discussion of politicization in Section 6. (See Figure A1 in the Appendix for a visual comparison.) Liberal attorneys are heavily overrepresented in “blue” states, such as New York, Illinois, and California, while lawyers in a some “red” states—Alabama, Georgia, Louisiana, Oklahoma, South Carolina, Wyoming—lean to the right. These patterns could create partisan incentives for politicization in some states but not others. However, as we show in Figure 3, *attorneys are by and large left of center compared to other mainstream political actors.*

	Model 1	Model 2
Female	-0.505*** (0.011)	-0.576*** (0.013)
Years since Admitted	0.038*** (0.002)	0.056*** (0.003)
Years since Admitted ²	-0.0004*** (0.00003)	-0.001*** (0.00003)
Government Lawyer	-0.680*** (0.025)	-0.574*** (0.031)
Corporate (in house counsel)	-0.138*** (0.013)	-0.147*** (0.013)
Big Law Firm (top 100)	0.044*** (0.009)	0.229*** (0.010)
Solo-practice	-0.038*** (0.004)	-0.058*** (0.004)
Law Professor	-0.384*** (0.015)	-0.350*** (0.017)
Partner	0.117*** (0.011)	0.236*** (0.012)
Prosecutor/District Attorney	-0.037** (0.016)	-0.125*** (0.018)
Public Defender	-0.566*** (0.027)	-0.650*** (0.030)
Top 14 Law School	-0.117*** (0.009)	0.035*** (0.010)
> 100 Ranked Law School	0.052*** (0.004)	0.003 (0.005)
CD Dem. Pres. Vote Share		-1.052*** (0.015)
Constant	-1.550*** (0.078)	-1.559*** (0.098)
N	393240	393133
Adj. R-squared	0.064	0.119
ρ	0.734	0.947
Inverse Mills Ratio	0.747*** (0.048)	1.162*** (0.056)

*** p < .01; ** p < .05; * p < .1

Table 2: Second-stage Results: OLS, Contributor DIME score as outcome variable.

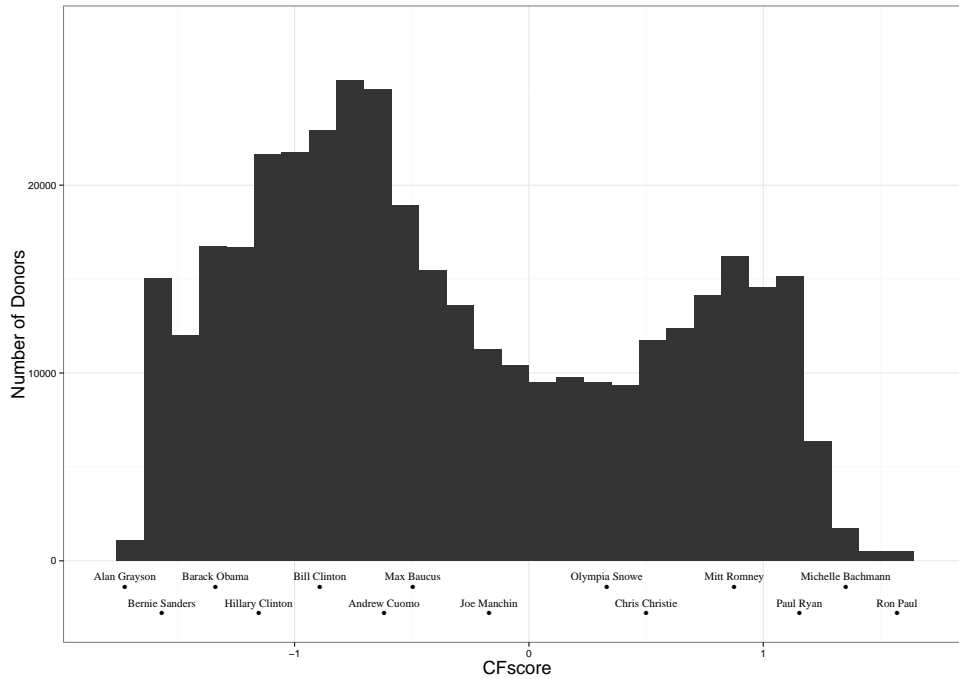


Figure 3: Ideal Point Distributions for Attorneys and Other Political Actors. Note: Increased value of DIME score indicates a more conservative ideology.

5 Ideology of Judges Compared to U.S. Attorneys

We now turn to extending these findings to judges, addressing our key question of how this ideological mapping relates to the ideological distribution of American judges. The DIME scores for the various tiers of the judiciary (state lower courts, state high courts, federal district, and federal courts of appeals) are presented in Figure 4, along with the ideological distribution of attorneys. The Figure demonstrates that the ideological distribution of each group of judges differs meaningfully from the overall distribution of lawyers, with all of the judicial distributions being more conservative overall. This difference is confirmed when we compare the ideological distribution of lawyers versus all judges (combined) using a non-parametric two-sample Kolmogorov-Smirnov test (K-S test).¹⁰ The K-S test operates by comparing the two cumulative distributions and using the maximum deviation between the two

¹⁰The K-S test has the advantage of making no formal assumptions about the underlying data distribution. (By contrast, a t test would assume the data to be roughly normal.) Although the extremely large sample size here ameliorates such concerns, we use the K-S test because tests like the t test may still fail with such non-normality.

to test the null hypothesis that both groups were sampled from populations with identical distributions. Comparing the distribution of lawyers with the distribution of judges via the two-sample K-S test gives us a D statistic of 0.12 with a p -value of 0.00. We therefore reject the null hypothesis that both lawyers and judges are sampled from an identical distribution.

In addition, the overall distribution of judges varies meaningfully across courts. Indeed, the higher in the judicial hierarchy, the less the overall distribution resembles the distribution of attorneys. Put differently, the most conservative courts (and thus the least representative of the overall distribution of lawyers) are the Federal Courts of Appeals, followed by the state high courts, the federal trial courts, and state trial courts. These differences are significant at the conventional levels, as confirmed via a series of K-S tests comparing the overall distribution of lawyers to the distribution of (1) state lower, where the null is rejected with a D statistic = 0.116 and p -value = 0.00, (2) state higher, D statistic = 0.187 and p -value = 0.0, (3) federal lower, D statistic = 0.170 and p -value = 0.00, and (4) federal appeals courts, D statistic = 0.216 and p -value 0.00. If anything, the higher the level of the court, the stronger the difference in distribution. (Comparisons among the distributions also lead to rejections of the null hypothesis at the 1% level.) Thus, *the higher or more politically important the court, the more conservative it is, especially when compared to the overall population of attorneys.*

We also confirm the more conservative nature of higher courts via regression analyses, presented in Table 3. Here, as in tables above, the outcome variable is the individual's DIME score (with larger values corresponding to more conservative). The model includes indicator variables for several categories of judges, ranging from state trial courts to the federal appeals courts. For the baseline model, we include only an indicator variable for being a judge, along with indicators for administrative judges (Models 1 and 3). We then include indicators for the various levels of the hierarchy, starting with state lower courts, state supreme courts, federal district courts, and federal circuit courts (Models 2 and 4). In two of the models, we include the same exclusion restriction as before. In the other two, we instead include state fixed effects in order to control for other geographical differences (including political ones).

The results confirm both hypotheses formulated in Section 2. First, it confirms that judges are more conservative than lawyers, with significant differences even after accounting for regional differences in judicial selection.¹¹ Second, the differences increase along with the court's level. The higher the

¹¹A possibility that we consider is whether judges are selected on the basis of characteristics that covary with partisanship—for example, race, gender, or age. We consider these in Appendix Section B, finding no support for this contention.

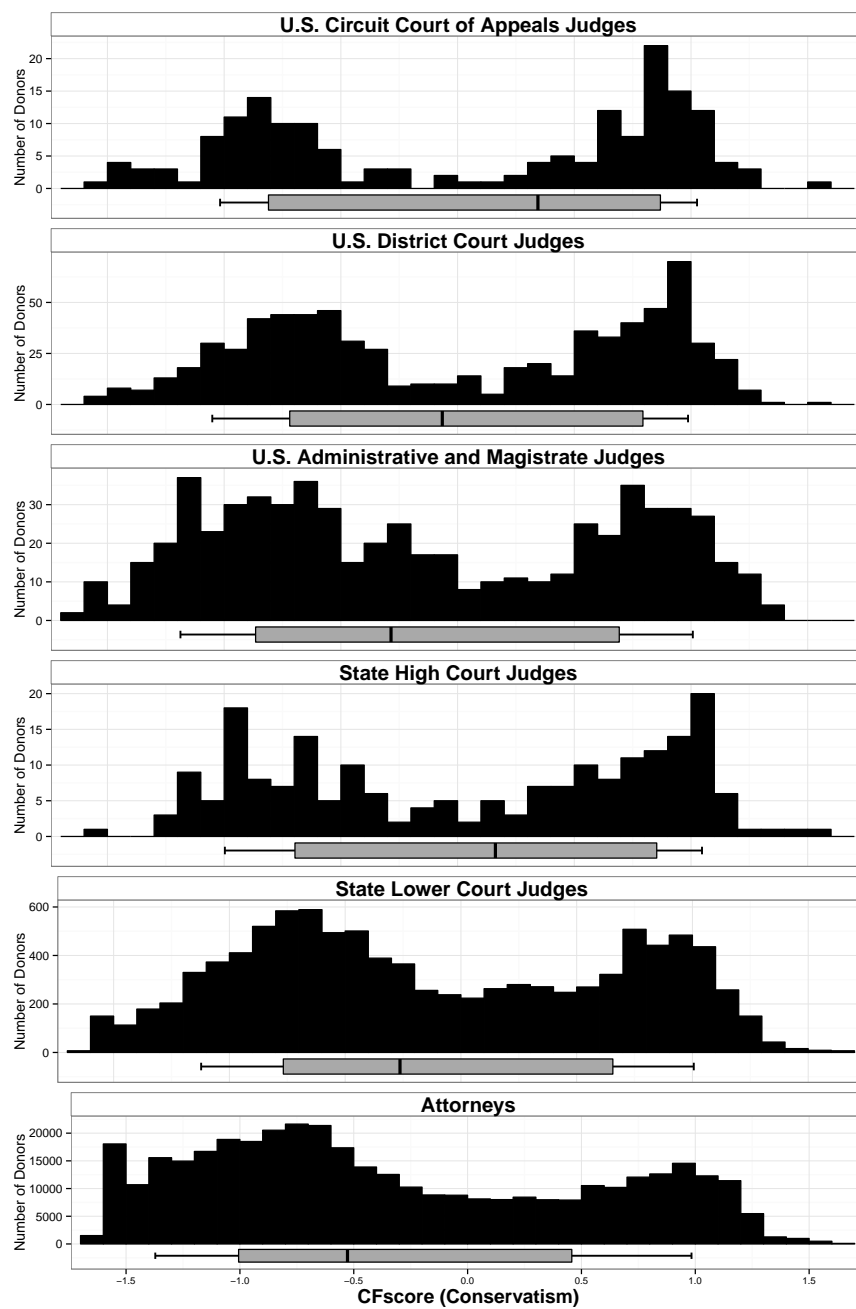


Figure 4: Ideal Point Distributions for Attorneys (bottom) and Judges. Box-and-whisker plots display the median, inter quartile range, and the 9th to 91st percentiles for each distribution. Note: Increased value of DIME score indicates a more conservative ideology.

	Model 1	Model 2	Model 3	Model 4
Any Judge	0.108*** (0.009)		0.189*** (0.011)	
Fed. Admin.	0.001 (0.089)	0.004 (0.089)	0.301*** (0.092)	0.178** (0.087)
State Admin.	-0.165*** (0.062)	-0.160*** (0.061)	0.105* (0.063)	0.025 (0.060)
Fed. Mag.		-0.009 (0.039)		0.183*** (0.044)
State Lower Courts		0.066*** (0.011)		0.121*** (0.011)
State High Courts		0.272*** (0.066)		0.195*** (0.061)
Fed. District Courts		0.258*** (0.040)		0.169*** (0.038)
Fed. CoA		0.385*** (0.083)		0.243*** (0.078)
Female	-0.452*** (0.010)	-0.449*** (0.010)	-0.135*** (0.017)	-0.224*** (0.020)
Years since Admitted	0.023*** (0.002)	0.023*** (0.002)	-0.032*** (0.003)	-0.014*** (0.004)
Years since Admitted ²	-0.0002*** (0.00002)	-0.0002*** (0.00002)	0.0005*** (0.00004)	0.0002*** (0.00005)
Top 14 Law School	-0.177*** (0.009)	-0.180*** (0.009)	-0.300*** (0.015)	-0.219*** (0.017)
> 100 Ranked Law School	0.070*** (0.004)	0.071*** (0.004)	0.105*** (0.005)	0.088*** (0.006)
Constant	-1.083*** (0.063)	-1.067*** (0.063)	0.578*** (0.106)	0.087 (0.142)
State Fixed Effects			✓	✓
ρ	0.509	0.499	-0.750	-0.429
Inverse Mills Ratio	0.460*** (0.039)	0.449*** (0.039)	-0.732*** (0.069)	-0.357*** (0.084)
N	393250	393250	393250	393250
Adj. R-squared	0.060	0.060	0.156	0.156

*** p < .01; ** p < .05; * p < .1

Table 3: Second-stage Results: OLS, Contributor DIME score as outcome variable. Models 3 and 4 include state fixed effects.

court, the more conservative the corresponding DIME score and the more bimodal the ideological distribution becomes. This is particularly true for, arguably, the most important courts from a political perspective, federal courts of appeals and state high courts. This is consistent with our theoretical expectation.

6 Where Does Politicization Benefit Parties the Most?

The results in Table 3 provide some evidence of politicization of courts; that is, there is evidence that judges are chosen on the basis of political beliefs rather than randomly, with higher courts deviating more strongly ideologically from the underlying pool of attorneys. However, Table 3 does not tell us whether the role of politics in judicial selection (or politicization) is widespread or concentrated in federal courts or a few states. The fact that lawyers appear to be unevenly distributed (with liberals concentrated in certain states, as shown in Figure A1) raises the possibility of geographically based strategic politicization, or that parties would try to politicize the judiciary in those areas where politicization stands to benefit them the most. To explore this, we turn to a comparative analysis that compares state and federal courts and also disaggregates across states.

Parties' Incentives to Politicize. We begin by examining state-by-state incentives for parties to politicize, conditional on the distribution of attorneys.¹² Here, our theoretical framework from Section 2 provides expectations regarding the incentives for politicization across jurisdictions. Recall that politicization, ω , is the degree to which judicial selection is driven by politics. High values of ω (close to 1) suggest a process driven entirely by politics, while low values (close to 0) suggest that judges are chosen in ways orthogonal to ideology. We compare different values of ω in terms of their effect on the overlap coefficient, which is the degree to which the composition of the judiciary would resemble (or not) the composition of Republican or Democratic party elites. We estimate the overlap coefficient using a non-parametric estimator proposed by Schmid and Schmidt (2006). This estimator has also been used by Hare et al. (2014) to measure partisan overlap in ideal points for survey respondents. Of particular interest is whether the patterns observed at the national level are replicated at the level of the states or whether the

¹²Judicial selection, of course, does not occur in a vacuum. The diversity of judicial selection methods used by the states introduces another layer of complexity to political control of the judiciary. We note instances where selection mechanisms aid in the interpretation of our results, but we leave a systematic analysis of the relationship between judicial selection and politicization for future research.

geographic sorting of attorneys creates different patterns of incentives. For instance, are there any states where the distribution of attorneys advantages Republicans? Or do Democrats stand to benefit simply because lawyers tend to the left-of-center?

The results are displayed in Figure 5, which displays how the overlap coefficient by party (on the Y-axis) varies according to values of politicization ω (on the X-axis), conditional on the distribution of attorneys. Substantively, a positive relationship between the overlap coefficient and politicization suggests that the party stands to gain from increased politicization; a negative relationship suggests that politicization is actually disadvantageous to the party. Figure 5 reveals two general patterns. The first is that, conditional on the ideology of attorneys, Republicans stand to gain (often substantially) from increased politicization in nearly every state and also in the federal system. In only two strongly Democratic states, Massachusetts and Rhode Island, do Republicans stand to lose out from increased politicization. We note that Kansas and Florida, which rank second and third respectively in terms of Republican incentives, stand out as being recent hot-spots for conservative judicial reform efforts (e.g., [Simon, 2014](#); [Ward, 2011](#)). The second relates to the differing incentives for Democrats. In many states the Republicans' gain would be the Democrats' loss, similar to what is observed at the federal level. In others, both parties would share in the gains from politicization. This typically occurs when a large percentage of attorney ideal points are to the extreme of Democratic politicians. It occurs in some of the most liberal states, including California, New York, and Illinois, all of which also happen to serve as hubs for "Big Law" firms. It can also arise in conservative states where Democrats elected to office tend to be more moderate, such as Arkansas, Alabama, and West Virginia.

Empirical Evidence of Politicization. Figure 5 serves to highlight the various ways the configuration of attorneys can shape the incentives of politicians. However, given these incentives, how many jurisdictions actually exhibit evidence of politicization?

We test for politicization based on whether the ideology of judges is statistically distinguishable from attorneys practicing in the jurisdiction.¹³ As before, we use two-sample K-S tests to test for distributional differences among the judges and attorneys in each jurisdiction. We then group jurisdictions into two categories: (1) "Politicized," or those with a statistically significant difference (p -value ≤ 0.05) and (2) "Non-Politicized," or those where we cannot reject the null that judges are drawn randomly from the population of at-

¹³The distribution for elected politicians aggregates over all elected officials in the jurisdiction who served in office between 2004 and 2012.

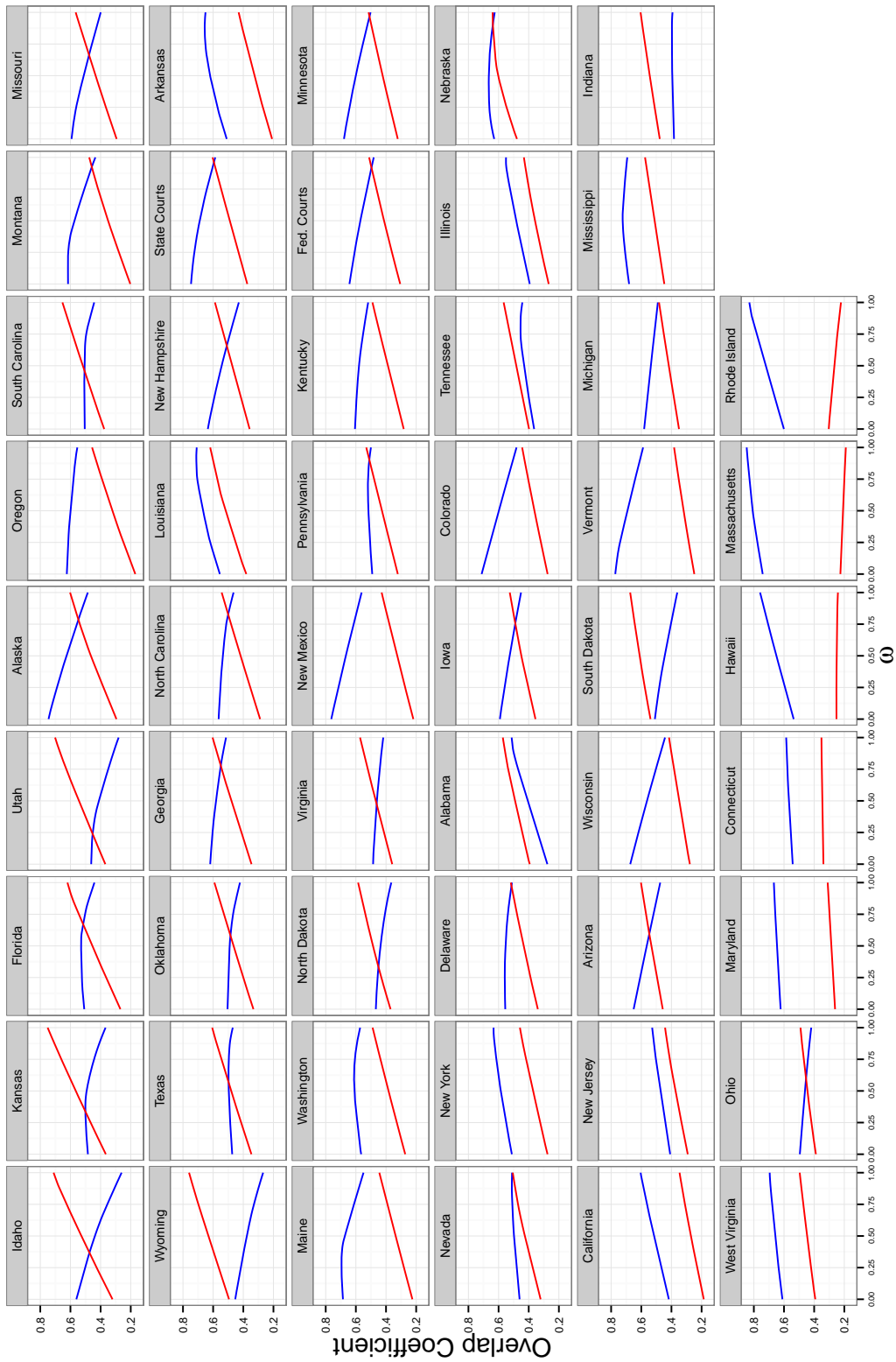


Figure 5: Predicted Overlap Coefficient for State Judges and Politicians by Party For Values of ω . The lines are color coded by party (Dem = Blue; Rep = Red). The panels are ordered by the predicted increase in the overlap coefficient for Republicans moving from $\omega = 0$ to $\omega = 1$. Federal and state courts are indicated separately.

torneys. In total, 24 states join federal courts in exhibiting evidence of politicization and 26 states exhibit insufficient evidence of politicization.¹⁴

To place these results in context, Figure 6 plots the mean position for (1) attorneys, (2) judges, and (3) elected politicians for each state as well as for the federal courts (denoted by “US”). It reveals that while ideology of attorneys varies greatly across states, judges are for the most part *more conservative than are the state’s attorneys*, as evidenced by the number of politicized states. (This includes the federal courts as well.) We note that this is the case for four key states identified as having strong incentives to politicize (on the conservative side) from Figure 5: Florida, Missouri, Texas, and Georgia. We note also that, with the exceptions of Connecticut and Rhode Island, attorneys are, on average, more liberal than politicians, which is consistent with Figure 5. Thus, we have strong evidence of politicization in a number of jurisdictions, with the politicization mostly working to Republicans’ advantage.

Surprisingly, the Figure also reveals that even among states that exhibit evidence of politicization, judges are generally closer to attorneys than to politicians—suggesting the parties might stand to gain from additional politicization. There are two exceptions in which judges resemble more closely political actors than they do attorneys. The first is Virginia, the only state to select judges exclusively via legislative election. In fact, it is the only state where judges are statistically distinguishable from attorneys (D -statistic of 0.26 and a p -value of 0.00) but not from politicians (D -statistic of 0.11 and a p -value of 0.28). The other is the federal courts (U.S. District and U.S. Courts of Appeals). In federal courts, judges are significantly closer to federal political actors than they are to the underlying pool of national attorneys. In only two states—Connecticut and California—are judges more conservative than politicians. Both states select the majority of their judges via gubernatorial appointments and, despite being strongly Democratic, had Republican governors in office during most of the period since 2004.

Also intriguing is the lack of evidence of politicization in roughly half of the states, including some states we identified as having an incentive to politicize in Figure 5. The failure to reject the null in some less-populous states such as Alaska, Idaho, North Dakota, South Dakota, and Wyoming might be a matter of sample size. The remaining states appear to be genuinely indistinguishable from the population of attorneys. For example, Utah Republicans have a strong incentive to politicize the judiciary; however, Utah judges are, if anything, more to the left of the population of attorneys (although the difference is non-significant). This implies that politicization might not extend to all state courts as some have claimed, despite the clear evidence of politicization in the federal courts and in the courts of many of the states.

¹⁴The individual state-level results for these tests are included in the Appendix.

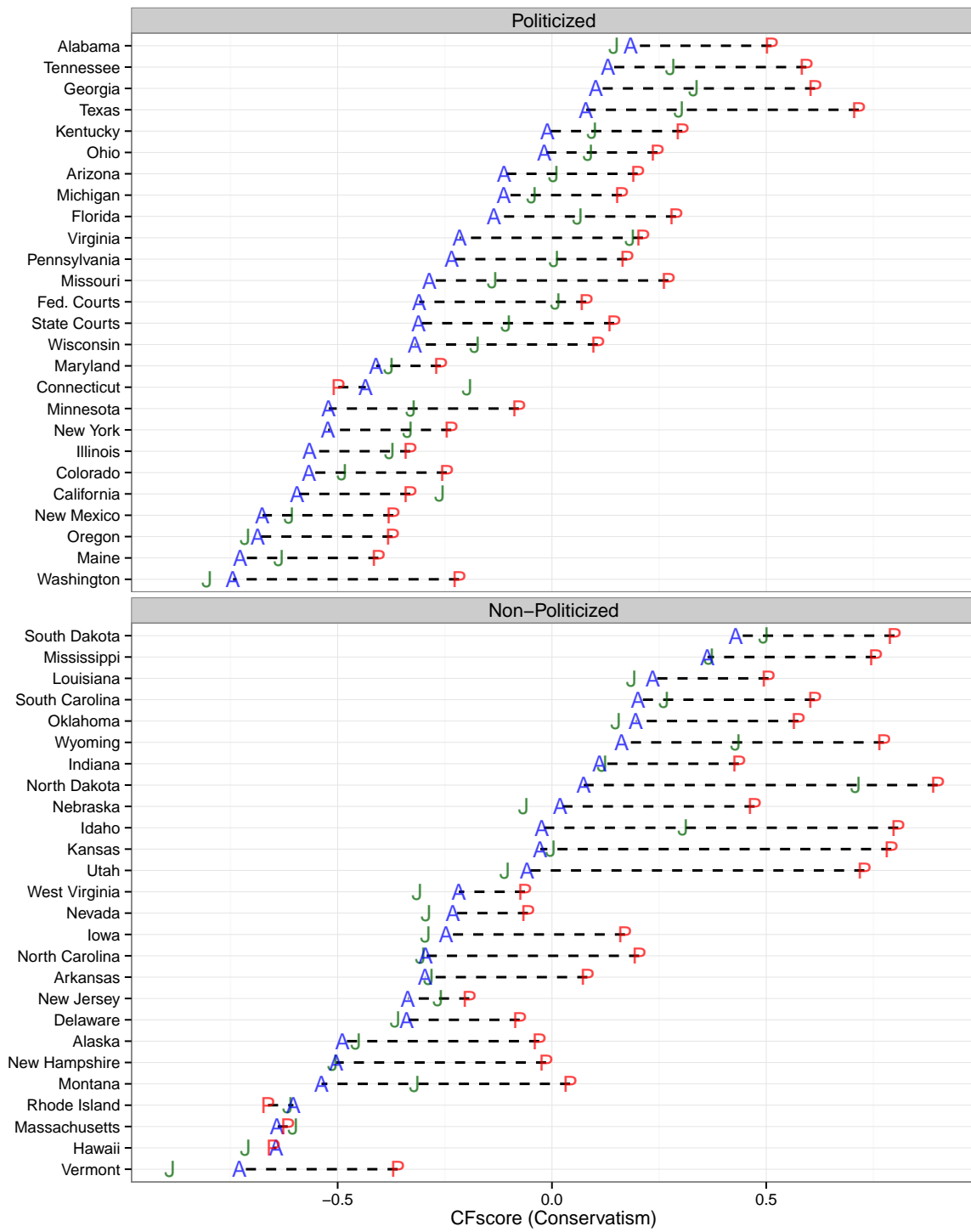


Figure 6: Comparison of average ideology of judges, politicians, and attorneys. Note: States are first grouped into two categories based on evidence of politicization. The first groups includes states with statistically significant differences between judges and attorneys. The second group includes states where the K-S test was unable to reject the null. Within groups, states are ordered by the average attorney ideal point. Federal and state courts are indicated separately.

7 Strategic Politicization in Higher Courts

The analyses provide some explanation for the opposing stances the parties have taken regarding judicial selection. Partisan battles over judicial nominations have worked in the Republicans' favor by shifting federal courts to the right, as shown by Figure 6. On the other hand, there is more limited evidence that all state courts have been politicized to a similar extent.

What explains politicization in the federal courts (and some states), but the lack of politicization in other states? One explanation for this is that viable conservative judicial candidates are strategically funneled toward judgeships in the nation's higher courts (including federal courts) by political elites, informal institutions, and formal organizations. At these higher levels, decision making becomes more political—particularly regarding the interpretation of delicate questions involving constitutional law, political questions, and electoral redistricting (Sunstein et al., 2006). Thus, the relatively small number of conservatives in the overall legal population, coupled with the expectation that the function of lower courts is less political, makes it less likely that similarly concerted efforts will be made to adjust for imbalances in lower courts.

If indeed conservatives are more concerned about populating higher courts with like minded jurists and if the pool of potential attorneys is overwhelmingly liberal, then the pool of potential conservatives will be smaller. One implication of this is that conservative elites may have to work harder to produce comparable numbers of viable conservative candidates than would liberal elites. Perhaps the clearest example of this would be among elite universities. Drawing and recruiting conservative candidates from the elite cadre of schools becomes, for conservatives, quite important given the small shares of conservatives at these schools. Perhaps the best example of this is the creation of the Federalist Society, the conservative-leaning intellectual organization that was founded in 1982 and has memberships at nearly 200 U.S. law schools.¹⁵ The Federalist Society represents a coordinated strategy of retaining and fostering conservative talent at the upper echelons of legal academia, with an eye toward shaping important federal courts—the precise strategic politicization that we consider here.

In terms of our data, if conservative elites are actively seeking out and recruiting potential conservative candidates from a smaller pool (the Federalist Society model), then this should be empirically demonstrable in examining the population of lawyers conditional on education. That is *conditional on high pedigree, conservatives should be more likely to head toward the judiciary*. We

¹⁵The Society was founded with the explicit aim of cultivating conservative students to develop policy prescriptions and networking opportunities, in order to challenge what Federalist Society saw as a “form of orthodox liberal ideology which advocates a centralized and uniform society.” (<https://www.fed-soc.org/aboutus/>).

	Model 1	Model 2	Model 3
Fed. CoA	0.459*** (0.104)	0.437*** (0.104)	0.432*** (0.101)
Fed. District Courts	0.237*** (0.070)	0.215*** (0.069)	0.211*** (0.068)
State High Courts	0.371*** (0.139)	0.349** (0.138)	0.373*** (0.135)
State Lower Courts	0.117*** (0.026)	0.095*** (0.026)	0.061** (0.025)
Public Defender		-0.663*** (0.091)	-0.561*** (0.088)
Prosecutor/District Attorney		-0.125** (0.053)	-0.042 (0.051)
Law Professor		-0.396*** (0.019)	-0.354*** (0.019)
Government Lawyer		-0.429*** (0.028)	-0.319*** (0.027)
Female			-0.355*** (0.009)
Years since Admitted			-0.002 (0.001)
Years since Admitted ²			0.0001*** (0.00002)
Constant	-0.503*** (0.004)	-0.481*** (0.004)	-0.514*** (0.026)
N	52983	52983	52769
Adj. R-squared	0.001	0.014	0.062

***p < .01; **p < .05; *p < .1

Table 4: Ideology and Career Outcomes (Graduates of Top 14 Law Schools with at least 15 Years of Experience). Note: The sample is restricted to graduates of top 14 law schools that are at least 15 years into their careers (as measured by the time since first being admitted to the bar). The reference category are lawyers in private practice.

provide support for this by regressing DIME scores onto career outcomes for graduates of top 14 law schools. We further restrict the sample to graduates who are at least 15 years into their careers (as measured by the time since first being admitted to the bar). The results in Table 4 reveal that graduates

of elite law schools that went on to become judges are far more conservative than their peers. This is particularly true for federal courts of appeals and state high courts. Again, this provides evidence of strategic politicization, or that politicization is stronger at higher, more politically important courts.

8 Implications for Judicial Polarization

Commentators and scholars alike have generally attributed polarization of the courts to the politicization of judicial selection process, which in turn is often characterized as a spill-over effect of party or Congressional polarization (e.g., [Devins and Baum, 2014](#)). Yet this account actually relies on untested assumptions about the configuration of ideological preferences of politicians and lawyers. Our data, which are the first consistently measured data for both attorneys and judges across the hierarchy, enable a more thorough inquiry than has been the case before. We first examine how polarization varies across the the judicial hierarchy. We then examine the relationship between politicization and polarization.

Polarization across the Judicial Hierarchy We first assess how polarization varies across the judicial hierarchy. Following [Clark \(2009\)](#), we measure judicial polarization using a measure developed by [Esteban and Ray \(1994\)](#). The measure operates by calculating the linear distance between all individuals, weighted by the number or mass of individuals at each single ideal point ([Clark, 2009](#)). Thus, if two judges share the same ideal point, they have low polarization, but if another judge is distant ideologically, then the distance between her and her two colleagues would be amplified by the fact that she is far apart from two colleagues instead of just one.

Table 5 reports the polarization statistic for different groups of judges; substantively, a higher statistic means that the individuals in the population are more polarized. We also report the polarization coefficients for lawyers, members of Congress, and elected state officials as comparison. Table 5 demonstrates that polarization varies across levels of the judicial hierarchy, with higher courts being more likely to be polarized. Specifically, U.S. Circuit Courts the most and the state lower courts the least polarized. Federal judges are more polarized than the population of attorneys from which they are drawn but are less polarized than members of Congress.

Does politicization increase polarization? Supposing judges were selected (elected, appointed, or some combination) for reasons uncorrelated to ideology, the level of polarization would reflect the polarization of the population of attorneys. Whether efforts to politicize the courts will result in a more or

	Polarization
U.S. Congress	0.246
U.S. Circuit Courts	0.224
U.S. District Courts	0.220
Attorneys	0.207
State High Courts	0.205
State Lower Courts	0.197
U.S. Magistrate	0.196
U.S. Administrative	0.195
State Administrative	0.192

Table 5: Polarization Across Levels of the Judiciary. Note: Coefficients calculated following [Esteban and Ray \(1994\)](#) (higher levels indicate increased polarization).

less polarized judiciary depends on whether the preferences of lawyers are more or less extreme than the preferences of other actors involved in judicial selection. Our theory formalizes the relationship between politicization and polarization as function of the ideological distributions of lawyers and politicians. Figure 7 displays the mapping of ω onto polarization for the state and federal courts. The panels are ordered with respect to estimated increase in polarization associated with moving ω from 0 to 1.

The analysis suggests that polarization does not go hand in hand with politicization. It instead suggests a more complicated relationship. For the federal courts and 7 states, polarization is monotonically increasing in ω . For 18 states, polarization is monotonically decreasing in ω . Polarization is predicted to either increase or decrease non-monotonically over the baseline in another 7 and 11 states, respectively. The relationship is less straightforward in the remaining 7 states, increasing polarization over the baseline for some values of ω and decreasing it for others.

Overall, it appears that concerns that increased politicization will serve to polarize the federal judiciary are validated by the data. On the other hand, similar concerns about the state courts are generally not well-founded. On the contrary, increased politicization is likely to reduce polarization in a large number of states.

9 Concluding Remarks

In this paper, we have used some of the most comprehensive data available today on U.S. legal ideologies. We used this data to make several contributions to our knowledge of the judicial ideological landscape. The first is that

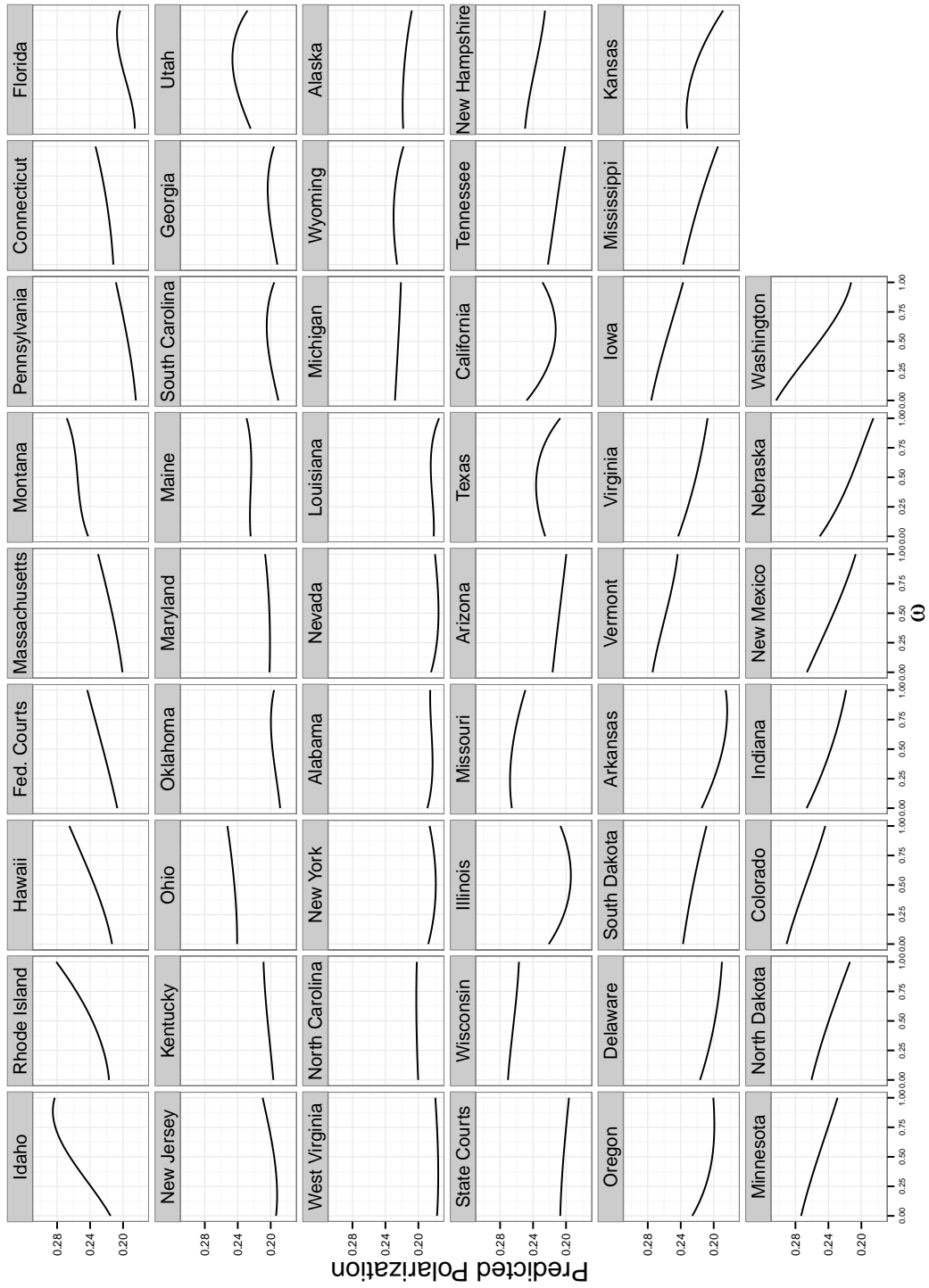


Figure 7: Predicted Polarization Coefficient for Values of ω .

partisan efforts to shape the judiciary cannot be fully understood without accounting for the ideological preferences of attorneys. As we have shown, U.S. attorneys as a whole lean to the left of the ideological spectrum. Under a judicial selection method devoid of ideological considerations, our analysis shows that the judiciary should resemble this more liberal population of lawyers, rather than resembling the more bimodal population of political actors. This poses a dilemma for those seeking to push the courts in a different, perhaps more conservative course.

Second, we have shown that the judiciary as a whole does not resemble this liberal population, instead leaning in a more conservative direction. Furthermore, as we have shown, the higher the court, the more conservative and politicized it becomes and the more it deviates from the overall population of attorneys. This is particularly the case for the federal courts and state high courts. We have argued that a compelling explanation of this finding may be rooted in strategic politicization, or that political actors (primarily conservatives, for whom the incentives to politicize are greater) choose to prioritize higher or more politically important courts in determining where to stage politicization battles. Indeed, a large-scale effort to balance the ideological composition of all state courts would likely be politically costly, hard-fought, and have no guarantee of success. This might lead political actors to prioritize placing like-minded candidates on higher courts (including federal courts), while foregoing battles in many states. As evidence of this, we have shown that higher courts demonstrate strong evidence of politicization and that it appears that highly educated conservatives (e.g., graduates of top law schools) are more likely to become judges.

Third, we note that politicization is perhaps not as pervasive as some have feared, at least not when we compare across all 50 states. Although we see strong evidence of politicization in the federal courts and also in state high courts, many states exhibit little to no signs of politicization. Given that conservative political actors may stand to benefit from increased politicization, this leaves some questions unresolved. More research is needed to ascertain why some state courts are politicized and others are not, and how this does (or does not) relate to methods of judicial selection.

We conclude with two additional thoughts regarding these data. First, we believe these data provide a valuable new resource for legal and judicial politics scholars. Several other empirical patterns are of interest in their own right, including the high percentage of lawyers donating to campaigns, variation in the ideology of lawyers and judges across states, ideological divisions within the profession based on career choice (e.g. prosecutors versus law professors), and the relationship between law school rank and ideology. Future researchers stand to benefit from the breath of these data. Second, although we have examined lawyers and judges using the same measures, we

analyzed them separately. However, the judiciary functions primarily to rule on cases presented and argued *by lawyers*. We would therefore expect to see interactions between lawyer and judicial ideology, perhaps with more conservative judges being more likely to rule in favor of conservative lawyers (and the opposite being true for liberal judges). To date, these are questions that have been unexplored. However, the data that we develop here enable these sorts of inquiries.

Bibliography

- American Bar Association. 2009. "Standing Committee on the Federal Judiciary: What It is and How it Works."
- Bailey, Michael A. 2007. "Comparable Preference Estimates Across Time and Institutions for the Court, Congress, and Presidency." *American Journal of Political Science* 51 (3): 433–448.
- Balkin, Jack M. 2001. "*Bush v. Gore* and the Boundary between Law and Politics." *Yale Law Journal* pp. 1407–1458.
- Barton, Benjamin H. 2010. *The Lawyer-Judge Bias in the American Legal System*. Cambridge University Press.
- Binder, Sarah A, and Forrest Maltzman. 2009. *Advice and Dissent: The Struggle to Shape the Federal Judiciary*. Brookings Institution Press.
- Bonica, Adam. 2013. "Database on Ideology, Money in Politics, and Elections: Public version 1.0 [Computer file]."
- Bonica, Adam. 2014. "Mapping the Ideological Marketplace." *American Journal of Political Science* 58 (2): 367–387.
- Bonica, Adam, and Michael Woodruff. 2014. "A Common-Space Measure of State Supreme Court Ideology." *Journal of Law, Economics and Organization* Forthcoming.
- Boyd, Christina L. 2011. "Federal District Court Judge Ideology Data." University of Georgia.
- Boyd, Christina L., Lee Epstein, and Andrew D. Martin. 2010. "Untangling the Causal Effects of Sex on Judging." *American Journal of Political Science* 54 (2): 389–411.
- Brace, Paul, Laura Langer, and Melinda Gann Hall. 2000. "Measuring the Preferences of State Supreme Court Judges." *Journal of Politics* 62 (2): 387–413.

- Caldeira, Gregory A. 1986. "Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court." *American Political Science Review* 80 (4): 1209–1226.
- Carter, Stephen L. 1994. *The Confirmation Mess*. Basic Books.
- Chilton, Adam S., and Eric A. Posner. 2014. "An Empirical Study of Political Bias in Legal Scholarship." University of Chicago Coase-Sandor Institute for Law & Economics Research Paper.
- Clark, Mary L. 2002. "Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other Human Rights Record." *Journal of Gender, Social Policy and the Law* 11 (3): 1131–1163.
- Clark, Tom S. 2009. "Measuring Ideological Polarization on the United States Supreme Court." *Political Research Quarterly* 62 (1): 146–157.
- Clark, Tom S, and Benjamin Lauderdale. 2010. "Locating Supreme Court Opinions in Doctrine Space." *American Journal of Political Science* 54 (4): 871–890.
- Dershowitz, Alan M. 2001. *Supreme Injustice: How the High Court Hijacked Election 2000*. Oxford University Press.
- Devins, Neal, and Lawrence Baum. 2014. "Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court." *William & Mary Law School Research Paper* 9.
- Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland. 2007. "The Judicial Common Space." *Journal of Law, Economics, and Organization* 23 (2): 303–325.
- Epstein, Lee, and Jack Knight. 1998. "The Choices Justices Make."
- Esteban, Joan-Maria, and Debraj Ray. 1994. "On the measurement of polarization." *Econometrica: Journal of the Econometric Society* pp. 819–851.
- Ferejohn, John. 2002. "Judicializing Politics, Politicizing Law." *Law and Contemporary Problems* 65 (3): 41–68.
- Fiorina, Morris P., and Samuel J. Abrams. 2008. "Political Polarization in the American Public." *Annual Review of Political Science* 11: 563–588.
- Giles, Micheal W., Virginia A. Hettinger, and Todd Peppers. 2001. "Picking Federal Judges: A Note on Policy and Partisan Selection Agendas." *Political Research Quarterly* 54 (3): 623–641.

- Hare, Christopher, David A Armstrong, Ryan Bakker, Royce Carroll, and Keith T Poole. 2014. "Using Bayesian Aldrich-McKelvey Scaling to Study Citizens' Ideological Preferences and Perceptions." *American Journal of Political Science* .
- Heckman, James J. 1979. "Sample Selection Bias as a Specification Error." *Econometrica* pp. 153–161.
- Hetherington, Marc J. 2001. "Resurgent Mass Partisanship: The Role of Elite Polarization." 95 (03): 619–631.
- Kastellec, Jonathan P. 2013. "Racial Diversity and Judicial Influence on Appellate Courts." *American Journal of Political Science* 57 (1): 167–183.
- Layman, Geoffrey C., and Thomas M. Carsey. 2002. "Party Polarization and 'Conflict Extension' in the American Electorate." *American Journal of Political Science* 46 (4): 786–802.
- Liptak, Adam. 2014. "The Polarized Court." *The New York Times*.
- Maltzman, Forrest, James F. Spriggs, and Paul J. Wahlbeck. 2000. *Crafting Law on the Supreme Court: The Collegial Game*. Cambridge University Press.
- Martin, Andrew D., and Kevin M. Quinn. 2002. "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999." *Political Analysis* 10 (2): 134–153.
- McCarthy, Justin. 2014. "Americans Losing Confidence in All Branches of U.S. Gov't." Gallup Poll.
- McCarty, Nolan, Keith T. Poole, and Howard Rosenthal. 2006. *Polarized America: The Dance of Ideology and Unequal Riches*. Vol. 5 MIT Press.
- McGinnis, John O., Matthew A Schwartz, and Benjamin Tisdell. 2004. "The Patterns and Implications of Political Contributions by Elite Law School Faculty." *Georgetown Law Journal* 93: 1167.
- Nicholson, Stephen P., and Robert M. Howard. 2003. "Framing Support for the Supreme Court in the aftermath of Bush v. Gore." *Journal of Politics* 65 (3): 676–695.
- Prior, Markus. 2013. "Media and Political Polarization." *Annual Review of Political Science* 16: 101–127.
- Report on the Lawsuit Industry of America*. 2013. Manhattan Institution for Policy Research.

- Schmid, Friedrich, and Axel Schmidt. 2006. "Nonparametric Estimation of the Coefficient of Overlapping." *Computational Statistics & Data Analysis* 50 (6): 1583–1596.
- Segal, Jeffrey A., and Albert D. Cover. 1989. "Ideological Values and the Votes of U.S. Supreme Court Justices." *American Political Science Review* 83 (2): 557–565.
- Semet, Amy, Nathaniel Persily, and Stephen Ansolabehere. 2014. "Bush v. Gore in the American Mind." In *Election Administration in the United States*, ed. R. Michael Alvarez, and Bernard M. Grofman. Cambridge University Press.
- Simon, Ammon. 2014. "The Battle for Judicial Selection Reform in Kansas." National Review Online.
- Stone, Geoffrey R. 2014. "Our Politically Polarized Supreme Court?" *The Huffington Post*.
- Sunstein, C.R., D. Schkade, L.M. Ellman, and A. Sawicki. 2006. *Are Judges Political?* Brookings Institution Press.
- Tausanovitch, Chris, and Christopher Warshaw. 2013. "Measuring Constituent Policy Preferences in Congress, State Legislatures, and Cities." *Journal of Politics* 75 (02): 330–342.
- Ward, Kenric. 2011. "Florida Lawyers, GOP Gird for Judicial Reform Battle." Sunshine State News.
- Weiden, David L. 2010. "Judicial Politicization, Ideology, and Activism at the High Courts of the United States, Canada, and Australia." *Political Research Quarterly* 64 (2): 335–347.

Appendix A Linking Lawyers To Their Contribution Records

In order to link records between DIME and the Martindale-Hubbell Directory, we developed a customized probabilistic record-linkage algorithm.

The algorithm works as follows. First, it queries the DIME database for records that identify donors as attorneys by filtering on individuals who either (1) have a self-reported occupation that matched against a list of relevant search terms (e.g., lawyer, attorney, “atty,” judge, etc.), (2) have a self-reported employer that matched against a pre-compiled list of law firms or contained terms commonly used by the legal industries such as “law offices” or “LLP,”¹⁶ or (3) list “Esq.” or “J.D.” as a title. The algorithm then cycles through each record in the Martindale-Hubbell directory searching for the set of potential matches in the DIME database. The algorithm narrows the set of possible matches by comparing values for first, last and middle name, suffix, title, address, city, state and zip codes, firm/employer, and geographic proximity. To adjust for slight variations in reporting, the algorithm fuzzy-matched on both names and addresses using the Jaro-Winkler algorithm. Name matching was further conditioned on information frequency of first and last names obtained from Social Security Administration and the U.S. Census, respectively.¹⁷ We measured geographic proximity as the distance between geo-coordinates of the address in the Martindale-Hubbell database and the geo-coordinates of records from the DIME database. If a set of records assigned to a single ID in the DIME data exceeded the predefined threshold, it was identified as a match.

As we note above, there was significant variance in reporting across state bar associations and across individuals. Several of the fields therefore required additional processing and disambiguation. Specifically, we first standardized names and parsed into separate fields for first, last, middle, suffix, and title. Second, we standardized address strings (i.e., “street” becomes “st”). Third, we used automated disambiguation techniques to standardize entries for employer, law schools and undergraduate institutions, and practice areas.¹⁸ For instance, the listings for law professors were derived from a

¹⁶In order to further narrow the search on attorneys, we screened out records with occupational titles commonly used by paralegals and staff at law firms.

¹⁷Social Security Administration data on name frequency were accessed at <http://www.ssa.gov/OACT/babynames/limits.html>. Census data on the frequency of surnames were accessed at <https://www.census.gov/genealogy/www/data/2010surnames/dist.all.last>.

¹⁸Information on practice areas was compiled from written descriptions and lacked structured categorizations. After applying standard techniques to clean and normalize the text, we grouped entries into a more general set of 31 categories.

partial list of law schools. As a result, most law professors employed at the missing universities were grouped into the catch-all employment categorization. We were able to extract the remaining law professors by searching the fields on employment and title for terms that could be used to identify them as law professors.

In addition to the eight variables fields described in the text, a significant percentage of listings included even more information voluntarily provided by the attorney, such as (9) detailed employment history, (10) judicial clerkships along with the name of judge, (11) lists of prominent clients, and (12) prominent cases argued. Since lawyers choose to provide the information and others do not, some items are incomplete sources of information. When available, record-linkage algorithm referenced items (9) and (10) as a way to augment matching algorithm. However, we do not include any information from items (9) through (12) in the main analysis.

Appendix B Consideration of Alternative Mechanisms

Other mechanisms could explain why judges might differ from the underlying population of attorneys. One important alternate explanation is that judges are selected on the basis of other characteristics that do vary according to ideology—that is, that judges are recruited or selected for reasons that appear to be apolitical but that vary according to political beliefs. Selection on these sorts of variables would have the effect of skewing the ideological distribution of judges (*vis-a-vis* attorneys), without necessarily implicating an ideologically based selection mechanism.

The most obvious example of such characteristic would be demographic. Ever since the Carter Administration started aggressively recruiting women and ethnic minorities (Clark, 2002), Presidents and other executives have tried to make the judiciary more reflective of the population as a whole. In addition, numerous studies have identified that women and minority judges vote in a more liberal direction on certain issues once they are appointed (Boyd, Epstein, and Martin, 2010; Kastellec, 2013). Making the judiciary more demographically representative could therefore have the effect of selecting also on ideology. We can, however, rule out this particular explanation: because women and minorities vote (if anything) in a more liberal direction, such a mechanism would mean that more liberals are selected *vis-a-vis* the population of attorneys. We see no evidence of this. To the contrary, the judiciary is *more conservative* than the overall potential pool of attorneys.

Another example is selecting judges on the basis of superior credentials. For example, conservatives being on average being more likely to attend highly rated law schools than liberals would explain our results. Under such a scenario, the selection on quality of education would have the effect of introducing into the courts more conservatives, even if no ideological selection was in effect. In terms of evidence, the data are more mixed, but still point toward this being an unlikely explanation. As we see in Table 2 Model 1, those who attend elite law schools are more liberal than their counterparts. Comparisons with Model 2 reveal that this difference moves in the opposite direction when we control for geography. However, the magnitude in Model 2 is close to zero, despite its significance. In addition, as we show in Table

3, there are substantial differences across the selection of conservatives and liberals *even conditional on education*. Thus, education appears not to be the decisive factor here.

Within this category of explanations, we consider the most likely explanation to be that the pool of judges is simply older than the rest of the population. As we see in Table 3, those who are older tend to be more conservative. If judges are much older than lawyers, then this could plausibly explain why judges as a whole tend to be more conservative. We note, however, that the effect of age does not diminish the effect of the judge variable, suggesting that judges are more conservative even when conditioning on age.

Appendix C Distribution Comparisons of Judges with Politicians and Attorneys by State

	Attorneys			Politicians		
	K-S <i>D</i> -stat	K-S <i>P</i> -value	Overlap Coef.	K-S <i>D</i> -stat	K-S <i>P</i> -value	Overlap Coef.
US	0.18	0.00	0.82	0.11	0.00	0.85
AK	0.18	0.23	0.92	0.39	0.00	0.63
AL	0.15	0.00	0.83	0.50	0.00	0.46
AR	0.10	0.08	0.89	0.50	0.00	0.60
AZ	0.14	0.00	0.84	0.19	0.00	0.83
CA	0.29	0.00	0.69	0.16	0.00	0.75
CO	0.19	0.00	0.78	0.22	0.00	0.70
CT	0.27	0.00	0.78	0.38	0.00	0.67
DE	0.21	0.34	0.81	0.47	0.00	0.66
FL	0.15	0.00	0.86	0.30	0.00	0.61
GA	0.17	0.00	0.84	0.27	0.00	0.75
HI	0.17	0.51	0.89	0.25	0.13	0.76
IA	0.06	0.95	0.88	0.30	0.00	0.73
ID	0.24	0.23	0.79	0.41	0.00	0.62
IL	0.20	0.00	0.81	0.25	0.00	0.75
IN	0.08	0.60	0.90	0.27	0.00	0.76
KS	0.07	0.84	0.88	0.48	0.00	0.54
KY	0.15	0.00	0.90	0.22	0.00	0.81
LA	0.14	0.06	0.85	0.41	0.00	0.57
MA	0.11	0.19	0.89	0.09	0.61	0.86
MD	0.18	0.00	0.80	0.14	0.08	0.83
ME	0.29	0.00	0.78	0.30	0.00	0.54
MI	0.10	0.00	0.91	0.15	0.00	0.84
MN	0.17	0.01	0.80	0.15	0.07	0.84
MO	0.11	0.01	0.87	0.31	0.00	0.72
MS	0.11	0.53	0.83	0.33	0.00	0.71
MT	0.18	0.23	0.85	0.35	0.00	0.54
NC	0.09	0.05	0.86	0.41	0.00	0.63
ND	0.32	0.18	0.68	0.19	0.73	0.82
NE	0.11	0.76	0.87	0.45	0.00	0.50
NH	0.20	0.20	0.74	0.37	0.00	0.57
NJ	0.11	0.07	0.86	0.20	0.00	0.72
NM	0.22	0.00	0.78	0.28	0.00	0.68
NV	0.11	0.32	0.87	0.29	0.00	0.71
NY	0.20	0.00	0.81	0.17	0.00	0.82
OH	0.12	0.00	0.88	0.18	0.00	0.86
OK	0.13	0.06	0.88	0.44	0.00	0.63
OR	0.13	0.00	0.85	0.40	0.00	0.62
PA	0.16	0.00	0.86	0.19	0.00	0.82
RI	0.13	0.84	0.87	0.37	0.00	0.79
SC	0.10	0.47	0.89	0.33	0.00	0.68
SD	0.21	0.08	0.60	0.41	0.00	0.63
TN	0.12	0.04	0.84	0.25	0.00	0.76
TX	0.16	0.00	0.86	0.29	0.00	0.70
UT	0.09	0.96	0.86	0.48	0.00	0.57
VA	0.26	0.00	0.74	0.11	0.28	0.87
VT	0.22	0.39	0.74	0.35	0.03	0.48
WA	0.21	0.00	0.75	0.41	0.00	0.61
WI	0.19	0.00	0.75	0.32	0.00	0.59
WV	0.22	0.08	0.81	0.40	0.00	0.60
WY	0.24	0.29	0.84	0.24	0.31	0.80

Appendix D Attorney Ideology By State

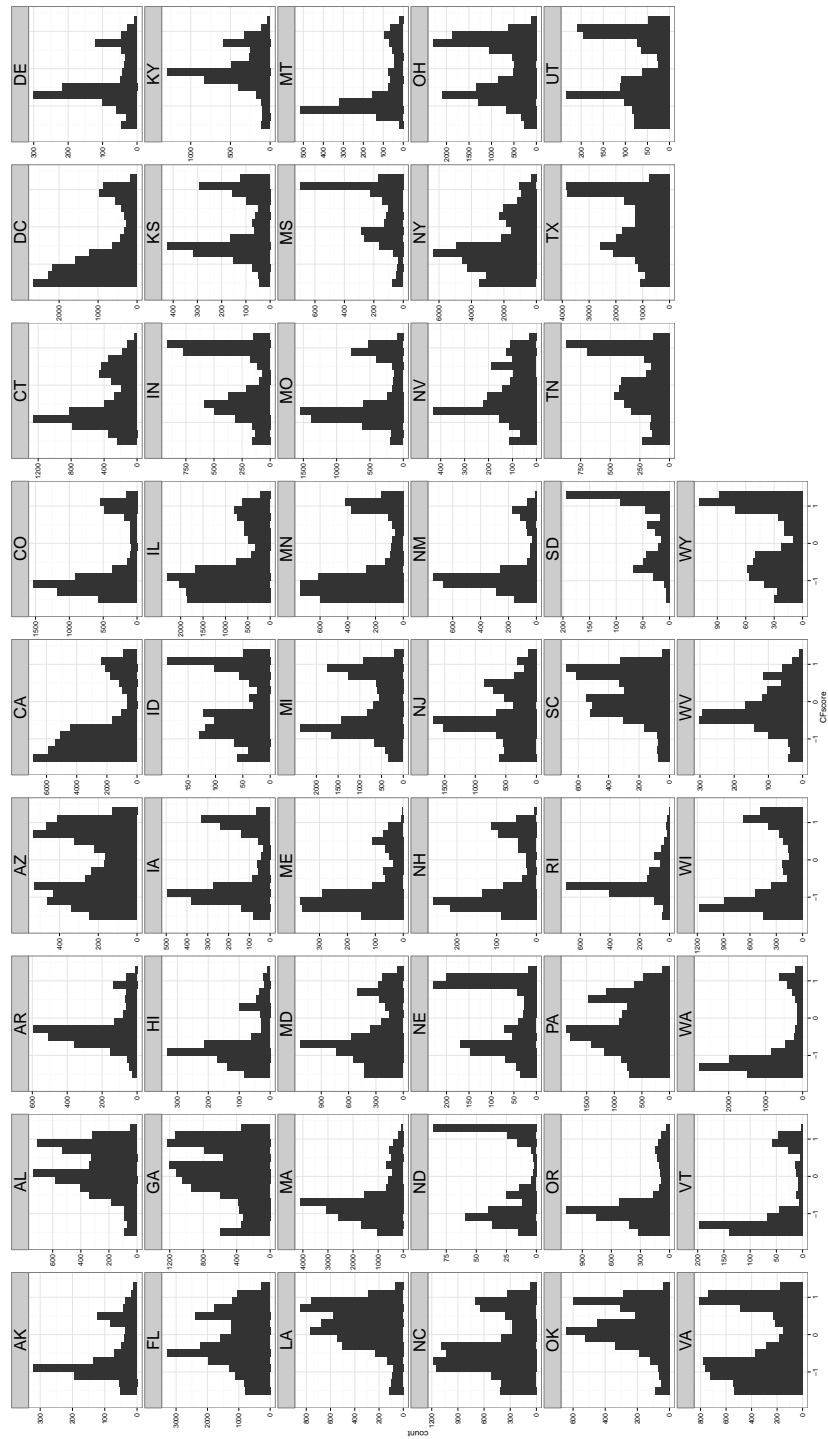


Figure A1: Distribution of estimated DIME scores for attorneys, by state. Increased value of ideal points indicates a more conservative ideology.