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

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September 23, 2014

Abstract. The American judiciary, like other branches of government, has increasingly come under attack as both ideologically driven and polarized. At the same time, scholars have limited understanding of the extent to which politicization has shaped the courts or how its influence varies among tiers of the judiciary and across states. We present a simple theory of judicial politicization that models the ideological composition of the judiciary as a function of the ideological distributions of attorneys and politicians. The model generates predictions for when parties have the greatest incentives to politicize judicial selection and how these efforts will reshape and polarize the judiciary. We find empirical support for these predictions using an original dataset that captures the ideological positioning of nearly half a million judges and lawyers who have made campaign contributions. To our knowledge, our study is the first to provide a direct ideological comparison across tiers of the judiciary, or between judges and lawyers.

1 Introduction

In reflecting on the role of lawyers in the early American democracy, Alexis De Tocqueville famously wrote, "If I were asked where I place the American aristocracy, I should reply without hesitation that it is not composed of the rich, who are united together by no common tie, but that it occupies the judicial bench and the bar"(de Tocqueville, 1835). Nearly two centuries later, lawyers continue to dominate American politics. Beyond being well represented among the ranks of elected office-holders, lawyers have the unique privilege of calling an entire branch of government their own.

The political implications of this ownership have been under studied. In this paper, we propose a theory of judicial politicization that models the ideological composition of the judiciary as a function of two general inputs. First is the ideological distribution of the pool of attorneys eligible to serve on the state or federal courts. Second are external political forces (e.g. voters and politicians) that through the process of selecting judges attempt to reshape the judiciary. Left to a judicial selection method devoid of ideological considerations, the state courts should, after controlling for relevant demographic characteristics, closely resemble the population of attorneys from which it is drawn. As judicial selection becomes more politicized, 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. The model also generates predictions about how efforts to politicize the courts will reshape and polarize the judiciary.

We test the implications of the model by linking together two previously untapped datasets. The first is a newly collected dataset from online legal directories that includes all of the nation's attorneys. The second is the the Database on Ideology, Money in Politics, and Elections (DIME) (Bonica, 2013). Taken together they 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 dataset that captures the ideologies of judges across the judicial hierarchy – including federal district

court and state trial court judges – without relying on the ideologies of appointing political actors. These data further allow us to compare the relative ideologies of various levels of the U.S. court system, as well as the comparison of judges to attorneys.

The wealth of data on the ideological preferences of attorneys and judges provides for more detailed analyses of the forces shaping the judiciary. Consistent with theoretical predictions, our we find that judges are more conservative than the nation's lawyers, with their ideological distribution more closely resembling other branches of government. We then turn our attention to the state courts to further explore the theoretical implications of the model in a comparative setting.

This paper proceeds as follows. We begin in Section 2 by discussing the implications of selecting judges from an underlying population of attorneys. Section 3 presents a basic theoretical framework for judicial politicization. In Section 4 we discuss the data for this project and explain why we rely on campaigns contribution data and how we draw the link between lawyers, judges, and contributions. We present basic descriptive evidence starting in Section 4, which provides an overview of the ideological distribution of lawyers. We then perform tests of the hypotheses generated by the theory in Section 5 followed by a comparative analysis of the state courts in Sections 6 and 7. We conclude in Sections 8 and 9 by returning to our core question of what this means for the debate over judicial selection and ideological landscape of the judicial hierarchy.

2   The Politics of Judges and Lawyers

We start the inquiry with a broad question: What determines who serves on the bench and why? The related literature, both the normative and the descriptive, presents at best conflicting answers to this question. Institutions such as the American Bar Association maintain that judges should be selected based solely on merit (American Bar Association, 2009). The claim that judges should be chosen based on the criteria of "qualifications," "temperament," and "integrity" as opposed to political beliefs, has also been made by numerous legal commentators and political actors (e.g., Carter, 1994). Others have approached this question from the perspective of the courts as representative institutions. Within political science, the question has increasingly turned on the distinction between substantive and descriptive representation (Pitkin, 1967), and how both can work to extend the legitimacy of the courts. Substantive represen-

tation refers to the courts sharing the political view of the population at large. Under descriptive representation, on the other hand, the courts draw legitimacy and acceptance from being demographically representative (Scherer and Curry, 2010).

However, one important fact clouding this discussion is that judges – if not by definition then certainly by custom – are nearly all former lawyers. The practice is historical, dating back to the Anglo-American common law, and the United States has never deviated from this norm. Today, all state supreme court justices are former lawyers, and 48 states explicitly *require* that their high court justices be former lawyers. All judges currently serving on the federal courts are former lawyers, as are all nine justices sitting on the Supreme Court. The result, some have claimed, is that the judiciary has evolved to reflect the views of the legal profession.

This is further complicated by a sentiment among public commentators that lawyers – particularly trial lawyers – do not generally represent the population at large. The critique, often levied by conservative groups, is that large government (by way, perhaps, of plentiful regulation) provides fertile ground for the proliferation of litigation activity, and this not only attracts the more liberal (and perhaps litigious) minded but also encourages trial lawyers to themselves support increasing legislation and its complexity. Some of this is borne out in empirical analysis conducted by advocacy organizations.Within the scholarly literature, McGinnis, Schwartz, and Tisdell (2004) examine the campaign contributions made by law professors at elite institutions, finding that they overwhelmingly tend to be made to extremely liberal political actors.

Is the presumed liberal tilt of attorneys actually bourne out by the data? And, if so, is it reflected in the judiciary? On this point, no study (to our knowledge) has addressed the question of the overall ideological positioning of the judiciary, or how it compares to the population of attorneys from which they are drawn. In addition, no study (again, to our knowledge) has tackled the question of how tiers of the judiciary compare to each other or how courts vary across states.

A possible reason for the gap in the literature is that, although scholars have measures of judicial ideology at high-court levels, data on lower-court ideology is more scarce. At the Supreme Court level, quality measures account for pre-confirmation information (Segal and Cover, 1989), ideological shifts across time (e.g., Martin and Quinn, 2002), shifts over issue area (e.g., Clark and Lauderdale, 2010), and shifts over the composition of the court. This has been done using both votes (e.g., Martin

and Quinn, 2002) and combinations of votes and text (Lauderdale and Clark, 2014) and citations (Clark and Lauderdale, 2010). Taken together with bridging between similar cases and bills, it is also possible to extend the scaling of Supreme Court votes to be consistent with existing measures of Congressional scaling (Bailey, 2007). However, measuring judicial ideology is more difficult at the lower-court level, owing to the fact that judges from various jurisdictions rarely sit together – which in turn makes relative measurements difficult. Instead of using voting as a measurement strategy, estimates of lower-court ideology have most often involved looking at the identity of the appointing President, or, in instances where Senatorial courtesy perhaps applied, the ideology of the senior home-state Senator (e.g., Boyd, 2011; Epstein et al., 2007; Giles, Hettinger, and Peppers, 2001). Within the state-courts literature, the most widely cited measure has been Brace, Langer, and Hall's Party-Adjusted Justice Ideology (PAJID) scores, which rely on ADA interest group ratings of each state's congressional delegation. More recently, Bonica and Woodruff (2014) use the raw data that we rely on here in constructing state ideology measures from campaign contributions.

3   A Theory of Strategic Judicial Politicization

In this section, we propose a basic theoretical framework for understanding efforts to politicize the courts. Starting with a sparse set of assumptions, it characterizes the ideological composition of the judiciary as a function of the ideology of politicians and attorneys and the level of politicization of judicial selection. It generates several testable predictions about the incentives, strategies, and consequences of efforts to politicize the judiciary. In particular, it reveals how stylized scenarios corresponding to the observed distributions of the nation's attorneys and politicians create strategic assymetries in the partisan struggle to shape the judiciary.

To help motivate the model, we consider a hypothetical configuration of preferences across groups of actors shown in Figure 1. The distributions of preferences is intended to resemble stylized accounts of the political leanings of attorneys. Given what should be largely uncontroversial claims that courts play a role in determining important political outcomes and that the personal preferences of judges to some extent influence decision-making, the parties have incentives to seat judges that
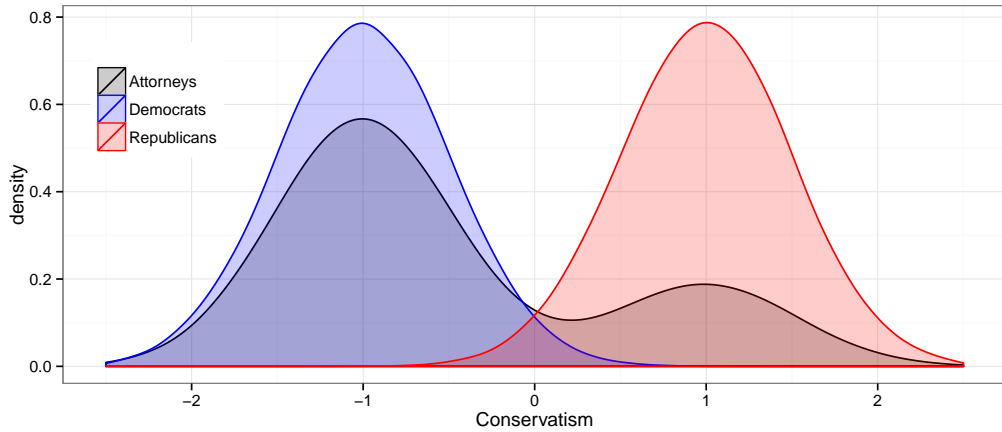
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Figure 1: Hypothetical ideological distributions of the attorneys and partisan elites.

share the preferences of their members.[1] This provides us with a functional definition of judicial politicization as the extent to which judges are selected on the basis of their partisanship or personal ideology. Supposing a scenario where judicial politicization is minimal and judges are drawn more or less randomly from the population of attorneys shown in Figure 1, the liberal skew in the preferences of attorneys would result in a judiciary that more closely resembles the preferences of Democrats. In effect, the liberal bias in the attorney pool gives Democrats a natural advantage in the struggle for political control over the judiciary. This, in turn, is likely to influence the the parties' incentives and strategies regarding the judiciary.

We now turn to formalizing the relationship between the ideology of attorneys and politicians and judicial politicization. Let $d(.)$ and $r(.)$ represent the ideological distributions of political elites for Democratic and Republican parties, with $p(.)$ representing the combined distribution of politicians from both parties, and let $a(.)$ represent the ideological distribution of attorneys eligible to serve on the bench. Suppose judges are drawn from the distribution $j(.) = (1 - \omega)a(.) + (\omega)p(.)$, where ω is a mixing parameter representing the level of politicization. If $\omega = 0$, there is no politicization and judges will be randomly drawn from the pool of attorneys. Under the scenario of complete politicization where $\omega = 1$, judges are strategically oversampled such that the judiciary perfectly re-

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[1] ferejohn:2002

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sembles the population of politicians.[2]

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

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

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, $c(.)$, 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 reputational 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 capacity of the courts through judicial vacancy and other consequences of partisan conflict. 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.

$$U_d = \Delta(d, j(\omega|a(.), p(.))) - c_d(.) + q(\omega) \tag{2}$$

$$U_r = \Delta(r, j(\omega|a(.), p(.))) - c_r(.) + q(\omega) \tag{3}$$

The setup above provides a simple framework for conceptualizing the strategic assymetries in the partisan struggle to shape the judiciary. To illustrate further, Figure 2 shows three distributions of $j(.)$ at different levels of ω and the corresponding overlap with other distributions.

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[2]The assumption that efforts to politicize judicial selection are drawn from joint distribution of politicians, $p(.)$, reflects the notion that once politicized, judicial selection outcomes generally will reflect the partisan balance of power in the legislative and executive branches.
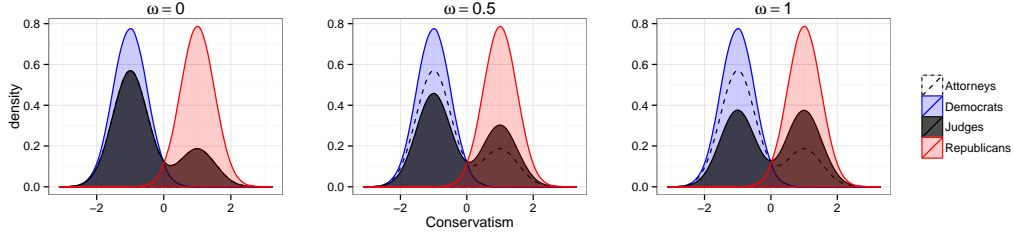
Figure 2: Distributions of judges at varying levels of ω.

As evidenced by the noticeably higher overlap at $\omega = 0$, a strictly non-politicized judicial selection process that randomly draws from the attorney pool yields a better payoff for Democrats than it does for Republicans. In fact, Democrats obtain their best possible outcome when $\omega = 0$ and $c(.) = q = 0$. 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,

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

We note that the general results fit quite well with the 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."

Given that the ideological distribution of the judiciary can be expressed as a function of $p(.)$, $a(.)$, and ω, this simple model generates predictions about the distributional effects of judicial politicization. As we show later, the empirical distributions of $a(.)$, $r(.)$, and $d(.)$ actually correspond closely to stylized distributions used in the example. An implication is that politicization efforts will result in a rightward shift in the distribution of judges away from $a(.)$. This forms our first hypothesis:

Hypothesis 1: Politicization will result in a rightward shift in the judiciary 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 – where

ideology matters most for decision making (Sunstein et al., 2006).[3] Similar to accounts of politicization of executive agencies, efforts to politicize the judiciary should adopt top-down strategies. This forms our second hypothesis.

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

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

4 Lawyers and Campaign Contributions Data

We conduct our empirical analysis using data from two sources: (1) the Database on Ideology, Money, and Elections and (2) the Martindale-Hubbell lawyers' directory.[4] We describe each in turn, paying particular attention to how we linked records across databases.

4.1 Database on Ideology, Money in Politics, and Elections (DIME)

A detailed discussion of the Database on Ideology, Money, and Elections (DIME)[5] is provided in Bonica (2014); we provide here only a quick overview to provide the necessary context for the following discussion.

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[3]We provide our operationalization of the judicial "hierarchy" below. Roughly, we organize the judiciary along the federal/state and higher/court distinction, with U.S. circuit courts, U.S. district courts, state high courts, and state trial courts comprising the different tiers.

[4]We draw upon a third source, which are existing records of both state and federal judges drawn from existing sources, such as the Federal Judicial Center and the American Judicature Society.

[5]http://data.stanford.edu/dime.

The database reports common-space scores (also known as "common-space CFscores") for all individuals and organizations that have made campaign contributions to state and federal candidates. The DIME scores are calculated by examining donations made to various political candidates and committees. The DIME scores provide estimates of how liberal/conservative any individual donor is, and in doing so, places them in a common space with candidates and other political organizations spanning local, state, and federal politics. At an intuitive level, someone who makes contributions to a conservative candidate is more likely to be conservative themselves, while the opposite is true for people making contributions to more liberal candidates.[6]

The primary advantage of DIME, and our motivation in using this as opposed to other measures, is in the breadth of data. DW-NOMINATE scores are available for Congressional representatives, judicial common space scores for federal judges (Epstein et al., 2007; Boyd, 2011; Giles, Hettinger, and Peppers, 2001), and PAJID scores for state judges (Brace, Langer, and Hall, 2000). However, there is no equivalent or consistent measure for the hundreds of thousands of lawyers in the United States. DIME scores, which are available for any individual that has made a campaign contribution in an amount large enough to be itemized, provide an appealing solution. Using DIME scores, we can measure the ideological positioning of any lawyer in the DIME database. DIME scores also provide a consistent measure across tiers of the judiciary, including across federal lower-court and state judges, for whom standard common space scores might have more error.

One limitation of our approach is that, as survey research has shown, donors may vary in meaningful ways from non-donors (Tausanovitch and Warshaw, 2013). Thus, while a large percentage of lawyers have contributed to campaigns, selection into the donor population is not random, a fact that could induce bias in the estimates. While widespread participation among legal professionals suggests much smaller selection effects than would be expected in the population at-large, many of the factors that determine donor status, such as gender, age, and income, are also correlated with political ideology. As we discuss below, our data on U.S. lawyers are comprehensive and come as close as possible to capturing the complete population, including donors and non-donors alike. We use this to directly model the selection process into the donor pool and to attempt to correct for it using a two-stage Heckman selection model,

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[6]See Bonica (2014) for an extensive treatment of the measures and their validity.

discussed below ([Heckman, 1979](#)).

4.2   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 American Bar Association maintains a centralized national database of licensed attorneys, we turned to the Martindale-Hubbell Law Directory maintained by Lexis-Nexis.[7] 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. Although historical data are available, the database used here represents a snapshot of the population of active legal professionals as of 2012. The directory is widely viewed as the most authoritative and comprehensive source of information on the nation's attorneys.

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) employer type.[8] 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 assigned an international standard lawyer number (ISLN), a unique identifier assigned by the American Bar Association that does not vary over the course of a lawyer's career. Lastly, 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. How-

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[7]We note that some states, e.g., California, do have online databases of lawyers who have been admitted to the state's bar; however, rules and regulations involving disclosure of attorneys' names vary from state to state in ways that are inconsistent.

[8]The 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.

ever, we do not include any information from items (9) through (12) in the main analysis.

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.[9] For instance, the listings for law professors were derived from a 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 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.

4.3   Linking Lawyers To Their Contribution Records

The next step in the analysis was linking the Martindale-Hubbell Directory to those in the DIME database. In order to link records for individuals across databases, we developed a customized probabilistic record-linkage algorithm.

Briefly, 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,"[10] 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

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[9]Information 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.

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

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.[11] 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.

4.4 Robustness of Measures to Strategic GIving

Detailed treatments of the robustness of the 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. We summarize the main findings from the analyses 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 the 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.

The authors further note that the model does not strictly assume that ideological proximity is the sole determinant of contribution behavior given that they allow 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,

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[11] Social 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.

most accounts of strategic behavior are actually largely compatible with ideological giving. Many conjectured strategic incentives serve largely to motivate contributors to engage more in funding campaigns but do not necessarily influence the choice of which candidates to support.

As the analysis here 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. Some have argued that lawyers face distinct pressures to contribute to the campaigns of sitting judges. When we re-estimate the DIME scores for lawyers with contributions to judicial candidates excluded, 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.

4.5   Self-Selection into the Donor Population

Attorneys are extremely active contributors, even with regard to other similarly situated 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%, which is an order of magnitude greater than the participation rate among the voting age population.[12,13]

One potentially serious selection problem relates to regulations that bar federal and some state judges from making political contributions.[14]

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

[13]We note that we 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 an attempt on our behalf 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, where as false matches would bring into the data people who have the potential to be confused with the population of interest.) As a result, the number of lawyers identified by the record-linkage algorithm represents a conservative estimate for the percentage of attorneys who have made political donations.

[14]Federal judges who are currently on the bench are barred from making political contributions by the Code of Conduct for United States Judges (Canon 5), which states

Fortunately, the majority of these 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 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 we limit the sample to those appointed since 2011.

Despite the high participation rates, self-selection into the donor population can still bias results. Table 1 displays results from probit models used as the first-stage of the heckit model. This first step takes as the outcome variable donor status (i.e., an indicator of whether the individual appears in the DIME data) using variables that capture gender, age, geography, area of employment, career status, and some basic measures of quality of legal education.[15] Model 2 of the table further includes the Democratic vote share in the last Presidential election for the individual's congressional district.

Both models suggest that we do have some reason to worry about 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 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 significantly 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 identification of the selection 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

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that a judge should not "solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate." However, those under consideration for appointment to the federal bench are not barred from having engaged in political activity earlier in their careers.

[15]For measures of quality of 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.

state.[16] The logic of using this variable is as follows. When selected via elections, races for these state executive offices are typically high-profile events 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.[17]

Table 2 presents results from the second-stage OLS models corrected for selection bias, with estimated ideology as the outcome measure. Here, and for the rest of the analysis, a negative effect indicates increased liberalism, while a positive effect indicates increased conservatism. Again, we include two models, with Model 2 including an additional variable capturing the district-level Democratic vote share in the 2008 Presidential election, a good measure 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, women lawyers are more likely to be liberal leaning than male lawyers, as are law professors, public defenders, and government lawyers. We would expect this: it would make sense that those drawn into academic or government type work are more liberal, and other studies have shown that women are as a whole more liberal than men. On the other side of the spectrum, those who work in "Big Law" firms as well as those who are identified as partners are more conservative. We also see an increased conservative effect the longer one has been admitted to the bar.

We note two other patterns of interest in relation to the theoretical

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[16]There are fifteen states with appointed secretaries of state (AK, DE, FL, HI, MD, ME, NH, NJ, NY, OK, PA, TN, TX, UT, VA), six states with appointed attorneys general (AK, HI, ME, NJ, TN, WY), twelve states with appointed treasurers (AK, GA, HI, MD, ME, MI, MN, MT, NH, NJ, TN, VA), 25 states without 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 without elected lieutenant governors (AZ, ME, NH, OR, TN, WV, WY).

[17]The F-stat for number of elected executives is 553.9, which easily exceeds the F-stat > 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***	−0.338***
	(0.003)	(0.003)
Years since Admitted	0.069***	0.069***
	(0.0003)	(0.0004)
Years since Admitted^2	−0.001***	−0.001***
	(0.00001)	(0.00001)
Government Lawyer	−0.461***	−0.568***
	(0.014)	(0.014)
Corporate (in house counsel)	−0.305***	−0.263***
	(0.007)	(0.007)
Big Law Firm (top 100)	0.244***	0.203***
	(0.006)	(0.006)
Solo-practice	−0.017***	−0.009***
	(0.003)	(0.003)
Law Professor	−0.029**	−0.022
	(0.014)	(0.014)
Partner	0.314***	0.300***
	(0.007)	(0.007)
Prosecutor/District Attorney	−0.232***	−0.222***
	(0.012)	(0.012)
Public Defender	−0.296***	−0.292***
	(0.021)	(0.021)
Top 14 Law School	0.291***	0.266***
	(0.004)	(0.004)
> 100 Ranked Law School	−0.091***	−0.083***
	(0.003)	(0.003)
CD Dem. Pres. Vote Share		0.319***
		(0.009)
N. Elected State Execs.	0.028***	0.023***
	(0.001)	(0.001)
Constant	−1.302***	−1.482***
	(0.007)	(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.

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

expectations outlined earlier. The first is that geography matters for explaining variation in ideology – specifically comparing Model 2, which includes the district-level 2008 Democratic Presidential vote share, with Model 1, which does not. This is most apparent for Big Law attorneys, who cluster in democratic strongholds like Los Angeles, Washington, D.C., New York, and San Francisco. On average, Big Law attorneys have offices located in congressional districts where Barack Obama received on average 0.77 of the two-party vote share in 2008, compared to an average of 0.60 for all other attorneys.[18]

The second pattern concerns attending differently tiered law schools. In Model 1, we see that those who attended elite law schools are more liberal, while those who attended schools ranked outside of the top 100 are more conservative. However, the effect switches signs when we control for being an ideologically liberal area in Model 2. Thus, it appears that graduates of elite law schools are slightly more conservative, once geography is taken into account. This is again complicated by the same geographic sorting patterns as observed for Big Law attorneys. Although less concentrated, alumni of the top 14 law schools locate in congressional districts where Barack Obama received on average 0.70 of the two-party vote share in 2008. This suggests that geographic sorting patterns among lawyers are inherently linked to the geographic structure of the labor market and the sorting mechanisms operating within the profession. In fact, 65 percent of Big Law attorneys and 44 percent of graduates of elite law schools are located in a select group of 10 congressional districts with Democratic presidential vote shares ranging from 74 to 89 percent.

The geographic clustering of lawyers matters for understanding the composition of the state courts. When one moves beyond the few states that serve as hubs for the legal market, the liberal bias in the population of attorneys becomes less apparent. The ideological distributions of lawyers varies meaningfully from state to state. (See Figure A2 in the appendix for a visual comparison.) Liberal attorneys are heavily overrepresented in "blue" states, such as New York, Illinois, and California. However, attorneys from several key swing states – for example, Ohio, Florida, Pennsylvania, Arizona, and Virginia – are roughly evenly balanced between liberals and conservatives. Lawyers in a small number of states – Alabama, Georgia, Louisiana, Oklahoma, South Carolina,

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[18]We note that this difference would likely be less extreme were we to examine place of residence rather than place of work. However, only addresses for office location are listed in the Martindale-Hubbell database.

Wyoming – lean to the right. Moreover, geographic clustering has created considerable variation in the number of attorneys relative to general populations of the states. This could create partisan incentives for politicization in some states to look very different from what is observed nationally.

5 Ideology of Judges Compared to Lawyers

We now turn to extending these findings to U.S. judges, addressing our key question of how this ideological mapping affects (or is predictive of) the ideological distribution of American judges. As an initial analysis, we compare the ideal point distributions of lawyers and judges using a non-parametric two-sample Kolmogorov-Smirnov test (K-S test)[19] The K-S test operates by comparing the two cumulative distributions and using the maximum deviation between the two distributions 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. (A substantive interpretation of the p-value would be the probability of the two cumulative distributions being as far apart as is actually observed if they were randomly drawn from identical populations.) We therefore reject the null hypothesis that the two distributions come from the same underlying distribution.

To further unpack these differences, we disaggregate the judiciary in various ways. States courts clearly have different methods of selection, as well as different roles that vary from state to state; for example, some state appeals courts can hear both criminal and civil appeals, whereas others can hear only civil appeals. We therefore separate state from federal courts as well as lower courts from higher courts, with divisions between courts of appeal and lower courts.[20] As the federal courts occupy a more prestigious, perhaps more powerful position within the nation's judicial system, this provides a rough hierarchy – state lower courts at the

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[19]The K-S test has the advantage of making no formal assumptions about the underlying data distribution. Other non-parametric tests would make assumptions about the data distribution that do not appear to be met here; for example, the 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.

[20]We set aside the nine Justices on the U.S. Supreme Court, primarily because cross court comparisons are difficult with such a small sample.

bottom, state supreme courts and U.S. district courts somewhere in the middle, and U.S. circuit courts at the top. Furthermore, these different tiers carry with them different ways of selecting judges as well as varying degrees of political importance. Administrative courts are included in the analysis but treated as distinct from the judiciary.

We present the distribution of DIME scores in Figure 3. The figure reveals several distinct patterns. The first is that the ideological distribution of each group of judges differs meaningfully from the overall distribution of lawyers. For example, the distribution of U.S. circuit court judges is significantly more conservative than the overall distribution of lawyers. The same is true for the distribution of other judges, including those federal district judges and state high and state trial court judges in the sample.

Second, 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 federal district courts, state high 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 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.)

We also confirm the more conservative nature of higher courts via regression analysis, with results presented in Table 3. Here, as in tables above, the outcome variable is the individual's DIME score. The model includes indicator variables for four general categories of judges, ranging from state trial courts to the U.S. Circuit Court of Appeals. As the baseline model, we include only an indicator variable for judges – which could include both state or federal level positions – along with separate indicitor variables for administrative judges (Model 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
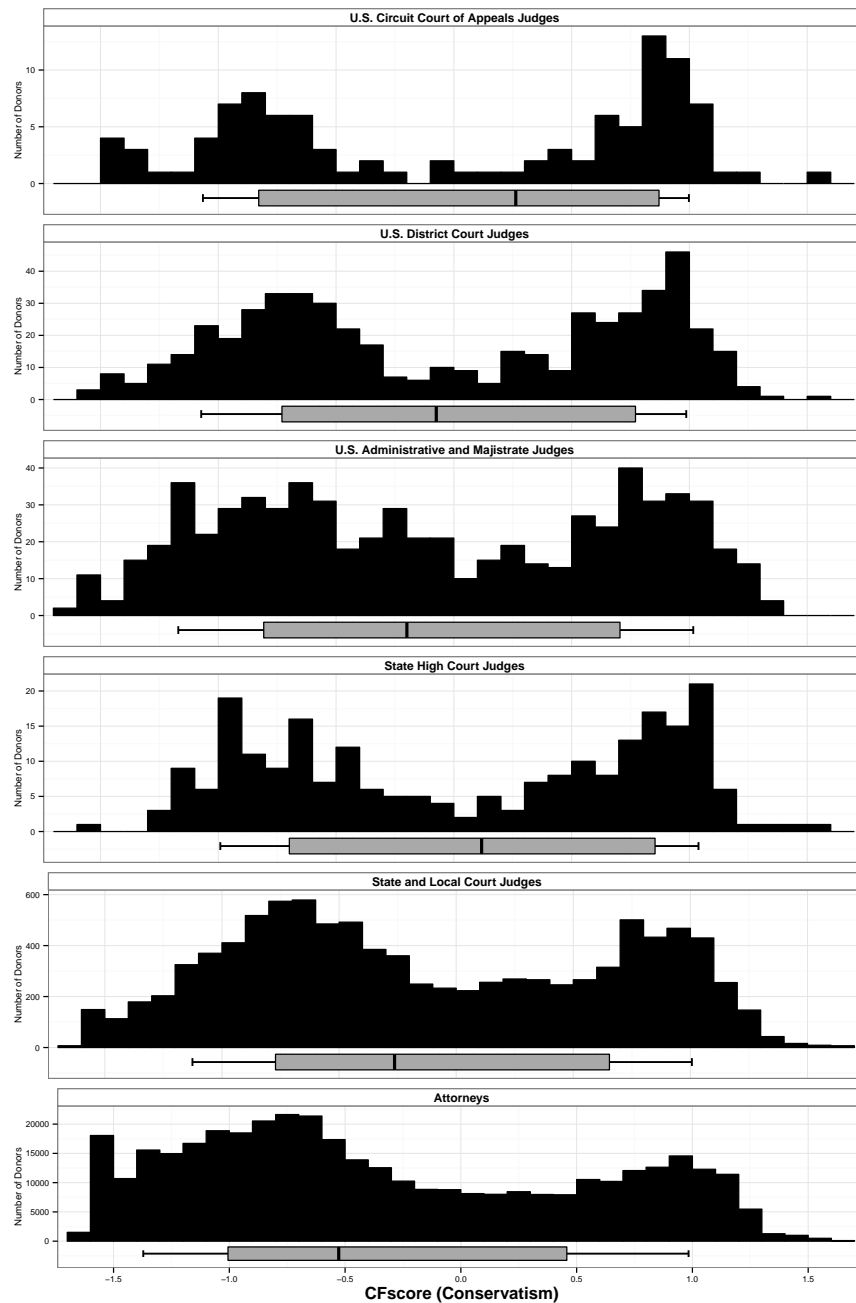
Figure 3: Ideal Point Distributions for Lawyers and Judges

Note: Increased value of DIME score indicates a more conservative ideology. Box-and-whisker plots display the median, inter quartile range, and the 9th to 91st percentiles for each distribution.

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

state fixed effects in order to control for differences in the population of lawyers from the state as well as variation in judicial selection methods. The inclusion of state fixed effects is also intended as a way to account for geographic differences in the political context surrounding the selection of judges at the federal level, such as senatorial courtesy, the use of which could vary according to state.

The results confirm both hypotheses formulated in Section 3. First, it confirms that judges are more conservative than lawyers, with significant differences even accounting for regional (state) differences in judicial selection. Second, the differences increase along with the court's level. The higher the court, the more conservative the corresponding DIME score and the more bimodal the ideological distribution becomes.

6   Politicization of The State Courts

We now shift our focus to a comparative analysis of state courts. The theoretical framework provides expectations regarding the incentives for politicization given the observed empirical distributions of judges, politicians, and attorneys. We begin by considering the partisan alignment of incentives for politicization in the states. We then examine the evidence of politicization across the states courts.

Judicial 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. When moving beyond the federal judiciary to the states, appointing judges is not the norm. This is further complicated by the many states that use different selection mechanisms for different courts. While we note instances where selection mechanisms aid in interpreting the results, a systematic analysis of the relationship between judicial selection and politicization is beyond the scope of this study.

We begin by examining the incentives for the state parties by mapping the predicted overlap coefficients for the parties at different values of ω for each state. Of particular interest is whether the patterns observed at the national level are replicated at the level of the states or whether the geographic sorting of attorneys creates different patterns of incentives. For instance, are there any states where the distribution of attorneys advantages Republicans? 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 over-

lap in ideal points for survey respondents. The results are displayed in Figure 4.

Figure 4 reveals two general patterns. The first is that Republicans stand to gain, often quite substantially, from increased politicization in nearly every state.[21] 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.[22] 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. It can also arise in states, such as Arkansas, Alabama, and West Virginia, where Democrats elected to office tend to be more moderate. This serves to highlight the various ways the configuration of attorneys can shape the incentives of politicians.

Given the patterns of incentives, how many state courts actually exhibit evidence of politicization? The results in Table 3 provide evidence of politicization of state courts but does not tell us whether its influence is widespread or is concentrated in a subset of states. We test for politicization based on whether the ideology of state judges is statistically distinguishable from attorneys practicing in the state.[23] As before, we use two-sample K-S tests to test for distributional differences among the judges and attorneys in each state. We then group states into three categories: (1) those with a statistically significant difference (p-value ≤ 0.05) where, on average, judges locate between attorneys and politicians; (2) those with a statistically significant difference but the average judge is "out of bounds" of the theoretical predictions; and (3) those with insufficient statistical evidence of politicization. In total, 24 states join federal courts in exhibiting evidence of politicization, 5 of which are out of bounds of the model parameters, and 26 states exhibit insufficient evidence of politi-

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[21]In only two strongly Democratic states, Massachusetts and Rhode Island, do Republicans stand to lose out from increased politicization.

[22]For example, see http://www.nationalreview.com/bench-memos/336925/battle-judicial-selection-reform-kansas-ammon-simon.,

[23]The distribution for elected politicians aggregates over all elected officials in the state who served in office between 2004 and 2012.
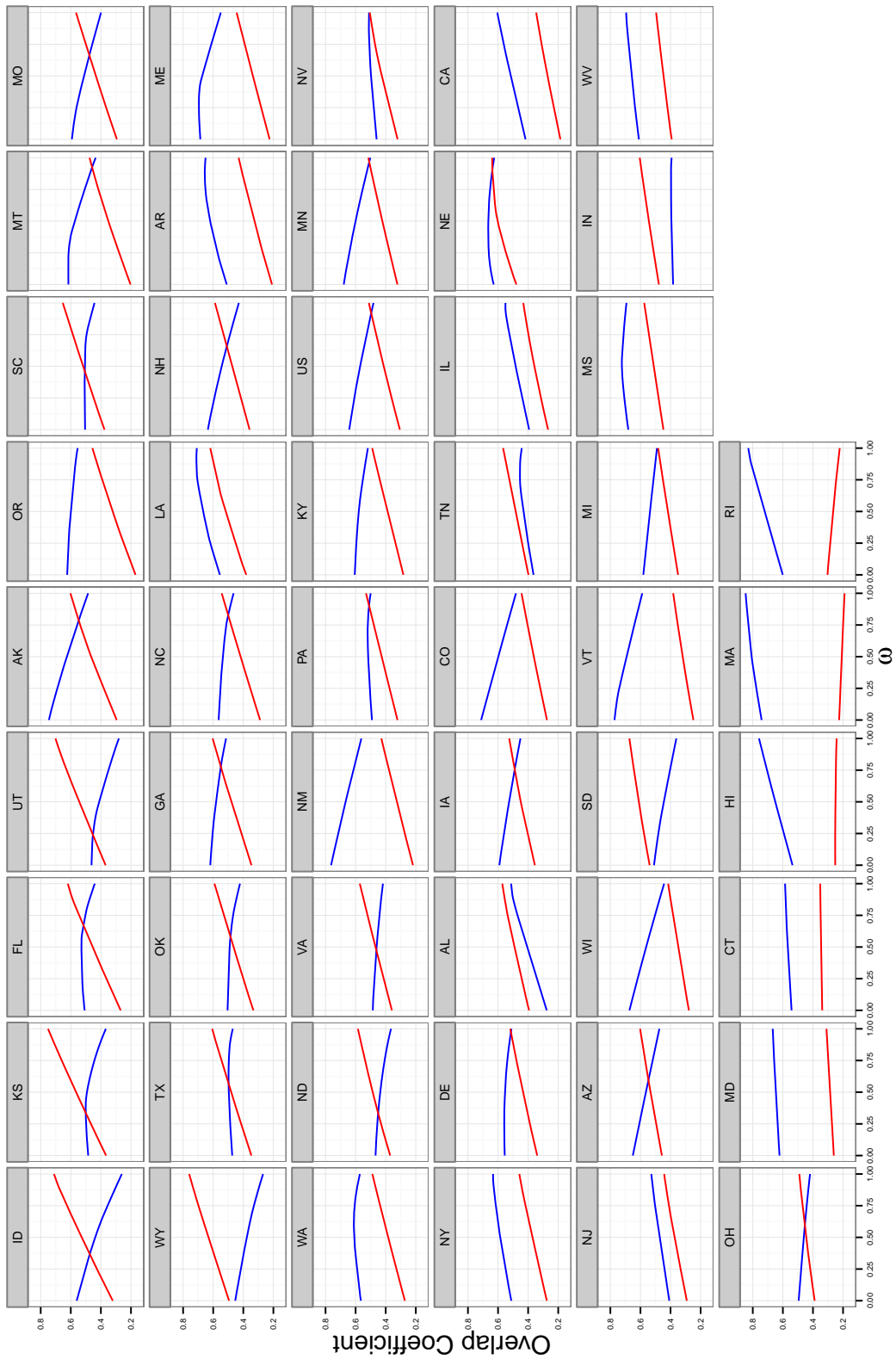
Figure 4: Predicted Overlap Coefficient for State Judges and Politicians by Party For Values of ω. The lines are color coded by party (Dem = Blue; Rep = Red). The panels are ordered by the predicted increase in the overlap coefficient for Republicans moving from $\omega = 0$ to $\omega = 1$. The 'US' label indicates the federal courts.

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cization.[24]

To help place these results in context, Figure 6 plots the mean position for attorneys, judges, and elected politicians for each state as well as for the federal courts. It reveals that while ideology of attorneys varies greatly across states, with the exceptions of Connecticut and Rhode Island, attorneys are, on average, more liberal than politicians. This is consistent with results from Figure 4. It also reveals that even among states that exhibit evidence of politicization, judges are generally closer to attorneys than to politicians. In this respect, the federal courts are somewhat exceptional in the extent to which the judiciary has come to resemble politicians. Virginia, as the only state to select judges exclusively via legislative election, also happens to be the sole state where judges more closely resemble politicians. 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).

In most states that exhibit evidence of politicization, the judiciary locates between the attorneys and politicians, consistent with theoretical expectations, but falls outside the expected bounds for handful of states. One thing to note is that politicians elected in a state during the last decade is at best an approximate measure of $p(.)$, so finding that a few states appear to be slightly out of bounds is probably to be expected. Nonetheless, judicial selection methods might account for some of the discrepancies. In two of these states–Connecticut and California–judges are to the right of both attorneys and politicians. Both states rely on gubernatorial appointments for selection of most state judges and, in spite of their Democratic leanings overall, had Republicans governors for most of the period since 2004. It is slightly more difficult to make sense of the three states–Alabama, Oregon, and Washington–where the judges are to the left of both the attorneys and politicians. Given the seemingly negligible differences between the average judge and average attorney in these states, it is possible that differences in the distributions might result from something other than politicization as it is usually understood.

Perhaps most intriguing is the lack of evidence of politicization in roughly half of the states. The failure to reject the null in some less-populous states such as 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. This im-

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[24]The individual state-level results for these tests are included in the appendix.
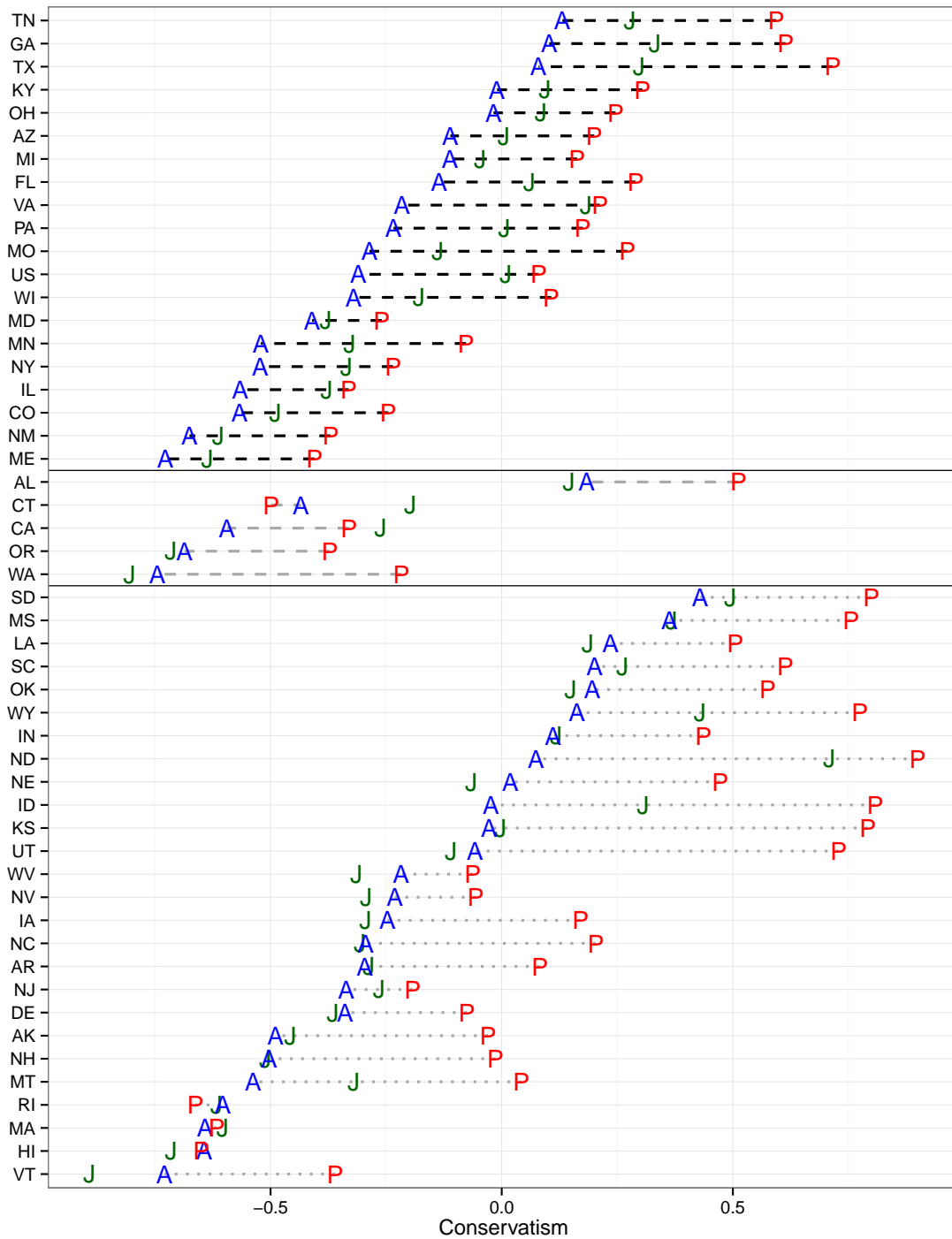
Figure 5: Comparison of average ideology of judges, politicians, and attorneys.

Note: States are first grouped in to three categories based on evidence of politicization. The two groups includes states with statistically significant differences between judges and attorneys. The third 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. The 'US' label indicates the federal courts.

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plies that politicization might not be as pervasive as some have claimed. While the analysis provides strong evidence of politicization for the federal courts and in some states, generally speaking, attorneys practicing in a state are far more important than elected politicians in explaining the ideological composition of the judiciary.

7 Implications for Judicial Polarization

The topic of polarization has gripped American public discourse, and many important papers have evaluated to what extent polarization has creeped into political life. These inquiries extend to documenting polarization among political elites (McCarty, Poole, and Rosenthal, 2006), members of the public (Hetherington, 2001; Layman and Carsey, 2002), and among state and local officials. Still other papers examine increasing polarization in media (Prior, 2013) and in public discourse and speech. There is a lively debate as to the importance and origins of these divides (e.g., Fiorina and Abrams, 2008), but the scholarship is united in the idea that understanding polarization has becoming increasingly important.

Despite this robust literature, no existing study of polarization or ideological divisiveness has examined these questions systematically and comprehensively within the context of the nation's courts. This gap is surprising. America's state and federal courts ask and answer questions of remarkable public and political salience, which could be affected by varying levels of ideological divisiveness on the courts (Epstein and Knight, 1998; Maltzman, Spriggs, and Wahlbeck, 2000; Binder and Maltzman, 2009). At the higher levels, federal courts have increasingly come under scrutiny from journalists and public intellectuals as being just as polarized as elected bodies (Rosen, 2007; Liptak, 2014). Among the public, support for the Supreme Court as an institution has fallen to an all-time low (McCarthy, 2014). Even though a few, important studies have looked at polarization at the Supreme Court level (e.g., Clark, 2009), there is a clear gap in the literature regarding whether and to what extent courts are polarized and whether this varies meaningfully across the judicial hierarchy.

We explore the theoretical expectations for the effect of politicization on polarization for the state courts. If judges are randomly selected from the population of attorneys, or if they were somehow selected on a basis orthogonal to ideology, we would expect the judiciary as a whole to resemble the overall ideological distribution of lawyers. This provides

a natural baseline estimate for the expected level of judicial polarization absent the efforts to politicize the courts. In other words, if judges were selected (elected, appointed, or some combination) for reasons uncorrelated to ideology, the level of polarization in the state courts should reflect the polarization of the population of attorneys practicing in the state. As ω increases, the model predicts that its effect on polarization depends on the ideological distributions of lawyers and politicians in the state.

Figure 6 displays the mapping of ω onto polarization for the state and federal courts. Following Clark (2009), we measure judicial polarization using a measure of polarization developed by (Esteban and Ray, 1994). 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, state courts are generally not well-founded. On the contrary, increased politicization is likely to reduce polarization in a large number of states.

8   Discussion

The analyses performed here help to place the contentious debates over the judiciary into context. In particular, it seems to explain 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 sharply to right. In the process, politicization has resulted in a judiciary that is significantly more polarized than what would be anticipated if judges were selected without respect to ideology. On the other hand, there is little evidence that the state courts have been politicized to a similar extent. By and large, the ideological composition of a state's judiciary reflects the ideology of attorneys practicing in a state.
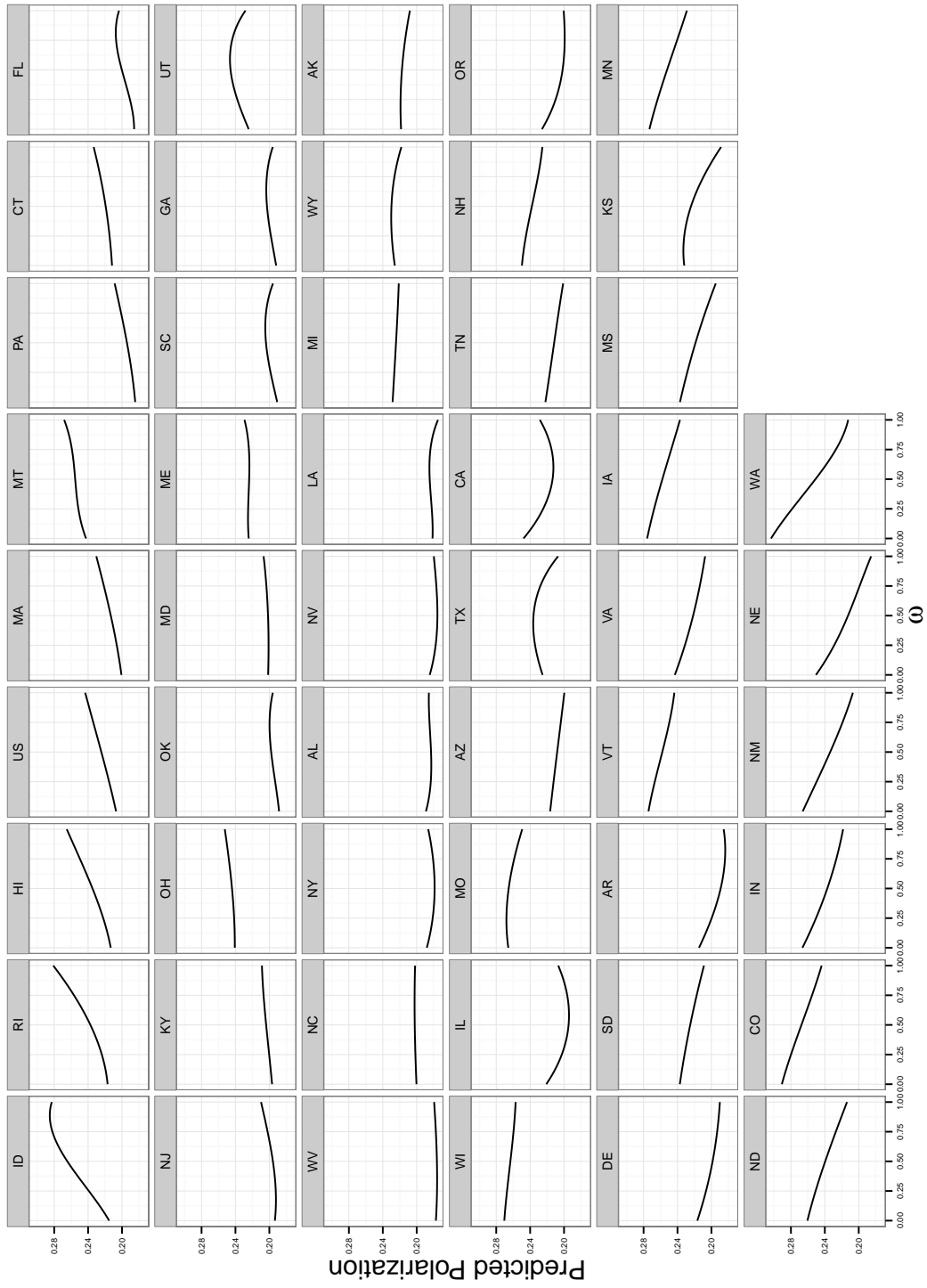
Figure 6: Predicted Polarization Coefficient for Values of ω.

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What explains the lack of evidence of politicization in so many states? One explanation for this is that viable conservative judicial candidates are strategically funneled toward judgeships in the nation's higher courts by political elites, informal institutions, and formal organizations. At higher levels, decision making becomes more political – particularly in regard to the interpretation of delicate questions involving constitutional law, political questions, and electoral redistricting (Sunstein et al., 2006). More recently, higher courts have adjudicated questions involving same-sex marriage, abortion, and affirmative action. Unlike lower courts, which concern themselves with questions involving factual and occasionally legal questions, higher courts concern themselves with questions involving law and policy issues (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.

The hypothesis that parties are strategic in their recruitment efforts appears consistent with our empirical evidence so far. It also yields additional testable implications. 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 a bit 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.

On this point, there is extensive qualitative evidence. Perhaps the best example of this is the creation of the Federalist Society, the conservative-leaning intellectual organization that has connections and chapter memberships at over 190 U.S. law schools. The Society was founded with the explicit aim of cultivating and encouraging conservative students to develop policy prescriptions and networking opportunities, with the aim of challenging what the Federalist Society saw as a "form of orthodox liberal ideology which advocates a centralized and uniform society."[25] As one commentator described it, the early Federalist Society members were "ideological outliers who struggled to gain credibility in class and accep-

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[25] https://www.fed-soc.org/aboutus/.

tance on campus" (Hicks, 2005, p. 628) No longer: today, the Society boasts 196 chapters across the country, and claims four current Supreme Court Justices among its members. This is a qualitative example of the kind of ideological recruitment we see in our data – that is, a coordinated strategy of recruiting and retaining conservative talent at the upper echelons of legal academia.

Our data allows us to examine the empirical implications of this strategic politicization. If conservative elites are actively seeking out and recruiting potential conservative candidates from a smaller pool, 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*. Put differently, among similarly educated and prepared individuals, conservatives should end up more likely to be judges. We provide initial 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.

On the other hand, strategic politicization fails to explain why some state courts are politicized but others are not. In this regard, a detailed analysis of the role of judicial selection mechanism presents a promising avenue for future research. It is also worth considering accounts which hold that judicial independence waxes and wanes based on the configuration of preferences of the legislature and executive (McCubbins, Noll, and Weingast, 2006). An implication of this is that courts are at their weakest in states where one party dominates and unified government is the norm. This may lessen the incentives for politicians in these states to politicize judicial selection precisely because the dominant party is able to overrule the courts more easily. Lastly, another factor the model does not take into account is the influence of powerful interest groups, most notably the state bar associations which strongly opposes selecting judges on the basis of ideology. The lack of politicization may simply reflect success on their behalf.

Table 4: Ideology and Career Outcomes (Graduates of Top 14 Law Schools with at least 15 Years of Experience)

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

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

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.

9   Concluding Remarks

The partisan efforts to shape the judiciary cannot be fully understood without accounting for the preferences of attorneys. Left to a judicial selection method devoid of ideological considerations, the judiciary would, in expectation, closely resemble the population from which it is drawn. This poses a dilemma for those seeking to move the state courts in a conservative direction. A large-scale effort to balance the ideological composition of state judges would likely be costly, hard-fought, and without a guarantee of success. This had led conservatives to prioritize placing conservative candidates on higher courts, while largely ignoring the rank and file. This explains what we see in the data, which is that, the higher the court, the more conservative it becomes. Still, politicization is not as pervasive as many have claimed. Generally speaking, attorneys practicing in a state remain far more informative than politicians elected in the state in explaining the ideological composition of the judiciary.

We believe the database will become a valuable new resource for scholars of judicial politics and the legal profession. This made it possible to perform the extensive ideological mapping of the legal community and judiciary, and with it, large-scale empirical tests of the model and its implications. Yet, in the process of exploring the theoretical implications of politicization, we revealed several other empirical patterns that are of interest in their own right, including the remarkably 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 public defenders and law professors), the relationship between law school rank and ideology, and so on.

We conclude by noting that this paper represents a starting point for inquiries based on this data. We see various avenues for future research. First, and most obviously, we may use this data to explore the ideology of judges who are otherwise difficult to pinpoint. District court judges, for example, do not hear cases alongside other judges; this makes estimating their ideology compared to other judges extremely difficult. The methodology described in this article could be used to more precisely identify the ideology of such individuals. Second, although we have examined lawyers and judges using the same measure, we analyzed them separately and compared to each other. However, the judiciary functions primarily to rule on cases presented and *argued by lawyers*. We would therefore expect to see some interactions between lawyer and judicial ideology, perhaps that more conservative judges are more likely to rule

in favor of more conservative lawyers, and, vice versa, the opposite for more liberal judges. To date, these are questions that have been unexplored. The data that we provide here, however, enable these sorts of inquiries.

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Appendix A Consideration of Alternative Mechanisms

Here we consider an alternative mechanism for explaining why judges might differ from the underlying population of attorneys. It is possibility 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 objective and apolitical, but that, inevitably, 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 – e.g., ascriptive characteristics. Ever since the Carter Administration started aggressively recruiting women and ethnic minorities (Clark, 2002), Presidents and other governing executives have tried to make the judiciary more reflective of the population as a whole. This extends, too, to the state level, although the impact has been moderated by elections and other kinds of selection mechanisms. Nonetheless, numerous studies have identified that women and minority judges vote differently once they are appointed, and that their voting appears to affect those of their colleagues via panel effects (Boyd, Epstein, and Martin, 2010; Kastellec, 2013). Thus, attempts at making the judiciary more reflective could have the effect of inadvertently selecting also on ideology – thereby making the judiciary less reflective of the pool of attorneys. 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 would be selecting judges on the basis of superior credentials. Even though we have little reason to think that personal criteria such as temperament and integrity vary according to ideology, it could be that things like the quality of legal education do. For example, something that would explain our results would be if conservatives were on average better educated (e.g., attended more prestigious, highly rated law schools) than liberals. 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 driven behavior 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 B Distribution Comparisons of Judges with Politicians and Attorneys by State

|	Attorneys			Politicians		
	K-S D-stat	K-S P-value	Overlap Coef.	K-S D-stat	K-S P-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 C Attorney Ideology By State
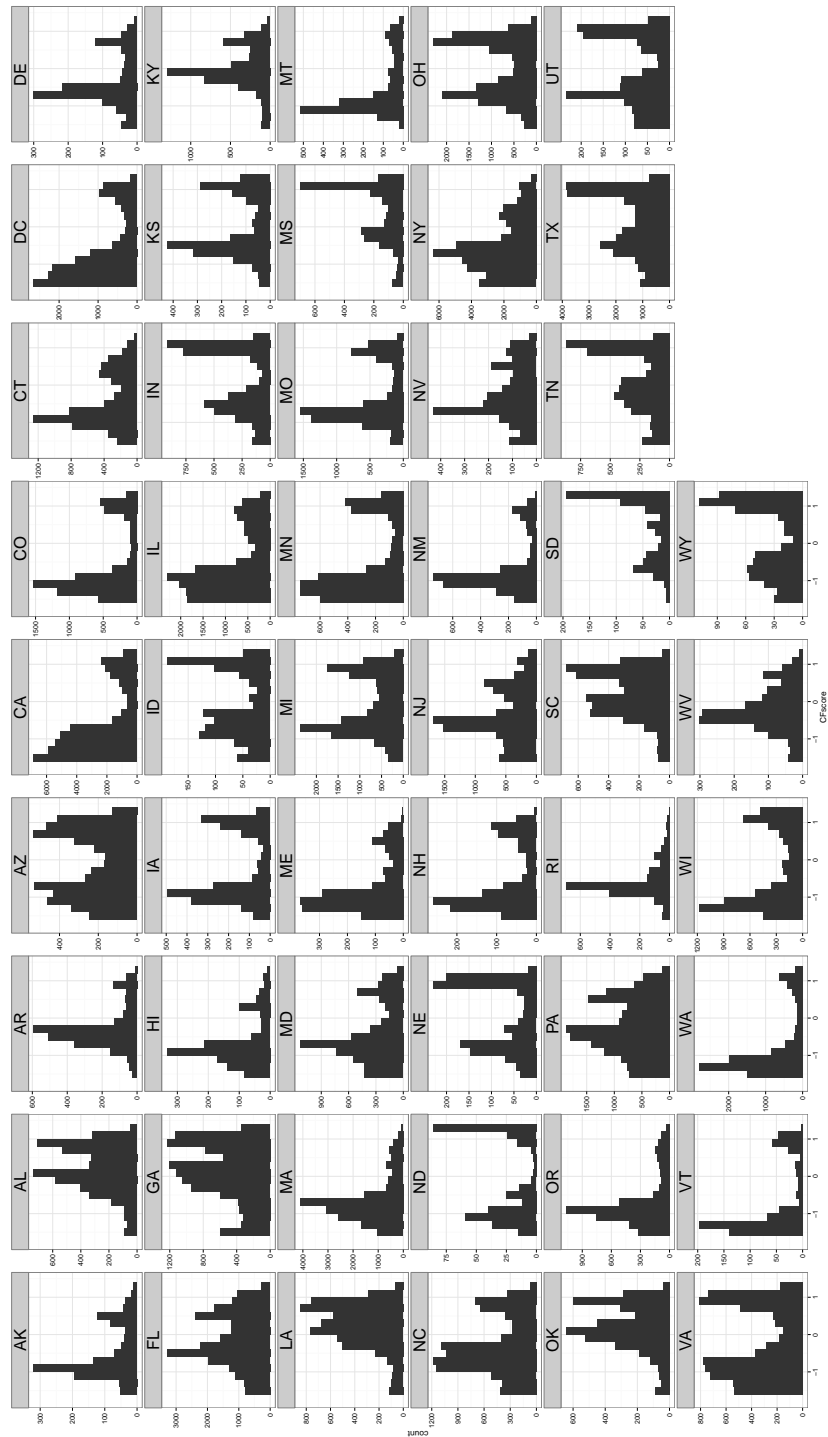
Figure A1: Distribution of estimated DIME scores for attorneys, by state. Increased value of ideal points indicates a more conservative ideology.

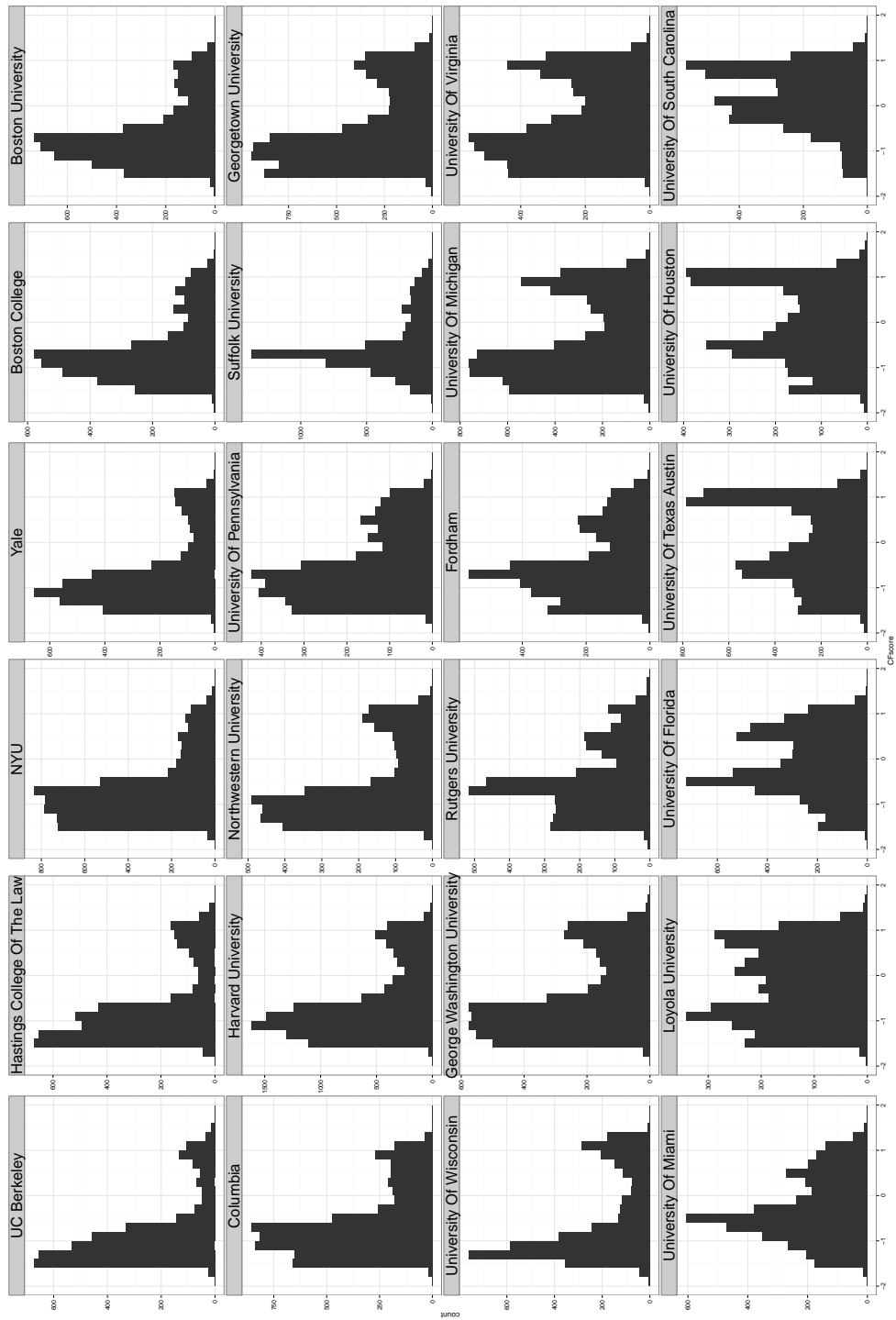# Appendix D Attorney Ideology By Law School Attended

Figure A2: Distribution of estimated ideal points of alumni from selected law schools. Increased value for ideal points indicates a more conservative ideology.

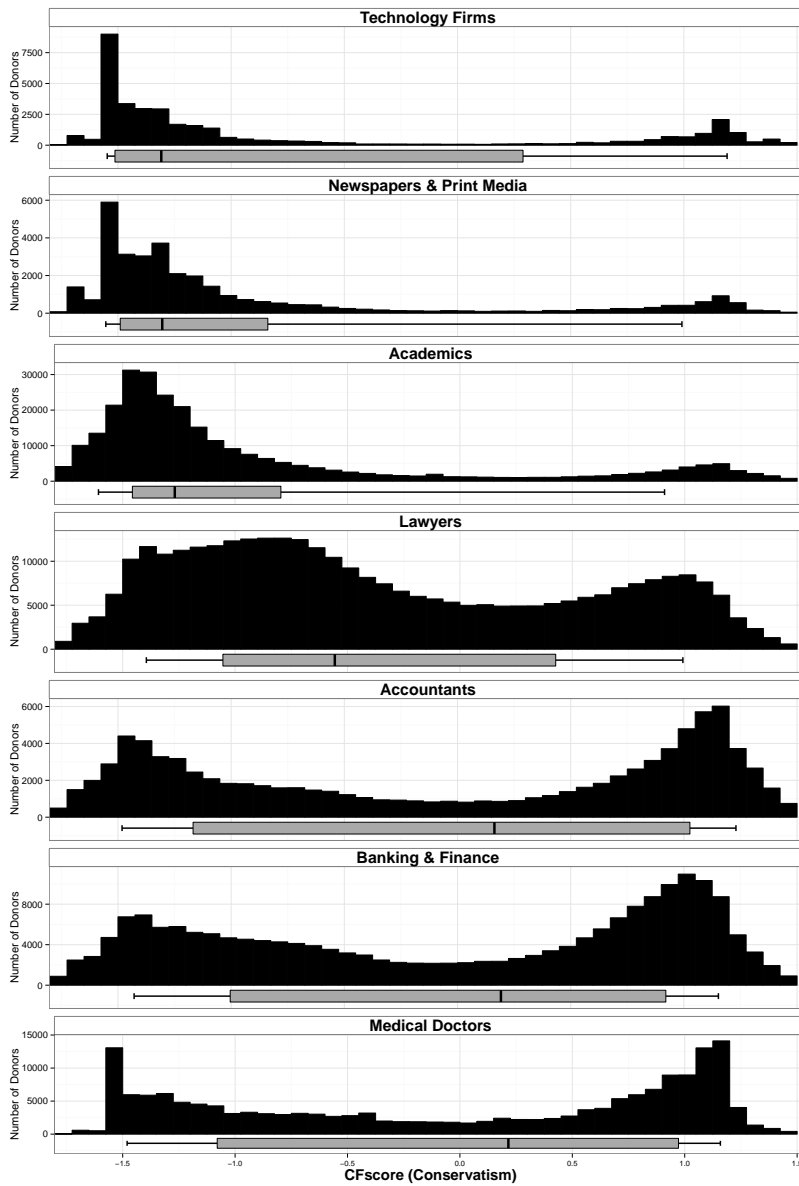# Appendix E   Comparison of Lawyers with Other Professions

Figure A3: Distributions of DIME scores for Lawyers and Other Groups of Professionals.

Conservatism is increasing with DIME scores. Box-and-wisker plots display the median, interquartile range, and the 9th to 91st percentiles for each distribution.