

Policy, Institutions, and Judicial Legitimacy: The Role of Issue Preferences in Structuring Attitudes Toward Courts

Alexander Bolton and Paul J. Gardner*

January 2, 2014

Abstract

Critics and defenders of judicial elections have drawn attention to the issue of the effects of selection institutions on the public's evaluations of the judiciary. In this paper, we argue that individuals' perceptions of courts are less affected by selection institutions and other procedural concerns and more by policy preferences. Using a variety of experimental and survey evidence, we demonstrate that while individuals' views of judges and courts are somewhat influenced by selection methods, individual policy concerns play a much larger role. In particular, when individuals perceive a mismatch between their preferences and legal policy outcomes, they express significantly lower levels of support for and trust in courts. Furthermore, we demonstrate that these policy concerns also impact support for selection institutions. In particular, individuals who are dissatisfied with outcomes and judges are more likely to support elections over merit selection/retention plans. In sum, these results suggest that individuals' support for courts and selection institutions are premised as much, if not more, on instrumental policy goals than on concerns for procedural justice and judicial independence.

*Prepared for the 2014 Annual Meeting of the Southern Political Science Association. The authors thank Tali Mendelberg, Xun Pang, Matt Tokeshi, Steve Rogers and participants in the Princeton Public Law Working Group and QAPS Poster Session for helpful comments and conversations. We also thank Joseph Aistrup for sharing his survey data. All remaining errors are our own.

1 Introduction

Since retiring from the Supreme Court, Justice Sandra Day O'Connor has become a leading advocate for reforming the methods by which state court judges are chosen. Elected judges now comprise the vast majority of state court judges (American Judicature Society 2010), but judicial elections, goes the argument, reduce trust in judiciary by inviting politics into the courtroom. New-style judicial campaigns are characterized by the use of high levels of campaign fundraising and spending, attack ads, and even policy commitments by potential judges. "This crisis of confidence in the impartiality of the judiciary is real and growing," O'Connor writes in a letter urging the abandonment of judicial elections, "Left unaddressed, the perception that justice is for sale will undermine the rule of law that the courts are supposed to uphold" (Sample et al. 2010). O'Connor is not alone in her preference for judicial appointments. Many judicial reform advocates have viewed the rise of these campaign tactics with alarm (see, e.g., Skaggs et al. 2011; American Bar Association 2003). But should Justice O'Connor fear loss of legitimacy from judicial elections? Previous work suggests that elections may actually confer greater legitimacy to judges.

In this paper, we seek to address two questions that shed light on these debates. First, what determines individuals' views of the courts? In particular, we argue that individuals' legal policy preferences and the extent to which they believe courts' are aligned with those preferences are a more important factor in structuring evaluations of courts than selection institutions. Second, we ask, what determines individuals preferences for elections? We find that the alignment of individuals' policy preferences and perceived legal policy outcomes affect preferences for selection institutions. In particular, individuals that perceive a mismatch between their preferences and perceived outcomes and have low confidence in judges prefer elections rather than merit selection/retention plans. This selection institution privileges the preferences of individuals both through reelection incentives and individuals' greater control over selection.

It is no surprise that judicial reformers have focused their concerns on the maintenance of the independence of courts. How judges are selected directly implicates some of the central concerns about the function and legitimacy of the judiciary. The democratic legitimacy of independent and politically insulated courts has been one of the primary concerns in the study

of the judiciary for over a century (e.g. Thayer 1893; Llewellyn 1930; Bickel 1962; Ely 1980). The primary thrust of this literature, however, has been the normative debate about the proper limits of judicial review. While many have offered theories of judicial review that would limit the power of courts while preserving their independence, only more recently have scholars focused on limiting the power of judges by changing the institutional authority of courts. Popular constitutionalists concerned with the democratic legitimacy of courts have proposed a more limited role for courts in constitutional interpretation (Kramer 2004; Tushnet 1999; Whittington 1999). Pozen (2010) bridges the literatures by conceptualizing judicial elections as a form of popular constitutionalism. Pozen echoes the concerns of judicial reformers, but notes that “Inasmuch as elective judiciaries stand in tension with principles of legality, equity, and efficiency, they also—and consequently—stand in tension with the demands of self-government” (Pozen 2010, 2101-3).

By considering judicial elections as a democracy enhancing institution, Pozen identifies the key tension ignored in the arguments of judicial reformers. While there certainly exist some negative effects of campaigning for judgeships, eliminating elections might reduce legitimacy insofar as their absence would mean the absence of democratic accountability as well. Moreover, appointment politics comes with its own complications. Numerous scholars have documented the extent to which partisan politics informs appointments to the Supreme Court (e.g. Dahl 1957; Gibson and Caldeira 2009), and Bonneau and Hall (2009) note that it was for reasons of legitimacy that most states transitioned from appointed to elected judges in the first place. For this reason, scholars have attempted to bring empirical scrutiny to the claims of judicial reformers with regard to the effects of judicial elections on legitimacy. The results of these studies have been more nuanced than the dire claims of judicial reformers. In general, the findings suggest that adversarial elections with attack ads and high levels of campaign spending are generally associated with lower levels of legitimacy. Many other aspects of elections, however, have been shown to be no less legitimate in the eyes of constituents than merit selection, and in some cases are *more* legitimating.

Bonneau and Hall (2009) have written the most complete analysis of the effect of selection systems on judicial legitimacy. Using behavioral measures like rolloff and competition, Bonneau and Hall show that judicial elections do allow voters to engage in informed decision-

making about judicial candidates. In fact, they argue, partisan elections create the highest levels of interest among voters, compared with retention or non-partisan elections. While competition and the politics of campaign finance are important in their own right, Bonneau and Hall decline to address more directly questions of whether elections and campaigns harm the integrity of the courts. As they say, “we do not want to walk through the quagmire of sorting out what really influences citizens’ perceptions of courts and whether citizens must perceive state court judges as being above politics in order to view courts as legitimate institutions.” It is precisely that thicket which we enter here, though first we note others that have tread there before.

The question of campaign effects is ably explored by Gibson and co-authors in a number of articles and a recent book (2008; 2010; 2012). Gibson convincingly argues that some aspects of campaigns can have a delegitimizing effect on legal institutions. Gibson et al. (2010) show that advertising, both negative and positive, is associated with lower levels of diffuse support. Interestingly, however, they also find that trust levels actually increased in each wave of the panel, suggesting that the actual election, net of the decreases associated with advertising, has positive effects on diffuse trust. Explaining this and similar results, Gibson (2012) argues that elections themselves are sufficiently democracy enhancing to overwhelm the negative effect of campaigns themselves. Moreover, he shows that voters actually value informational aspects of campaigns, a finding that is echoed in the broader negative campaigning literature (Geer 2008). Gibson’s work is in large part motivated by the U.S. Supreme Court’s decision in *Republican Party v. White*, which provides constitutional protection to some judicial campaigning, because it blurs the separation between campaigns and elections. But Gibson’s own work demonstrates that, in the minds of voters, campaigns and elections are distinct phenomena. The people seem to favor elections at least under some circumstances. Gibson emphasizes circumstance, saying that preferences for elections do not seem to be totally uniform across the population. We take up his implied invitation to explore the “who” and the “when” of voter confidence and preferences for judicial elections.

The second question that remains from Bonneau and Hall—influences on the perceptions of state court legitimacy—has, perhaps, received even more attention. Multiple studies have appeared in journals, including at least one special issue completely dedicated to the question

of confidence in local courts (*Behavioral sciences & the law* 2001). Previous work has focused on experience (Benesh and Howell 2001), on perceptions of fairness (Tyler 2001), demographic factors (Brooks and Jeon-Slaughter 2001), as well as the combination of all three (Benesh 2006). Perhaps unsurprisingly, Benesh (2006) shows that a person's personal experiences with the law and their commitments to procedural justice are correlated with their confidence in courts. She also shows that people living in states with partisan election of judges show lower confidence in courts. This illuminates some of the factors that affect confidence in courts, including selection systems. We argue, however, that there are other factors which voters will look to first when evaluating the legitimacy of the judiciary and their preferences for selection institutions. The first part of this paper aims to indicate at least some of the issues which drive attitudes of trust and legitimacy in the judiciary. We find that partisan and policy concerns play a larger role than has been previously argued, trumping the effect of selection mechanisms.

It should also be noted that there exists a discrepancy in the literature on the effects of partisan elections. As we have already discussed, Bonneau and Hall find few negative effects of elections. Gibson (2012) finds negative effects of campaign advertising, but argues that the net effect of elections is democracy enhancing, while finding no distinction between partisan and non-partisan campaigns. Benesh (2006) and Jamieson and Hardy (2008), however, find negative effects associated with judicial elections. Using a similar modeling approach, Wenzel, Bowler and Lanoue (2003) find no difference between respondents in appointment and election systems. We contribute an additional analysis that we hope will help to clarify this issue, but we further argue here that the focus on selection institutions is a valuable one insofar it asks us to examine the normative questions about what the role of courts should be. For example, scholars have argued that differences in selection institutions can have important impacts on judicial behavior from a policy perspective (e.g. Gordon and Huber 2007; Huber and Gordon 2007). But knowledge that, for example, non-partisan elections for judges can lead to more judicial punitiveness (Caldarone, Canes-Wrone and Clark 2009) is only useful insofar as political scientists and legal scholars can agree upon the normative framework that should govern the decision-making of courts. That is, if voters favor punitiveness, then instead of lacking independence, judges have an "electoral connection." We argue here that the focus

on the relationship between selection systems and confidence is only part of the story, and that we should instead look holistically at the factors which inform individual preferences for appointments or elections, whether confidence and legitimacy, partisanship, or policy.

We further depart from the previous literature in trying to determine whether voters consider the likely outcomes of institutional design. That is, we will argue that people do not maintain independent preferences with regard to what judicial selection methods they find most legitimate, but instead view these institutions as instrumental, choosing selection institutions with the goal of maximizing their policy preferences. Countless studies of political behavior have catalogued the relative inattentiveness of the American voter to structures and issues of governance (Converse 1964; Carpini 1996). In a survey to be discussed in greater detail below, only one-quarter of respondents even professed to know how judges in their state were selected, and fewer again correctly identified the method of selection. Therefore, it is fair to say that selection of judges is a relatively low salience issue for most voters. We argue that voters are more likely to map their selections preferences to policy concerns than to normative concerns about the role of the judiciary.

Lastly, it should be noted we focus on trial court judges, judges which perform the vast majority of the work of the courts, and those courts which the ordinary citizen is more likely to find himself in, whether as a juror, witness, plaintiff or defendant. The majority of work in this area has been focused on state courts of last resort. By studying trial courts, our focus is on courts with lesser policy authority, but with more chances for contact with the population. We think that the examination attitudes toward these courts—which are at once the most accessible and least visible in their decisions—is interesting in its own right, but we also believe that it is where the balance between fairness, accountability and policy is most relevant to voters. We proceed from here to outline our approach to understanding how confidence in state trial courts is constructed in individuals, as well as how this understanding of confidence in the judiciary should inform our approach the the debates over judicial elections.

In Section 2 we outline our expectations for the relationships between policy attitudes, confidence in the judiciary and selection mechanisms. We contrast our approach with that of previous scholars, and situate our approach to judicial legitimacy in the larger political science literature.

In Section 3, we use an original survey to show that citizens do view non-partisan elections as the most legitimizing of judicial selection mechanisms. We show, however, that these effects are relatively small and are diminished to the point of insignificance when respondents have access to basic information about the quality of a judge. We also show that ideological concerns play a role in respondents' evaluations of legal confidence, as people who view their politics as much different from the politics of the people in the area in which they live have lower levels of confidence.

Given the limited effects of selection mechanism and potentially important ideological factors, in Section 3.3 we turn to a survey administered in Kansas. In this analysis, we make use of the unique nature of Kansas's judicial selection institutions to show that policy attitudes and demographic factors have a much greater impact on judicial confidence than living in an area that selects judges through partisan elections. The analysis of the Kansas data is limited in at least two ways. First, Kansans are not entirely representative of the national population and the survey lacks a significant number of policy questions that can be used to explore the relationship between policy attitudes and judicial confidence. Therefore, in Section 3.4 we turn to an analysis of the General Social Survey (GSS), which, along with questions about confidence in the legal system, has a nationally representative random sample of U.S. residents and numerous policy attitude and partisanship questions. Here, we show that respondents desire for judicial punitiveness as well as their attitudes toward crime were the strongest predictors of confidence in courts and the legal system.

Having established that partisan and policy preferences play a larger role in confidence in courts than has previously been argued, we return to the question of selection institutions. If confidence in state courts is more likely to be influenced by policy and partisan concerns than by selection institutions, then what are the factors that influence people's preferences for elections or appointments? We turn to this question in Section 4. First, we return in Section 4.1 to the survey of Kansans to show that preferences for elections are higher in individuals who are dissatisfied with how punishments are meted out in local courts. Finally, in Section 4.2, we collect and analyze the results of a Florida referendum that, had it been successful, would have shifted Florida county judges from a system of partisan elections to a merit selection and appointment system. Since the Kansas survey does not include partisanship measures, in

our analysis of Florida votes, we use ecological inference methods to show that preferences for judicial elections are highly correlated with presidential vote, which suggests that Republicans and Democrats have different ideas about what selection system confers them the greatest benefit, though we are unable to determine whether that is the result of differences in policy preferences, institutional preferences, or simply partisan politics.

2 Policy Preferences, Confidence, and Selection Institutions

In this section, we lay out our theoretical expectations for understanding the ways in which individuals form evaluations of courts and preferences over different judicial selection institutions. The starting point for our analysis is that individuals have policy preferences over legal outcomes, for example sentence severity, that they wish to see represented by judges and in the legal system. We argue that these preferences serve as a foundation upon which individuals' form evaluations about the functioning of the court and institutional design. This is a departure from the literature on lower courts, but is virtually assumed and has been empirically demonstrated for other institutions like the Congress and even state high courts (Hall 1987; Canes-Wrone, Brady and Cogan 2002; Mayhew 1974). Hibbing and Theiss-Morse (2001) look to identify process based concerns for government broadly construed, and find that though they exist, policy and partisan concerns have more substantial effects on desire to comply with government outputs. We argue that people's confidence in courts is likewise connected to policy. Importantly, like Hibbing and Theiss-Morse (2001) we do not deny the importance of preferences that are not directly policy-related, such as judicial independence or procedural justice (Benesh 2006; Tyler 2001; Baird 2001). In this paper, however, we seek to highlight the role of policy preferences in structuring opinion.

We argue that individuals observe information about policies that are implemented by judges. Of course, as is generally the case individuals tend to lack meaningful political information and are often unable to tie information and their views to coherent ideologies (Converse 1964; Carpini 1996). There is no reason to think that legal policies and outcomes would be an exception to this rule. Nonetheless, to the extent that individuals do come to these judgments,

we argue that they use them, no matter how flawed, to evaluate judges and the legal system. For instance, an individual might read a newspaper article about rates of incarceration in the United States and come to form a perception about the punitiveness of judges. Individuals then view their perceptions of these policy outcomes in relation to their own preferred policy outcomes. When observed legal outcomes diverge significantly from individuals' own preferences, we argue that individuals will have diminished confidence in courts. For example, when individuals come to view courts as too punitive or not punitive enough, their policy divergence will translate into lower ratings of confidence and trust in judges. On the other hand, when individuals believe policy is where they prefer, they will rate judges more positively. Figure 1 provides a schematic of our theory as compared to the theory in the existing literature.

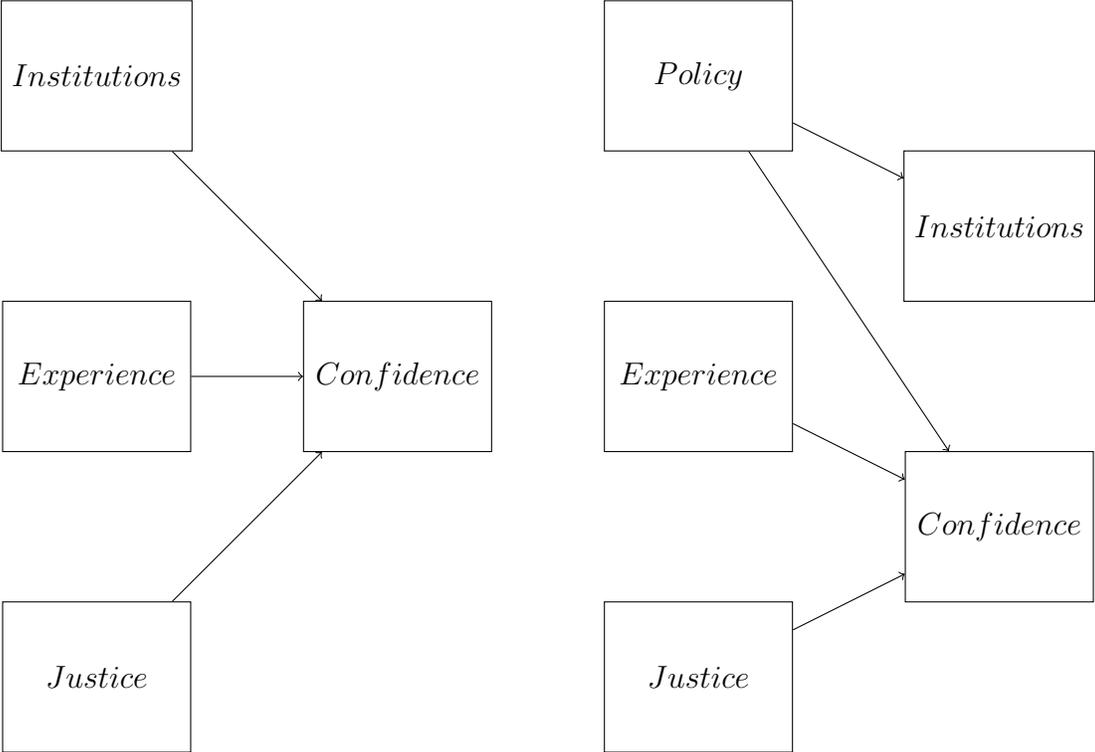
These evaluations of policy, however, may also influence individuals' preferences over the institutional design of selection institutions. In particular, we argue that individuals who find that their preferences are not well-represented by judges will prefer institutions that enhance responsiveness to preferences. In particular, Gordon and Huber (2007) demonstrate that elections bring about more responsiveness to some kinds of preferences, particularly punitiveness. Elections offer individuals the ability to induce responsive with electoral incentives as well as select individuals for judgeships that best match their preferences. Thus, we expect that individuals who are dissatisfied with judges – view them as out of step with their views, unfair, etc. – will be more likely to support elections.

3 The Determinants of Legitimacy

3.1 Data Collection

In this section we examine the effects of judicial selection mechanisms on citizens' perceptions of court legitimacy. While previous work has focused on the election/merit dichotomy, we attempt to explore differences between partisan and non-partisan elections as well. Because judicial selections are not randomly assigned, it is difficult to assess the causal effects of selection institutions on citizens' perceptions of the court. In order to address this issue, we designed and implemented a survey experiment in which selection mechanism was the key variant across conditions. We recruited 767 respondents through Amazon Mechanical Turk

Figure 1: Models of Attitudes Toward the Judiciary, Existing and Modified



On the left hand side of the figure, we show what we understand to be the model that is implied by the extant literature. We rely, in particular, on Benesh (2006) for this model. On the right hand side, we show what we will argue is a more accurate and more useful model for explaining the preferences of citizens for judicial institutions and their confidence in courts. As is explained in the text, we place more emphasis on the role of policy in both confidence in the judiciary and in preferences for institutions, and we deemphasize the linkage between selection institutions and confidence.

during the period October 24-November 12, 2011.¹

The survey combined two different forms of manipulations. The first was a vignette-style manipulation that introduced respondents to a judge (Andrew Campbell) and the way in which he was selected. In addition to how the judge was selected, the vignette also included information suggesting that Judge Campbell was of some reasonable level of quality: “Andrew Campbell is a judge in a nearby state with 3 years experience on the bench and 20 years of legal experience. He earned his law degree at a prestigious law school after graduating from the state university.” The second type of manipulation asked respondents to consider a hypothetical situation in which their own state were to adopt a particular selection institution. Respondents were provided with no further information about a judge or a case. We refer to this second type of manipulation as the “hypothetical” manipulation throughout this paper.

We believe that the vignette style manipulation has the most external validity. It is unlikely that individuals will find themselves forming evaluations of judges solely on the basis of the way in which they were selected (as they do in the hypothetical manipulation). We include the hypothetical manipulation, however, in order to observe what the greatest possible effect of selection institutions might be on individuals’ attitudes. The inclusion of the vignette-style manipulation as well allows us to examine the effect of greater information on individuals’ evaluations relative to the hypothetical manipulation.

In this experiment we considered the three most common forms of judicial selection at the state level: nonpartisan elections, partisan elections, and merit-selection/retention (Missouri) plans. Although within these three types of selection mechanisms there is even more institutional variation, the experimental design required a succinct summary of each institution for respondents. They were explained to respondents as follows:

- Merit selection/Retention: A commission from the legal community selects three candidates to hold the judgeship based on their experience and qualifications. From these three candidates, one judge is selected by the governor. This judge is then subject to re-approval by a majority of voters every 4-6 years.

¹Though this sample is not nationally representative, we are primarily interested in associations between the manipulations and responses. Random assignment allows us to make these sorts of inferences holding all other factors constant. Indeed, experimental groups are balanced on all observed individual characteristics. Furthermore, we have no theoretical reason to expect that the non-randomness of the sample interacts in any way with the treatments, which further mitigates concerns about the non-representativeness of the sample.

- Partisan election: Candidates from the Republican, Democratic and other parties run in an election in which the judge is selected through majority vote. Judges are subject to reelection every 4 years.
- Non-partisan election: Candidates not identifying with any party run in an election in which the judge is selected through majority vote. Judges are subject to reelection every 4 years.

All respondents were then asked two questions designed to elicit assessments about legitimacy. The first asked respondents about the degree to which they trusted the ability of the judge (or a judge chosen by that mechanism for the second type of manipulation) to make fair rulings. We refer to this question as the “trust” question in the remainder of this paper. The second asked respondents whether they would feel comfortable being a party to a case before the judge (or a judge chosen by that mechanism, for the hypothetical manipulation). We refer to this question as the “comfort” question throughout the analysis that follows. Respondents were given a 1-7 to scale to register an answer, with 1 representing the lowest levels of trust and comfort and 7 representing the highest levels. The survey manipulations and questions are provided in Appendix A.

3.2 Ideology, Selection, and Legitimacy: Results of an Experiment

In order to assess the effect of the treatments on respondents’ reports of trust in the judge and comfort appearing as a party before the judge, we first consider the difference in means across experimental conditions. Because the treatments were randomly assigned to respondents, their assignment should be independent of any other attributes of individuals.² Figure 2 displays the sample averages for each selection mechanism and manipulation type (vignette or hypothetical) on the trust and comfort questions with 95% confidence intervals. Inspection of these figures leads to a number of interesting conclusions.

First, consider responses to the trust question in the vignette-style manipulation, pictured

²One may be concerned that individuals might know the selection institutions in their own state and that this could bias results. We asked respondents if they did know how judges in their state were selected, and nearly 80% reported that they did not. The results reported here hold when the analysis is conducted only on the subset of the sample that did not know how judges were selected in their state.

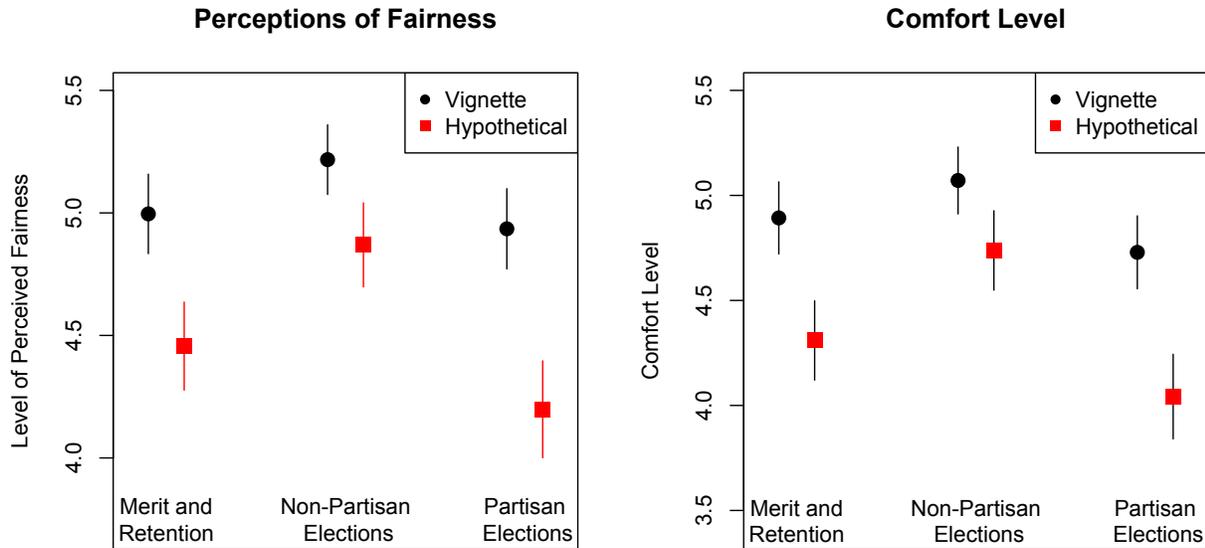


Figure 2: Experimental Results. The results of the experiment suggest that non-partisan elections are associated with the highest levels of perceived judicial legitimacy in both types of treatments. Partisan elections, on the other hand, fare the worst.

in the first panel of Figure 2. Here there is no statistical difference between the nonpartisan and the merit-selection/retention conditions and the difference between the nonpartisan and partisan conditions is only just significant at the 95 percent level with a two-tailed test. The partisan election and merit selection/retention conditions are statistically indistinguishable. These results imply that in the vignette manipulation, the effect of selection institution on individuals' trust in a judge to rule fairly is minimal.

Now consider trust in the hypothetical selection mechanism manipulation. Here, the partisan and merit-selection/retention conditions are statistically different from the nonpartisan election condition but not from one another. The ranking of the conditions with respect to trust in a judge to rule fairly is nonpartisan elections generating the highest levels of trust, followed by merit selection/retention elections and partisan elections scoring lower on the trust measure. In the hypothetical manipulation, then, there is more variation in responses to the trust question that is attributable to selection institution than in the vignette manipulation.

Now we turn to the respondents' indications of their comfort appearing as a party to a case before a judge, pictured in the second panel of Figure 2. Here again, there is no

statistically distinguishable difference in the vignette manipulation between the mean responses in the nonpartisan elections and merit-selection/retention conditions. There is a statistically significant difference between the partisan and non-partisan conditions, but this difference is not very large. We did not observe any statistically significant difference between results from the merit-selection/retention and partisan election conditions. These results suggest that the effect of selection institutions are negligible on individuals' comfort appearing before a judge.

Turning to the condition in which respondents were told of a hypothetical selection institution that would be introduced in their state, we see a similar pattern as for the trust variable. The partisan election and merit-selection/retention conditions generated significantly lower levels of comfort than the non-partisan election condition but were statistically indistinguishable from one another. The conditions again had the same ordering as before: nonpartisan elections generated the highest levels on the comfort measure, with merit selection and partisan elections trailing behind. As for the trust question, answers to the comfort questions were more responsive to selection institution in the hypothetical manipulation than in the vignette manipulation.

These findings generate two interesting features. First, it is not possible to conclude that merit-selection/retention plans are superior to partisan or nonpartisan elections with respect to evaluations of legitimacy. It is clear that partisan elections generate the lowest levels of trust and comfort in both types of manipulations. The results suggest that merit selections are not superior to nonpartisan elections in terms of their impact on the public's evaluations of judicial legitimacy. Nonpartisan elections score higher on both trust and comfort in all conditions (although not always statistically significantly). It is also important to note that, while statistically significant, the differences observed between the two selection institutions may not be substantively significant. For instance, no selection institution resulted in differences of more than one on a seven-point scale when compared to another selection institution. This casts further doubt on the supposed advantages of the merit selection/retention plans, at least with respect to their ability to increase perceptions of legitimacy.

The second interesting aspect of these results is that there is a clear difference between the vignette and hypothetical results, suggesting that some aspect of the manipulation changed respondents' responses. The key difference between the two manipulations was the information

provided to respondents. In the hypothetical manipulation, respondents were only told about the selection institution that had selected the judge. In the vignette manipulation, however, the respondents were also informed about the quality of the judge, indicating that the judge had experience on the bench and in legal practice as well as a law degree from a prestigious law school. Given this information, there was no statistical difference in responses across selection institutions. This suggests that to the extent that different selection institutions can pick similar quality judges, the institution has a negligible effect on evaluations of legitimacy. Again, we believe that the vignette-style manipulations offer the most external validity because individuals are rarely presented with only information about the way in which a judge is selected. Thus, the difference response patterns for the vignette and hypothetical manipulations further weakens the case for the importance of selection institutions in evaluations of judicial legitimacy.

Two plausible objections can be raised to these conclusions. First, some might argue that “new-style” judicial campaigning is most prevalent in partisan election systems, so these findings do not necessarily show that merit selection/systems are worse if retention elections do not have the same types of campaigns. It is not clear that this is true. Many political scientists and judicial reformers alike have noted that retention politics can be just as politically charged and negative as elections under other selection institutions (e.g. Skaggs et al. 2011). Second, one could argue that it is not clear that different institutions choose judges of comparable quality. Existing evidence (which probably needs updating given the changes in judicial campaigns in the 1990s), however, suggests that they do (Glick and Emmert 1987).

We now turn to a further analysis of the experimental results using an ordered probit model, adding controls that might shed light on other theoretically relevant factors that may be associated with individuals’ evaluations of judicial legitimacy. The results of this analysis are reported in Table 1.

First, we control for significant experience with the court system, with 0 indicating no reported experience and 1 indicating that the respondent reported experience with the court system, either through their job or as a party to a case. We also include dummy variables for partisan identification (Republican and Democrat) excluding non-identifiers, as Republicans and Democrats might have different views about the courts relative to independents. The

Table 1: Ordered Probit of Effect of Treatment on Trust and Comfort

Variable	Trust Vignette	Comfort Vignette	Trust Hypothetical	Comfort Hypothetical
Partisan condition	-0.25 (0.09)	-0.29 (0.09)	-0.49 (0.09)	-0.50 (0.09)
Merit Selection/Retention condition	-0.18 (0.09)	-0.15 (0.09)	-0.31 (0.09)	-0.31 (0.09)
Republican	0.34 (0.12)	0.24 (0.12)	0.28 (0.12)	0.27 (0.12)
Democrat	0.18 (0.09)	0.15 (0.09)	0.14 (0.08)	0.11 (0.09)
Experience	0.24 (0.09)	0.28 (0.09)	0.15 (0.09)	0.18 (0.09)
Knowledge	-0.06 (0.04)	-0.03 (0.04)	-0.04 (0.04)	-0.05 (0.04)
Ideology	-0.02 (0.03)	-0.02 (0.03)	-0.02 (0.03)	-0.02 (0.03)
Ideological distance	-0.09 (0.04)	-0.10 (0.04)	-0.10 (0.04)	-0.10 (0.04)
Intercepts:				
1—2	-2.13 (0.28)	-2.91 (0.40)	-1.92 (0.27)	-1.84 (0.27)
2—3	-1.82 (0.27)	-1.90 (0.28)	-1.49 (0.26)	-1.32 (0.26)
3—4	-1.30 (0.27)	-1.48 (0.29)	-1.04 (0.26)	-0.83 (0.26)
4—5	-0.54 (0.26)	-0.91 (0.26)	-0.37 (0.26)	-0.24 (0.26)
5—6	0.18 (0.26)	-0.19 (0.26)	0.37 (0.26)	0.41 (0.26)
6—7	1.36 (0.27)	1.53 (0.27)	1.25 (0.27)	1.26 (0.27)
AIC	2210	2324	2444	2537
Number of observations	767	767	767	767

Standard errors in parentheses.

ideological distance variable is meant to control for respondents' perceptions of ideological distance (ranging from 0-4) between themselves and the area in which they live. We hypothesize that those who perceive larger ideological distances will view courts more warily and offer more negative evaluations on the trust and comfort measures that we employ. We also control for self-reported ideology (seven point scale, with 1 being very liberal and 7 being very

	Vignette Trust	Hypothetical Trust	Vignette Comfort	Hypothetical Comfort
$\Pr(y_i = 1 ID = 4)$	+0.02	+0.05	+0.02	+0.05
$-\Pr(y_i = 1 ID = 0)$	(0.01)	(0.02)	(0.01)	(0.02)
$\Pr(y_i = 4 ID = 4)$	+0.06	+0.03	+0.05	+0.02
$-\Pr(y_i = 4 ID = 0)$	(0.02)	(0.01)	(0.01)	(0.00)
$\Pr(y_i = 7 ID = 4)$	-0.05	-0.05	-0.05	-0.05
$-\Pr(y_i = 7 ID = 0)$	(0.02)	(0.01)	(0.01)	(0.01)

Standard errors in parentheses

Table 2: Effect of Ideological Distance by Manipulation: The values in the table show the change in predicted probabilities for each manipulation. y_i represents the response to the question about trust or comfort. Recall from above that 1 corresponds to the lowest levels of trust and comfort and 7 corresponds to the highest levels. Thus for instance, moving from an ideological distance of 1 to 4, is associated with a 5% decrease in the probability of reporting the highest levels of trust in the vignette condition. These quantities of interest and their standard errors were calculated using a quasi-Bayesian approach.

conservative) and political knowledge (scored 0-5). We estimate this model for each of the outcome variables (trust and comfort) and each type of manipulation (vignette and hypothetical institution). Results from the models can be found in Table 1.

The multivariate models echo the results from the difference-in-means analysis. Merit selection/retention and partisan election generate lower levels of trust and comfort among respondents. The partisan election condition consistently led to the lowest levels.

The results of the multivariate analysis also suggest that partisanship may play an important role in shaping views of courts. Republican identification was positively associated with evaluations of trust and comfort and was statistically significant relative to the excluded group, non-partisan identifiers. Democratic party identification had no significant effect in any of the four models, again, relative to non-identifiers, but the positive direction was the same as for Republicans. This provides some initial support for the idea that partisans may generally have more positive views of courts than non-identifiers, perhaps reflecting a general detachment of independents from the political system. We explore this result in greater detail later in the paper.

Next we turn to individuals' experience with the court system. The variable indicating experience with the legal system is highly significant in the vignette manipulations for both trust and comfort reports, but is not significant in the hypothetical institution manipulation.

It is not apparent why this would be the case. It may be that the vignette manipulation is more evocative of an individual's experience. It is also possible that the effect of individual level factors become more salient when greater contextual information is available. Therefore, in the vignette manipulation respondents are less likely to focus on the effect of the institution, and instead substitute their own experiences in evaluating the judiciary.

Finally, we examined the influence of perceived ideological distance on the outcome variables, depicted in Table 2. Here, we found a consistent negative effect of perceived ideological distance on comfort and trust that is significant at conventional levels in every model. The effects of the ideological distance variable are shown in Table 2. The table shows that when people view themselves as having a different ideology from that of the people living around them, they are less likely to express trust in and comfort with judges.

In sum the results of this experimental analysis suggest two conclusions. First, the focus on the importance of selection institutions on legitimacy in the literature is likely overstated. While we find that there are some differences among the institutions in their effects on perceptions of courts, particularly for partisan elections, these differences are not large and are appreciably lessened when respondents are provided with contextual information suggesting that judges are of adequate quality. Second, the results of the experiment suggest that other individual-level factors, particularly citizens' perceptions of the political system as well as policy and partisan concerns likely play a greater role in structuring public opinion about courts. These factors, then, play a critical role in determining citizens' preferences over selection mechanisms as well. We explore each of these areas more below.

3.3 Case Study of Kansas Attitudes on Legitimacy

To further test the hypothesis that policy factors play an important role in citizens' assessments of courts, we also conducted an analysis using data collected by Aistrup and Bannister (1999) of 1226 adults in the state of Kansas. That the data was collected only in Kansas limits our ability to generalize to the entire U.S. population, but there are some unique attributes of this survey that make it particularly useful for our analysis. First, unlike most other U.S. states, Kansas does not have a state-wide method of selecting judges. Instead, the selection of judges is determined by county, which allows us to exploit the variation in selection mech-

anisms. Second, by limiting our analysis to one state, we improve upon studies like those in Jamieson and Hardy (2008) which attempt to make similar comparisons of perceptions of judicial legitimacy. Jamieson and Hardy (2008) compare judicial legitimacy *across* states, and fail to control for other important variation across states. Benesh (2006) alleviates this concern to some degree by including state crime rates, but states' adoption of particular selection mechanisms are non-random, thus these studies still fail to identify a causal relationship between judicial elections and judicial legitimacy. By limiting the analysis to one state, we are able to exploit variations in selection mechanisms while avoiding some of the pitfalls of cross-state analyses.³

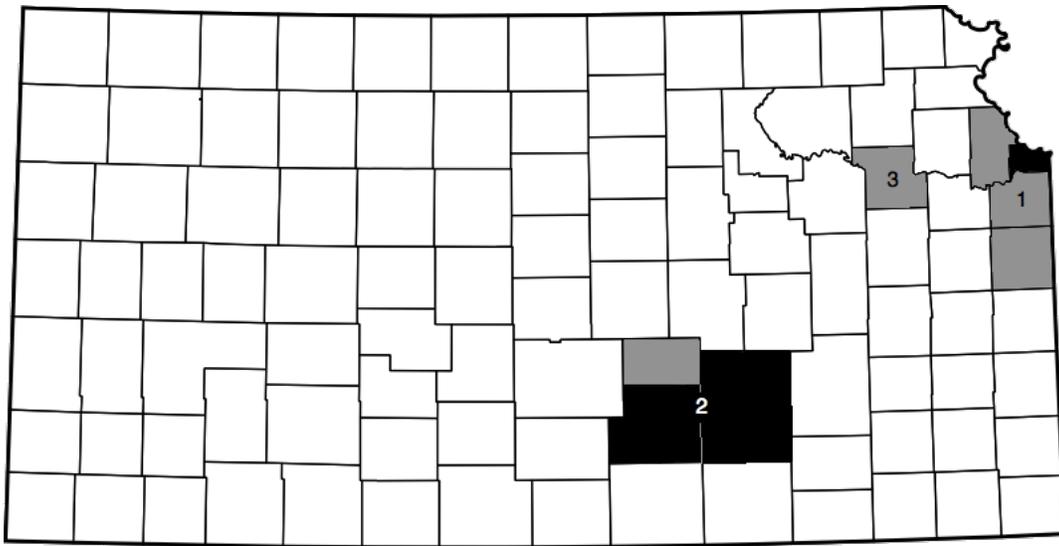


Figure 3: Variation in selection mechanisms in Kansas Metropolitan Statistical Areas. Each of the contiguous shaded areas represents an MSA. The area marked with the number 1 is the Kansas City metropolitan area, number 2 the Wichita area, and number 3 the Topeka area. Counties shaded in black select judges through partisan elections. Counties shaded in grey select judges by nominating commissions with retention elections.

Though the variation in Kansas creates an opportunity, there exist significant missing data problems making the analysis difficult. Identification of the effect of selection mechanism relies on knowing the judicial district in which survey respondents reside. Unfortunately, the only geographic information included in the survey were telephone area codes. We also have information about whether the respondent lives in one of Kansas' Metropolitan Statistical

³The variation in selection mechanism by county in Kansas might be subject to the same criticism that selection is nonrandom, but the problem is at least reduced in this case. See Gordon and Huber (2007) for a brief history of the judicial selection in Kansas. Many of the referendums are quite close, which should alleviate some concern, and referendums are fairly low salience. Only Topeka (area 3 in Figure 3) has had a referendum in the past 25 years, which failed.

Areas (MSA). Each area code is anchored by one of the three MSAs, thus we can determine the geographic location of some respondents. Figure 3 shows what we can determine about where people live. Therefore, we do have some variation that can be exploited in order to test whether the result from the experiment is realized in a natural setting. In total, approximately 80 percent of people in the Kansas City MSA are under a merit selection/retention system, while 95 percent of people in the Wichita MSA are under a partisan election system. As can be seen from the map, the entire Topeka MSA has a merit selection system. Thus, we can exploit this variation in selection mechanisms, though we should still be skeptical that other differences between these cities might affect confidence in the judiciary.

The survey features a question analogous to the fairness question in our survey experiment. Respondents were asked to rate their agreement with the statement, “Kansas judges are fair” on a four point scale, with 4 representing strong agreement and 1 representing strong disagreement. As a first test of the effect of selection institution across the MSAs, we conducted pairwise two-tailed difference-in-means tests for each combination of MSAs. We found that none of the means were statistically distinguishable at the 0.05 level (the p-value for the difference between Kansas City and Wichita MSAs was 0.09, and the the p-values for the other two combinations, Kansas City and Topeka and Wichita and Topeka were both greater than 0.20).

If selection mechanisms are not affecting individuals’ evaluations of fairness and support for selection mechanisms, then what factors are associated with individuals’ attitudes? The survey asks several questions which can be used as a measure for trust in the judiciary and asks respondents whether they prefer judicial elections or a merit selection system. Additionally, the survey asks for various attitudes toward the legal system, as well as a greater number of demographic variables that are included in our survey. From this, we study some individual-level factors that might influence people’s evaluations of the fairness of judges in Kansas in addition to differences across geographic areas.

Table 3 displays the results from an ordered probit regressing policy preferences and demographic factors on perceived fairness of judges. We include measures for individuals’ perceptions of the appropriateness of plea bargains (*Plea bargain*), scaled 1-4, with higher values corresponding to more negative views of plea bargains. The *Sentencing* variable is coded 1 if

Table 3: Ordered Probit Regression for Perceived Fairness of Kansas Judges

	All Counties	MSA Counties
Plea Bargain	-0.10 (0.07)	-0.08 (0.10)
Sentencing	-0.02 (0.10)	-0.08 (0.14)
Good Experience	0.26*** (0.08)	0.28** (0.11)
Any Experience	-0.17*** (0.04)	-0.18** (0.06)
Fair Punish	0.44*** (0.07)	0.55*** (0.11)
Black	-1.06*** (0.24)	-0.95*** (0.27)
Hispanic	-0.27 (0.39)	-0.36 (0.58)
Asian/Pacific	-0.18 (0.49)	0.31 (0.56)
Income	0.03 (0.02)	0.03 (0.03)
Male	0.01 (0.10)	0.07 (0.14)
Kansas City	0.35* (0.15)	
Wichita	-0.06 (0.13)	-0.40* (0.17)
Topeka	0.21 (0.14)	-0.14 (0.18)
<i>N</i>	761	357

*** $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.1$

This table reports the results of an ordered probit analysis of individuals' perceptions of fairness of Kansas judges. Policy dissatisfaction is negatively related to expressions of confidence in the fairness of judges. Significance codes: *** $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$. Standard errors in parentheses.

individuals believe that judges should have strict guidelines for sentencing and 0 if the respondent supports flexibility in sentencing. The *Fair Punishment* variable corresponds to whether individuals believe that criminals are punished fairly, with higher values representing more perceived fairness. We include dummy variables for individuals identifying as Black, Hispanic, and Native American, with whites being the excluded group. We also control for individuals' reported income level⁴ and gender. Finally, we also control for individuals' evaluations of the positiveness of their experiences with the Kansas justice system.

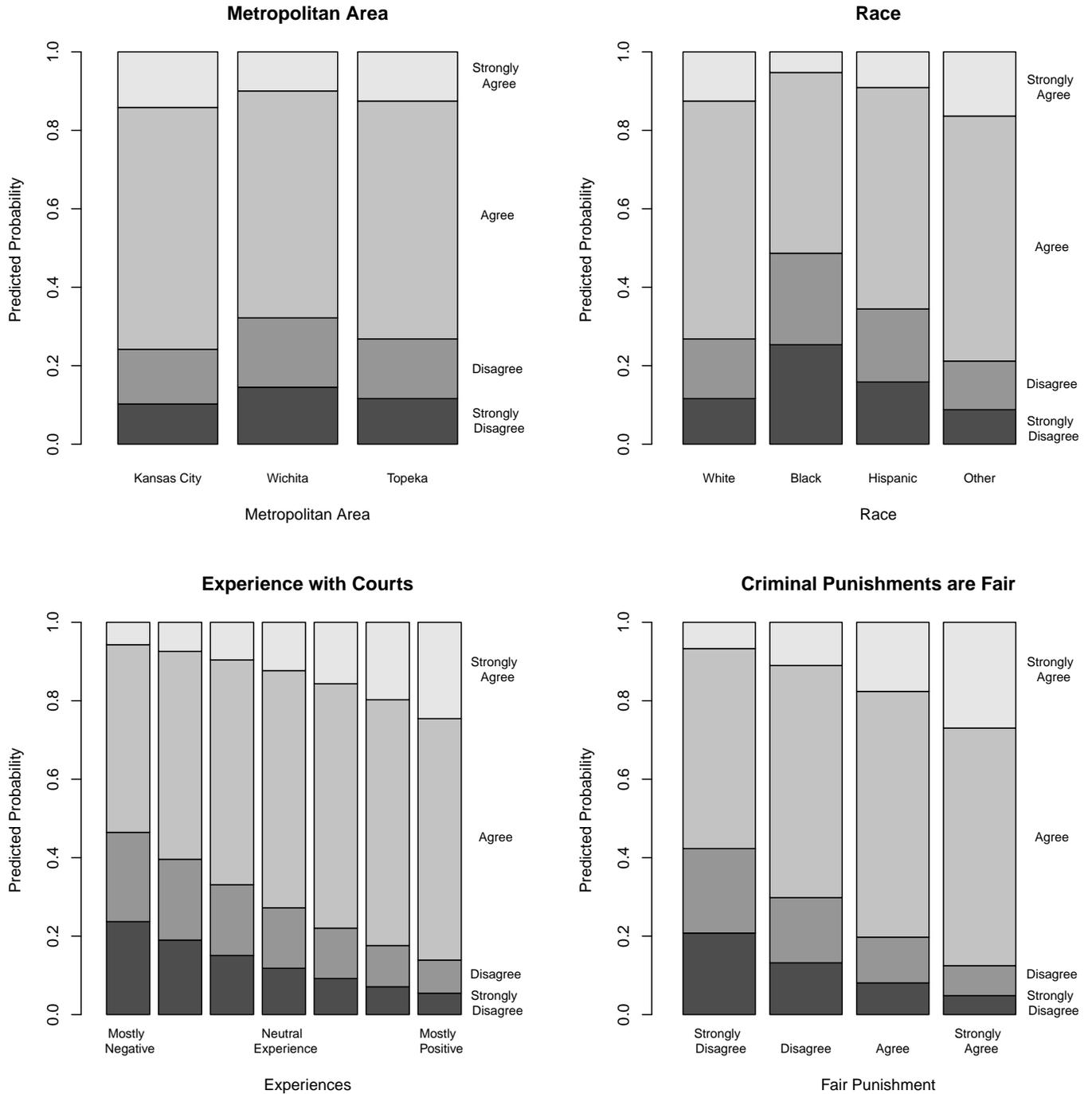
The results from the ordered probit analysis of the fairness of Kansas judges suggests that individuals call significantly on their own experience in considering their attitudes toward judges, consistent with findings in Benesh (2006). Those that experienced more satisfactory interactions with the court system were far more likely to express support for the statement that Kansas judges are fair. In addition, and distinct from previous findings, the large, positive coefficient for the fair punishment variable suggests that individuals who believe that criminals are punished fairly in Kansas are more likely to view judges as fair. Figure 4 shows the effect of these variables on the probability of being in each response category. As can be seen, demographic factors play a significant role, with nearly 50% of African-Americans predicted to respond that judges are not fair, while only around 25% of white respondents believe Kansas judges are not fair. Attitudes toward criminal punishments also have a large impact. Those respondents who believe criminals do not receive fair punishments are at least twice as likely (increasing from about 20% for those responding "Agree" to 40% for those responding "Strongly Disagree") to believe judges are unfair. These factors suggest that individuals' evaluations of the fairness of judges are based more on results from the legal system than the the selection mechanism. Individuals that view the outcomes of the legal system as fair and satisfactory are more likely to view the whole system as such.

3.4 The Effects of Policy Attitudes in a National Sample

Next, we explore the same individual level factors in a nationally representative survey. First, the General Social Survey (GSS) asks interviewees in three years, "How much confidence do you have in courts and the legal system?" Other questions measuring attitudes about courts

⁴The income variable is coded according to survey response values: 1 if \leq \$10,000; 2 = \$10-20,000; 3 = \$20-30,000; 4 = \$30-40,000; 5 = \$40-50,000; 6 = \$50-60,000; 7 = \$60-70,000; 8 = \$70,000+.

Figure 4: Marginal Effects of Variables on Perceptions of Fairness of Judges



Effect of covariates on respondents' evaluation of the statement "Kansas judges are fair."

and legal systems are limited, as is information about the residence of the respondents, which makes measuring institutional variation impossible. Still, the GSS is useful in this context, because it allows us to look at relationships between confidence in the legal system and specific policy attitudes, which rarely appear on surveys about courts.

The dependent variable in this analysis, confidence in the courts and legal system, takes five possible values for each respondent, ranging from no confidence at all (1) to complete confidence (5). We include responses to two questions about individuals' legal policy preferences in the analysis as well. The first, asks respondents to indicate whether they view sentencing in the courts as generally too harsh, too lenient, or about right. This question serves as a proxy for the punitiveness of the respondent. The second policy question taps into individuals' ideas about the importance of crime as a policy issue. The question asks individuals to rate whether we spend too much, too little, or the right amount on crime. The analysis also controls for the partisanship of respondents, as well as their educational attainment, income, and race.

We have hypothesized that individuals are policy-motivated when they consider the courts. That is, they are concerned with the outcomes of judgments. Thus, we expect that individuals express dissatisfaction with the courts and legal system – i.e. that courts are either too harsh or not harsh enough and that we spend too much or too little on crime – will express less satisfaction than those that are relatively happy with the rulings of judges and legal policy. The results of an ordered logistic regression are displayed in Figure 5 and Table 4.

As can be seen, the effects of policy variables about the punitiveness of courts and preferences about crime spending are significant, large and in the hypothesized direction. Furthermore, the effects of these variables are substantially larger than previously measured effects of experience or institutions, and are similar in size to those for procedural values (Benesh 2006). For example, holding all other variables at their means (or mode for categorical variables), we see that the difference between believing that the amount of crime spending is “about right” and believing that we spend “too much” reduces the probability of having little or no confidence in courts by 25% and increases the probability of complete or great confidence by 15%. The results for sentencing preferences are similar. These results provide strong confirmation for our hypothesis that individuals' confidence in the courts and legal system is in fact significantly shaped by their perceptions and evaluations of policies.

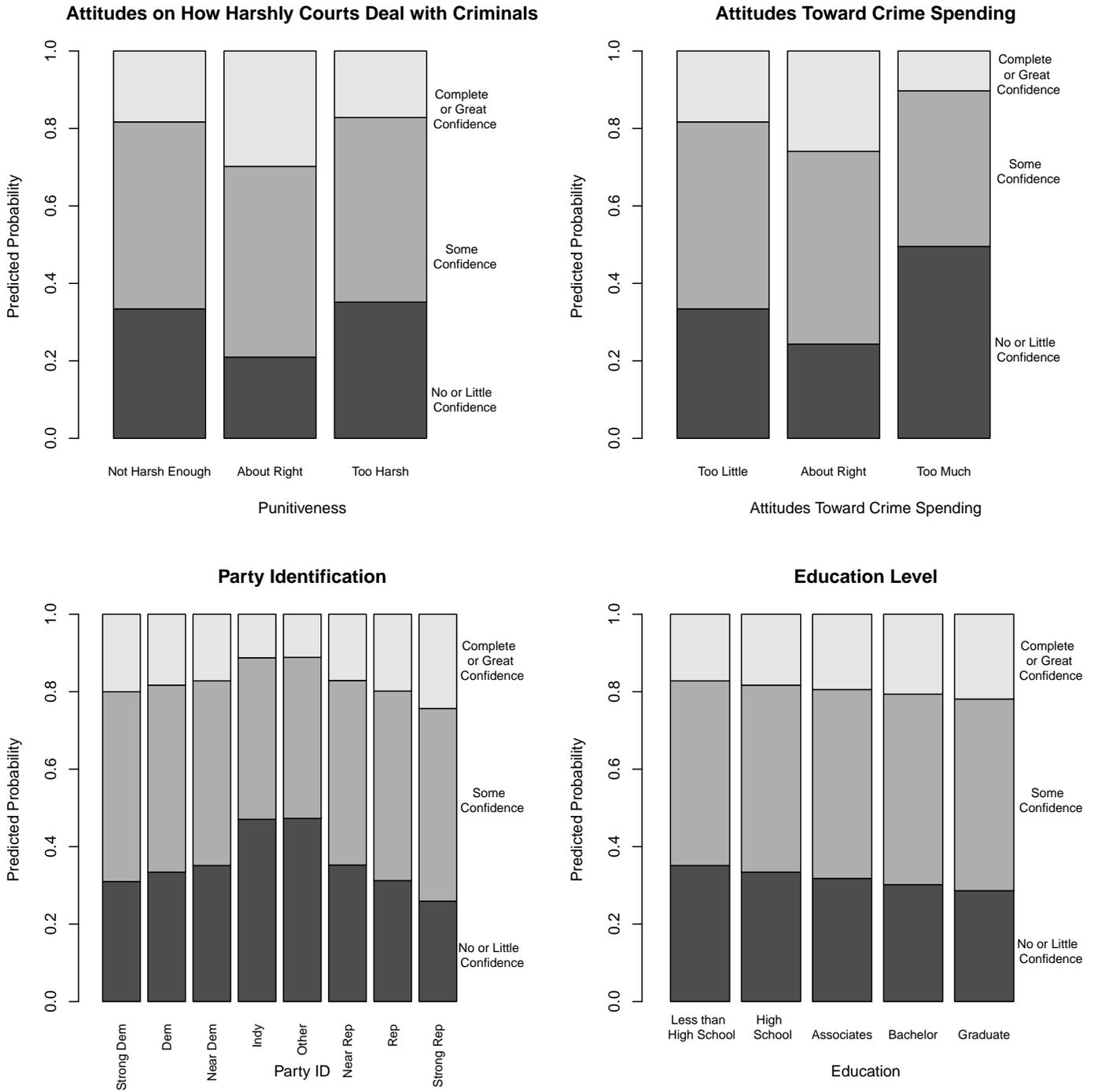
Table 4: GSS: Confidence in Courts

	Confidence in Courts
Courts Not Harsh Enough	-0.64*** (0.13)
Courts Too Harsh	-0.71*** (0.21)
Spend Too Little on Crime	-0.45*** (0.11)
Spending Too Much on Crime	-1.12*** (0.21)
Strong Democrat	0.07 (0.17)
Democrat	0.19 (0.19)
Near Republican	-0.01 (0.20)
Republican	0.44* (0.20)
Strong Republican	0.18 (0.17)
Independent	-0.50** (0.19)
Other Party	-0.51 (0.35)
Income	-0.02 (0.02)
Degree	0.07† (0.04)
Black	-0.14 (0.16)
Other Race	0.53** (0.20)
Num. obs.	1587

*** $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.1$

This table displays the results of an ordered logistic regression. Policy dissatisfaction is negatively related to confidence in courts and the legal system. Standard errors in parentheses. Baseline values are “Near Democrat” for party, “White” for race, and “About Right” for both punitiveness of courts and crime spending. Intercepts not reported. Significance codes: *** $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, † $p < 0.10$. Standard errors in parentheses.

Figure 5: Marginal Effects of Variables on Expressions of Confidence in Courts



Effect of covariates on respondents' response to the question, "How much confidence do you have in courts and the legal system?"

We also find significant differences between party identifiers and non-identifiers. As can be seen in the third panel of Figure 5, independent and third party identifiers are the most skeptical of courts, while strong identifiers have the most confidence regardless of their identification with Republicans or Democrats. This suggests that preferences about courts are motivated by partisan politics in addition to more general attitudes about the role of courts and procedural fairness.

In sum, the results of the survey experiment and survey data from Kansas and the GSS suggest that while selection institutions themselves do not have large influences on individuals' evaluations of courts, their policy preferences and the degree to which they are met by existing legal policy do have significant effects on evaluations. Given that individuals are policy-motivated in evaluating courts, we argue that they also take into account the extent to which courts are responsive to their preferences when making decisions about which selection institutions they prefer. We now turn our attention to this question.

4 Explaining Preferences For Selection Mechanisms

The previous results have demonstrated that there is little connection between selection mechanisms and attitudes about the legitimacy of courts. Evaluations of judges and courts appear to be based on more individualized concerns – policy preferences, general views of the political system, and partisanship, as well as experience with courts, as has been reported in previous work. In this section we consider how these factors also affect individuals' preferences for different selection mechanisms. In particular, we argue that individuals will seek selection institutions that promote responsiveness and the ability to control the preferences of judges – e.g. elections – when they are dissatisfied with existing policies.

To examine these questions, we use two different data sources. The first is based on a survey of Kansans and voting data from a 2000 Florida ballot initiative that gave voters an opportunity to switch from elections to a merit appointment system. The former data source demonstrates the connection between policy concerns and support for elections. The latter gives us the opportunity to describe differences in partisan support for elections. Together, the results of these analyses demonstrate that support for different selection mechanisms is tied to individuals' policy concerns and partisan preferences.

4.1 Determinants of Selection Preferences in Kansas

In this section, we turn again to the survey of Kansas voters used earlier in the analysis Aistrup and Bannister (1999). In addition to querying individuals about their views of the court, the survey also asked respondents about whether they preferred that trial and appeals judges in the state be elected or appointed. In this section, we examine responses to these two questions. The questions read as follows:

There are people who argue that state and local judges should run for office in a competitive election as candidates of a political party, while others believe that these judges should be appointed by the governor with citizens voting every four years on whether or not to retain the appointed judge. For each of the following types of judges, please indicate whether you think the judges should be elected or appointed by the governor. Local trial judges? Judges who hear appeals?

Responses in favor of elections were coded as “1” and responses in favor of the proposed merit selection/retention system were coded as “0”. Because the dependent variable is binary, we used logistic regression to analyze the variation in respondents’ choices. We include three sets of variables in the model. First, we include four policy preference/experience variables: whether respondents think too many cases end in plea bargains (*Plea Bargain*); whether judges should follow sentencing guidelines (*Sentencing*); whether individuals have had good experiences with the judicial system (*Good Experience*); and whether the respondent views Kansas judges as fair (*Fair Judges*). Second, we also include a set of demographic controls, including race (white is the excluded group), income, and gender (female is the excluded group). We also control for the MSA in which the respondent lives. Respondents that do not live in one of Kansas’s MSAs are the excluded group.

The results of this analysis are presented in Table 5. The policy preference variables appear to have the greatest role in shaping respondents’ preferences for elections. In particular, individuals that view too many cases as being settled by plea bargains are much more supportive of elections for both trial court judges and appeals court judges. Because plea bargains often result in lesser sentences, this question might be taken as a measure of punitiveness, suggesting that individuals with more punitive preferences seek to implement them through electing judges. It appears that this is an effective strategy – Gordon and Huber (2007) find that judges facing elections in Kansas hand down harsher sentences than those in Kansas’s merit

Table 5: Support for Election Systems in Kansas

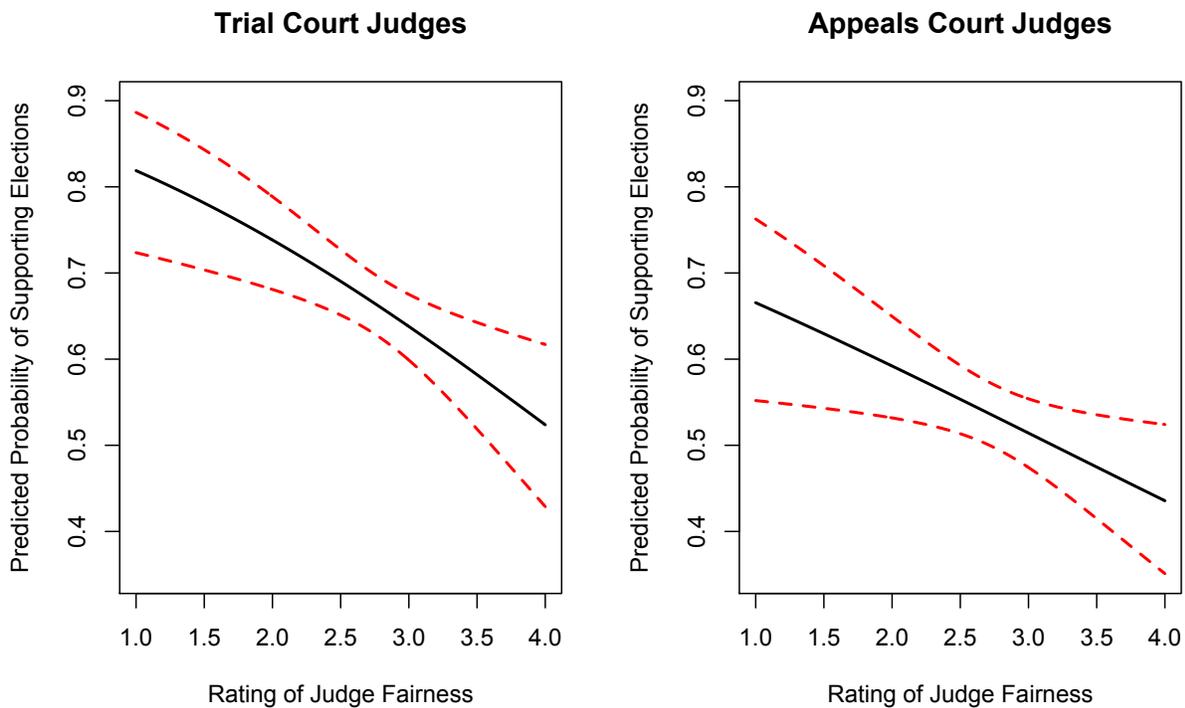
	Trial Judges	Trial Judges	Appeals Judges	Appeals Judges
(Intercept)	0.84 (0.60)	0.28 (0.82)	-0.21 (0.56)	-0.73 (0.78)
Plea Bargain	0.42*** (0.11)	0.48** (0.15)	0.40*** (0.11)	0.38** (0.14)
Sentencing	0.21 (0.16)	0.33 (0.21)	0.24 (0.15)	0.41* (0.21)
Good Experience	-0.09 (0.13)	-0.26 (0.17)	-0.18 (0.13)	-0.31 [†] (0.17)
Fair Judges	-0.47** (0.15)	-0.53** (0.20)	-0.32* (0.13)	-0.33 [†] (0.18)
Black	-0.47 (0.42)	-0.73 (0.45)	0.09 (0.41)	0.18 (0.45)
Hispanic	0.65 (0.76)	0.03 (0.84)	0.64 (0.66)	-0.22 (0.80)
Asian/Pacific	-0.68 (0.71)	-0.19 (0.84)	0.02 (0.76)	0.05 (0.88)
Income	-0.05 (0.04)	-0.03 (0.05)	-0.04 (0.04)	0.01 (0.05)
Male	0.17 (0.16)	0.25 (0.22)	0.01 (0.15)	-0.02 (0.21)
Kansas City	-0.35 (0.22)		-0.31 (0.22)	
Wichita	0.09 (0.20)	0.45 [†] (0.26)	0.36 [†] (0.19)	0.70** (0.25)
Topeka	-0.06 (0.22)	0.28 (0.27)	0.20 (0.21)	0.54* (0.27)
<i>N</i>	784	374	780	375

*** $p < 0.001$, ** $p < 0.01$, * $p < 0.05$, [†] $p < 0.1$

Statistical models

selection districts. We also find that citizens' perceptions of fairness also has a large impact on their preferences for elections. Perhaps dismayingly for judicial reformers, individuals who have the most negative views of judge fairness in Kansas are the most supportive of electing judges over the merit selection/retention system. Furthermore, these effect sizes are large and substantively significant. Figure 6 plots the predicted probability of supporting elections over merit selection at different levels of perceived judge fairness.

Figure 6: Effect of perceptions of judge fairness on preference for elections.



Notably, the demographic variables appear to have no significant impact on individuals' preference for elections. There are some differences across MSAs, with individuals from Wichita having somewhat greater preferences for electoral systems over the merit selection plan. In sum, these results suggest that policy preferences are significantly associated with individuals' preferences for different selection mechanisms. The Kansas survey is limited, however, in that it does not include one of the most important policy preference indicators – party identification. We explore the existence of partisan effects on selection preferences in the next section.

4.2 Partisan Effects in a Florida Referendum on Elections

Voters in Florida were faced with the following ballot measure in the 2000 general election: “Shall County Court Judges be appointed by the Governor with retention by vote of the people?” Statewide, support for the ballot measure was low and it was roundly defeated – no county adopted the measure. There was, however, substantial variance in support across counties – nearly thirty percentage point separated the “yes” votes of the most and least supportive counties. Figure 7 displays the distribution of the percent of voters in favor of the ballot measure. Thus, on first inspection, it appears that there is substantial variation in support for the measure across the state.

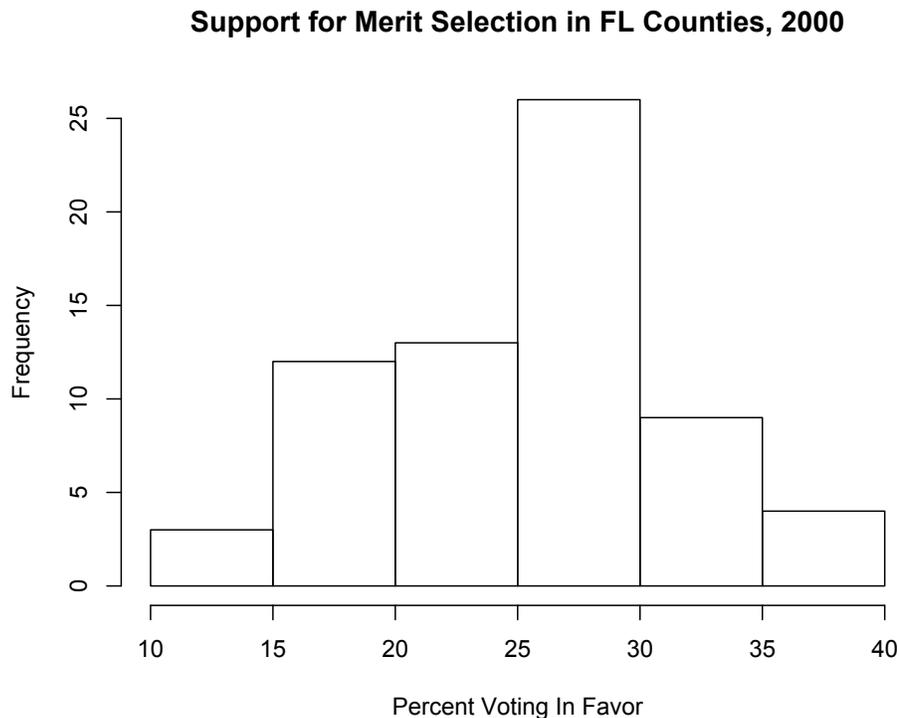


Figure 7: This figure displays the distribution of levels of support for the FL ballot measure across counties. As can be seen, there is substantial variation in support for the merit selection plan.

The Florida election results give us the opportunity to examine the extent to which partisanship shapes individuals’ preferences for elections. Unfortunately, we do not have individual-level votes and covariates to examine this data like those present in the Kansas survey. The Florida votes are aggregated at the precinct level for twenty eight counties and 3,483 precincts. For each precinct, we know the number of voters that voted for and against the ballot proposi-

Table 6: Ecological Inference Problem

	Republicans	Democrats	
Yes	P_{i1}	P_{i2}	Y_i
No	$1 - P_{i1}$	$1 - P_{i2}$	$1 - Y_i$
	X_i	$1 - X_i$	

tion. We also proxy for the partisanship of a precinct using the two-party vote share for Bush and Gore in the presidential election which occurred concurrent with the referendum.

Because the data is aggregated in this way, aggregation bias looms large. Inferences about individual-level voting behavior may not be valid using the aggregated data. The problem is illustrated in Table 6. In this analysis we seek to estimate P_{i1} and P_{i2} , the proportions of Democrats and Republicans voting in favor of the ballot proposition. We only know, Y_i , the number of votes for the proposition in the precinct and X_i the number of Republicans in the precinct. Thus, in the analysis that follows we examine the data using a variety of ecological inference techniques that attempt to mitigate these potential biases. No matter which method we use, however, the results remain the same. We find that Democrats were significantly more supportive of the merit selection/retention plans than Republicans.

To begin the analysis, we first derive the deterministic bounds (Duncan and Davis 1953) for support among Republicans and Democrats. Using the idea that Y_i is determined by the relationship, $Y_i = P_{i1}X_i + P_{i2}(1 - X_i)$, the bounds for P_{i1} and P_{i2} can be derived. We can express the maximum proportion of Republicans support the change to a merit selection system as $\min\{\frac{Y_i}{X_i}, 1\}$ and the minimum proportion as $\max\{0, \frac{X_i + Y_i - 1}{X_i}\}$ (Imai, Lu, and Strauss 2008). The interval bounds for are graphed in Figure 8. The numerical results are available in the appendix. As is typical, these bounds are large and do not readily illuminate differences among Republicans and Democrats with respect to support. We find that as few as 1% of Republicans and 8% of Democrats may have voted for the ballot proposition, but the upper bounds are large, as high as 62% for Republicans and 55% of Democrats. In order to better assess partisan effects, we turn to two other ecological inference methods – Goodman (1953) regression and the Bayesian NCAR method proposed by Imai, Lu and Strauss (2008).

Estimates of Partisan Support

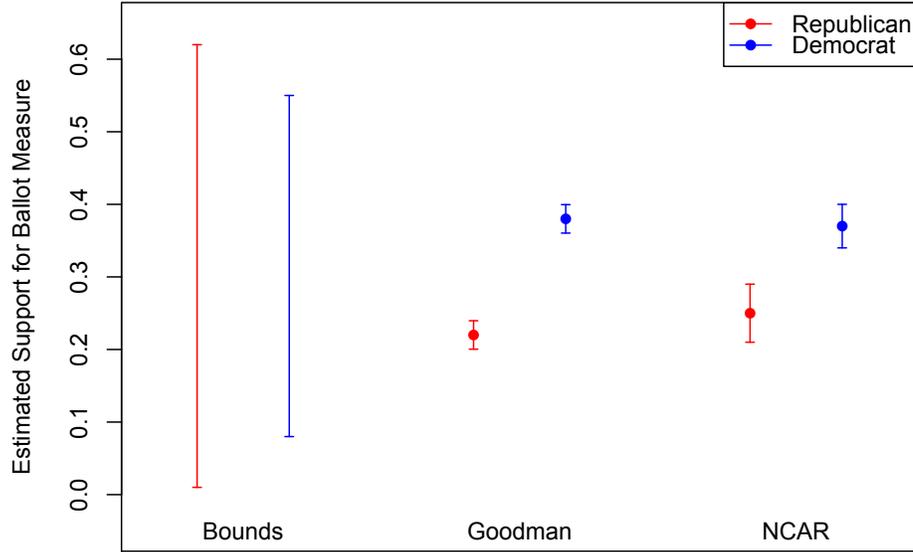


Figure 8: This figure displays estimates of support by partisanship from each of the three ecological inference methods used in the analysis. Red dots indicate Republican support and blue dots indicate Democratic support. 95% confidence intervals are plotted for the results of the Goodman and NCAR analyses.

In order to implement the Goodman regression, we estimate the following regression model:

$$Y_i = X_i\beta_1 + (1 - X_i)\beta_2 + \epsilon_i$$

where Y_i is the proportion of “yes” votes in precinct i and P_i and $1 - P_i$ are the proportion of Republican and Democratic voters, respectively. The intercept term is suppressed, so β_1 and β_2 are interpretable as the proportion of Republicans and Democrats voting in favor of the ballot measure. The observations are weighted by the number of voters in each precinct. The Goodman regression requires two main assumptions to be satisfied in order to make valid inferences. First, as in all OLS models, we assume exogeneity, in particular that the error term is uncorrelated with the regressors. This assumption would clearly be invalid if the partisan make-up of a precinct is correlated with vote choice. Thus, we assume that β_1 and β_2 are constant across precincts. The second assumption is homoskedasticity. One source of heteroskedasticity is the differing size of the precincts. We attempt to alleviate this problem

by weighting observations by the size of the precinct. We also report robust standard errors in order to allow for arbitrary heteroskedasticity.

The results of the Goodman regression are reported in Table 8. As can be seen, the estimated rate of voting in favor of the proposition for Republicans was 22%, while 39% of Democrats voted in favor of the ballot measure. This seventeen percentage point difference is also highly significant (standard error = 0.01). As noted, however, this model requires a number of uncomfortable assumptions. In particular, the assumption that there are no contextual effects, i.e. the relative proportions of Democrats and Republicans have no effect on partisan voting rates, is particularly troubling.

Imai, Lu, and Strauss (2008) propose a Bayesian method for the 2 x 2 ecological inference problem described here that is based on treating vote data as coarsened. When this data is coarsened at random, then the constancy assumption holds. However, when it is not coarsened at random, the proposed method allows us to account for these effects, even when we do not model any other covariates, as is the case here. Imai, Lu, and Strauss (2008) refer to this as the not coarsened at random (NCAR) model. We use this method to estimate P_{i1} and P_{i2} . The results of this analysis are reported in Table 9. Even after accounting for potential contextual effects, we still find a persistent difference in partisan voting.

The survey and ecological inference analyses presented here provide strong support for the idea that individuals' policy and partisan preferences play a significant role in shaping their support for different selection institutions. In particular, dissatisfaction with existing legal policies and judges leads to greater support for electoral selection institutions that will induce greater responsiveness to voter preferences.

5 Discussion and Conclusion

With a few exceptions, the literature on approval of state courts has downplayed the importance of policy factors. We find that the exclusion of policy from debates about confidence in the judiciary and choice of selection mechanism is unfounded. While commitments to procedural fairness and personal experience have some impact on confidence in the judiciary, we find that policy based attitudes, such as preferences about crime policy or desire for lesser or greater punitiveness in court sentencing have strong effects on confidence in the judiciary.

This finding is consistent with work in other areas of political science that have indicated that support for government is influenced to a greater degree by partisan and policy concerns than by commitments to procedure.

With this in mind, we turn to the question of judicial elections. We join scholars who reject the inferiority of elections, though for slightly different reasons. While we also find minimal effect of selection mechanism on perceptions of legitimacy in the judiciary, we feel the focus on legitimacy has been misplaced. Our investigation indicates that people have more instrumental policy concerns that inform their preferences toward their choice of judicial elections. Those who are dissatisfied with judicial policy are more likely to prefer elections, which indicates that they desire elections as a way of achieving accountability. Whether citizens' expectations of how selection mechanisms will be translated into policy results is consistent with actual policy outcomes is a line of inquiry that should be explored, but evidence here indicates that confidence is not in the forefront of the public's preferences.

References

- Aistrup, Joseph A. and Shala Mills Bannister. 1999. "How Previous Court Experience Influences Evaluations of the Kansas State Court System." *Court Review* pp. 32–35.
- American Bar Association. 2003. "Justice in Jeopardy."
- American Judicature Society. 2010. "Judicial Selection in the States: Appellate and General Jurisdiction Courts."
- Baird, Vanessa A. 2001. "Building institutional legitimacy: The role of procedural justice." *Political Research Quarterly* 54(2):333–354.
- Behavioral sciences & the law*. 2001. Vol. 19 Wiley Online Library.
- Benesh, Sara C. 2006. "Understanding public confidence in American courts." *Journal of Politics* 68(3):697–707.
- Benesh, Sara C and Susan E Howell. 2001. "Confidence in the courts: A comparison of users and non-users." *Behavioral sciences & the law* 19(2):199–214.
- Bickel, Alexander M. 1962. *The Least Dangerous Branch*. Yale University Press.
- Bonneau, Chris W and Melinda Gann Hall. 2009. *In defense of judicial elections*. Routledge.
- Brooks, Richard RW and Haekyung Jeon-Slaughter. 2001. "Race, income, and perceptions of the US court system." *Behavioral Sciences & the Law* 19(2):249–264.
- Caldarone, Richard P, Brandice Canes-Wrone and Tom S Clark. 2009. "Partisan Labels and Democratic Accountability: An Analysis of State Supreme Court Abortion Decisions." *The Journal of Politics* 71(02):560–573.
- Canes-Wrone, Brandice, David W Brady and John F Cogan. 2002. "Out of step, out of office: Electoral accountability and House members' voting." *American Political Science Review* 96(1):127–140.
- Carpini, Michael X Delli. 1996. *What Americans know about politics and why it matters*. Yale University Press.

- Converse, Philip E. 1964. "The Nature of Belief Systems in Mass Publics." *Critical Review* 18(1-3):1-74.
- Dahl, Robert A. 1957. "Decision-making in a democracy: The Supreme Court as a national policy-maker." *J. Pub. L.* 6:279.
- Duncan, Otis Dudley and Beverly Davis. 1953. "An alternative to ecological correlation." *American Sociological Review* 18(6):665-666.
- Ely, John Hart. 1980. *Democracy and distrust: A theory of judicial review*. Harvard University Press.
- Geer, John G. 2008. *In defense of negativity: Attack ads in presidential campaigns*. University of Chicago Press.
- Gibson, James L. 2008. "Challenges to the Impartiality of State Supreme Courts: Legitimacy Theory and "New-Style" Judicial Campaigns." *American Political Science Review* 102(1):59-75.
- Gibson, James L. 2012. *Electing Judges: The Surprising Effects of Campaigning on Judicial Legitimacy*. University of Chicago Press.
- Gibson, James L and Gregory A Caldeira. 2009. *Citizens, courts, and confirmations: Positivity theory and the judgments of the American people*. Princeton University Press.
- Gibson, James L., Jeffrey A. Gottfried, Michael X. Delli Carpini and Kathleen Hall Jamieson. 2010. "The Effects of Judicial Campaign Activity on the Legitimacy of Courts: A Survey-Based Experiment." *Political Research Quarterly* 20(10):1-14.
- Glick, Henry R. and Craig F. Emmert. 1987. "Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges." *Judicature* 70(4):228-235.
- Goodman, Leo A. 1953. "ECOLOGICAL REGRESSIONS AND BEHAVIOR OF INDIVIDUALS." *American Sociological Review* .
- Gordon, Sanford C. and Gregory A. Huber. 2007. "The Effect of Electoral Competitiveness on Incumbent Behavior." *Quarterly Journal of Political Science* pp. 107-138.

- Hall, Melinda Gann. 1987. "Constituent influence in state supreme courts: Conceptual notes and a case study." *Journal of Politics* 49(4):1117–24.
- Hibbing, John R and Elizabeth Theiss-Morse. 2001. "Process preferences and American politics: what people want government to be." *American Political Science Review* 95(1):145–154.
- Huber, Gregory A and Sanford C Gordon. 2007. "Directing retribution: On the political control of lower court judges." *Journal of Law, Economics, and Organization* 23(2):386–420.
- Imai, Kosuke, Ying Lu and Aaron Strauss. 2008. "Bayesian and likelihood inference for 2×2 ecological tables: an incomplete-data approach." *Political Analysis* 16(1):41–69.
- Jamieson, Kathleen Hall and Bruce W. Hardy. 2008. "Will ignorance and partisan election of judges undermine public trust in the judiciary?" *Dædalus* Fall.
- Kramer, Larry D. 2004. *The People Themselves*. Oxford University Press.
- Llewellyn, K. N. 1930. "A Realistic Jurisprudence: The Next Step." *Columbia Law Review* XXX(4).
- Mayhew, David. 1974. "The electoral connection."
- Pozen, David E. 2010. "Judicial Elections as Popular Constitutionalism." *Columbia Law Review* 110:2047–2134.
- Sample, James, Adam Skaggs, Jonathan Blitzer and Linda Casey. 2010. "The New Politics of Judicial Elections." Brennan Center for Justice.
- Skaggs, Adam, Maria da Silva, Linda Casey and Charles Hall. 2011. "The New Politics of Judicial Elections, 2009-2010."
- Thayer, James B. 1893. "The Origin and Scope of the American Doctrine of Constitutional Law." *Harvard Law Review* VII(3):129–156.
- Tushnet, Mark. 1999. *Taking the Constitution Away from the Courts*. Princeton University Press.

Tyler, Tom R. 2001. "Public trust and confidence in legal authorities: What do majority and minority group members want from the law and legal institutions?*" *Behavioral Sciences & the Law* 19(2):215–235.

Wenzel, James P, Shaun Bowler and David J Lanoue. 2003. "The Sources Of Public Confidence In State Courts Experience and Institutions." *American Politics Research* 31(2):191–211.

Whittington, Keith E. 1999. *Constitutional Construction*. Cambridge University Press.

A Ecological Inference Results

Table 7: Deterministic Bounds

	Republicans	Democrats
Yes	[0.01, 0.62]	[0.08, 0.55]
No	[0.38, 0.99]	[0.45, 0.91]

This table reports the estimated deterministic bounds for the 2000 Florida vote data.

Table 8: Goodman Regression Results

	Goodman Model
Republican	0.22*** (0.01)
Democrat	0.39*** (0.01)
R^2	0.94
Adj. R^2	0.94
N	3483

This table displays the estimated Goodman regression model. There is a significant partisan divide in support for the ballot measure.

Table 9: NCAR Estimates

	Republicans	Democrats
Yes	0.25 [0.21, 0.29]	0.37 [0.34, 0.40]

This table displays the results from the NCAR analysis. Even after modeling contextual effects, the partisan divide in the election remains. 95% confidence intervals in brackets.