Ideology and Judicial Decision Making: A Study of Political Activism in Labour Courts

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The paper studies the incidence and extent of political activism amongst judges arbitrating dismissal disputes. In a two-party model of electoral cycles and government appointments we derive predictions about political parties' demand for- and judicial supply of ideologically-based rulings, which we test empirically using a database of 1234 employment arbitration decisions covering a 10 year time span. Using dummies to control for time and policy effects, and exploiting natural randomization in the allocation of judges to cases, we find that the appointing political party and the employment history of labour court judges are significant predictors of arbitration outcomes, affecting judicial decisions by 8 to 10 percent.

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1. INTRODUCTION

The credibility of the judiciary as an institutional control over government power rests on its independence from executive and legislative power (Kaufman 1980, Salzberger 1993). In addition, judicial independence is 'the priceless possession of any country under the rule of law' (Brennan 1996), protecting fundamental freedoms (Hayek 1960, United Nations 1985) and is a key institutional asset for the pursuit of economic prosperity (World Bank 2001, Feld and Voigt 2003, La Porta et al. 2003). Evidence of politically motivated behaviour amidst the judiciary should therefore be a matter of significant concern for the public interest.

Judges' life tenure[1] and independently-set salaries are important safeguards but are they sufficient to deter political interference? Politicians could still seek to influence judicial processes through punish and reward strategies. Punishment may include barring judges' promotions to higher courts or reducing a court's budget and jurisdiction (Landes and Posner 1975, Ferejohn and Kramer 2006). Rewards may be paid in markets for political activism[2] where politicians' demand for conducting policy through judicial rulings meets with judicial supply of ideological rulings[3]. Although constitutional law prevents formal contracts from underwriting transactions between buyers and suppliers of political activism services, political activism may still emerge in courts through investment rather than consumption, which is the concern of this paper.

A government could influence judicial processes at entry level by appointing judicial candidates who, through their work history, have signalled an ideological stance compatible with party platforms. The government then appoints best-fit candidates as an investment in policy control (Landes and Posner 1975, Hansen 2004). A reasonable assumption is that appointing parties expect their appointees to use their ideological beliefs (social values) whenever established rules are insufficient to determine a case[4].

As with most investments, government appointments bear uncertain returns. Judicial ap-

[1] Tenure increases the opportunity cost of accepting bribes (and increases the predictability of a judge's decisions - Landes and Posner 1975). However, there are exceptions to life tenure. In the United States, most State- and lower courts judges are submitted to the elective principle: they can be voted in or out on a regular basis - although very few ever are (Friedman 2006).

[2] Political activism consists of rulings made to promote the ideological objectives a political party. By contrast, judicial activism (which is not the subject of this paper) consists of rulings that create new law or change existing law but may have no underlying political motivation.

[3] By 'ideology' we mean more than principled disagreements about a set of social values and adopt Roemer's (1994 : 327) characterisation as 'different views of how the economy works' put forth with the sole objective of maximising the expected utility of a particular income class.

[4] This is similar to the assumption made in the attitudinal model in legal scholarship (Segal and Spaeth 1993) that ideology comes into play in 'hard cases'.

pointees may subsequently rule more objectively than expected out of concern for reputation or reluctance to 'falsify' their mandate as objective arbiters (Kuran 1990, Miceli and Cosgel 1994), or they may act strategically by not signalling their true ideological stance prior to appointment. Investing in political activism is also risky: public and media scrutiny relays information about blatant or extreme cases of politically motivated appointments to the electorate, which may bring electoral punishment[5].

We study these questions in the particular context of labour courts arbitrating dismissal disputes; a context where judicial decisions rely as much on social values as on established rules (Brennan 1996). Social values emerge from the projection of strong ideological arguments over workers' rights to job security, business' rights to adjust or discipline their workforce at no cost, and appropriate levels of government intervention in labour markets. Established rules are set by statutory law (unfair dismissal- or wrongful discharge laws) in common law countries and by the civil code in civil law countries. If the judicial processes of labour courts are not value-free, a judge who has insufficient evidence to decide a case based on rules may rely on her own ideological beliefs to issue a decision. The arbitration of dismissal disputes therefore presents an ideal field of study to test for political influence over judicial appointments and subsequent effects on judicial rulings.

This study therefore purports to examine the incidence and magnitude of political activism amongst judges arbitrating dismissal disputes, with a particular focus on ideological signals, the appointment process, and judicial rulings. We ask whether judicial appointees may, through their decisions, be perceived as vectors of the appointing party's ideology and to what extent the phenomenon affects judicial outcomes. In a simple two-party model of judicial appointments and rulings we derive predictions about political and judicial behaviour, which we test empirically using a new database of 1234 unfair dismissal decisions in Australian labour courts over a 10 year time span.

2. RELATED LITERATURE

How should we integrate political motivations in models of judicial behaviour and what could be the expected behaviour of a judge acting as a political activist? Fundamentally, there

[5] The considerable legislative and media attention given to the nomination of Federal and Supreme Courts judges in the US, and scrutiny of their subsequent decisions is a case in point. Few elections are decided by government bias in judicial appointments, but for the purpose of our model it is enough that the probability of losing elections is affected by an extreme appointment. Electoral cost as a discipline device is discussed in Alesina and Tabellini (1990), World Bank (2001) and Hansen (2004).

are two types of judge-activists: *judicial activists* who change the law beyond the norms of their profession through case decisions [which may or may not involve ideological motivations] and *political activists* who decide cases ideologically [which may or may not involve changes to the law]. Legal and political science scholars have long studied the former group, largely through case-based scholarship and development of activism metrics[6]. By contrast, economists have shown more interest for political activism and its public choice underpinnings.

Aside from the large legal literature on judicial activism there is a relative paucity of scholarship about the individual motivations driving judicial decisions. Much of the sparse economic literature on judicial motivation focuses on intrinsic (contributing to justice) and extrinsic (income, reputation, status) rewards. These models accept a role for judges' self-interest but none for the political forces driving appointments and influencing decisions. Judges are assumed to impart their own ideology via the law through their interpretation of it but the judiciary is nonetheless assumed to be impartial in the sense that there is no assumed relationship between the ideology of the appointing political party and judges' decisions.

The lack of economic modelling of ideological motivations and political objectives is unfortunate given the considerable controversy over judicial selection and justice appointments in the United States alone. A common assumption in law and economics research is that judicial decisions are based partly on case characteristics and partly on judge-specific factors (Cohen 1992). Amongst the latter, economic research such as Miceli and Cosgel (1994) isolates the reputation of judges, which is improved through precedent setting and reversal aversion (a motive for judicial- rather than political activism). In these models reputation is maximised either for its own sake (which in Miceli and Cosgel's model contributes directly to judges' utility), or as investment into higher court appointment (Cohen 1992). None of these models suggest any role for political ideology or political economy considerations.

Judges need to develop an understanding of society's dominant values and prevailing ideologies in order to interpret legal texts according to the norms of their time, for instance by paying due consideration to criteria such as economic efficiency or work-life balance. Political activism differs from this behaviour by actively implementing the policy platforms of political parties through judicial decisions. To some, political activism is an exercise in gaining better policy control at the cost of reduced policy durability (Landes and Posner 1975, Hansen

[6] Booth (2010) provides an extensive review of the judicial activism literature mainly from a US perspective but also in other jurisdictions.

2004). Investing in political activism allows incumbent governments to harness judicial discretion over policy implementation and gain better control over the actual use and relevance of their policies. However, political activism also reduces the probability that the judiciary will protect government policies against their overthrow by a later government of different political persuasion. If judges are politically selected and politically active, policies are more vulnerable to the voting cycle. With the typically high discount rates used in political strategy, the short-run need for policy control and implementation may overcome longer term concerns for policy stability thus motivating ideological appointments.

However, there are also political costs to governments of openly engaging in the promotion of party policy through biased appointments. Judicial appointments are subject to public and media scrutiny and median or swing voters may inflict electoral punishment for extreme ideological appointments. There are also career costs to judgesfrom blatant use of ideology in their decisions: the mere reputational and esteem cost from a peer rebuke may alone justify that 'most judges would sooner admit to grand larceny than confess a political interest or motivation' (Jackson 1974 : 18). So, opportunities for activism, when they do occur, will be exploited with due care.

Garoupa & Ginsburg (2011) review the degree of judicial independence and accountability in seven common law and civil law countries, including the US and several European countries. For Japan, a civil law country, Ramseyer and Rasmussen (1997) find no evidence of nomination bias or of activism. However, Berger and Neurath's (2011) study of appointment bias in German labour courts finds that the decisions of lower labour courts do correlate with the political leaning of the appointing (State) government. The authors further point to a relationship between their evidence of nomination bias and adverse labour market outcomes in Germany.

Dismissal law protecting employees against unwarranted dismissal (excessive use of discipline) presents an interesting field of study for political activism research because these laws have strong ideological implications (e.g. for job ownership and the distribution of economic surplus between capital and labour). The arbitration of dismissal disputes in labour courts commonly involves representation by union delegates and employer associations with links to either the governing party or the main opposition party. Dismissal disputes are frequent because the cost of specifying all possible contingencies in employment contracts is prohibitive.

Since employment relationships are too often characterised by irreversible human capital investments, disputes over job property rights are also very costly. Third party arbitration of employment disputes reduces these transaction costs. Arbiters' reach and prerogatives vary according to jurisdictions, but in most countries the bulk of employment disputes are settled at low cost through 'quasi-court' services, following a fact-finding process both parties commit to adhere to. In the US, one can at one extreme find arbitration of dismissal disputes in Federal and State courts under the common law of employment-at-will[7], and on the other hand find less formal, privately managed out-of-courts dispute resolution alternatives, such as labour arbitration, which covers dismissal claims in the unionised sector (contracts negotiated under collective bargaining) and employment arbitration. The UK, South Korea, Australia, and New Zealand all have unfair dismissal regimes regulated through statutory law. In these countries labour courts handle the arbitration of dismissal disputes in a relatively expeditious, cost effective (legal cost are low and employee compensation is capped) and informal way (litigants can represent themselves). Unfortunately, there is very little research connecting the ideological leanings of labour judges with their decisions.

3. A TWO-PARTY MODEL OF JUDICIAL APPOINTMENTS AND DECISIONS

In an attempt to remedy this lacuna, let us consider two political parties, L (Labour) and C (Conservative), indexed by j, which alternate the exercise of government power with probability p at the end of discrete time intervals of length $t = \alpha T$, with α an integer and with T denoting the length of an electoral cycle. Political parties care about the implementation of ideology (the 'quality' of their policy preferences) as a way of promoting the interest of the social categories of the population they represent (Alesina 1988, Roemer 1994). Whenever a political party has incumbency (is in government), it promotes these interests by appointing judges with a signalled ideological bias $c_i \neq 0$ as close as possible to the policy stance of the party. Orthogonal party ideologies about the conduct of employment relations policy (promoting the interests of employees and employers, respectively) prevent platform convergence (Roemer 1994) and there are no inter-party parliamentary negotiations over appointments either (Porteiro and Villar 2011). We first model political parties' demand for political activism, which is expressed

[7] In that context, dismissal disputes can be lodged for breach of contract, breach of a Federal Act (e.g. civil rights, anti-discrimination, etc.) or for one of several statutory exceptions to employment-at-will, which a number of States enacted as unjust dismissal doctrine (where compensation is uncapped) and wrongful discharge laws (where compensation is capped, see Krueger 1991).

through the appointment process. We then examine the subsequent supply of political activism through judicial rulings.

3.1. Appointments

Political power is used to appoint judges selected from a finite pool of n judicial candidates who have comparable degrees of expertise in labour law (same ability) but have varying work histories (with unions, employer associations, etc). Judicial candidates compete for appointment in labour courts. Through their work histories (as union delegates, labour lawyers or legal counsels of employer associations), candidates signal to the appointing party the intensity of their ideological leanings c_i which varies in a continuum between -1 (conservative activist), 0 (unbiased arbitrator) and $+1$ (labour activist). By construction positive values of c_i are associated with the promotion of labour policies and negative values with conservative policies. For instance, a union lawyer with a history of taking highly mediatised and controversial employee cases may be viewed as signalling a strong commitment to Labour values ($c_i \sim 1$), whereas a lawyer who throughout her career equally and fairly represented the interests of employees and employers signals that she is an objective (non-ideologue) player ($c_i \sim 0$).

Realistically, political parties do not expect their appointees to act as zealots, using ideology as the main criterion to decide cases. Instead they expect signalled ideologies to mix with objectivity factors in the the decision of cases. For instance, they may expect judges to decide cases ideologically when the magnitude of the ideological signal exceeds the strength of the evidence in a given case

Candidates cannot directly observe party preferences. Instead they infer parties' preferred ideological positions from histories of judicial appointments previously made, patterns of statutory reforms (which may indicate a tougher or looser stance on dismissal practice), and changes in party platforms offered (e.g. a new party leadership). Judicial candidates therefore select ideological positions c_i in an ideological corridor derived from their inferences about party preferences. The incumbent party orders and select nominees with signalled ideological preferences c_i closest to their preferred policy stance c_i^{j*} (the stance that maximises party utility[8]).

Political parties determine their optimal policy stance c_i^{j*} by maximising an objective func-

[8] For instance, for $j = C$ the policy objective may be: 'uphold employers' right to fire at no cost in *all* cases $c_i = -1$', whereas for $j = L$ it may be: 'uphold right to monetary compensation for *all* dismissed workers $c_i = 1$'. Intermediary policy stances could be 'always uphold employers' rights when the evidence suggests a tie' or 'always uphold employers' rights as long as evidence of employer wrongdoing is not too compelling'. The neutral stance is 'there are no a priori rights other than based on rules and facts $c_i = 0$'.

tion $U^j(c_i) = U^j[r_{j,i}(c_i), p(c_i)]$ continuously differentiable in its arguments $\left(\frac{\partial U^j}{\partial r_{j,i}} > 0, \frac{\partial U^j}{\partial p} < 0\right)$, where $r_{j,i}$ is the policy return (a higher number of rulings in favour of a certain socio-economic class) to party j from appointing political activist i $\left(\frac{\partial r_{j,i}}{\partial |c_i|} > 0, \frac{\partial^2 r_{j,i}}{\partial |c_i|^2} \leq 0\right)$, and where p is the probability of regime change (losing elections), which is affected by non-neutral appointments$\left(\frac{\partial p}{\partial |c_i|} > 0, \frac{\partial^2 p}{\partial |c_i| 2} > 0\right)$ [9]. A politically-neutral appointment $c_i = 0$ yields neither utility nor disutility to any political party, $U^j(0) = 0$[10]. Thus appointing ideologically-prejudiced judges c_i generates positive party utility through $r_{j,i}$ but disutility through p (and vice versa for the party in opposition). For simplicity, we assume the political cost to be restricted to the appointment process (subsequent controversial rulings by a zealot judge affect the reputation of the judge but have no political costs).

The political cost of biased appointments varies over time and the political parties know from their market research what is the likely current political cost of making biased appointments. Candidates know (from observing past appointments) that to signal a neutral stance $c_i = 0$ is unlikely to lead to selection since incumbents derive no utility from signalled ideology 0. Signalling an extreme position $c_i = |1|$ likewise reduces the chance of selection because excessive political cost damages expected political returns. Thus candidates signal 'moderate' ideological stances c_i in a corridor $(0, |1|)$ and the party in government selects the ideological argument $c_i = c_i^{j*}$that equilibrates the marginal benefits and costs from appointments, i.e. such that[11]:

$$U^j_{r_{j,i}} \frac{\partial r_{j,i}}{\partial |c_i|} = U^j_p \cdot \frac{\partial p}{\partial |c_i|} \tag{1}$$

Figure 1 illustrates the appointment process by showing the utility function of a governing Conservative party as a function of ideological appointments c_i. The shape of party utility results from the concavity and convexity assumptions for $r_{j,i}(c_i)$ and $p(c_i)$ respectively.

The incumbent Conservative party selects amongst a pool $c_i \in [-1, 0]$ of competing applicants the candidate having signalled a level of ideology c_i^{C*} as defined in (1)[12]. In the absence

[9] We justify convexity of $p(c_i)$ by the assumption that most voters expect (and tolerate) a small degree of partisanship in the appointment process.

[10] Convergence towards a centric position $c_i \sim 0$ is a common prediction of party behaviour in pure and mixed Downsian election models. Although our model combines Downsian and policy motivations (Wittman 1977, Alesina 1988), it entails no convergence of platforms because Downsian considerations only intervene as discipline device (they are not the main driver of the appointment process).

[11] Note that there is no need for the usual second order condition as political parties do not appoint candidates with a signalled ideology that is signed differently to their own (i.e. when $sgn(c_i) \neq sgn(c_i^j)$).

[12] More generally, if no candidate signals the optimal level of ideology expressed in the first order condition, the incumbent party appoints the candidate with the nearest ideological fit, that is, the candidate having signalled $arg\ \underset{c_i}{min}\ \Delta c = \{c_i : \Delta c(c_i) \leq \Delta c(c_s), \forall c_s \in [c_i^{j*} \pm \tilde{c}_i^j]\}$, in which $\Delta c = c_i - c_i^{j*} \lesseqgtr 0$ is the gap between the signalled ideological stance of the candidate and the preferred policy stance of the incumbent party.

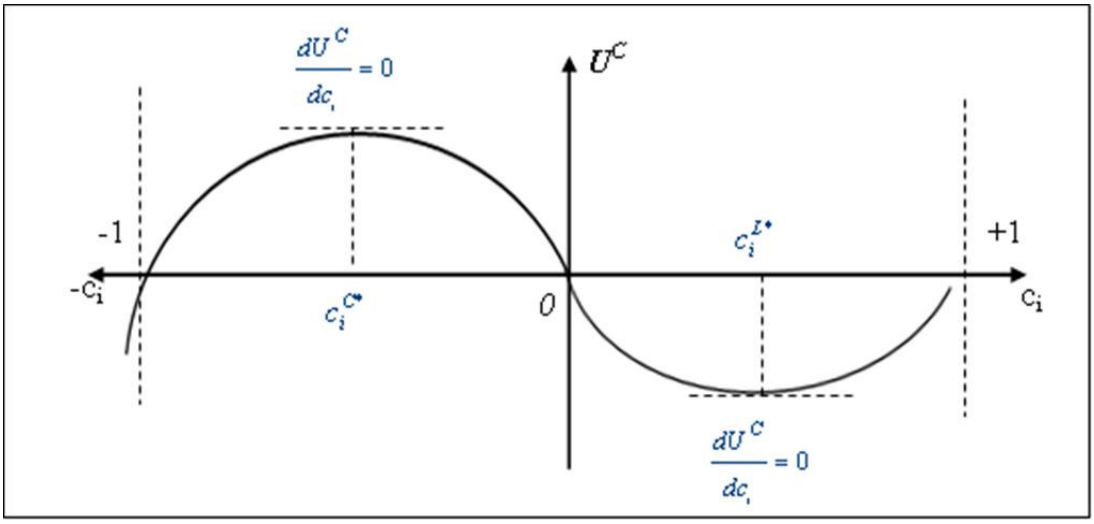

FIG. 1 Conservative party utility from judicial appointments

of functional specifications for U we place no particular condiitons on c_i^{C*}, which can take any value within $[-1, 0]$. Generally, we will expect that as $c_i \longrightarrow -1$ Conservative party first rises, then declines as political costs overcome expected policy retruns. As $c_i \longrightarrow -1$, the Labour opposition simultaneously experiences net negative welfare effects (not displayed in figure 2) from lower expected policy returns, which eventually decrease (as $c_i < c_i^{C*}$) due to future incumbency effects. Interpretation of the right side of the graph follows similar reasoning, showing the effects on Conservative party welfare if, instead, the Labour party was in government ($j = L$) and nominations took place in a $c_i \longrightarrow +1$ direction.

3.2. Rulings

The appointment process only indicates the strength with which governments invest in the creation of political activism opportunities. Whether (and to which extent) judges exploit these opportunities is a question of individual judicial behaviour. First let us assume that judges have revealed their true ideological preferences through signalling. Following appointment, a judge with ideology c_i is randomly allocated M unfair dismissal cases over a certain reference period (e.g. an electoral cycle). Let $m = 1, 2...M$ index the sequence of unfair dismissal cases assigned to the judge. The characteristics of dismissal cases differ from one another and are revealed through the simple random walk $\{\varepsilon_m\}$ (the 'facts of the cases'), which is independently distributed with mean 0 and variance 1. Variable ε_m represents the quantity

and quality of receivable evidence about the unfairness of the dismissal net of evidence about employee wrongdoing. Thus, a value $\varepsilon_m > 0$ indicates a case that, absent other considerations, should objectively be decided in favour of the employee, and vice versa for $\varepsilon_m < 0$. Again abstracting from ideological considerations, a value $\varepsilon_m = 0$ indicates an indeterminate case that is decided by tossing a coin.

Judicial rulings materialise through a binary variable $x_{i,m}$ (the award), which follows a sequence of $\{0\}$ (employer wins) and $\{1\}$ (employee wins). As the sequence $\{\varepsilon_m\}$ unfolds, the matching of judicial ideology with case evidence creates a sequence of couples (c_i, ε_m), which take their values from the convex set $X = \{(c_i, \varepsilon_m) : (-1 \leq c_i \leq 1) \cap (-1 \leq \varepsilon_m \leq 1)\}$. Let us assume that ideological and evidence variables are independent, separable and equally weighted. An ideologue judge who is true to her signalled ideology may decide cases by considering the balance $\bar{x}_{i,m}$of her ideological prejudice and the evidence of the case, that is, following the rule:

$$\bar{x}_{i,m} = \frac{c_i + \varepsilon_m}{2} \tag{2}$$

However, the actual decision $x_{i,m}$ must always sum up to $\{0\}$ or $\{1\}$ rather than to a continuum of values within the closed interval $[-1, 1]$. Let S be a class of decisions $x_{i,m}$ defined by the indicator function $I[(\frac{c_i+\varepsilon_m}{2}) \geq 0]$ that assigns strictly negative values of $\bar{x}_{i,m}$ to $\{0\}$ and positive values of $\bar{x}_{i,m}$ to $\{1\}$[13]. The decision variable $x_{i,m}$ can then be defined as a behavioural function $x(c_i, \varepsilon_m) : X \to S$, which to every couple (c_i, ε_m) drawn from set X maps a decision $[\{0\}, \{1\}]$ in the class S. Observed judicial decisions can thus be characterised as: the outcome of

$$x_{i,m} = I[(c_i + \varepsilon_m) \geq 0] \tag{3}$$

By contrast, a non-ideologue judge ($c_i = 0$) decides a case by following the evidence-based rule:

$$x_{0,m} = I(\varepsilon_m \geq 0) \tag{4}$$

which given our behavioural assumptions and the random nature of ε_m, yields a balanced sequence of $\{0\}$ and $\{1\}$ rulings. Evidence of ideological bias over the sequence of rulings is

[13] We assume that if by fluke $x_{i,m} = 0$, the judge tosses a coin. This happens when ideology and evidence oppose one another with equal magnitude, or when there is neither judge ideology nor conclusive case evidence.

revealed by the frequency $\pi_i = \sum_m \frac{x_{i,m}}{M}$ with which the judge rules in favour of the employee over the M cases. The benchmark frequency is the probability of employee success under rule (4), which is:

$$\pi_0 = \sum_m \frac{I(\varepsilon_m \geq 0)}{M} = \frac{1}{2} \tag{5}$$

A polar opposite is the rule followed by zealot judges ($|c_i| = 1$) who always ignores the evidence when deciding a case, i.e.:

$$x_{i,m} = I[(c_i \geq 0] \tag{6}$$

Zealot behaviour produces a uniform sequence of rulings $\pi_i = 0$ or $\pi_i = 1$ (depending on the sign of c_i).

Let us now specify the per-period return $r_{j,i}$ to political party j having appointed a judge with ideology c_i as the absolute percentage difference between the unbiased and biased rulings frequencies, i.e:

$$r_{j,i} = \left| \frac{\pi_i - \pi_0}{\pi_0} \right| \tag{7}$$

Objective (non-ideologue) judges therefore always deliver a zero return to political parties whereas zealots deliver a return $r_{j,i} = 1$ (a maximum return) to the appointing political party.

Judges derive different utility $V[.]$ from ruling objectively and ideologically. Let us denote the utility of a non-ideologue ($c_i = 0$) who always decides cases by rule (4) as $V[x_{0,m}] = v_0$. This implies that judicial utility over the whole sequence of M objective decisions is $V[\pi_0] = Mv_0$. The intrinsic utility of an ideologue judge deciding cases by ideology is $V[x_{i,m} \neq x_{0,m}] = v_i$ which exceeds v_0 by a benefit $d_1 > 0$ derived from the judge's satisfaction at applying her ideology to the case's decision. We make no particular assumption on benefit d_1, which could be a fixed value or increase with c_i. There is also a disutility cost d_2 attached to ruling ideologically for which likewise no particular functional assumptions are required. Along with Miceli and Cosgel (1994) we assume that d_2 is a cost that ideologue judges incur through peer disapprobation, reputation loss or simply from (legal) 'preference falsification'[14]. Benefit d_1

[14] Miceli and Cosgel (1994), who refer to the work of Kuran (1990) and Posner (1993, see also Epstein 1990 : 829-30), define preference falsification as a private cost judges incur when their decisions diverge from their objective assessment of the case. In their model, the cost is incurred to derive reputational benefits (higher citations). In our model the cost is incurred to derive ideological benefits. To a significant extent, this distinction arises from the different regulatory context of our study (statutory rather than case law).

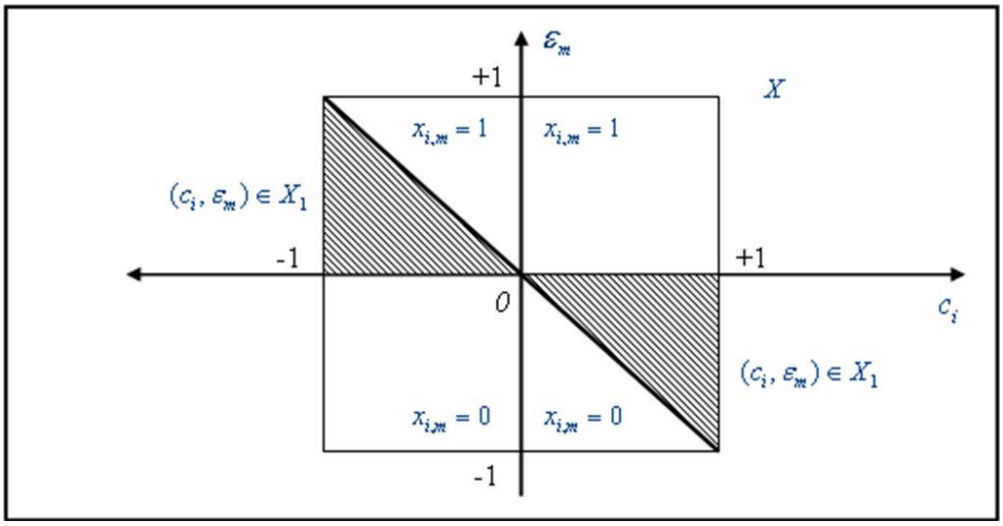

FIG. 2 Opportunities for ideological rulings

and penalty d_2 are only incurred when the judge rules ideologically and only their net value is relevant to our analysis. Hence whenever a judge decides a case by ideology judicial utility is:

$$v_i = v_0 + d_N \tag{8}$$

which implies that the following basic condition, together with the actual values of c_i and ε_m, determines whether a case is determined ideologically:

$$d_N > 0 \tag{9}$$

Even if condition (9) holds $\forall c_i \neq 0$, few cases are ever decided ideologically because most of the time the ideological stance of an ideologue judge is irrelevant to her rulings. To see this, consider that opportunities to rule ideologically only arise when case evidence ε_m points at a different outcome than the one decided by the ideological stance of the judge (i.e. $sgn(\varepsilon_m) \neq sgn(c_i)$) *and* the magnitude of the ideological bias dwarfs the magnitude of the evidence (i.e.$|c_i| > |\varepsilon_m|$). Opportunities to rule ideologically are represented through shaded areas in Figure 2, which depicts the convex set X. The upper, non-shaded area of X represents the contour $x_{i,m} = 1$ of the function $x_{i,m}$, whereas the lower non-shaded area represents the contour $x_{i,m} = 0$. The upper (lower) shaded area represent couples (c_i, ε_m), which objectively belong to the upper (lower) contour of $x_{i,m}$ but that ideologue judges will map to the other contour.

The probability $q(c_i)$ of facing options to rule ideologically is thus shown at any value of c_i on the horizontal axis by the fraction of shaded to non-shaded area over the whole vertical range of values taken by ε_m. Let the subset X_1 describe the locus of couples (c_i, ε_m) lying in the shaded areas: $X_1 = \{(c_i, \varepsilon_m) : (|c_i| > |\varepsilon_m|) \cap (sgn(c_i) \neq sgn(\varepsilon_m))\}$. When $(c_i, \varepsilon_m) \in X_1$, an ideologue judge following rule (3) switches to rule (6) and exploit the opportunity to use her ideology. In all other cases $(c_i, \varepsilon_m) \notin X_1$, the sequence of rulings is not affected by judicial ideology (rule (3) yields the same result as rule (4)), and judicial utility is v_0 regardless of ideological bias. We therefore define q by :

$$q = \Pr\{(c_i, \varepsilon_m) \in X_1\} \quad \forall c_i, \varepsilon_m \tag{10}$$

If a judge has an extreme ideological stance ($|c_i| = 1$) we have $q = \frac{1}{2}$ whereas in the absence of any ideological stance, $c_i = 0 \Rightarrow q = 0$. The relative size of the shaded area defining q as a function of c_i can thus be expressed simply as:

$$q = \frac{|c_i|}{2} \tag{11}$$

We can now state a few propositions, which claim that the expected value of $q(c_i) \cdot d_N$ determines the frequency at which a judge $c_i \neq 0$ rules ideologically.

PROPOSITION 1. *if* $d_N > 0 \quad \forall c_i \neq 0$ *then judges only follow rule (6) in qM cases, and* $\pi_i^{[1]} = \frac{1+\frac{c_i}{2}}{2}$

PROPOSITION 2. *if* $d_N \leq 0 \ \forall c_i$ *then judges always follow rule (4) in all cases, and* $\pi_i^{[2]} = \pi_0$

PROPOSITION 3. *if* $\exists c_i' \in (0,1) : d_N \gtreqless 0 \quad \forall c_i \gtreqless c_i'$ *then the frequency of ideological rulings is* $\pi_i^{[3]} = \frac{1+\frac{c_i}{2}(1-|c_i'|)}{2} \forall c_i > c_i'$

PROPOSITION 4. *if* $\exists c_i'' \in (0,1) : d_N \gtreqless 0 \quad \forall c_i \gtreqless c_i''$ *then the frequency of ideological rulings is* $\pi_i^{[4]} = \frac{1+|c_i''|\frac{c_i}{2}}{2} \forall c_i < c_i''$

Proof. $\forall c_i \neq 0$, $x_{i,m} \neq x_{0,m} \Leftrightarrow v_i > v_0$ (ideological rulings depend on utility differentials). For given $c_i \neq 0$; $v_i > v_0 \Leftrightarrow \{(c_i, \varepsilon_m) \in M_1$ and $d_N > 0\}$ (utility differentials occur when opportunities for ideological rulings arise and net benefits from ideological rulings are positive). If condition (9) holds$\forall c_i \neq 0$, then $Pr\{v_i > v_0\} = q$ and $Pr\{v_i \leq v_0\} = (1-q)$, which implies that $Pr\{x_{i,m} \neq x_{0,m}\} = q$ (qM cases are decided by $rule(6)$) and $Pr\{x_{i,m} = x_{0,m}\} = (1-q)$

$((1-q)M$ cases are decided by $rule(3)$). The resulting frequency of rulings in favour of employees is $\pi_i = q\sum_m \frac{I[(c_i)\geq 0]}{M} + (1-q)\,\pi_0$. Using (5) and (11) yields $\pi_i = \frac{|c_i|}{2} I[(c_i) \geq 0] + \frac{1}{2}(1-\frac{|c_i|}{2})$. Since the first term is either $\frac{|c_i|}{2}$ or zero, we have $\pi_i = \frac{1-\frac{|c_i|}{2}}{2}$ for a Conservative judge and $\pi_i = \frac{1+\frac{|c_i|}{2}}{2}$ for a Labour judge, i.e $\pi_i = \frac{1+\frac{c_i}{2}}{2}$ $\forall c_i \neq 0$. Proofs for propositions 3 and 4 follow the same logic. Proposition 2 is trivial. ∎

Two corollaries of proposition 1 follow. First, the greater is c_i the more opportunities arise for political activism (through $\frac{\partial q}{\partial |c_i|} > 0$) and provided the benefits of ruling ideologically exceed the cost, these opportunities are always exploited. Second, recalling expression (6), the corresponding policy return is thus $r_{j,i} = q$. Proposition 2 states the obvious claim that opportunities to rule ideologically are ignored if the net benefits are always negative. Proposition 3 states that when the net benefit from ruling ideologically is positively correlated to c_i and changes sign at some intermediate ideological stance c_i' political activism occurs at high values of c_i but is less extensive than $\pi_i^{[1]}$. Conversely, proposition 4 states that when the net benefit from ruling ideologically is negatively correlated to c_i and changes sign at some intermediate ideological stance $c_i^{"}$ political activism is less extensive than $\pi_i^{[1]}$ and the phenomenon is restricted to low levels of ideological bias.

So far we have reasoned assuming that judicial candidates signal their true level of ideological bias through their work history. There is the distinct possibility that candidates act strategically throughout their work history to maximise their chance of being appointed. In this case, candidates signal a degree of ideological bias commensurate to the expected demand c_i^{j*} of the political party j most likely to appoint them but, once appointed, follow their personal preferences c_i, which differ from stance c_i^{j*}. Strategic signalling potentially allows appointees to behave *ex post* as non-ideologues following rule (4), or as zealots following rule (6). As we saw in the previous section, appointing a zealot is too costly to political parties but by assumption political cost is confined to appointments. So, with strategic signalling it is possible for a candidate to signal mild ideological positions prior to appointment and later rule as zealots without imposing political costs to the appointing political party. In this case, specification (3) becomes *ad hoc*: it responds to the expectations of political parties but it no longer the basis for defining the decision rules judges can adopt in practice. Strategic judges follow the rule:

$$x_{i,m} = I[(\lambda c_i + (1-\lambda)\varepsilon_m) \geq 0] \tag{12}$$

where $\lambda \in [0,1]$ is a scalar weight judges assign *ex post* (after appointment) to their non-signalled preferences for ideology relative to objectivity. If $\lambda > \frac{1}{2}$ the strategically motivated judge will rule ideologically more often than signalled at time of appointment. Alternatively, a special but possibly realistic case is the one in which an ideologically neutral judge signals $c_i \sim c_i^{j*}$in order to be appointed (knowing that signalling her true stance $c_i = 0$ would yield little or no chance of appointment) and then rules objectively through (4) afterwards. Our last proposition asserts that with strategic signalling, our measure of political activism vanishes because no functional relationship can be established between appointment patterns and the frequency of ideological rulings:

PROPOSITION 5. *if judicial candidates signal fake ideological stances to maximise their chance of appointments then* $\pi_i^{[5]}$ *is a stochastic process with trend parameter* λ *unknown at appointment.*

To summarise the predictions of our model; If political parties believe that the work history of judicial candidates is an accurate signal of their ideological stance, they have sound incentives to make biased appointments to labour courts but the degree of selected ideological bias will be checked by political cost. Under this assumption, neither neutral nor zealot candidates are appointed. The subsequent frequency π_i with which labour court judges decide cases in favour of dismissed employees is then a function of the ideology of the party that appoints them (a discrete signal $sgn(c_i)$), their work history (a continuous signal $|c_i|$) and their net individual benefits from ruling ideologically. As long as net benefits are positive over a certain range of ideological values c_i frequencies with which judges rule in favour of dismissed employees will be affected to a degree by ideological appointments. Otherwise, there are two possibilities buttressed by propositions 2 and 5. In the former, appointments are not ideological, rulings are always objective and the frequencies of specific decisions are unaffected by appointments and work histories. In the latter, appointment are ideological but signalling is strategic and we cannot predict the frequencies of specific rulings from information about appointing political party and work history.

4. EMPIRICAL ANALYSIS

We have characterised political activism as a three-step process: judicial candidates signal their ideological stance, governments appoint them to courts and judges make discretionary use of their ideological beliefs in their rulings. We now test empirically our propositions 1, 3 and 4, which to different degrees hypothesise that the frequency of rulings in favour of employees is correlated to their work history and to the appointing party.

4.1. Court appointments

Fair Work Australia (FWA) is the labour court in charge of conciliating and arbitrating a range of labour market disputes in Australia. It is divided into ten panels, one of the most prominent being the Termination of Employment Panel (TEP). Judges of the TEP (referred to as 'commissioners') are appointed on a permanent full-time basis until they reach 65 years of age. They are appointed by the Governor-General of Australia on the recommendation of the government of the day, which is based on candidates' demonstrated expertise in workplace relations, labour law, business management, knowledge of the workings of specific industries, etc. Judges are therefore selected from a diverse range of occupational backgrounds, mostly lawyers and attorneys, although some are former businessmen, human resources managers, industry experts, union delegates or civil servants. Other FWA panels (e.g. Industrial Action, or Minimum Wages) allocate cases to judges on the basis of their industry-specific background but this is not so for the TEP where case allocation is independent of the specific background of the judge and can be considered an entirely random process. At the start of each month, the Head of the TEP fills a roster, which matches judges to cases through a lottery[15]. The only (very minor) exception to this rule is in the Western Australian representation of the TEP where cases are allocated 'off the clock' to whichever judge is available at that precise moment.

4.2. Data

The data used in our analysis was collected from electronic transcripts documenting the decisions of labour courts (FWA and its predecessor, the Australian Industrial Relations Commission - AIRC) in unfair dismissal disputes. Transcripts are public domain information available from the FWA website. Transcripts record factual information about the defending parties'

[15] This information was verified and confirmed in November 2011 through telephone interview with one of Fair Work Australia's Senior Deputy Presidents.

background and their respective allegations. They also report the testimonies of witnesses and the judge's decision although this information was sometimes difficult to harmonise because judges often report their decisions in different ways. We recorded all cases for which we have a transcript over the period January 2001 - October 2010, which provided us with 1234 arbitrated claims.

We recorded elementary data such as cases' legal reference, their lodgement date, the judge's identity, the dates of hire, dismissal, lodgement and judicial decision, the gender and age of the plaintiff, the sector of activity of the employer, the occupational group of the dismissed employee, the type of representation for both sides, alleged reasons for fair or unfair dismissal, and the judge's decision. If the decision is favourable to the employer, we recorded the variable Award as zero, otherwise we recorded it as 1.

To categorise judges according to their likely ideological positions, we used and updated Southey and Fry's (2011) appendix, which records the previous work history of judges using public media, parliamentary records, academic literature and online Who's Who searches. Since Southey and Fry's data stops at 2005, we extended their record of judges' work history and political appointment to identify union or employer association backgrounds for the most recent years. Work history consists of whether a judge worked for a union or an employer association prior to their appointment. Judges were recorded as not having an employer or union background if information on the judge's background was available, and this background was not listed. In a small number of cases the background information could not be found at all, in which case the variable was recorded as missing.

4.3. Descriptive statistics

Table 1 presents descriptive statistics for the key variables in our dataset: whether the case was awarded to the employee or the employer; the political party that appointed the judge sitting on the case; whether the judge sitting on the case had an employer association background; and whether the judge sitting on the case had a union background. Descriptive statistics (and subsequent analysis) are presented for those observations with no missing values for any of these key variables (1004 observations). For our final dataset, 38% of cases were decided in favour of employees. In 63% of cases, the judge making the decision had been appointed by the labour party. In 39% of cases, the judge had previously worked for an employer association, and in 30% of cases the judge had previously worked for a union.

TABLE 1
Descriptive statistics - binary variables

	Yes	No
Award employee	383	621
	(38%)	(62%)
Commissioner appointed by labour (yes) or conservative party (no)	628	376
	(63%)	(37%)
Commissioner has an employer association background	388	616
	(39%)	(61%)
Commissioner has a union background	302	702
	(30%)	(70%)
Total	1004	

4.4. Empirical model

We first test whether the decisions of labour court judges in unfair dismissal cases reflect a discretionary use of political ideology consistent with the ideology of the appointing party. Second, we investigate to what degree this discretion is used in practice by isolating the proportion of decisions influenced by ideology. Third, we identify a key observable mechanism by which political parties may ascertain the ideology of judges (and equivalently, by which ideologue judges might have originally signalled their ideology): the trade union and employer association history of labour court judges, and the extent to which such histories explain any observed patterns of decisions revealed by the appointing party variable.

To answer these questions, we take advantage of a natural experiment found in the case allocation procedures of Australian labour courts, where judges are randomly allocated to cases according to a monthly roster. With random matching of cases and judges, we are close to obtaining an experiment in which the set of cases faced by Conservative party appointees are the same on average as those faced by Labour party appointees. In such an experimental setting, any difference in the proportion of decisions in favour of employers compared to employees must reflect differences in the predispositions of the judges, not differences in the characteristics of the cases, which would help answer our first research question.

However, there is still a challenge to this experimental setting. Judges are appointed in waves by incumbent political parties: the Australian Labour party was in government over 1983-1996 and from 2007 to the time of writing (2012), with the Conservative party in gov-

ernment in the intervening period. If there are factors affecting cases that are correlated with such waves (health of the economy, composition of the court, legislative regime in effect), an observed difference in decision-making propensity may be a result of such spurious correlation. For example, it may be that conservative appointees have made more pro-employer decisions, but only because there were more conservative appointees on the bench when WorkChoices (a conservative reform reducing coverage and extent of remedies afforded dismissed employees) was enacted, and employers fared better under that regime. If there are time or legislative regime factors affecting cases, and these are correlated with the proportion of judges on the court appointed by the two parties, observed differences in decisions between judge types may be due to case differences rather than judge differences.

We use a probit estimator on the probability of the employee winning, with dummies for legislative regimes and year of dismissal included to remove the potential for such spurious correlation[16]. With time and policy dummies eliminating these potentially spurious factors, we rely on the random allocation of judges at any given time to obtain our experimental ideal. Formally, our basic specification is as follows:

$$\Pr\{y_{irt} = 1 \mid C_{irt}\} = \Phi\left(\Psi_r + \lambda_t + C_{irt}^{'}\beta_1\right) \tag{9}$$

We have y_{irt}, the decision in case i under legislative regime r arising from year of dismissal t, equal to 0 if the case is decided in favour of the employer, and equal to 1 if the case is decided in favour of the employee. ψ_r are the set of regimes (policy dummies), λ_t are the years of dismissal (time dummies), and C_{irt} is the characteristic of the judge in the case (political party appointing at this stage). For the estimate of the coefficient of interest β_1 to be unbiased, it must be the case that $E(\epsilon_{irt}C_{irt}) = 0$ (so that remaining idiosyncratic errors are uncorrelated with judicial characteristics). We assume there are no remaining sources of spurious correlation in the within year and regime variation.

4.5. Empirical results

In Table 2 below, we present the results of our probit estimator. The results suggest that the average employee who takes an unfair dismissal case to court has a 9% better chance of success if the judge allocated to his or her case was one who was appointed by the labour

[16] The years 2006 and 2009, during which new regulatory regimes came into force, appear as the year of dismissal for a significant number of cases decided under both relevant regimes, making year of dismissal dummies alone insufficient.

party as compared to one appointed by the conservative party (significant at the 1% level). We know that the judges appointed by the two parties are allocated cases with the same set of characteristics on average, so the evidence suggests that these variations are a result of ideological decision making by judges.

TABLE 2
Probit Estimates

	Award (1=employee)	Marginal effect
Party Appointing	0.246***	0.090***
Judge (Labour = 1)	(0.087)	(0.032)
Constant	-0.936	
	(0.598)	
Year of Dismissal Dummies	Yes	
Regime Dummies	Yes	
LR	46.15	
Prob > Chi-squared	0.000	
Observations	1004	

Standard errors in parentheses
*$p < 0.10$, **$p < 0.05$, ***$p < 0.01$

As a robustness check, in Table 3 we present a simple crosstabs table of the proportion of pro-employer and pro-employee decisions made by conservative and labour appointees. The conservative appointees find in favour of employers more than labour appointees by 10 percentage points, which is very close to the marginal effects from our probit estimator. The similarity of these results suggests that the potential sources of spurious correlation in practice contribute little to the observed decision making propensities of judges appointed by the two political parties - they inflate observed ideological decision making by around 10 percent (1 percentage point) based on these estimators.

TABLE 3
Two-way associations

	Conservative appointee decisions	Labour appointee decisions
Award employer	255	366
	(68%)	(58%)
Award employee	121	262
	(32%)	(42%)
Total	376	628

We now extend the analysis in order to isolate some of the mechanisms by which political parties appoint ideological judges. A natural hypothesis is that the labour party influences the ideology of labour court decision making by appointing qualified judges with a union background to the court (proxying for likely ideological position), and conversely that the conservative party influences the ideology of labour court decision-making by appointing qualified judges who have an employer association background (again, proxying for likely ideological position). Whether the parties themselves use such backgrounds directly as proxies for likely ideology, or whether such variables are proxies for appointment decisions made based on unobservable considerations, is irrelevant for this analysis

Table 4 shows a table of crosstabs for decisions by each of the judges' background characteristics. Judges with a history of working for employer associations have made decisions in favour of employers in an additional 13% of cases. Judges with a union background have made decisions in favour of employees in an additional 11% of cases[17]. Note that such associations do not represent a partial effect, and there is a strong (though not complete) negative correlation between having an employer association and a union background. The preliminary associations do nevertheless support the hypothesis that one or both of these backgrounds could be used as proxy for the innate ideology of appointees to the court.

TABLE 4
Preliminary associations

	Employer association background	No employer association background
Award employer	271	350
	(70%)	(57%)
Award employee	117	266
	(30%)	(43%)
Total	388	616
	Union background	No union background
Award employer	162	459
	(54%)	(65%)
Award employee	140	243
	(46%)	(35%)
Total	302	702

[17] These associations between background variables and decisions are not spurious. Equivalent probit analysis as in Table 2, not shown here, confirms the associations (the marginal effect is -12% in the case of employer background, and 10% in the case of a union background, both significant at the 1% level).

To tease out the ideological appointment dynamics at play, Table 5 shows the results of a probit model controlling for appointing party and background characteristics (candidate signals). The significant variable here is the employer association background (significant at the 5% level); decisions made by judges with that background are 9 percentage points more likely to favour the employer. There is no longer a significant (now partial) effect of the party appointing variable, or the union background variable. In other words, judges do not make ideological decisions simply because they were appointed by one party or another. Rather, the parties appoint ideological judges, with the key background variable explaining judge ideology being whether or not they had previously worked for an employer association.

TABLE 5
Probit Estimates

	Award (1=employee)	Marginal effect
Party Appointing	0.133	0.048
Judge (Labour = 1)	(0.094)	(0.034)
Employer Background	-0.234**	-0.085**
	(0.099)	(0.036)
Union Background	0.133	0.048
	(0.099)	(0.036)
Constant	-0.615**	
	(0.269)	
Year of Dismissal Fixed Effects	Yes	
Regime Fixed Effects	Yes	
LR	57.58	
Prob > Chi-squared	0.000	
Observations	1004	

Standard errors in parentheses
*$p < 0.10$, **$p < 0.05$, ***$p < 0.01$

5. CONCLUSION

Our study examined the incidence and extent of political activism in labour courts. Specifically, we asked to what extent judges in charge of arbitrating dismissal disputes use their judicial discretion to apply political party ideology into their decisions, for instance by deciding more often in favour of the plaintiff. We modelled political activism as a two-stage investment process consisting first of government appointment of candidates having signalled a desirable degree of ideological bias through their work history, followed by appointees' decisions

to apply ideological considerations to their determinations. Our working hypothesis was that if appointees signal their true ideological stance, they would use their discretion to sway decisions whenever the evidence of a case is weak relative to their signalled ideological convictions. The identity of the appointing political party and the previous work history of judges would therefore affect the frequency with which judges rule in favour of specific parties to a dismissal dispute. Otherwise, if all appointees act strategically about signalling their true preferences, no observable pattern can be predicted to emerge from judicial rulings. We also modelled the institutional constraints that could be assumed to restrict the magnitude of the phenomenon: the adverse electoral impact to party in government of appointing ideological zealots, and the benefits and costs of disregarding case evidence when delivering biased decisions

We tested our model's predictions using a database of 1234 unfair dismissal cases arbitrated over a 10 year period in Australian labour courts, together with records of judges' employment history and the political leaning of the government that appointed them. Since judges are randomly matched to cases, our analysis could exploit the implicit independence between judges and case characteristics. Controlling for time and statutory regime effects we found that Labour party appointment increases the likelihood of decisions favourable to employees by about 10 percent, and conversely for Conservative party appointments. Likewise, judicial candidates' signalled ideology (their work history) predicts decisions favourable to a specific party by about 11-13 percent. Controlling simultaneously for employment history and appointing party suggests that the reason employees fare better when their case is administered by judges appointed by the Labour party is that the Conservative party appoints more judges who have an employer association background, and judges with an employer association background are less likely to find in favour of the employee.

Our empirical analysis supports our model's conjecture that the frequency with which judges rule in favour of dismissed employees is significantly affected by political motivations in the appointment process. We do not suggest (nor offer evidence) that judges deliberately further political parties' agendas through their decisions. Instead, we contend that in contexts such as statutory dismissal law where judges interpret rather than make the law and where judicial processes are not value-free, judicial decisions will regularly rest on the ideological stance of the judge. To the extent that judges' true ideological stances are signalled to- and observed by political parties prior to appointment, the correlation between political interest

and judicial rulings emerges from the signalling and selection process.

If judicial independence is indeed 'the priceless possession of nations' these results may raise justified concern about the strength of the judicial institutions examined in this study. However, in line with the predictions of our model, we also find that the magnitude of the identified effects is relatively mild, which suggests that opportunities for political activism are relatively few and that there are strong institutional controls containing the phenomenon.

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