Estimates of Regulatory Interventions in Dismissal Dispute Decisions

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The paper disentangles the effects of governments’ social values on labour courts’ adjudication of dismissal disputes in Australia. We isolate two channels by which the social values of political parties affect decisions: (i) through changes to established rules (statutory reforms) and (ii) through changes in the composition of courts (politically motivated appointments). We use a panel of 85 judges and 2876 judicial decisions meted over a 15 years time span characterized by two major legal reforms and one minor reform. We deal with selection bias by testing for- and exploiting the natural randomized matching of labour court judges with unfair dismissal cases. Using several model specifications we find significant effects from both channels: statutory reforms, and judges’ work background have strong and significant effects on case outcomes, except when judges have a union work history.

Key Words: employment protection, unfair dismissal, political activism, judicial independence, labour courts

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1. INTRODUCTION

Labour courts adjudicating dismissal disputes operate in a context in which judicial decisions rely as much on social values as on established rules (Brennan 1996). Social values (such as ‘efficiency’, ‘freedom’, or ‘fairness’) emerge from the day-to-day projection of strong ideological arguments over workers’ rights to job security, business freedom to adjust or discipline their workforce, and appropriate levels of government intervention in labour markets. By contrast, established rules reflect a longer term evolution of acceptable norms and standards embodied either in statutory law (unfair dismissal- or wrongful discharge laws) or in case law, or, in civil law countries, in the civil code. Thus, unfair dismissal laws (established rules) aim at striking a balance between workers’ demand for employment security and firms’ demand for flexible arrangements for workforce adjustment and discipline. Because these demands are to a very large degree mutually exclusive, the resolution of dismissal disputes through public arbitration institutions remains controversial and prone to ideological debate and value judgments. Consequently, governments of different political persuasion often change status-quo regulatory arrangements in order to tip the ‘workplace justice’ balance either towards more job security or more business flexibility. These regulatory changes are guided by current-time social values and operate through two channels: (i) direct amendments -or major reforms- to statutory laws (or to the civil code), which affect established rules and thereby judge’s capacity to administer workplace justice; and (ii) changes in the composition of labour courts, which affect the development of case law or the way in which established rules are interpreted and applied to case decisions. Accordingly, our interest is to model regulatory change as key determinant of judicial decisions.

In this paper we aim at quantifying effects of regulatory change in the particular context of Australian labour courts administering unfair dismissal disputes. We address the first question (effects from reforms to established rules) by quantifying the degree to which the decisions of judges did adjust to several reforms to Federal unfair dismissal laws that took place in Australia. 

1Employment protection laws may also correct externalities in labour markets. There is an old argument that unfair dismissal laws achieve much more than merely provide security to workers and impose adjustment costs to firms. For instance, in large organisations, the laws may help improve productivity by correcting information asymmetries deterring workers’ investment in firm-specific skills, or in adoption of new technologies [?], [?], [?].

2Although it is not the main theme of our article, it is worth noting that there is little consensus in the academic literature on the social benefits and economic impacts of employment protection laws. There has been considerable research interest in the U.S, Europe and Australasia about the labour market effects of these laws (on employment levels, productivity, wages, job transition, unemployment duration, minority groups, etc.). Good reviews of this literature can be found in [?], [?], [?], [?], [?], and [?].
over the last 20 years.

We address the second question by estimating the extent to which judges’s political and work backgrounds influence the outcome of arbitration cases (ie, independently of direct changes to established rules). As we have suggested above, the processes by which labour courts formulate judicial decisions are unlikely to be value-free. There is therefore a significant probability that judicial decisions may at least partly rely on these social values. A judge who has insufficient evidence to decide a case based on established rules may rely on her own ideological beliefs or worldview to issue a decision. If this is the case judicial appointees may through their decisions act as vectors of their appointing party’s ideology (wittingly or unwittingly).

The arbitration of dismissal disputes therefore presents an ideal field of study to test for political influence through judicial appointments, court composition and subsequent rulings of appointees.

It has long been believed that case outcomes are indeed influenced by judges’ characteristics, especially their ideological and work backgrounds. For example, a ‘legal realism’ view predominantly developed and tested in the United States (US) holds that judges often behave as activists, deviating from independent and impartial rulings in the pursuit of strategic interests. An extensive political science literature empirically examines this issue. 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. As with most investments, government appointments bear uncertain returns. Judicial appointees 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. However, most of the

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3 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’.

4 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
evidence is US-based, unrelated to labour law, and limited to the cases in which the court
publishes an opinion (mostly appellate opinions) in a number of politically sensitive areas of
US law (e.g. civil rights, crime, redistricting).

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.

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 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 where politicians’
demand for conducting policy through judicial rulings meets with judicial supply of ideological

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5 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).

6 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.
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.

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 2876 unfair dismissal decisions in Australian labour courts over a 15 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 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. 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

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7 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.

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

\[9\] 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).
cost effective (legal cost are low and employee compensation is capped) and informal way (lit-
igants 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 \( \alpha \) 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
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 appoint-
ment 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 associ-
ated 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 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 \(c_i^{*}\) (the stance that maximises party utility).10

Political parties determine their optimal policy stance \(c_i^{*}\) by maximising an objective function \(U_j(c_i) = U_j[r_{j,i}(c_i), p(c_i)]\) 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 \(\left(\frac{\partial p}{\partial c_i} > 0, \frac{\partial^2 p}{\partial c_i^2} > 0\right)^{11}\). A politically-neutral appointment \(c_i = 0\) yields neither utility nor disutility to any political party, \(U_j(0) = 0^{12}\). 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 appoint-

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10For 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 \(c_i = 0\)’.

11We justify convexity of \(p(c_i)\) by the assumption that most voters expect (and tolerate) a small degree of partisanship in the appointment process.

12Convergence 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).
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 $c_i = \pm 1$ 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 $c_i = c_i^*$ that equilibrates the marginal benefits and costs from appointments, i.e. such that $13$:

$$U_j \frac{\partial r_j}{\partial |c_i|} = U_p \frac{\partial p}{\partial |c_i|}$$

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 $r_j(c_i)$ 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 $c_i^*$ as defined in (1)$^{14}$. In the absence of functional specifications for $U$ we place no particular condition on $c_i^*$, which can take any value within $[-1, 0]$. Generally, we will expect that as $c_i \rightarrow 1$ Conservative party first

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$^{13}$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 $sgn(c_i) \neq sgn(c_j^*)$).

$^{14}$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 $arg \min \Delta c = \{ c_i : \Delta c(c_i) \leq \Delta c(c_{s}) , \forall c_{s} \in [c_i^* \pm \tilde{c}_j] \}$, in which $\Delta c = c_i - c_j^* \leq 0$ is the gap between the signalled ideological stance of the candidate and the preferred policy stance of the incumbent party.
rises, then declines as political costs overcome expected policy returns. As \( c_i \rightarrow -1 \), the Labour opposition simultaneously experiences net negative welfare effects (not displayed in figure 2) from lower expected policy returns, which eventually decrease (as \( c_i < c_i^* \)) 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 \( c_i \rightarrow +1 \) 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 \( m = 1, 2, \ldots M \) 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 \( \varepsilon_m \) 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 \( (c_i, \varepsilon_m) \), 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:

\[
\bar{x}_{i,m} = \frac{c_i + \varepsilon_m}{2}
\]

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 $I[(\hat{x}_i + \epsilon_m) \geq 0]$ that assigns strictly negative values of $\hat{x}_{i,m}$ to $\{0\}$ and positive values of $\hat{x}_{i,m}$ to $\{1\}$\textsuperscript{15}. The decision variable $x_{i,m}$ can then be defined as a behavioural function $x(c_i, \epsilon_m) : X \rightarrow S$, which to every couple $(c_i, \epsilon_m)$ drawn from set $X$ maps a decision $\{0, 1\}$ in the class $S$. Observed judicial decisions can thus be characterised as: the outcome of

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

(3)

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

$$x_{0,m} = I(\epsilon_m \geq 0)$$

(4)

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

$$\pi_0 = \sum_{m} \frac{I(\epsilon_m \geq 0)}{M} = \frac{1}{2}$$

(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.:

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

(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:

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

(7)

\textsuperscript{15}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.
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 \( V[\cdot] \) 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 ‘preference falsification’\(^{16}\). Benefit \( d_1 \) and penalty \( d_2 \) are only incurred when the judge rules ideologically and only their net value is relevant to our analysis. Let \( d_N = d_1 + d_2 \); whenever a judge decides a case by ideology judicial utility is:

\[
v_i = v_0 + d_N
\]

Even if \( d_N > 0 \ \forall c_i \neq 0 \), 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 \( \varepsilon_m \) points at a different outcome than the one decided by the ideological stance of the judge (i.e. \( \text{sgn}(\varepsilon_m) \neq \text{sgn}(c_i) \)) 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 \( (c_i, \varepsilon_m) \), 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

\(^{16}\)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

range of values taken by $\varepsilon_m$. Let the subset $X_1$ describe the locus of couples $(c_i, \varepsilon_m)$ lying in the shaded areas: $X_1 = \{(c_i, \varepsilon_m): (|c_i| > |\varepsilon_m|) \cap (\text{sgn}(c_i) \neq \text{sgn}(\varepsilon_m))\}$. 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:

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

(9)

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:

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

(10)

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 in $qM$ cases judges only follow rule (6) , and $\pi_i^{[1]} = \frac{1+d_N}{2}$

**Proposition 2.** if $d_N \leq 0 \quad \forall c_i$ then in all cases judges follow rule (4), and $\pi_i^{[2]} = \pi_0$
Proposition 3. If $\exists c_i' \in (0, 1) : d_N \geq 0 \ \forall c_i \leq c_i'$ then the frequency of ideological rulings is $\pi_{2}^{[3]} = \frac{1 + |c_i|}{2} \forall c_i > c_i'$

Proposition 4. If $\exists c_i^* \in (0, 1) : d_N \geq 0 \ \forall c_i \leq c_i^*$ then the frequency of ideological rulings is $\pi_{1}^{[4]} = \frac{1 + |c_i|}{2} \forall c_i < c_i^*$

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 $c_i = 0; v_i > v_0 \Leftrightarrow \{(c_i, e_m) \in M_1 \text{ and } d_N > 0\}$ (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 $Pr\{x_{i,m} \neq x_{0,m}\} = q (qM \text{ cases are decided by rule(6)})$ and $Pr\{x_{i,m} = x_{0,m}\} = (1-q)$ ($(1-q)M \text{ cases are decided by rule(3)})$. The resulting frequency of rulings in favour of employees is $\pi_i = q \sum_m \frac{f(c_i) \geq 0}{M} + (1-q) \pi_0$. Using (5) and (11) yields $\pi_i = \frac{|q|}{2} \int \{c_i \geq 0\} + \frac{4}{2} (1-\frac{|q|}{2}).$ Since the first term is either $\frac{|q|}{2}$ or zero, we have $\pi_i = \frac{1 + |q|}{2}$ for a Conservative judge and $\pi_i = \frac{1 + |q|}{2}$ for a Labour judge, i.e $\pi_i = \frac{1 + |q|}{2} \forall c_i \neq 0$. Proofs for propositions 3 and 4 follow the same logic. Proposition 2 is trivial. $\blacksquare$

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 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 $c_j^{[1]*}$ of the political party $j$ most likely to appoint them but, once appointed, follow their personal preferences $c_i$, which differ from stance $c_j^{[1]*}$. Strategic signalling potentially allows appointees to behave ex post as non-ideologues following rule (4), or as zealots following rule...
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:

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

(11)

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 \( c_i \sim c^*_i \) 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 \( \pi^{[5]}_i \) is a stochastic process with trend parameter \( \lambda \) 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 \( \pi_i \) 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 \( \text{sgn}(c_i) \)), 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 \( c_i \) the frequency 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, appointments 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. Context and statutory reforms

Since the main aim of this paper is to determine the extent to which judicial decisions are affected by regulatory change, it is appropriate to review the three main statutory regimes governing unfair dismissal protection over the relevant period for our study. Federal (Commonwealth) regulation of unfair dismissals began under the Keating government with the enactment of the 1993 Industrial Relations Reform Act, which utilised the Commonwealth’s external affairs power, and was modeled on the International Labour Organisation’s Convention on Termination of Employment (Convention 158). Dismissals were defined as unfair if third parties (labour courts and tribunals) could, upon review of the evidence, establish them as being ‘harsh, unjust or unreasonable’. A labour court, the Australian Industrial Relations Commission (AIRC) was put in charge of handling unfair dismissal cases and make orders for reinstatement or compensation to unfairly dismissed employees. Australian States, beginning with South Australia in 1972, had already introduced their own dismissal regulations well before Federal law was enacted, and these State provisions continued to be applied after the introduction of the Commonwealth legislation, leaving a complex web of regulations with jurisdictional ambiguities. Many cases were brought in the early years of the Commonwealth’s 1993 Act, generating significant protest from employers. The legislation and procedures were refined in the years which followed until a more workable balance appeared to have been achieved under the renamed Workplace Relations Act 1996 (WRA). The election of the Howard government
in 1996 triggered renewed pressure from employer organisations to remove unfair dismissal regulation, especially for small business. When the Howard government achieved control of both Houses of Parliament in 2005, reform of unfair dismissal regulation was announced as a major component of the government’s WorkChoices changes, embodied in the *Workplace Relations Amendment (Work Choices) Act 2005* (WCh), which came into force on 26 March 2006. Under WorkChoices Commonwealth jurisdiction increased significantly as the legislation utilised the Commonwealth’s corporations power to supersede State jurisdiction for all employment contracts of incorporated businesses. However, the WorkChoices reforms also considerably reduced the coverage of the laws; businesses employing less than 100 workers were exempted from unfair dismissal claims, scope was reduced for employees making claims on procedural grounds, and a new definition of redundancy as a dismissal for ‘genuine operational reasons’ (such reasons only had to exist, dismissals need not be required by these operational reasons) ruled out claims many of which would have succeeded under the previous regulatory regime. The then Department of Employment and Workplace Relations estimates that WorkChoices reduced the coverage of protected employees from 6.7 to 3.7 millions, a 45% reduction in coverage (DEEWR 2012) and indeed, the number of claims lodged to- and arbitrated by labour courts subsequently dropped very substantially between 2006 and 2009 (Freyens & Oslington 2013).

After the election of the Rudd/Gillard Labour government in 2007 the WorkChoices legislation was repealed and replaced by the *Fair Work Act* (FWA) which came into force in July 2009, administered by a new body Fair Work Australia. Coverage of workplaces by Federal legislation increased further with the transfer of State powers to the Commonwealth by all states except Western Australia. Employees of businesses with more than 100 employees were now once again eligible to claim unfair dismissal. Businesses with less than 15 employees were covered by the Small Business Fair Dismissal Code (a streamlined compliance procedure for business, which arguably facilitates the demonstration of fair dismissal to third parties). Employees of businesses with less than 15 employees also faced a longer qualifying period (one year, compared with 6 months for larger firms) and limited redress provided employers can show they have followed the Code. Protection for workers was increased by the restoration of the older definition of ‘genuine redundancy’. In 2013, minor revisions to the *Fair Work Act 2009* saw the qualifying period to lodge a claim extended from two to three weeks after the
dismissal, and some minor changes to the procedural requirements for fair dismissal, and the labour courts were renamed the Fair Work Commission (FWC). In this paper we treat this minor amendment as a separate regime, although we also plan in later research to treat it as a continuation of the FWA regime. The election of the Abbott government in September 2013 has not yet led to new reforms, but they are expected. Australia’s Productivity Commission was recently tasked to conduct an Inquiry into the Workplace Relations Framework (with employment protection featuring prominently as one five areas to be investigated) and is due to report in November 2015. Further insight into the main differences between dismissal regulation under the three regimes can be drawn from the legal literature (Stewart 2012, Stewart & Forsyth 2009, and Chapman (2009).

4.2. Cases-judge matching process

The Fair Work Commission (FWC) 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. Nominations for labour court appointment are 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, but most are lawyers and attorneys (others are former businessmen, human resources managers, industry experts, union delegates or civil servants). Other FWC panels (e.g. Industrial Action, or Minimum Wages) allocate cases to judges on the basis of their industry-specific background but this is not the case for the TEP where case allocation is independent of the specific background of the judge and operates through 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\textsuperscript{17}. There are a few (minor) exceptions to this rule. In the Western Australian representation of the TEP cases are allocated ‘off the clock’ to whichever judge is available at that precise moment. There are also no permanent representations of the TEP in Tasmania and the Northern Territory. All Tasmanian cases in our data are decided by the same commissioner (from the State of Victoria). Matters in the Northern Territory are

\textsuperscript{17}This information was verified and confirmed in November 2011 through telephone interview with one of Fair Work Australia’s Senior Deputy Presidents.
allocated to the member on the roster for the month in which a particular file is listed. Matters will occasionally be allocated to members in states other than where the parties are located. This includes files requiring arbitration as well as those with jurisdictional issues. There are a number of reasons matters may be allocated to an interstate member. Generally, there is at least one member from the New South Wales courts who also sits on the Queensland roster for unfair dismissal arbitrations. It also happens that in times of peak workload or when members are on leave, matters may be allocated to members interstate. Some matters can be dealt with on the papers by interstate members and there are members who may elect to list matters via telephone or video conference all of which allow matters to be dealt with across state borders.

4.3. 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' 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 - June 2015, which provided us with 2876 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.

4.4. 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 (2228 observations). Our initial published transcripts of 2,876 arbitrated cases contain extensive information about each case, including the parties’ claims and outcomes, some limited information on the characteristics of the claiming employees, how the parties are represented, the statutory regime that governs the case, and the commissioners in charge of the formulating a decision. For the purpose of this paper, we excluded 241 cases where one of the parties failed to appear in the court - because these kinds of cases are highly predictable and mostly appear after 2010 (thus introducing bias). As the details included in the transcripts vary a great deal, for some cases, not all relevant information is available for each case. We also excluded 124 cases for which the claims cannot be determined; 35 cases for which the characteristics of the commissioners are missing, and 248 cases where the characteristics of the cases are missing. This results in 2,228 cases in the sample being available for analysis.

In Table 1, we present the descriptive statistics of the sample, as a whole and for each regime. It depicts an overall picture of these dismissal cases. For example, about 18 per cent of the cases are from manufactural industries, about 23 per cent of the disputing employees are in the highest skilled professions (with skills ranked on a scale from 1 to 5), and about 72 per cent of the disputing employees are male. About one in five case alleges procedural unfairness from the employer. Meanwhile, in about one third of all cases, employers’ major counter-arguments against employee allegations are substantive, such as misconduct, breach of contract, etc. A large majority of the disputing parties are represented (71 per cent of employees and 79 per cent of employers, respectively). Geographically, about 64 per cent of the cases are located in New South Wales and Victoria only.
The characteristics of the cases vary to some extent across the regimes. In the later years/scheme, less disputes are from manufactural workers, but more cases are from the most skilled workers. Both the employers and the employees tended to be less often represented in the later years.

These cases are determined by 85 commissioners. The outcome variable we analysis is whether the employee is paid compensation or re-instated, i.e. whether the commissioner’s decision favours the employee. Overall, in about 39 per cent of the cases, the 85 commissioners’ decisions are in favour of the employee, but this rate varies with different regulatory regimes. In particular, under Work Choice, the employees won in only 30 per cent of the cases. It is also the cases that under Work Choice, employees’ major claim of procedure unfairness dropped to only 8 per cent of the cases. This could be because under Work Choice, small and medium-sized firms (employing less than 11 employees) were exempted from unfair-dismissal regulations and this subset of firms is usually more often sued by employees on grounds of procedural unfairness.

As a separate exercise, we plotted the number of cases and the proportion of employees...
FIG. 4

wins awarded over the sample period. Compared to the WRA regime, the number of cases per year was significantly reduced under the short lived WCh regime, but increased dramatically (more than doubled) under FWA and FWC. On the other hand, the employees were more likely to win under WRA period than under any other subsequent regime, and were the least likely to win under WCH. It is believed that FWA/FWC favours more to the employees than the other regimes. The rates of winning by the employees under FWA/FWC are indeed higher than under WCH, however, they seem to be lower than under the WRA regime.

The characteristics of the commissioners are presented in Table 2. We use the appointing government and commissioners’ previous association with unions and employers’ associations as indicators of their political and ideological tendencies. 72 per cent (61) of the 85 commissioners were appointed by a labour government and the rest are by a Coalition government. About 45 per cent of the commissioners have Workers Union background; 31 percent of them have previous employers’ association experiences; and a few of them (about 3.5 percent) previously have had experiences with both union and employer associations. It is quite clear that Labour governments tend to appoint commissioners with union backgrounds and Coalition governments tend to appoint commissioners with employer association backgrounds. It can be calculated that, for example, among the Labour appointed commissioners, 59 percent are with unions backgrounds, and among the Coalition appointed commissioners, 58 per cent have employers’ association backgrounds.

Also presented in Table 2 are the proportions that they awarded the cases to the employees. It seems that the labour appointees tend to favour the employees slightly more. But the variations in the proportions between the commissioners with different backgrounds are
more visible—commissioners with only union background and those with no previous union or employer association experiences tend to judge more often in favour of the employees.

4.5. Empirical model

Since we observe multiple cases decided by each commissioner, we can construct a panel data of the commissioners covering the period of our sample (2001-2015). We assume that the decisions of the commissioners are determined both by the characteristics of the cases, of the disputing parties, and of the commissioners themselves. Suppose the outcome of the jth case in year t judged by commissioner i, $Y_{ijt} \in \{0, 1\}$ (with $Y_{ijt} = 1$ indicating that the employee wins the case), is determined by a range of variables: $D_{ijt}$, a vector of regime dummies; $x_{ijt}$, a vector of case characteristics; $s_i$ a vector of commissioners’ observed characteristics; $\mu_i$ commissioners’ unobserved characteristics; and an idiosyncratic error term $\epsilon_{ijt}$, we specify that the probability for the commissioner delivering a verdict in favour of the employee is given by the following function.

$$
Prob\{Y_{ijt} = 1\} = F(\alpha + x'_{ijt}\beta + D'_{ijt}\gamma + s'_{i}\eta + \mu_i)
$$

(1)

To allow for the possibility that commissioners may behave differently under different regimes, we also include interaction terms between the regimes ($D$) and some of the characteristics of the commissioners. The impact of the regimes and the characteristics of the commissioners are captured by or are proportional to the parameters $\gamma$ and $\eta$, depending how the function $F(\cdot)$ is specified. We consider a few model specifications. First of all, if we assume that $F$ is linear and that the observed explained variables are uncorrelated with the unobserved commissioners’ characteristics $\mu$ (and the idiosyncratic error term), the model becomes a linear probability model and can be estimated with OLS. However, if some of the included explanatory variables are correlated with the error terms, the estimated effects would be inconsistent. This is quite likely since we only observe very limited information on the commissioners. For example, some of their characteristics that are unobserved, e.g., family background, might be correlated with their political inclination. In this case, OLS estimator will be inconsistent. Since we observe multiple cases for each commissioner, we can estimate the standard fixed-effect model to get consistent estimates for $\beta$ and $\gamma$. The drawback is that we are not able to identify the parameters for the time-invariant variable $s_i$. We obtain the estimates of $\eta$ by regressing residuals on the observed characteristics of the commissioners, $s_i$, and...
but these estimates may be inconsistent if $s_i$ and $\mu_i$ are correlated.

Secondly, alternatively, if we assume $F$ is the standard normal function (or logistic function), and that the observed explained variables are uncorrelated with the unobserved commissioners’ characteristics $\mu$ (and the ideosyncratic error term), it becomes a standard Probit (Logit) model. However, it suffers similar problems as the OLS when the unobserved characteristics of the commissioners are correlated with the observed variables. Thus, to take the unobserved heterogeneity problem into account, we estimate Chamberlain’s (1980) conditional logit model (also known as the ‘fixed-effect Logit’ model). Again, the drawback of this estimator is that the impacts of commissioner characteristics, which are time-invariant, cannot be estimated together with those of the regime.

4.6. Testing for randomness

Before we proceed with the analysis per se, we first have to test that cases are indeed randomly matched to commissioners and that we face the conditions of a natural experiment. In table 3A we report the P value of our F-Tests of random assignment of cases for the three largest Australian States, New South Wales (NSW), Victoria (VIC) and Queensland (QLD), under each of the four regulatory regimes. We test for randomness across 10 key variables of our database of cases, and report the number of commissioners (bracketed) and cases for each State and regulatory regime. As can be seen, the results conform us that labour courts do indeed randomly match cases with commissioners. The results for NSW (the most represented State in our sample) are particularly salient with no significant relationship under either of the four regimes (no occurrence of 5% level significance). Significance is only slightly more prominent for the other two Australian States.

4.7. Empirical results

In Table 4A below, we present the results of our four main model specifications and related estimators. The table presents the estimated effects of the regimes and commissioners’ background on commissioners’ decisions in the full sample of cases using the alternative models mentioned above. The estimates from OLS and probit are very close to each other. The results show that the commissioners decided cases differently under the four different regimes (with the WRA regime acting as benchmark). Compared to the WRA regime, commissioners are significantly less likely to award a cases to the employee under the WCh and FWC regimes, but
Table 3A. P-values of F-Tests for random assignment of the cases (NSW)

<table>
<thead>
<tr>
<th></th>
<th>WRA</th>
<th>WCH</th>
<th>FWA</th>
<th>FWC</th>
</tr>
</thead>
<tbody>
<tr>
<td>No of Commissioners</td>
<td>(16)</td>
<td>(14)</td>
<td>(25)</td>
<td>(17)</td>
</tr>
<tr>
<td>Multiple claims by employee</td>
<td>.243</td>
<td>.686</td>
<td>.773</td>
<td>.712</td>
</tr>
<tr>
<td>Multiple claims by employer</td>
<td>.219</td>
<td>.769</td>
<td>.340</td>
<td>.185</td>
</tr>
<tr>
<td>Gender of employee</td>
<td>.418</td>
<td>.788</td>
<td>.419</td>
<td>.535</td>
</tr>
<tr>
<td>Manufacture</td>
<td>.265</td>
<td>.582</td>
<td>.476</td>
<td>.382</td>
</tr>
<tr>
<td>Occupation</td>
<td>.693</td>
<td>.479</td>
<td>.637</td>
<td>.376</td>
</tr>
<tr>
<td>Most skilled</td>
<td>.669</td>
<td>.228</td>
<td>.155</td>
<td>.559</td>
</tr>
<tr>
<td>Employer represented</td>
<td>.676</td>
<td>.579</td>
<td>.132</td>
<td>.155</td>
</tr>
<tr>
<td>Employee represented</td>
<td>.201</td>
<td>.979</td>
<td>.077*</td>
<td>.155</td>
</tr>
<tr>
<td>1st claim employer: procedure</td>
<td>.394</td>
<td>.906</td>
<td>.325</td>
<td>.068*</td>
</tr>
<tr>
<td>1st claim employer: specified</td>
<td>.194</td>
<td>.925</td>
<td>.924</td>
<td>.986</td>
</tr>
<tr>
<td>no of cases</td>
<td>187</td>
<td>92</td>
<td>242</td>
<td>95</td>
</tr>
</tbody>
</table>

** Significant at 5% level; * Significant at 10% level.

Table 3B. P-values of F-Tests for random assignment of the cases (VIC)

<table>
<thead>
<tr>
<th></th>
<th>WRA</th>
<th>WCH</th>
<th>FWA</th>
<th>FWC</th>
</tr>
</thead>
<tbody>
<tr>
<td>No of judges</td>
<td>(34)</td>
<td>(16)</td>
<td>(13)</td>
<td>(17)</td>
</tr>
<tr>
<td>Multiple claims by employee</td>
<td>.225</td>
<td>.389</td>
<td>.950</td>
<td>.908</td>
</tr>
<tr>
<td>Multiple claims by employer</td>
<td>.181</td>
<td>.006**</td>
<td>.745</td>
<td>.121</td>
</tr>
<tr>
<td>Gender of employee</td>
<td>.294</td>
<td>.645</td>
<td>.396</td>
<td>.313</td>
</tr>
<tr>
<td>Manufacture</td>
<td>.949</td>
<td>.154</td>
<td>.801</td>
<td>.825</td>
</tr>
<tr>
<td>Occupation</td>
<td>.380</td>
<td>.962</td>
<td>.494</td>
<td>.034**</td>
</tr>
<tr>
<td>Most skilled</td>
<td>.014</td>
<td>.700</td>
<td>.442</td>
<td>.411</td>
</tr>
<tr>
<td>Employer represented</td>
<td>.078*</td>
<td>.921</td>
<td>.509</td>
<td>.156</td>
</tr>
<tr>
<td>Employee represented</td>
<td>.210</td>
<td>.968</td>
<td>.021**</td>
<td>.702</td>
</tr>
<tr>
<td>1st claim employer: procedure</td>
<td>.301</td>
<td>.901</td>
<td>.397</td>
<td>.222</td>
</tr>
<tr>
<td>1st claim employer: specified</td>
<td>.176</td>
<td>.542</td>
<td>.148</td>
<td>.437</td>
</tr>
<tr>
<td>no of cases</td>
<td>395</td>
<td>68</td>
<td>241</td>
<td>100</td>
</tr>
</tbody>
</table>

** Significant at 5% level; * Significant at 10% level.

Table 3C. P-values of F-Tests for random assignment of the cases (QLD)

<table>
<thead>
<tr>
<th></th>
<th>WRA</th>
<th>WCH</th>
<th>FWA</th>
<th>FWC</th>
</tr>
</thead>
<tbody>
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<td>No of judges</td>
<td>(5 )</td>
<td>(4 )</td>
<td>(13)</td>
<td>(13)</td>
</tr>
<tr>
<td>Multiple claims by employee</td>
<td>.130</td>
<td>.180</td>
<td>.714</td>
<td>.106</td>
</tr>
<tr>
<td>Multiple claims by employer</td>
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<td>.862</td>
<td>.854</td>
<td>.299</td>
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<td>Gender of employee</td>
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<td>.851</td>
<td>.619</td>
<td>.127</td>
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<td>Manufacture</td>
<td>.824</td>
<td>.412</td>
<td>.307</td>
<td>.042**</td>
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<td>Occupation</td>
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<td>.690</td>
<td>.212</td>
<td>.533</td>
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<tr>
<td>Most skilled</td>
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<td>.851</td>
<td>.127</td>
<td>.391</td>
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<td>.054*</td>
<td>.228</td>
<td>.334</td>
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<td>.180</td>
<td>.471</td>
<td>.039**</td>
</tr>
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<td>.233</td>
<td>.037**</td>
<td>.871</td>
</tr>
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<td>1st claim employer: specified</td>
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<td>.851</td>
<td>.325</td>
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<tr>
<td>no of cases</td>
<td>57</td>
<td>21</td>
<td>131</td>
<td>90</td>
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** Significant at 5% level; * Significant at 10% level.
not significantly so under FWA. These findings are confirmed by the results of the two fixed-effect models. As discussed earlier, the OLS (and Probit) results may be inconsistent due to the potential endogeneity problem of the commissioner background variables. The magnitudes of the two fixed-effect model estimates are somewhat different from the OLS (and Probit) estimates. However, they are qualitatively similar to the OLS estimates. According to the Linear Fixed-effect model, the likelihood of commissioners awarding the case to the employee is about 13 per cent less under Work Choice, and about 12 per cent less under FWC (compared to the benchmark WRA regime).

According to the OLS and Probit estimates, commissioners’ background also plays a key role in their judgement. Compared to the commissioners who did not have previous work experiences in either union or employer associations (our benchmark), we find that commissioners who associated with employer associations in their past working life were significantly less likely to award cases to employees. We do not find any significant effect of commissioners’ gender on the ruling of the cases. We do acknowledge that these estimates of commissioner characteristics effects could be inconsistent if there are omitted variables that are correlated with them. However, given that the OLS estimates of the effects of the time-variant variables are not very different from those from the fixed-effect models, it is plausible that the bias of these estimates may not be big.

In addition to the institutional variables and commissioners’ background variables, it seems that commissioners’ judgement is influenced strongly by the ‘characteristics’ of the cases. For example, the likelihood for the employee winning the case is increased by 15 per cent (according to the fixed effect model) if she had professional representatives. Her chance of winning is about 15 per cent higher if her main claim was procedural unfairness and about 10 per cent higher for every additional claim she may have. Meanwhile, employers were 16 per cent more likely to be awarded the cases if they had professional representatives or if they gave out very specific substantive reasons for the dismissals. These results are consistent across all models. These findings are not surprising in that the chance of winning is always higher when the party has a stronger case. For example, it seems reasonable to assume that a party would go to the trouble and expense of hiring a representative only if he or she believes that the expected pay-off from proceedings will be positive, and that hiring a representative only reinforces the likelihood of success.
These findings show that the commissioners are not operating in vacum so that their judgement will always be constrained by the institutional environment that they are operating and influenced their own background. These findings broadly confirm the preliminary results of Booth and Freyens (2014), which were nonetheless obtained with different methods (standard probit estimator, no judge fixed-effects), much less data (1133 cases) and a narrower time window (2001 - 2010).

As noted in the previous section, in some isolated cases, the random tests are rejected. To check whether the findings are robust we have also generated estimates using the New South Wales cases only where the random case allocation test is not rejected for all indicators. The estimated effects are by and large in line with those from the full sample, and are not reported here for the sake of conciseness. The results for the State of NSW show that the FWC and WCh regimes still have negative effects on commissioners’ deciding cases for employees, although the coefficient of WCh is no longer significant. The results also show that the effects of commissioners’ background on the rulings are still significant. Again, the likelihood that the commissioners awarded the cases to employees decreased by about 15 per cent if commissioners had been associated with employers’ associations. The estimated coefficients of the other variables remain close to those from the full sample. It is important to note that by narrowing the analysis to NSW the number of observations substantially reduces from 2,228 to around 600. As a consequence, the standard errors of the estimates become larger, which means the estimates are less precisely estimated.

5. CONCLUSION

Our study examined the effects of regulatory intervention on the decision of labour courts arbitrating unfair dismissal disputes. Specifically, we asked to what extent regulatory reforms to the strictness of unfair dismissal laws (how favourable established rules are to dismissed employees seeking redress) affect the decisions of labour court judges (commissioners). We also asked to what extent judges in charge of arbitrating dismissal disputes use their judicial discretion to apply social values (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
### Table 4A. Estimation results (full sample)

<table>
<thead>
<tr>
<th></th>
<th>OLS</th>
<th>Fixed effect linear</th>
<th>Probit</th>
<th>Fixed effect logit</th>
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<td>-.038</td>
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<td>-.128**</td>
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<td>2,228</td>
<td>2,214</td>
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</table>

Reference groups: the regime of WRA, and commissioners who had neither union or employer association background.

For Probit and Fixed effect Logit models, presented are the marginal effects. 

$t-$values calculated are in the brackets. Robust standard errors are for OLS and Probit.

** Significant at 5% level; * Significant at 10% level.

FIG. 6
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 2876 unfair dismissal cases arbitrated over a 15 year period in Australian labour courts, together with records of judges’ employment history and the political color of the government that appointed them. We tested that judges are, as labour courts allege, randomly matched to cases. Our analysis could then exploit the implicit independence between judges and case characteristics, so that judges of different backgrounds and under different regulatory regimes can be presumed to face the same mix of cases over time. We found strong statutory regime effects in the wake of a major and a minor reform to the strictness of the laws. We also found no significant party appointment effects in our four full specification models (but we note that Booth & Freyens 2014 only found such effects in their partial specifications). On the other hand, judicial candidates’ signalled ideology (their work history) significantly predicts decisions favourable to the employer (by about 10 percent), which is also in line with Booth & Freyens’ (2014) preliminary results (full specification). Our table 2 shows that the Conservative party, when in government, appoints more proportionally more judges who have an employer association background, and our analysis shows that judges with an employer association background are much 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 regulatory contexts such as statutory dismissal law where judges interpret rather than make the law and where judicial processes are not social 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. Our empirical analysis suggests that these effects are stronger for right-wing than for left-wing ideology.

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 not plentiful and that there are institutional controls containing the phenomenon.

REFERENCES


