

JUDICIAL IDEOLOGY IN THE ABSENCE OF RIGHTS: EVIDENCE FROM AUSTRALIA

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Abstract: Research on judicial behavior has yet to systematically examine the extent to which ideology affects voting behavior outside of rights-based issues. This study explores the predictive effect of judicial ideology on judicial votes in a country without a bill of rights: Australia. We develop an *ex ante* measure of judicial ideology and use original data on every Australian High Court decision between 1995 and 2019 to test whether, and in which types of cases, votes of Australia’s justices align with their ideology. The results show that *ex ante* ideology is predictive of voting behavior, regardless of policy area.

Keywords: judicial behavior; law and courts; ideology; rights; attitudinalism; apex courts; comparative judicial behavior

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Are apex courts always political? Contemporary studies of the effect of ideology on judicial voting behavior suggest that the relationship is strong and consistent in cases involving civil, political, or economic rights (Segal and Spaeth 2002; Segal and Cover 1989; Ostberg and Wetstein 2007; Weinshall, Sommer, and Ritov 2018). However, there is less evidence of the comparative strength of the relationship between judicial ideology and voting behavior in cases that do not involve civil, political, or economic rights (Segal and Spaeth 2002; Segal and Cover 1989; Epstein and Mershon 1996; Epstein, Lee et al. 2012; Ostberg and Wetstein 2007; Weinshall-Margel 2011; Weinshall, Sommer, and Ritov 2018; Sag, Jacobi, and Sytch 2009). This is not to claim that no studies have examined ideology and judicial behavior outside of the context of rights. Indeed, in both the US and comparative judicial behavior literatures scholars have examined the relationship between ideology and voting behavior on apex courts in either non-rights based cases or in a sample that includes both rights and non-rights cases (Sag, Jacobi, and Sytch 2009; Staudt, Epstein, and Weidenbeck 2006; Hönnige 2009; Hanretty 2020; Alaire and Green 2017). However, where research has focused on—or included substantial numbers of—non-rights cases, these studies measure ideology as a latent artefact of judicial votes (using item response modelling), rather than as a temporally prior predictor of votes. Thus while it finds that ideology and voting are related in non-rights cases on apex courts, it says little about the predictive effect of judicial ideology on voting behavior (Staudt, Epstein, and Weidenbeck 2006; Popelier and Bielen 2019; Smyth 2005; Hanretty 2020; Hönnige 2009).

In this article we address this gap. The key argument of this article is that judicial ideology measured prior to appointment is predictive of post-appointment voting behavior in both rights-based and non-rights-based cases. We examine the relationship between a judge's reported ideology and their subsequent voting behavior using the High Court of Australia as our case study, and disaggregating judicial voting behavior across rights-based and non-rights-based cases. Australia presents an ideal context in which to study this question. It remains the only liberal democracy without a bill of rights,

and, consequently, the High Court—Australia’s apex court—generally only hears issues involving questions of rights when raised by ordinary statutes or common law (Robinson 2011). Yet, the Court has many institutional features that should encourage judicial ideological expression: tenured judges, control of its own agenda, and lack of electoral accountability (Segal and Spaeth 2002). Further, despite the absence of an entrenched rights-based docket, the Court is an extremely powerful political institution, vested with American-style decentralized judicial review, and final jurisdiction over all federal and state law. The High Court Justices, then, are particularly powerful political actors, with a demonstrated capacity to impact both state and federal public policy (Galligan 1987).

In this study we create an *ex ante* measure of perceived ideology of all Justices of the High Court of Australia sitting on the Court between 1995 and 2019 by analyzing and coding the content of 7,900 paragraphs of all media coverage of each Justice across eight Australian newspapers (Ostberg and Wetstein 2007; Segal and Cover 1989). Further, we create a novel dataset comprising every decision of the High Court between 1995 and 2019. Using a series of cross-nested multilevel models we find that Australian High Court justices do have distinct ideological preferences, and that those preferences can reliably predict voting behavior in all policy areas, net of other salient factors.

Our findings make four key contributions to the literature on comparative judicial behavior. First, we show that judicial policy maximization occurs even in an entrenched democracy without a national bill of rights, suggesting that judicial ideology will find expression wherever institutional design permits. Second, we develop and extend reliable measures for judicial ideology, establishing important foundations for future studies. Third, by examining an example of the family of common law apex courts beyond the US Supreme Court and Canadian Supreme Court, our findings contribute to mapping the landscape of comparative judicial institutions. Finally, by isolating an *ex ante* measure of judicial ideology and determining its relationship with post-appointment behavior, we show that judicial nominators have a keenly important role in subsequent judicial outcomes, even in

parliamentary systems with limited legislative involvement in the appointment process, and that this has important consequences for governance and policy outcomes.

THE ATTITUDINAL CONTEXT

Judges are not motivated merely by the law but also by political factors, even after appointment and in conditions of strong judicial independence (Segal and Spaeth 2002). Among these factors, individual ideology features heavily, with the attitudinal model proposing that judges draw exclusively on their ideological predilections to make decisions that maximize their policy preferences (Segal and Spaeth 2002; Hönnige 2009), and the strategic model positing that judges maximize a variety of considerations, including ideology (Epstein and Knight 2013; Epstein, Landes, and Posner 2013). Both of these theories, then, contend that the judges behave like any other political elite and, like the legislator or executive actor, the judicial actor makes decisions that maximize (at least) their ideological or policy preferences.

However, outside of what can broadly be labeled civil, political, or economic rights issues, the evidence that judges are policy maximizers is far less consistent. US studies examining the effect of ideology on federalism, property law, intellectual property, securities law, and taxation, to name a few, have generally found that ideology is not a strong predictor of outcomes (Sag, Jacobi, and Sytch 2009; Staudt, Epstein, and Weidenbeck 2006). Similarly, while studies of non-American courts with American-style judicial review—including Canada, Israel, and the UK, have demonstrated that *ex ante* ideology predicts judicial voting behavior in rights cases (Weinshall, Sommer, and Ritov 2018; Weinshall-Margel 2011; Grendstad, Shaffer, and Waltenburg 2015; Skiple et al. 2016; Ostberg and Wetstein 2007), there is little evidence of the salience of ideology in non-rights-based cases. Some comparative scholars have found evidence that individual judges' voting behaviors reveal latent ideological positions in both rights and non-rights cases, but do not make claims about the relationship

between pre-appointment ideology and post-appointment behavior (Bertomeu, Pellegrina, and Garoupa 2017; Garoupa, Gomez-Pomar, and Grembi 2013; Hanretty 2020; Su, Ho, and Lin 2018). Further, in the small number of studies that deploy *ex ante* measures of ideology to examine the ideological propensities of judges in plausibly non-rights policy areas, such as federalism, ideology is typically used to explain dissenting behavior rather than voting behavior more broadly (Bagashka and Tiede 2018; Tiede 2016).

Existing Australian studies almost exclusively examine ideology (measured by party of appointing prime minister) as a determinant of dissent (Narayan and Smyth 2007; Schubert 1968; 1969; Smyth 2001; 2005; Weinshall, Sommer, and Ritov 2018; Myers 2020). The conclusion of this literature generally is that, “[f]rom a political science perspective ... there [is] little support for the attitudinal model” (Smyth 2005, 520). This argument has gained significant purchase and perpetuated an assumption that the “High Court is not considered to be highly politicized ... [and] It is seen to have a strong tradition of legalism” (Alaire and Green 2017, 22). However, as Hanretty (2013) notes, some judges simply have a propensity to dissent, whatever the direction, and so dissent is not necessarily measuring ideological preference. Relatedly, the handful of studies that deploy scaling methods based on the votes of the judges incur the same endogeneity problem as described above (Wood 2002).¹

Consequently, we are left with a substantial gap in our understanding of pre-appointment ideology and post-appointment judicial voting behavior, and the attitudinal model remains largely unexamined in the absence of rights. Here we proceed on the premise that ideology can predict judicial behavior in non-rights-based issue areas. We do so in the context of Australia, the only liberal democracy without either a constitutional or statutory national bill of rights (Law and Versteeg 2012),

¹ Other studies on behavior on the High Court examine decisions prior to its status as Australia’s apex court and therefore are not discussed.

removing the ‘overhang’ of rights-based issues as the driver of ideological decision-making. Indeed, as we discuss below, with the exception of the absence of a bill of rights, the Australian High Court largely replicates the institutional conditions of the US Supreme Court, making it an ideal forum for examining the veracity of ideology in the absence of rights.

THE INSTITUTIONAL CONTEXT

The absence of an entrenched rights docket underpins a widely-held perception that the ideological preferences of individual judges are inconsequential in Australia (Alaire and Green 2017; Narayan and Smyth 2007; Smyth 2005): “the sense in which the High Court might be described as ‘political’ cannot be understood without also appreciating that relative to the US Supreme Court, at least, there is an important sense in which the High Court is understood by its Justices and society more generally, and is expected, to be ‘apolitical’” (Cane 2012, 121). This is not to say that the High Court never encounters rights-based issues; while Australia lacks a national bill of rights, the Court presides over the limited number of rights contained in the Australian Constitution as well as several federal statutes that prohibit discrimination on the basis of race, sex, and disability. Further, the Court sits on matters that are conceivably ‘rights-based’ issues, including matters relating to Indigenous Australians and refugees.

There are sound institutional reasons to expect that Australian judges are ideological actors. Established by the Constitution of 1901, the High Court is a court of general jurisdiction that sits at the apex of Australia’s judiciary on matters of both state and federal law, with the power of judicial review. Further, since the formal abolition of appeals from the High Court to the UK Privy Council

in 1986, the Court has been the final word in the country's jurisdictional hierarchy.² Relatedly, since 1984 the Court has had control over which appellate cases it hears, through a special leave process overseen by the Chief Justice. Each of the seven Justices that sit on the Court, including the Chief Justice, is appointed by the Prime Minister at the time of the vacancy, without any constitutional requirement for consultation on appointments, and sit until the age of mandatory constitutional retirement (70 years old) without any electoral accountability or oversight. Indeed, some commentators have recognized the propensity of High Court Justices to make decisions pursuant to their own policy values, and as recently as February 2020, have highlighted the importance of who sits on the High Court for policy entrenchment (Allan 2020; Galligan 1987).

Without electoral accountability and ambition for higher office, and with judicial control of the Court's agenda there is, then, good reason to believe that the Justices of the High Court engage in some form of policy-maximizing behavior (Segal and Spaeth 2002; Hanretty 2013). To that end, we assume that Australia's apex judges are rational policy maximizers who exhibit ideologically distinct characteristics both prior to their appointment and while on the bench. In the following section we outline the data collection and methodology employed to examine whether Australian judges are indeed exceptional in exhibiting non-ideological behavior, or whether they resemble the ideological nature of judges in comparable jurisdictions.

DATA AND METHODS

One of the most difficult aspects of empirically examining judicial voting behavior is the absence of existing reliable and valid measures of judicial ideology, particularly where the question

² While the High Court is required by the Australian Constitution, it was not until 1986, with the advent of the *Australia Acts 1986* (Cth and UK) that the Court was formally the apex court in the Australia.

requires an *ex ante* measure of judicial ideology. With judges not commonly willing to divulge that they are ideological, let alone the direction or strength of their ideology, most previous studies, particularly outside the US, use the ideological direction of the party in government at the time of each judicial appointment as a proxy for judicial ideology. While party of appointing government fulfils the time-order condition of our research question and has high external reliability, it conflates partisanship and ideology (Epstein, Lee et al. 2012; Fischman and Law 2009; Lloyd 1995). It also ignores institutional constraints that might prevent judicial selectors from maximizing their ideological preference outside of that binary measure. For this reason, we follow Segal and Cover and create an *ex ante* proxy measure of ideology independent of party for all High Court Justices sitting from 1995-2019 from content reported in major newspapers reporting on potential appointees (Segal and Cover 1989, 560).³

Extending Segal and Cover (1989), we code all coverage from eight newspapers that mentions an eventual nominee in the six months prior to their appointment. While Segal and Cover's judicial ideology scores are limited to newspaper editorials, we capture all coverage of a nominee. The primary rationale for this is that Australian media coverage of judicial appointments is less voluminous than in the US, requiring us to include the additional news content to create a substantive corpus. However, this only varies the type of content included in analysis, providing additional validity. In addition, including all coverage of a nominee captures the tenor, if not the full extent, of information available to the judicial selector at the time of nomination.⁴ Further, while Segal and Cover's judicial ideology

³ A 2011 comparative study sought to replicate Segal and Cover's method for Australian High Court justices sitting in the 1990s (Weiden 2011). However, foundational details about the parameters of data collection were not provided thus we were unable to rely on and extend these scores.

⁴ We view newspaper articles in the Australian context as a proxy for the information available to the judicial nominator (i.e. the Prime Minister). Of course, information conveyed in newspaper reporting is not neutral, either ideologically nor politically. Reporters and commentators might use their public voice to persuade the Prime Minister toward or away from

scores are limited to newspaper editorials relating to civil rights and liberties issues, our scores include all issues of law and policy (Ostberg and Wetstein 2007; Segal and Cover 1989). This is crucial in the Australian context given the lack of a bill of rights and the importance placed on other policy and legal issues as salient to a judicial nominee to the High Court (Epstein, Lee et al. 2012).

We take newspaper coverage of the nominees from eight Australian newspapers, capturing the major broadsheet in each Australian state: *The Advertiser*, *The Age*, *The Australian*, the *Australian Financial Review*, the *Canberra Times*, *The Courier Mail*, the *Sydney Morning Herald*, and *The West Australian*. The large number of newspapers ensures geographic diversity as well as equal coverage of the two primary media ownership of print newspapers in Australia, Fairfax (broadly center-left ideologically) and News Corp (broadly center-right). To ensure temporal comparability, we study only newspapers that appear in print (although all now also have an online presence) and exclude online-only news sources such as *The Guardian* (Australian edition). We collect all articles on each High Court Justice for a six-month period, with the end of the period being the day the nominee was sworn in as a Justice of the High Court. This wide range was deliberate; Australia has a mandatory retirement age of 70, and in the months prior to the mandated retirement, speculation as to the replacement begins to appear in the media.

Each paragraph in each article was hand-coded by two different coders as either liberal, conservative, moderate, or not applicable (i.e., no ideological content). Following Segal and Cover's coding rules, an ideologically liberal position includes pro-defendant in criminal cases, pro-rights, pro-minorities, pro-union, pro-federal government in federal/state disputes, and pro-economic underdog,

certain candidates, just as American media outlets might report on presumptive Supreme Court nominees with a view to influencing Senators on whether to confirm or reject certain candidates (Cameron, Kastellec, and Park 2013). In such a case, reporting does not necessarily reflect a balanced summary of the future Justice's ideological position, but likely does reflect the information being conveyed to the person (or people) responsible for selecting the Justice.

amongst others. Conservative statements are those with the opposite direction, and moderate statements include those that explicitly ascribe moderation to the nominee or that ascribe both liberal and conservative views in the same paragraph. The ideology score for each Justice (JI) is measured by the formula $JI = \frac{1}{2}(1 + (L - C)/(L + M + C))$, producing an ideology score ranging from 0 (most conservative) to 1 (most liberal), distributed relatively continuously within that range. The final ideology scores for all Justices are reported in Table 1. The mean ideology score is 0.46 and the scores range between 0.06 to 0.85, with a standard deviation in 0.28. The scores are internally reliable at 96.5 per cent (Cohen’s Kappa 0.72, $p=.000$).⁵

TABLE 1: *Ideology scores for Australian High Court Justices, Ranked from Most to Least Liberal*

Justice	Score	Appointing Party	Justice	Score	Appointing Party
Michael Kirby	0.849	Labor (center-left)	Susan Crennan	0.329	Coalition
Stephen Gageler	0.833	Labor	Geoffrey Nettle	0.292	Coalition
Mary Gaudron	0.823	Labor	Patrick Keane	0.270	Labor
John Toohey	0.823	Labor	Kenneth Hayne	0.256	Coalition
Michael McHugh	0.810	Labor	Susan Kiefel	0.228	Coalition
Virginia Bell	0.759	Labor	William Gummow	0.220	Labor
William Deane	0.731	Coalition(center-right)	Darryl Dawson	0.150	Coalition
Robert French	0.616	Labor	Murray Gleeson	0.148	Coalition
Gerard Brennan	0.524	Coalition	Dyson Heydon	0.096	Coalition
Michelle Gordon	0.500	Coalition	Ian Callinan	0.055	Coalition
James Edelman	0.382	Coalition			

Measuring Judicial Votes

To test the impact of judicial ideological on outcomes, we code new data on the High Court of Australia’s decisions in all cases between 1995 and 2019.⁶ We locate the cases by primarily relying on the High Court of Australia’s own online judgments database (High Court of Australia 2020). As

⁵ Details of the coding scheme and the distribution of the scores are available in the Online Appendix.

⁶ We do not include panel decisions relating to special leave (i.e. decisions whether an appeal can proceed before the full court on the merits). Details are available in the Online Appendix.

the information published on the Court website relating to decisions prior to 2000 is often incomplete, we cross-reference the decisions on the Court's website with two respected online repositories, 'Jade' and 'Austlii'. For the purposes of our analysis, we consider only non-unanimous decisions, where at least one Justice dissents from the majority of the panel's determination as to the disposition of the case. This is a common analytic strategy (Hanretty 2020; Segal and Spaeth 2002) and we provide further justification and analysis in the Online Appendix.

In total, we identify 1,758 cases decided by the High Court in the specified period, accounting for 12,306 individual Justice votes. For the purposes of analysis, where multiple cases are heard and decided together we include only the primary case to exclude the possibility of duplication bias. This results in a total of 1,379 cases and 7,677 individual justice votes. Non-unanimous cases account for 36 per cent of cases, with 84 per cent of these non-unanimous cases being cases resulting from an appeal from a lower court.⁷ The final number of non-unanimous cases in the dataset accounts for a total of 2,937 individual votes. We code these votes as either ideologically liberal or ideologically conservative, using the same rules as for the newspaper content analysis to determine ideological direction.⁸ The result is a liberal voting rate for each Justice sitting on the High Court between 1995 and 2019 which serves as the dependent variable, where 1.0 equals 'most liberal' and 0.0 'least liberal'. Table 2 presents the results.

⁷ While the dissent rate on the Australian High Court is significantly lower than the US Supreme Court, it remains the second-highest in the common law court family after the US Supreme Court being the highest (Alaire and Green 2017). However, compared to other common law apex courts, it is the US Supreme Court's dissent rate that is the outlier. For a discussion of the dissent rate, see the Online Appendix.

⁸ In a small number of cases the ideological direction was indeterminate and these votes are excluded from the analysis.

TABLE 2: *Proportion of Liberal Votes by Justice in All Non-Unanimous Decisions, Most Liberal to Least Liberal*

Justice	Proportion	Appointing Party	Justice	Proportion	Appointing Party
Kirby	0.783	Labor	Gordon	0.441	Coalition
French	0.605	Labor	Kiefel	0.432	Coalition
Bell	0.604	Labor	Keane	0.429	Labor
Edelman	0.585	Coalition	McHugh	0.422	Labor
Toohey	0.561	Labor	Crennan	0.422	Coalition
Gaudron	0.538	Labor	Brennan	0.412	Coalition
Gageler	0.531	Labor	Hayne	0.399	Coalition
Nettle	0.515	Coalition	Gleeson	0.296	Coalition
Gummow	0.471	Labor	Callinan	0.294	Coalition
Deane	0.455	Coalition	Heydon	0.253	Coalition
Dawson	0.449	Coalition			

Both the ideology and voting scores have strong face validity. Reflecting on their reputations both prior to and after appointment to the Court, Gleeson, Heydon, and Callinan expectedly have extremely conservative ideology scores and voting records, whereas Kirby, Bell, Toohey, and Gaudron expectedly have very liberal ideology scores and voting records. At the same time, the ideology scores for Deane, Keane, and Gummow seem not to comport with expectations; Deane’s ideology score denotes him as an ideologically liberal appointee, despite being appointed by the conservative-Coalition government, and the scores of both Gummow and Keane indicate conservatism, despite being appointed by the generally center-left Labor Party. However, several of these appointments were widely considered as strategically poor choices by the executive, and contemporaneous media reports suggest the Gummow appointment was influenced by the Labor Party’s desire for respect within the legal establishment, rather than just ideological fit (Merritt 1995).

To explore whether one or more subset of policy issues drives a Justice’s proportion of liberal votes, we create a taxonomy of the corpus of decisions (Hanretty 2020). We take as our starting point the High Court’s own categorization of the issue of the case via the ‘catchwords’ that appear at the outset of every decision issued by the Court (Myers 2020; Stewart and Stuhmcke 2020; Smyth 2005).⁹

⁹ See the Online Appendix for a more detailed explanation and example of the Court’s issue identification procedures.

These catchwords are approved by the Justices prior to the opinion being issued. At the broadest level, the Court categorizes each case as involving either civil law or criminal law, while at the granular level the Court sorts cases into one of numerous legal practice areas (e.g., in 2014 the Court sorted the cases into one of 41 categories) (Stewart and Stuhmcke 2020). Given we are concerned with the public policy perspective of a case—the social or political context—rather than its doctrinal context, we chose to code for the legal issues involved in each case, before sorting those legal issues into categories of general policy areas that reflect the underlying subject matter—or policy issue—of each controversy.¹⁰

The result is a six-category taxonomy of broad policy areas (Epstein, Landes, and Posner 2013): (1) economic issues, (2) criminal law and procedure, (3) public law, (4) traditional common law, (5) civil rights and vulnerable persons, and (6) civil procedure and ethics. Cases are assigned to categories based on their primary policy area; where secondary and tertiary areas are relevant to the case, we create secondary and tertiary variables but our analysis involves only primary policy area variables. Categories one through four are relatively self-explanatory: category one captures economic issues, including corporate and business issues, as well as bankruptcy, property (real and intellectual), consumer and competition law, taxation, and succession. Category two is criminal law and procedure, and includes all issues relating to state or federal substantive criminal law or matters of criminal procedure such as evidence. Category three is public law, and includes all matters of state and federal constitutional and administrative law; and category four contains matters relating to traditional common law, namely tort, contracts, equity, and trusts.

Categories five and six require some further explanation. Category five is identified as ‘civil rights and vulnerable persons’. Although Australia does not have a national bill of rights, it does maintain a limited number of statutory anti-discrimination statutes, including racial, age, and disability

¹⁰ The Online Appendix includes a complete list of the sub-issues that comprise the six categories of the Issue variable.

discrimination legislation. This category captures cases relating to those statutory regimes, as well as the limited cases relating to common law rights and the two state-level statutory bill of rights. The category also includes decisions relating to otherwise vulnerable persons, specifically Indigenous Australians, immigrants, claims relating to the environment, and family law issues (e.g., child protection). Category six (civil procedure and ethics) includes issues relating to evidence and procedures in civil litigation, issues relating to the legal profession and ethics, and inherent power of the court to oversee lower courts in civil cases. The category, then, largely captures decisions in civil proceedings to allow or disallow certain actions or evidence, as well as decisions relating to the legal profession itself.

Table 3 presents voting behavior by Justice in each of the policy areas. The results demonstrate relative consistency across policy areas for most Justices: for instance, Kirby is reliably liberal across each domain, while Callinan is reliably conservative. Other Justices demonstrate variance across domains, with Dawson notably liberal on criminal cases but conservative on civil rights, and Heydon particularly liberal on economic cases. This is almost certainly due to variation in the number of cases heard by each Justice across policy areas: for example, Gageler has a range of 0.67 across policy areas and Gordon a range of 0.60, but each only heard only two cases in the procedure and ethics category.

TABLE 3: *Liberal Voting by Policy Issue, in Non-Unanimous Cases*

Name	Initials	Economic	Criminal	Public	Common	Civil Rights	Procedure & Ethics
Kirby (L)	MK	0.76	0.85	0.73	0.68	0.86	0.56
Gageler (L)	SG	0.61	0.50	0.53	0.45	0.33	1.00
Gaudron (L)	MGG	0.45	0.79	0.33	0.56	0.82	0.45
Toohey (L)	JT	0.56	0.42	0.62	0.60	1.00	0.50
McHugh (L)	MM	0.48	0.29	0.41	0.60	0.41	0.42
Bell (L)	VB	0.65	0.57	0.56	0.67	0.33	0.50
Deane (C)	WD	1.00	0.50	1.00	-	-	0.00
French (L)	RF	0.50	0.57	0.56	0.53	0.60	0.80
Brennan (C)	GB	0.43	0.33	0.36	0.67	0.33	0.60
Gordon (C)	MMG	0.60	0.38	0.58	0.50	0.50	0.00
Edelman (C)	JE	0.75	0.60	0.29	0.67	0.67	0.50
Crennan (C)	SC	0.46	0.31	0.42	0.70	0.27	0.67
Nettle (C)	GN	0.33	0.65	0.67	0.43	0.40	0.00
Keane (L)	PK	0.60	0.33	0.35	0.43	0.33	0.50
Hayne (C)	KH	0.43	0.34	0.43	0.38	0.40	0.44
Kiefel (C)	SK	0.54	0.45	0.35	0.37	0.38	0.33
Gummow (L)	WG	0.46	0.51	0.53	0.45	0.40	0.52
Gleeson (C)	AMG	0.36	0.12	0.44	0.40	0.27	0.40
Dawson (C)	DD	0.13	0.67	0.60	0.60	0.00	0.33
Heydon (C)	DH	0.51	0.15	0.45	0.21	0.13	0.25
Callinan (C)	IC	0.33	0.40	0.33	0.25	0.21	0.36

Note: Dashes indicate the Justice did not sit on a non-unanimous case in the specific issue area. Initials are reproduced in Figure 1.

ANALYSIS: IDEOLOGY AND VOTING BEHAVIOR ON THE HIGH COURT

The analysis is divided into three stages. First, we examine the link between ideology and voting behavior by undertaking a simple association test between ideology and voting behavior to ascertain the baseline validity of our hypotheses. Second, we test our main hypothesis that *ex ante* ideology is predictive of voting behavior using non-nested multi-level models. Third, we estimate the predictive effect of ideology on voting behavior in discrete areas of law and policy that aims to determine whether ideology is isolated to specific issue areas or, rather, is evident across the body of the High Court’s decisions. First, to establish the existence of a bivariate relationship we conduct a simple test of

association between newspaper ideology score and liberal voting using a weighted Pearson correlation.¹¹ We find a strong positive correlation between ideology and voting behavior in both all non-unanimous cases ($r = 0.78$), and in all non-unanimous cases that originate in a lower court ($r = 0.81$). The following section builds a multivariate model to further examine this relationship.

Multilevel Logistic Regression Models

We estimate a series of multilevel regression models to demonstrate the effect of our key ideological explanatory variable at the Justice-level (Newspaper Ideology Score). Our models predict the likelihood of a liberal vote by a judge in an Australian High Court case between 1995-2019, taking into account the ‘crossed’ multilevel data structure, where each case is seen by several Justices, the Justices sit on many cases across different areas of law, and the Court is presided over by different Chief Justices (Gelman and Hill 2006). This non-nested multilevel data structure is modelled with random intercepts across four levels: The Justice ($n=21$), area of law ($n=33$), Chief Justice ($n=4$), and the case itself ($n=530$).¹² The subsequent incorporation of a Justice-level measure of ideology should increase the precision with which we estimate a given judge’s probability of making a liberal decision on any given case.

Our model specification may be summarized as follows:

$$Pr(y_i = 1) = \text{Logit}^{-1}(\beta_0 + \alpha_{j[i]}\text{Justice} + \gamma_{k[i]}\text{Case} + \delta_{l[i]}\text{Issue} + \varphi_{m[i]}\text{CJ}),$$

where α_j , γ_k , δ_l and φ_m are random intercepts for Justices, cases, issue area and Chief Justice respectively. Each set of intercepts are normally distributed with group level explanatory variables specified at each level. For example, Justice-level intercepts are the result of a Justice-level regression:

¹¹ Weighted by the number of cases for each justice in the dataset.

¹² We test additional specifications for random intercepts in the Online Appendix.

$$\alpha_j \sim N(\psi_0 + \psi_1 \text{ideology}_j, \sigma_\alpha^2)$$

The intuition for this model specification is that the Justice-level ideology variable will improve our estimation of each Justice’s likelihood of voting liberally in two ways. First, it adds information to the model through the pooled ‘fixed effect’ coefficient. Second, it accounts for the clustering of decision-making at the Justice-level and enable an improved estimation of the Justice-level intercepts (when compared with model without Justice-level predictors).

In building our model, we make three simplifying assumptions on case selection, covariate inclusion, and specification of random intercepts. First, as indicated above, we analyze non-unanimous cases only. In the Online Appendix we discuss this reasoning further and provide supplementary analysis showing that there is no substantive change to the relationship between ideology and vote direction when including unanimous cases to the analysis. Second, we make an inclusive choice in considering the potentially different dynamics of cases with varying numbers of Justices hearing each case. In contrast with the US Supreme Court, the Australian High Court sits in a variety of panel combinations when hearing cases. In fact, only 194 of 504 non-unanimous cases were heard by a full seven Justice panel of the Court, the others being heard by combinations of three, four, five and six Justices. Given the large number of cases heard by subsets of the Court rather than *en banc*, we included the entire corpus of High Court merits decisions in order to provide a robust analysis of High Court decision-making.¹³ Third, for the sake of parsimony, our models contain a limited number of co-

¹³ Notably, panel selection is made at the discretion of the Chief Justice and therefore plausibly motivated, at least in part, by the ideological of the Chief Justice and therefore a *prima facie* confounding factor for ideological voting behavior. However, in the Online Appendix we compare models based on panel size and find no evidence of a significant impact of panel size on the probability of a liberal vote.

explanatory variables at both the individual Justice level and case level that have been shown to influence voting behavior in apex courts, and that do not introduce potential post-treatment bias.¹⁴

The Justice-level control variables we include are Justice specialization, lower-court experience, and gender. Specialization refers to each Justices' area(s) of legal specialization, for example criminal law. Multiple studies have demonstrated that a judge's issue-area expertise is a 'primary determinant' of ideologically consistent behavior, and that issue-specific expertise amplifies an individual Justice's ideological propensities (Miller and Curry 2009; Judd and Downing 1990). Further, specialization may lead to a direct effect on voting patterns if specialists see proportionally more cases in their area of specialization than other Justices (Hanretty 2020).

While specialization is generally measured post-appointment, based on a proportion of cases heard or opinions written in a specific area of law in the court being studied (Brenner 1984; Maltzman and Wahlbeck 2004), to avoid post-treatment effects we measure specialization as pre-appointment, i.e. an indicator of specialization prior to the Justice taking their seat on the High Court (Hanretty 2020). We propose a new measure of specialization, a Justice's legal practice area prior to any judicial appointment, and triangulate this with an existing measure, lower court specialization, which allocates specialization based on the proportion of cases each Justice sat on in specific areas of law prior to the Justice's apex court appointment (Hanretty 2020). To capture a Justice's legal practice specialization, we examine the records of each Justice's legal practice as a barrister to capture up to three areas of specialization and map these onto our six-category taxonomy of broad policy areas. We measure a Justice's lower court specialization by coding the legal issues for each Justice's 30 most recent cases on a lower court and again mapping these legal issues onto our six-category taxonomy. Both forms of

¹⁴ This leaves open the question of omitted variable bias. In the Online Appendix we compare models including extra Justice-level variables and a model including both extra Justice and case-level variables with no substantive consequences for our main findings.

specialization are measured as binary scores of whether a Justice has above-average experience in each field, with a maximum three specializations for each Justice. Given that four of the Justices in our dataset did not sit on appellate lower courts, legal practice specialization provides a more comprehensive measure than lower court specialization and thus we present the results from legal practice specialization only.¹⁵

We also include pre-appointment experience as an independent variable. Studies indicate that apex court judges who have served on lower courts prior to their apex court appointment are more likely to be socialized into their judicial role and consequently more deferential to precedent and less inclined to vote ideologically (Epstein, Landes, and Posner 2013). We account for this potential pre-appointment confounder and measure experience by the number of years the Justice sat on any lower court prior to their appointment to the High Court. Justices with no prior appellate experience are included in the analyses and scored as zero.¹⁶ As a final Justice-level control, we include gender in light of a recent Australian study evidencing the impact of attorney gender on judicial voting behavior, as well as the various studies demonstrating that holding all else equal, female Justices are more likely to vote in a liberal direction than male Justices (Boyd, Epstein, and Martin 2010; Peresie 2005; Smyth and Mishra 2014).

¹⁵ We provide results from analyses including lower court specialization in the Online Appendix which show no substantive changes to the results.

¹⁶ In the Online Appendix, we also include post appointment experience—operationalized as the number of years a Justice has sat on the High Court prior to any given case in the dataset. We test the assertion that ideological voting depends on experience using an interactive model. For instance, it may be that our measures of ideology are only effective in predicting vote choice in the first years of a High Court Justice’s career, since judges are liable to change their views over time. However, we find that justices vote more ideologically as their tenure on the High Court progresses.

In addition to Justice-level confounders, we include two case-level control variables that studies have demonstrated impact judicial voting behavior in the US Supreme Court, namely lower court direction and lower court dissent (Cross and Nelson 2001; Epstein, Landes, and Posner 2013). Both variables measure details about the decision of the court from which the case was appealed to the High Court. Lower court direction measures the ideological direction of each case in the court below. Prior studies have suggested that ideological distance between the lower court decision and the Justice's ideology increases the propensity to vote to overturn the lower court decision (Epstein, Landes, and Posner 2013). The ideological direction of the lower court decision was determined by the outcome in the High Court. If the High Court allowed the appeal, the lower court's decision direction is the opposite of the Court's, and if the Court dismissed the appeal, the lower court's decision direction is the same as the High Court's. Lower court dissent measures whether the decision of the court below the High Court was unanimous or non-unanimous. Prior studies have shown that not only does the presence of a lower court dissent increase the probability of apex court review, but also the probability of a unanimous apex court decision (Beim and Kastellec 2014; Epstein, Landes, and Posner 2013). Further, the presence of a lower court dissent indicates that case is highly ideologically salient, given the propensity for lower court dissent aversion (Beim and Kastellec 2014). Lower court dissent, then, is a binary variable that denotes the presence or absence of a dissent in the decision of the court from which the case in the High Court was appealed.

Table 4 presents three models of liberal voting in the High Court. Model 1 includes random intercepts and newspaper ideology scores only. Given the random effects, this foundational model incorporates a substantial amount of information about the likely direction of voting from a given Justice and, along with the newspaper ideology score, this model provides a robust estimate of any given Justices' probability of casting a liberal vote in any given case. Model 2 expands Model 1 by incorporating multiple pre-appointment Justice-level measures that may confound the relationship

between ideology and voting. Model 3 additionally incorporates case-level variables and is the most comprehensive model, including both case-level and Justice-level variables.¹⁷

¹⁷ Model 3 has a reduced number of observations, as original jurisdiction cases are excluded.

TABLE 4: *Non-Nested Multi-Level Models with Random Intercepts: Determinants of Liberal Votes*

	Model 1	Model 2	Model 3
Ideology Score	1.52*** (0.35)	1.51*** (0.26)	1.84*** (0.25)
Justice Pre-Appointment Characteristics			
Specialization			
Economic		0.18 (0.31)	0.45 (0.32)
Criminal		-0.67*** (0.19)	-0.72*** (0.18)
Public		-0.97** (0.29)	-1.11*** (0.29)
Civil		-0.03 (0.25)	0.05 (0.24)
Common		-0.92** (0.33)	-1.02** (0.32)
Experience		0.02 (0.01)	0.02 (0.01)
Female		-0.13 (0.15)	-0.18 (0.14)
Case Characteristics			
Lower Court Direction [ideologically liberal]			-0.38** (0.14)
Lower Court Dissent			0.30* (0.14)
Constant	-0.79*** (0.24)	-0.09 (0.39)	-0.31 (0.39)
N	2937	2937	2458
Log Likelihood	-1856.58	-1847.66	-1523.01
AIC	3725.16	3721.32	3076.03
BIC	3761.07	3799.13	3163.13

Note: Significance at *** $p < .001$; ** $p < .01$; * $p < .05$. This table presents estimates from non-nested multilevel models. Random intercepts specified are: Case Number ($n=501$ in M1 and M2; $n= 429$ in M3); Primary Issue Sub Area ($n=33$); Chief Justice Reign ($n=4$); and Justice ($n=21$).

In both Models 2 and 3, ideology remains positive and a statistically significant predictor of voting behavior, even in the presence of numerous possible confounders. Gender has no observable effect on rates of liberal voting in Model 2, and although the standard errors are too large to achieve statistical significance, the coefficients for gender are negatively signed and suggest that female Justices

do not disproportionately cast liberal votes. While the effects of specialization in specific fields is not easily interpretable, as specializations are measured as dummy variables and are not mutually exclusive, Justice specialization in pre-appointment legal practice does not affect the relationship between ideology and voting with the coefficient for ideology remaining strong and positive in both Models 2 and 3. However, they do suggest that, that net of judicial ideology and other Justice-level factors, voting in criminal, public law, and common law cases is disproportionately conservative. Similarly, there is no relationship between lower court experience and the probability that a Justice will vote liberally in either Model 2 or 3. Liberal lower court decisions have a negative effect on liberal voting at the Justice level, while non-unanimous decisions in lower courts positively predict liberal voting at the Justice level.

Figure 1 (right) provides substantive meaning to our regression results by plotting predicted probabilities at the Justice-level (using output from Model 3) with whiskers indicating upper and lower 95 per cent confidence intervals. Post-estimation simulation gives the probability of a Justice voting for a liberal outcome, conditional on a linear combination of coefficient effects, including Justice ideology. The left panel gives a simple scatter diagram for comparison. It aggregates Justice votes to the proportion of liberal votes over the course of each Justices HCA career on the y-axis, with justice level ideology on the x-axis. The following section explores the relationship between ideology and specific types of cases.

FIGURE 1: *Predicted Probabilities with Judge-Level Ideology Score, All Non-Unanimous Cases*

[Figure 1 Right Panel about here] [Figure 1 Left Panel about here]

Note: The panel on the left shows a scatter plot of Justice ideological position and aggregate proportion of liberal votes by that Justice. Black initials denote Labor (left-wing) appointees, while grey initials denote Coalition appointees (right-wing). The panel on the right presents predicted probabilities of a liberal vote for 21 Justices of the High Court of Australia (Model 3), conditional on their pre-appointment ideology. Initials indicate individual Justices (see Table 3). Black initials denote Labor (left-wing) appointees, while grey initials denote Coalition appointees (right-wing).

Estimating the Relationship Within Specific Policy Areas

We expect that ideology will find expression in each subset of the law, not simply in areas that are analogous to civil rights-based cases in other legal systems. To explore this claim, we use the same specifications from Model 3 and estimate the effect of ideology conditional on policy area. Table 5 presents the estimates from a varying slopes non-nested multilevel model. With civil rights cases as the reference category, we find significant reductions in the gradient of the slope for each non-civil rights category, indicating that ideological voting is strongest in the civil rights category. Yet, while ideology appears to be strongest in the area of civil rights and vulnerable persons, Figure 2 (with conditional predicted probabilities derived from Model 4) indicates that a strong ideology effect is also present in other areas of law, indicating that ideological behavior is not conditional on an entrenched bill of rights or a strong rights culture. Common law cases (which includes traditional common law issues such as tort, contract, equity, and trusts) also show strong ideological effects. This is largely unsurprising: traditional common law issues frequently involve claims reflective of rights-based claims, with a strong party versus an ‘underdog’. In addition, these common law categories involve ‘judge-made law,’ where the judiciary itself develops the law through its own decisions, rather than legislation creating those causes of action. The result is judicial decision-making free of legislative constraints and open to ideological persuasion.

Similarly, public law cases involve few formal constraints on judicial actors; the High Court has the power of judicial review and supremacy in matters of constitutional interpretation, and the political branches cannot overturn the Court's decisions except by passage of a constitutional amendment.¹⁸ Conversely, numerous studies have the extent to which judicial voting behavior is impacted by informal constraints imposed by the legislative and/or executive branches in public law matters (Jacobi 2006; Segal 1997; Segal, Westerland, and Lindquist 2011). While we cannot state whether the Court is responsive to various informal constraints of the political branches or not, our analysis suggests that matters of constitutional law are inherently ideological.

Similar results are evident in criminal law and procedure cases: ideology is a strong and positive predictor of voting behavior. This is unsurprising, as criminal cases are often comparable to civil rights ones, involving decisions on the rights of defendants, challenges to jury decisions, sentencing decisions and procedures, pre-trial conduct of judges and police, and admittance of evidence. It is intuitive, then, that liberal ideology generally would predict liberal voting on criminal cases.

Economic relations is comprised of issues such as corporate law, taxation, bankruptcy, and property law. Comparatively, US and Canadian studies find mixed results in economic cases (Segal and Spaeth 2002; Staudt, Epstein, and Weidenbeck 2006; Ostberg and Wetstein 2007). Nevertheless, in the Australian context, we find evidence of a strong relationship between judicial ideology and voting behavior in economic policy cases. This finding is consistent with Myers (2020) who examined High Court voting behavior in the context of economic cases involving the federal government. Myers found that the Justices behave differently toward the federal government as a litigant in economic cases depending on the strength of the economy, concluding that the 'results present evidence that

¹⁸ Australian Communist Party v The Commonwealth [1951] HCA 5, (1951) 83 CLR 1 (9 March 1951).

challenges the ... assumption that judges are motivated by economic factors and innocent of political or ideological considerations' (Myers 2020, 11).

Finally, the coefficient for the ideology score in procedure and ethics cases is positive, but significantly lower than in civil rights cases (and the lowest among the six policy categories). This category of cases largely involves civil procedure and evidence cases—those issues that are constrained by technical rules of procedure and evidence. This suggests that in cases where Justices are *ex ante* constrained by technical rules, and the issues do not directly involve the substantive allocation of benefits and burdens, Justices are less willing (or able) to act ideologically.

Ultimately, while prior studies have demonstrated that evidence of ideological voting is most likely in rights-based claims (Segal and Spaeth 2002; Epstein, Lee et al. 2012), our results show that ideological behavior is not conditional on an entrenched bill of rights or a strong rights culture. Instead, we largely replicate findings from the US and other countries where protection of the underdog is a classic predictor of liberal voting behavior in rights-based claims across the corpus of decisions. Even more significant is the fact that these results occurred with a very general *ex ante* measure of ideology—i.e. a measure that includes a Justice's ideological predispositions on issues including, but not limited to, rights—whereas equivalent US studies measure ideology based entirely on rights-focused newspaper reports.

TABLE 5: *Ideology and Liberal Voting by Policy Issue: Logit Mixed Model with Random Intercepts*

<i>Predictors</i>	Model 4		
	<i>Estimate</i>	<i>CI</i>	<i>p</i>
Ideology Score	3.36	2.31 – 4.42	<0.001
Case Level			
<i>Area of Law</i>			
Common Law	0.77	0.08 – 1.47	0.029
Criminal Law and Procedure	0.46	-0.23 – 1.15	0.194
Economic Relations	0.93	0.24 – 1.63	0.009
Procedure and Ethics	1.31	0.34 – 2.28	0.008
Public and Constitutional Law	1.03	0.20 – 1.85	0.015
Lower Court Disposition [liberal]	-0.48	-0.77 – -0.19	0.001
Lower Court Dissent	0.33	0.04 – 0.61	0.026
Pre-Appointment Characteristics			
<i>Specialization</i>			
Economic	0.48	-0.16 – 1.12	0.142
Criminal	-0.79	-1.15 – -0.44	<0.001
Public	-1.15	-1.73 – -0.58	<0.001
Civil	0.06	-0.42 – 0.53	0.811
Common	-1.04	-1.67 – -0.40	0.001
Experience	0.02	-0.00 – 0.04	0.072
Female	-0.18	-0.46 – 0.10	0.200
Interactions			
Ideology × Area [Common Law]	-1.45	-2.66 – -0.24	0.019
Ideology × Area [Criminal Law and Procedure]	-1.34	-2.53 – -0.15	0.027
Ideology × Area [Economic Relations]	-1.73	-2.93 – -0.52	0.005
Ideology × Area [Procedure and Ethics]	-2.71	-4.36 – -1.06	0.001
Ideology × Area [Public and Constitutional Law]	-1.67	-3.10 – -0.25	0.022
Constant	-1.01	-1.97 – -0.05	0.040
Random Effects			
	<i>Intercept Variances</i>		<i>Group Sizes</i>
τ_{00} HCDBeaseld	0.95		N _{ChiefJustice} 4
τ_{00} primaryIssueSubArea	<0.01		N _{HCDBeaseld} 422
τ_{00} justice	<0.01		N _{primaryIssueSubArea} 31
τ_{00} ChiefJustice	0.06		N _{justice} 21

Note: n=2,416. $\sigma^2= 3.29$. p-values<0.05 in bold.

FIGURE 2: *Predicted Probabilities of Liberal Voting by Policy Area*

[Figure 2 about here]

Note: This figure presents predicted probabilities for the probability of a liberal vote in a non-unanimous case with 95% confidence intervals shaded in grey.

Accounting for Uncertainty in Measuring Judicial Ideology

Thus far our modelling strategy assumes perfect measurement of pre-appointment Justice ideology when estimating its effect on voting behaviour. To our knowledge, this is true of virtually all tests of the attitudinal model using newspaper measures of ideology (cf. Zorn and Caldeira, 2008) despite the acknowledged need to account for measurement error in explanatory variables (Treier and Jackman 2008), and the explicit incorporation of measurement uncertainty into endogenous votes-based models of judicial ideology (Martin and Quinn 2002). Given considerable variability exists between Justices in terms of the number of newspaper articles and ideologically relevant paragraphs that contribute to each Justice's ideology score, measurement uncertainty is a serious issue that may undermine the reliability of our ideology scores.

To this end, we propagate the uncertainty around the measurement of ideology by deploying a two-step strategy: First, we obtain simple estimates of uncertainty for each Justice's ideology score; second, we incorporate those uncertainty estimates into a Justice-level Bayesian estimation of the effect of ideology on voting with a measurement model component.

First, we provide estimates of uncertainty of the measurement of judicial ideology. Since our ideology measures for each Justice are bound between 0 and 1, a simple approach to provide a reasonable source of measurement error might be the standard deviation for a proportion. ($SD = \sqrt{i(1-i)/n}$), where i is the estimate of the ideology score for each Justice and n is the number of ideological paragraphs coded for each justice. However, given the presence of moderate paragraphs in each ideology score, the standard error for the proportion would over-estimate the variance in an ideology score where there are a large proportion of moderate paragraphs for each Justice. For example: in simple numeric terms, the standard error for an ideology score with 10 moderate paragraphs (score: 0.5), 0 liberal paragraphs (score: 1), and 0 conservative paragraphs (score:

0.5) would be 0, since there is no variance from 0.5 in the sample. However, when applying the standard error for a proportion, the estimate of the standard error would be 0.16.

We account for the impact of moderate paragraphs on ideological variability with resampling, estimating standard deviations with 10,000 bootstrapped ideology estimates for each Justice. Table 6 shows how our estimates of standard deviation increase both because of smaller sample size (see Dawson for whom there were only 10 ideological paragraphs available) and of ideological inconsistency. For example, Chief Justice Brennan had 9 conservative paragraphs, 2 moderate paragraphs and 10 liberal paragraphs. His standard deviation is similar in size to Dawson, despite having more than twice the number of ideological paragraphs.

TABLE 6: *Uncertainty in Measurement of Judicial Ideology by Justice with Bayesian Estimates*

Justice	Number of ideological paragraphs	Observed Measures	
		Ideology	Bootstrapped SD
Brennan	21	0.52	0.11
Deane	13	0.73	0.08
Dawson	10	0.15	0.11
Toohey	31	0.82	0.05
Gaudron	31	0.82	0.06
McHugh	28	0.81	0.05
Gummow	66	0.22	0.04
Kirby	63	0.85	0.03
Hayne	43	0.26	0.05
Callinan	129	0.06	0.01
Gleeson	65	0.15	0.03
Heydon	120	0.10	0.03
Crennan	85	0.33	0.04
Kiefel	68	0.23	0.03
French	160	0.62	0.03
Bell	58	0.76	0.05
Gageler	15	0.83	0.07
Keane	63	0.27	0.05
Nettle	12	0.29	0.08
Gordon	24	0.50	0.09
Edelman	17	0.38	0.07

TABLE 7: *Bayesian Estimates of Justice-Level Liberal Voting Rates*

	Model 5 (with propagated error)			
	Mean	SD	2.5%	97.5%
Ideology Score	1.80	0.41	0.96	2.56
Justice Pre-Appointment Characteristics				
<i>Specialization</i>				
Economic	0.39	0.44	-0.53	1.26
Criminal	-0.67	0.30	-1.24	-0.06
Public	-1.15	0.46	-2.07	-0.23
Civil	-0.08	0.39	-0.91	0.65
Common	-1.14	0.53	-2.18	-0.10
Experience	0.02	0.02	-0.02	0.06
Female	-0.22	0.24	-0.69	0.25
Case Characteristics				
Lower Court Direction [ideologically liberal]	-0.39	0.15	-0.69	-0.10
Lower Court Dissent	0.31	0.15	0.01	0.60

Note: N=2,458. The model was run using Hamiltonian Monte Carlo (with 4,000 iterations reserved for burn in) and contained four MCMC chains run for 1,000 iterations each after burn in. The two right hand columns for each model display the 95% credible intervals for each regression coefficient.

Second, we estimate a Bayesian model of the rate of liberal voting at the Justice, equivalent to Model 3, correcting for the measurement error in the independent variable by including a measurement model of the observed ideological positions, varying according to the estimates of their standard deviations from the bootstrapping procedure. The model was implemented using the measurement error option within the brms package in R (Bürkner 2017). In the Online Appendix, we provide a simple alternative specification with explicit parameterization, showing substantively similar results.

The results are presented in Table 7. We find that Model 5 is comparable in to Model 3, with similar sign, magnitude and significance for each coefficient. However, when accounting for the error in measuring ideology, we find that the estimation of standard error increases from 0.25 to 0.41, a factor of approximately two thirds. Despite this increase in the standard error, we do not find evidence for an attenuation of effect size, nor an estimate of the coefficient indistinguishable from 0.

CONCLUSION

The relationship between judges' pre-appointment ideology and their subsequent behavior on the bench has long been central to judicial behavior research. We contribute to this literature by examining whether the strong predictive effects of *ex ante* judicial ideology on judicial voting behavior extends beyond rights-based cases. The findings of this study can be grouped under two broad themes and one important implication for further study. First, judicial ideology matters beyond rights-based cases. Our empirical results suggest that judges' *ex ante* ideology predicts their voting behavior on the apex court in Australia, the High Court, in both rights-based and non-rights-based cases. These findings make a distinct contribution to a small but growing field of judicial politics that examines the behavior of judges outside of the US and demonstrates the need to develop distinct and contextually appropriate theories and measures for judicial preferences and voting behavior. Our findings highlight the importance of mapping judicial policy preferences in both rights and non-rights-based cases, and provide valuable insights for scholars interested in judicial voting behavior in countries where public policy not directly touching on civil, political, and economic rights is as equally, or more, salient than policies that implicate those rights.

Second, our study emphasizes the continuing relevance and importance of *ex ante* measures of judicial ideology for improving our understanding of judicial selection outside the US. While ideology measures based on judicial voting—item response scores and similar—can tell us about judicial behavior on the bench, *ex ante* measures are critical to understanding who gets selected to the judiciary and why. That is, the temporal distinction is important not only for determining the association between a judge's ideological predisposition and their subsequent voting behavior, but also for what it reveals information about selectors' motivations. The *ex ante* ideological measure, then, reflects a precise temporal moment: when judicial nominators are finalizing their shortlist of nominees, and deciding on a final candidate. Post-appointment item-response scales of ideology serve a particular purpose in the literature, but *ex ante* measures should not be forgotten. Moreover, future research might

compare *ex ante* and *ex post* expressions of ideology, to examine possible effects of appointment on ostensible ideology.

These findings also have direct implications for the selection of apex court judges outside of the US. While the overtly politicized selection process for US Supreme Court judges has meant that we understand deeply the incentives and motivations involved that in that process, the opacity of executive-only appointments—and potentially other selection mechanisms—has meant that the political nature of judicial selection outside of the US context is underappreciated. We demonstrate that regardless of the selection mechanism, knowledge of a judge’s ideological predisposition necessarily means that ideology affects the selection process. This is perhaps even more so when the process is opaque. Consequently, our findings highlight the significant role of judicial selectors for subsequent judicial outcomes and the longevity of government policy, even in parliamentary systems with limited legislative involvement in the appointment process.

Our research sheds new light on the predictive role of judicial ideology in voting, which highlights avenues for future research. We focus specifically on delineating ideological effect on voting in both rights-based and non-rights-based cases. In demonstrating the effects of judicial ideology across the corpus of decisions we show that, in order to ensure the longevity of their policies, governments will select ideologically homogenous judges across all core policy issues, not just rights-based ones. We hope our work will encourage future research exploring the impact of ideology on judicial votes in all issues of public policy, not just rights-based issues, as well as research that examines the importance of the relationship between the ideological preferences of the judicial selector and judicial outcomes in systems where the selection of judges is less overtly politicized than the US.

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