

The Apex Court's Dilemma: Rulemaking Alignment Under Hierarchical and Political Constraints[†]

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Abstract

Under what conditions do apex courts align with lower courts in constructing legal rules? Some scholars posit that apex courts rulemaking is shaped by lower courts' expectations, while others focus on their responsiveness to external political actors. However, it remains unclear how apex courts prioritize between these competing demands. I examine this tension by investigating how the operating conditions of the European Court of Justice shapes the take-up of the same legal bases when answering domestic court's referrals. Using a novel dataset of over 5,000 referral applications from 2008 to 2023, I employ a graphical causal identification strategy to disentangle the effects of judicial hierarchy, political constraints, and legal alternatives. Unexpectedly, I find that the chief mechanism of misalignment is not the threat of an override but the provision of alternative legal options. Decisively, this mechanism also tempers the positive alignment effect exerted by domestic high courts.

Keywords: *Judicial Hierarchy; European Union; High Courts; European Court of Justice; Rulemaking*

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We have to deliver... to the satisfaction in particular of the national judges that are asking the questions. This is... our first addressee... It's not academia... but it's the judge that has asked the question, and we want that... she receives an answer that she can work with.

And then the Commission is in every proceeding, telling us, "Well, the directive effectively intends to regulate this and that," and so on and so forth. And of course, the Member State in question would say, "No, no, no, this is going way too far."

— Vice President to the ECJ, Thomas von Danwitz,
Borderlines Podcast #3, 1st November 2024

INTRODUCTION

RULEMAKING IS A HALLMARK FEATURE OF APEX COURTS within a judicial hierarchy (Carrubba and Clark 2012; Lax 2007). Besides disposing of cases (choosing winners and losers), judges write opinions that contain legal rules which become vertically binding to their subordinates, and signal to outside parties which legal arguments may be viable in future litigation (Fox and Vanberg 2014; Hansford et al. 2013; Huang et al. 2019; Lax 2012; Liu 2020; Tiller and Cross 2006). At the same time, a hierarchical judicial structure implies a degree of delegation to lower courts, where they constantly conduct rulemaking experiments to address new factual scenarios, legal inconsistencies, or shifting societal demands (Beim 2017; Carrubba and Clark 2012; Clark and Kastellec 2013; Hansford et al. 2013). Lower courts, in turn, act as decentralized repositories of legal rules, which may later be reaffirmed, modified, or overturned upon reaching an apex court docket.

Institutionally, this places apex courts at the center of the judicial system, where their opinions matter for both the lower courts and governments. With this dual role, scholarship has pursued two separate puzzles: how rulemaking operates in hierarchical judicial systems and how political contexts shape apex court decision-making.

On one hand, theories of judicial hierarchy examine how apex courts manage and leverage the multi-level court system. Inter-court judicial behavior theories focus on the strategic crafting of legal rules made to maximize top-down enforcement (Carrubba and Clark 2012; Clark and Kastellec 2013). In this view, lower courts supply legal issues, rules, and facts through their decisions but do not always act as strict implementers of higher court doctrines (Klein 2002; Kornhauser 1995). On the other hand, theories of court decision-making behavior explore how apex courts adapt their decisions to signals from external actors (Caldeira and Wright 1988; Carrubba et al. 2008; Helmke 2002; Songer et al. 1995). In responding to cues from lawmakers or the executive, apex courts may strategically refine their reasoning to preempt the possibility of being overridden, confronted with non-compliance, or undermined in their legitimacy (Larsson and Naurin 2016; Lupu and Voeten 2012; Staton and Vanberg 2008). At the intersection of these perspectives lies a tension: apex courts must balance rulemaking to satisfy both the hierarchical demands of lower courts and pressures

from external political actors —yet such dual optimization is rarely feasible.

This tension is particularly pronounced in the European Union judicial system, where the European Court of Justice (ECJ) crucially relies on domestic courts. The ECJ receives most of its cases via preliminary references, which are both submitted and implemented by these courts.¹ Historically, this relationship has characterized domestic courts as the “main allies” of the ECJ in the judicial construction of Europe (Alter 1996; Slaughter et al. 1998; Weiler 1991). Consistent with any judicial hierarchy, the ECJ expects domestic courts to incorporate its case law into domestic proceedings involving EU law, even when a preliminary reference is unnecessary (Davies 2012).² These institutional logics imply that the ECJ faces latent, yet ever-present, threats of disengagement and non-compliance from these national courts as it cannot coerce them to submit cases or use its rulings in their day to day work. Thus, rulemaking alignment, being the extent to which the an apex court rule preference coincides with one from a lower court, is not only an informational response, but a way to maintain court comity and cooperation from domestic courts. And by extension, misalignment may be perceived as dismissive by domestic judges and deter them from referring cases in the future (van Gestel and de Poorter 2019, Ch.4; Bobek 2008; Leijon and Glavina 2022).

At the same time, the ECJ is influenced —and sometimes constrained— by threats of override and non-compliance from the member states. Once a case arrives in Luxembourg, any member state can submit their written observations to the Court expressing their legal views.³ And in cases dealing with secondary law, if enough member states oppose a particular interpretation of EU law, they can credibly threaten an override through the enacting of new legislation in the Council by Qualified Majority Voting (QMV) (Carrubba et al. 2008; Larsson and Naurin 2016). More pressing, however, are threats of systemic non-compliance by the affected member states (Carrubba et al. 2008). These threats of non-compliance are particularly pernicious because they undermine the ECJ’s authority and the effective enforcement of EU law, potentially leading to fragmented legal interpretations and inconsistent application across member states.

Leveraging this EU tension, I examine how hierarchical pressures from domestic referring courts and member states observations shape the ECJ’s rulemaking alignment. Specifically, I assess the correspondence between legal points raised by domestic courts and those addressed by the ECJ. To capture this, I develop a novel citation-based measure that quantifies the citation overlap between referring courts and the ECJ, grounded in set-theoretic and information-theoretic principles.⁴

I focus on citations to EU law because they form the legal scaffolding upon which legal

¹From a legal lens, Broberg and Fenger (2021), recount that “When the Court of Justice gives a preliminary ruling, in principle it does not decide on the resolution of the actual case before the national court, but only gives a ruling on the validity or interpretation of one of the legal acts referred to in Article 267(1)” (2021, pp.399).

²As a case in point, since 2009 the Research and Documentation Directorate of the ECJ has published *Reflète*, a periodical presenting the application of EU law by national courts.

³As established in Article 267 of the Treaty on the Functioning of the European Union (TFEU) and specified in Article 96 of the CJEU’s Rules of Procedure (RoP).

⁴I build on the assumptions of Arnold et al. (2023); Clark and Kastellec (2013); Larsson and Naurin (2016); Lupu and Fowler (2013). For full details see Appendix D.

rules are created. When a domestic court submits a question for a preliminary reference, it constructs a legal argument about how one or more EU legal points should be interpreted—either highlighting potential incompatibility of domestic laws or granting the provisions novel effects on their own. Removals or additions alter the scope of legal effects towards the subjects of the legal rule itself (Schmid et al. 2022).⁵ By measuring overlaps and divergences in cited legal points, the metric captures how the ECJ aligns with the legal reasoning signaled by domestic courts.

Theoretically, I build on research of judicial hierarchy and court decision-making behavior to derive testable expectations for the EU setting. First, the ECJ cannot adjudicate every case dealing with EU law across the Union, its own resource constraints incentivize it to craft legal rules that will more likely be used by domestic courts (Beim 2013; Davies 2012). This resource limitation, combined with the fact that referral applications comprise the vast majority of instances to issue new rulings, engenders a persistent *hierarchical disengagement* pressure from domestic courts.⁶ Second, the ECJ's role is not confined to its hierarchical position. Member states have an institutionalized right to submit observations in every case, and when disputes involve secondary law only, they can signal a risk for a *credible override*, since such legislation is frequently revised in the Council (Carrubba et al. 2008; Larsson et al. 2017). Third, when cases deal with primary law, the risk of an override is lowest since that would require unanimous Treaty revision by all 27 member states. Yet, the ECJ is still subject to the influence of *legal alternatives* presented by submitted observations which sometimes convey a threat of non-compliance (Larsson and Naurin 2016). On balance, the ECJ seeks to be responsive to both stakeholder spheres: domestic courts in the application and interpretation of EU Law and the member states who ought to implement and enforce those particular interpretations.

Empirically, I evaluate these implications using a new dataset (N=5017) encompassing all referral applications submitted to the ECJ between 2008 and 2023. Using a graphical causal identification strategy I disentangle the effects of hierarchical disengagement, credible override, and legal alternatives. First, I measure rulemaking alignment between the referring court and the ECJ. Second, I estimate their marginal effects to test whether each pathway produces effects in the theorized direction: expecting positive effects for hierarchical disengagement, negative effects for credible override, and smaller negative effects for legal alternatives. Third, I examine the conditional effects under two sets of conditions: credible override $\times$ hierarchical disengagement, and legal alternatives $\times$ hierarchical disengagement. These cross-tabulations reveal whether the base effects vary across institutional contexts mirroring the balancing act performed by the Court.

The results reveal a fundamental paradox in judicial politics that challenges conventional wisdom about apex court responsiveness. I find that member states exert their

⁵This is not to say that changing a single citation always produces an entirely different legal rule. Often it only adjusts the scope of applicability, nevertheless, this shift in framing is sufficient for assessing alignment in line with the view of Friedman (2006) that urges political science to take “law seriously”.

⁶For analytical precision, hierarchical disengagement pressure refers to the ECJ's expected cost of reformulating the initial framing from a national court's referral. This cost being, that the referring court is less likely to use its caselaw or refrain from requesting more preliminary rulings in the future.

greatest influence not through credible threats of legislative override, but through the provision of alternative legal arguments —precisely when they lack formal power to override ECJ decisions. While hierarchical pressure from domestic high courts consistently increase rulemaking alignment as expected, legal alternatives from member states significantly decrease alignment even in referrals from domestic high courts, demonstrating that the Court is more responsive to exigent political demands than managing its own judicial hierarchy. These findings suggest that influence through legal reasoning is more powerful than formal institutional leverage, fundamentally re-framing our understanding of how apex courts navigate competing pressures in multi-level judicial systems.

THEORY

Scholars of judicial behavior now widely agree that the primary function of apex courts is to create legal rules, rather than rectify lower court mistakes. Previous studies posited that apex courts primarily function to police lower court decisions and rectify “bad ones” in order to instill discipline within the judicial hierarchy (Caldeira and Wright 1988; Cross and Tiller 1998; Songer et al. 1995). However, more recent formal models suggest that within judicial hierarchies, apex courts are strategically better off leveraging the information generated by lower court decisions to refine and optimize their doctrinal preferences (Beim 2017; Hansford et al. 2013; Kornhauser 1995). This dynamic grants lower courts a degree of agenda-setting power, allowing them to shape legal rules by highlighting specific issues or factual patterns.

Evidence of lower court influence has been documented across jurisdictions. In the United Kingdom, Bowie et al. (2024) find that justices on the UK Supreme Court incorporate the language from lower court decisions into their own opinions, indicating, at the very least, that a high court relies on the lower court’s opinion for justification (2024, pp.232). Similarly, in the United States, Corley et al. (2011) demonstrate that the US Supreme Court (SCOTUS) consistently incorporates language from lower federal court opinions into its majority opinions. And, Hansford et al. (2013) find that SCOTUS uses citation practices that closely resemble those of the U.S. Circuit Courts, underscoring the importance of citations in the rulemaking process between higher and lower courts.

However, apex courts have also been found to adapt their decisions to the political context that they face (Carrubba et al. 2008; Glick 2009; Staton and Vanberg 2008). Since executive and legislative actors have the power of the sword and the purse to implement their rulings, apex courts who want their rules enforced must grant these political actors some consideration. Particularly, in the EU, where member states observations (*amici curiae* briefs) have been shown to significantly affect judicial behavior when solving case dispositions (Cheruvu 2025, pp.12; Larsson and Naurin 2016, pp.375; Carrubba et al. 2008, pp.440).⁷ Against this backdrop, the next sections flesh out the main lessons from dominant strands of rulemaking in judicial hierarchy and of apex court decision making under political constraints.

⁷In this paper I use legal *amici curiae* briefs and observations interchangeably.

Optimizing Hierarchy: managing the judiciary

Theories that focus on their decisions for managing the judicial hierarchy emphasize how apex courts need to optimize for lower court compliance with their rules (Carrubba and Clark 2012; Clark 2016; Lax 2012; Sunstein 1999). Lower courts are considered “strategic actors” that have their own preferences and do not blindly follow vertical *stare decisis* (Carrubba and Clark 2012; Hansford et al. 2013). While not outright dismissive, lower courts retain discretion about what precedents to cite when making their judgments. This careful construction of arguments-through-law is not innocuous, but directly shapes the range of possible legal outcomes of a case (Arnold et al. 2023).⁸ This implies that the rules crafted by the apex court must account for the expectations of lower courts rather than simply maximizing the apex court’s own doctrinal preferences (Callander and Clark 2017; Clark 2016; Jr 1991; Lax 2012). When apex courts outright disregard lower courts, they risk undermining the application of their decision rules throughout the polity by engendering an animus relationship with the lower court judges; as it is lower court judges who retain discretion whether to use or not use the apex court’s rules in their day-to-day work.

Following the flow of legal information, lower courts act as agenda-setters within a parallel and distributed legal system.⁹ In this system, the apex court uses lower court decisions to shape novel legal rules. A key insight emerges from this structure.

The position in hierarchy of the lower court transmits an implicit threat of disengagement when framing a legal rule. As one moves up in the judicial tier, lower court preferences become more authentic and they *should* care more about having them upheld by the apex court (Zorn and Bowie 2010, pp.1219). In tandem, this means a corresponding increase in the quality of the rules produced by lower courts, that will jointly influence their uptake by the apex court as it seeks to ensure future usage by lower courts (Clark 2016; Lax 2012). With limited resources, the apex court is more likely to adopt a rule from a ‘higher’ lower court. These higher lower courts produce higher-quality legal rules that require less rectification, saving valuable time and resources. By contrast, lower-quality rules coming from ‘lower’ lower courts often necessitate changes in cited legal sources, making the process more resource-intensive (Lupu and Fowler 2013; Lupu and Voeten 2012). This occurs because judges and clerks must engage in research to determine which sources to cite, while ensuring they are appropriately discussed to avoid criticism for inaccurate citations. More importantly, even when an apex court disagrees with the legal rule, it might adopt it to avoid overt confrontation that causes disharmonious effects within the hierarchy it oversees.

In sum, optimizing hierarchy theories provide a key pathway for rulemaking misalignment between an apex court and a lower court: hierarchical disengagement.

⁸For example, in the EU context, a national court determining whether a member state is liable for breaches of EU law decides whether or not to apply the *Francovich* test based on its interpretation of the relevant facts and if the criteria are met.

⁹I draw an analogy to parallel and distributed systems to highlight how lower courts operate simultaneously across multiple legal issues, rather than sequentially. This generates multiple and sometimes competing legal interpretations that higher courts may reference, adapt, or refine.

Bounded Discretion: adjusting to political signals

Unlike the aforementioned theories that focus on bottom-up rule creation within judicial hierarchies, bounded discretion theories emphasize the influence over case outcomes – specifically, determining who wins and who loses (Carrubba et al. 2008; 2012). More recent accounts, however, suggest that political actors consider both ‘law and politics’ simultaneously, recognizing that different case dispositions reflect distinct legal rules (Dederke and Naurin 2018; Larsson et al. 2017). Evidence of the importance of law is the inclusion of legal experts in modern governments who can decode the legal rules used by judges. The central premise of these theories is that apex courts strategically adjust to external political demands (Carrubba et al. 2008; Glick 2009; Larsson and Naurin 2016). To navigate these pressures, courts may preemptively employ vagueness to mitigate political backlash (Staton and Vanberg 2008), and strategically use citations to strengthen their legal justifications, particularly when operating in a more politically adverse environment (Larsson et al. 2017).

From an informational standpoint, external political actors reveal their positions after litigants and lower courts have already framed the legal issue and it has arrived at the apex court. At this stage, strong executives or legislators may signal their stance via *amici curiae* within court proceedings (Caldeira and Wright 1988; Gleason and Provost 2016; Larsson and Naurin 2016). Explicitly, these briefs contain their view of the identified legal issue and their distilled interpretation of law for how the case should be decided (Dederke and Naurin 2018). Implicitly, they convey a threat of override when backed by a legislative majority or a threat of willful non-compliance when the cost of implementing the ruling is too high (Carrubba et al. 2008). By extension, these briefs serve as the chief mechanism of influence for external political actors by engaging in legal argumentation that demand of the court due consideration. That is, the political actors do not just provide obstructive political threats but alternative legal visions to the court that might be plausible alternatives to the initial framing.

This logic provides two key insights. First, when a credible threat of an override exists the apex court is more likely to circumvent the implied legal rule in the lower court’s question. A credible threat of override poses a serious challenge to the court’s legitimacy, as it subordinates judicial interpretation to a politically preferred exegesis (Carrubba et al. 2008, pp. 440; Larsson and Naurin 2016, pp. 375). Yet, a court’s legitimacy is essential for enforcing its judgments because it lacks the power of the sword and, therefore, requires buy-in from external political actors to enforce its rulings, and that legislative majorities refrain from quashing them. In turn, submitting an *amicus* brief signals a credible threat of override from the political actor, as it indicates that the actor cares about the issue at hand and has distilled its stance into legal arguments for the apex court to see. Thus, the more political constituents submit briefs, the more credible the threat becomes.

Second, the submission of multiple *amici curiae* briefs also supplies the apex court with plausible legal alternatives that may differ from the initial framing (Dederke and Naurin 2018; Larsson and Naurin 2016). As the number of briefs increases, the probability that the apex court keeps the original framing of the legal rule decreases. In practical terms, more

briefs increase the number of readily available legal rules in the court's repertoire, providing potential alternative framings to the one implied by the original question. The apex court receives legal briefs from political actors, who use legal arguments to persuade the court by highlighting relevant factual patterns or omitted laws.

In sum, bounded discretion theories offer two pathways of political influence: threat of a credible override and legal alternatives.

Strategic Rulemaking Alignment by the ECJ

The EU's preliminary reference procedure provides an ideal empirical setting for testing these dynamics because it institutionalizes both hierarchical agenda-setting by lower courts and formalized political intervention by member states making the theoretical mechanisms directly observable. First, the preliminary reference procedure grants domestic courts a strategic agenda-setting power in shaping binding interpretations of EU law with little formal ECJ 'docket control' (Šadl and Wallerman 2019). Under this procedure cases arise from three main scenarios. The first scenario is when a domestic court in the member states determine that a national law *might* conflict with certain EU legal provisions. The second one occurs when the domestic court recognizes that EU law applies but is unclear about how to interpret it and thus seeks clarification from the ECJ. And the third happens when litigants question the validity of an EU act and the domestic court sends a referral asking for such legal review.¹⁰ To better illustrate this, I will use the *Roca Álvarez* case original framing and discuss two alternative ones to highlight differences across these types.¹¹

Based on the original framing, *Roca Álvarez* exemplifies the first scenario. In this case, the High Court of Justice of Galicia inquired the ECJ whether Article 37.4 of the Spanish Workers' Statute was compatible with Article 13 of the then EC Treaty and Directive 2002/73/EC. This legal question arose because the Spanish statute provided that employed mothers, but not employed fathers, were entitled to paid leave. Essentially, the question was whether the Spanish law should be 'disapplied' in light of Article 13 and the directive, to ensure that fathers are similarly guaranteed parental leave. However, the Galician court could have framed its question in a manner characteristic of the second scenario too. It might have asked whether Article 13 of the Treaty and Directive 2002/73/EC confer a right to parental leave for fathers even in the absence of the conflicting Spanish statute. In doing so, the domestic court would have identified a set of EU legal provisions applicable to specific factual circumstances that endow individuals with an EU claim-right. Alternatively, under the third type of case, the private company, Sesa Start, could have flipped the case on its head by questioning the validity of Directive 2002/73/EC on the basis of a provision of primary EU law, prompting the Galician court to make the referral asking the ECJ to invalidate secondary law.¹² Across all three instances, when the ECJ receives the prelim-

¹⁰ According to the *Foto-Frost* doctrine, national courts have no jurisdiction to declare EU acts invalid. When a question of validity of an EU act arises that national court must refer the question to the ECJ for a preliminary ruling if it has doubts about the act's validity. See Case C-314/85, *Foto-Frost v Hauptzollamt Lübeck-Ost* [1987], ECLI:EU:C:1987:452.

¹¹ C-104/09, *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010], ECLI:EU:C:2010:561.

¹² Only EU secondary law can be declared invalid whereas Treaty provisions cannot, though they can

inary reference, it already includes the case facts, pertinent national laws (if applicable), and crucially a set of EU laws invoked for the potential creation of a legal rule —illustrating the importance of the referring court for the activation of this process.

Second, this procedure forces the ECJ to engage with legal issues raised by domestic courts when crafting its judgments, providing a straightforward way to compare rulemaking alignment.¹³ As documented in qualitative and empirical legal studies, once the ECJ receives a preliminary reference, it often reformulates the questions, diverging from the legal issue originally raised by the domestic court (Ghavanini 2022; Šadl and Wallerman 2019; van Gestel and de Poorter 2019). A key aspect of this rephrasing practice involves altering, omitting, or adding EU legal provisions, which ultimately shape the scope and nature of the resulting legal rule (Sarmiento 2012). For instance, the omission of EU treaty provisions can lead to a narrower rule confined to the subject matter of secondary legislation, whereas retaining treaty provisions results in broader more durable legal interpretations.

As noted in interviews conducted by Hoevenaars and Krommendijk (2021) with Irish and Dutch judges from both lower and higher courts, reformulation is problematic because it indicates that the ECJ misunderstood the original question, making it difficult to obtain an answer to “[...] the question you want them to answer” —all the more so considering the amount of careful work put into the “formulation of the questions” (2021, pp. 76). Similarly, results from van Gestel and de Poorter (2019)’s study of Supreme Administrative Court judges and their referrals indicate that “the ECJ rarely responds directly to the argumentation of referring courts,” a tendency that has instilled a feeling of distrust among these supreme judges (2019, Ch.3, Ch.4). In turn, if the ECJ does systematically follow these practices, it risks discouraging domestic judges from making referrals in the future, thereby starving itself of cases essential for the development and enforcement of EU law.¹⁴

Third, the ability of EU member states to submit observations after the initial framing by domestic courts institutionalizes a pathway of external political influence on rulemaking alignment.¹⁵ When a legal question is salient enough for the member states to submit their legal briefs, the ECJ must incorporate political considerations to its base calculus focused on doctrinal preferences and managing the judicial hierarchy. This is evident through its judicial opinions where the ECJ regularly discusses the arguments presented by member states —either to refute them, agree with them, or merely acknowledge their existence (Lindholm et al. 2025). Thus, these briefs transmit potential alternative legal visions and oftentimes threats of override and non-compliance (Cheruvu 2025, pp.12; Larsson and Naurin 2016, pp.375; Carrubba et al. 2008, pp.440). This dynamic showcases that the ECJ’s decision-making process is not only shaped by its hierarchical position but also by the po-

still be subject of re-interpretations.

¹³The way rulemaking alignment is conceptualized and measured is explained in the measuring section and further detailed in Appendix D.

¹⁴In 2023, the ECJ received 558 new cases via the preliminary reference procedure which accounted for 63% of the court’s overall workload.

¹⁵Specifically, Article 23 of the Statute (Protocol No. 3 TFEU) enables national courts to shape EU law through referrals while allowing member states, the Commission, and select EU institutions to intervene, a process formalized by Article 96 of the RoP, which structures these pathways of hierarchical and political influence.

litical pressures exerted through member state involvement, which can influence both the outcome and interpretation of EU law.

While these dynamics are institutionalized in the EU’s preliminary reference procedure, the underlying tension between hierarchical management and political responsiveness characterizes any apex court operating in multi-level governance systems where lower courts retain discretion and external political actors possess override or non-compliance capacity. Before detailing my research design in the following sections, I first outline the key assumptions underlying my analysis and present my hypotheses.

Building on the theoretical insights of the previous sections, I advance a theoretical model of conditional rulemaking alignment to derive testable implications stemming from three influence pathways —two of political management (*hierarchical disengagement* and a *credible override*) and one from information (*legal alternatives*) (see Table 1). This model takes into account the relevant set of regularized steps and their sequence in the making of legal rules by the ECJ. That is, it follows the flow of legal information and their respective political management pressures as it flows through the EU legal system into established legal rules.

Table 1: Theorized Effects of Judicial Hierarchy and Political Constraints on Rulemaking Alignment

	Cause	Mechanism	Direction of Effect
<i>Political Management Pathways</i>	(1) Hierarchical disengagement	Hierarchical disengagement pressure by domestic courts increases rulemaking alignment with the ECJ.	+
	(2) Credible override	A credible threat of override from EU member states reduces rulemaking alignment with the ECJ.	–
<i>Informational Pathway</i>	(3) Legal alternatives	Alternative legal arguments to the ECJ decreasing rulemaking alignment with domestic courts.	–

First, the ECJ must balance its doctrinal preferences while maintaining its relationship with domestic courts. Each referral carries the risk of hierarchical disengagement, particularly if the Court’s legal rules deviate significantly from the referring court’s initial framing, as noted by Dutch and Irish judges (Hoevenaars and Krommendijk 2021; van Gestel and de Poorter 2019). This does not mean the ECJ cannot reformulate questions for greater legal precision, but rather that it does so selectively, depending on the perceived importance of the legal issue and the status of the referring court. For this reason, domestic high courts pose the greatest threat of disengagement because they wield authority over their jurisdictions and can reassert control over them “to influence the development of EU law” (Pavone and Kelemen 2019, pp. 352). Moreover, as integral parts of their domestic judicial systems, higher courts benefit from lighter caseloads, greater experience, and more resources, leading to higher-quality referrals in the first place (van Gestel and de Poorter 2019, Ch.4). And, in the post-Lisbon era, domestic high courts have been more willing to engage with the ECJ, as seen by first ever referrals by the German and Spanish Constitutional Courts *Gauweiler*

(2015) and *Melloni* (2013) showing the importance of EU wide constitutional rules.¹⁶ This increases instances for potential rulemaking alignment. Ultimately, when the ECJ receives a referral from a higher domestic court, it can streamline its reasoning and formulate a judgment based on the legal provisions already outlined by the referring court. As a result, I expect that ECJ's rulemaking alignment increases with the level of the referring court. This leads me to my first hypothesis.

Hypothesis 1 (H1) A higher position of the referring court in the judicial hierarchy increases rulemaking alignment between the ECJ and the referring court.

At the same time, the ECJ's ability to manage judicial rulemaking is tempered by external pressures from member states, particularly when it perceives a credible threat of an override (*Carrubba et al. 2008; Larsson and Naurin 2016*). It would be futile for the ECJ to maintain a harmonious relationship with all national courts and issue judgments based on its preferred legal rules if member state governments did not consider them legitimate or decided to override them. After the Lisbon Treaty, most areas of EU secondary law became subject to QMV exposing them to this threat. In turn, judges deciding these cases “unnecessarily” constrain themselves given their incomplete information about political preferences (*Larsson and Naurin 2016*, pp.382-383). Thus, submitting observations signals a credible threat of override from the member state, as it indicates that the actor cares about the issue at hand and has distilled its stance into legal arguments for the Court to consider.¹⁷ In turn, the more political constituents submit their briefs, the more credible the threat becomes.

I expect these political management pathways to have independent effects on rulemaking alignment, since cases differ both in the level of the referring court and in the number of submitted observations. At the crossroads, however, I anticipate that these effects will be conditional on each other, reflecting the ECJ's balancing act. Specifically, the positive effect of hierarchical disengagement is moderated by the threat of override, while the negative effect of override is moderated by the court level of the originating referral.¹⁸

To illustrate this interaction, consider a referral from the High Court of Justice of Galicia with no member state observations. Here, hierarchical disengagement should have a strong positive effect on rulemaking alignment, as the court's authority carries more weight and is the only consideration. If, however, several member states submit observations, the threat of override should dilute — or even overpower— the hierarchical disengagement effect. Conversely, in a referral from the German Constitutional Court with several member state observations, the override threat remains, but it should be tempered, if not outweighed, by the hierarchical disengagement pressure, since the ECJ would want to avoid misalignment

¹⁶Case C-62/14, *Gauweiler and Others v. Deutscher Bundestag*, 16 June 2015, ECLI:EU:C:2015:400.; Case C-399/11, *Melloni v. Ministerio Fiscal*, 26 February 2013, ECLI:EU:C:2013:107.

¹⁷Since EU member state observations documents are not disclosed for my analysis period, I validate this assumption using external hand-coded data detailed in Appendix F.

¹⁸This does not imply that the two variables causally affect one another in my model. Rather, their variation across instances can be examined in a set-theoretic way. Functionally, they interact only at the outcome level —namely, in the balancing act performed by the Court.

and preserve its relationship with such an influential court. These expectations lead to my next two hypotheses.

Hypothesis 2 (H2) In cases dealing only with EU secondary law which is subject to QMV, a greater number of member state observations decreases rulemaking alignment between the ECJ and the referring court.

Hypothesis 3 (H3) In cases dealing only with EU secondary law which is subject to QMV, the negative effect of member state observations on rulemaking alignment weakens as the referring court's judicial hierarchy increases; equivalently, the positive effect of judicial hierarchy on alignment is stronger when member state observations are fewer.

Beyond the pressures of the political management pathways, information too plays a crucial role in rulemaking alignment. The ECJ receives informational inputs from the EU member states' observations, which provide the Court with alternative legal visions. Given that these briefs are submitted after the initial framing from the referring court, but before the judgment is issued, they can sway the Court to reformulate the legal issue and preferred rule when writing its judgment (Larsson et al. 2017). That is, in areas of law that are not subject to QMV and specially for cases that deal with EU primary law, member states observations still decrease rulemaking alignment. This is not because the Court believes the member states would override its decisions, but because it is swayed by the legal arguments presented. This information pathway shows that observations are not simple objections to developing EU law, but alternative legal visions of how EU caselaw should develop. As recently shown by Lindholm et al. (2025), the ECJ's makes this explicit by addressing these briefs in their judgments not only positively but by negatively referencing briefs as a tool to increase the precision of the case law and to foster its legitimacy by showing responsiveness to external parties (2025, pp.21).

Still, just as in the credible override pathway, the influence of alternative legal visions is moderated by the referring court's position in the judicial hierarchy. When a case is referred by a domestic high court and concerns EU primary law (or domains not subject to QMV), the ECJ is less likely to be swayed by alternative legal arguments in member state observations because a stronger disengagement threat raises the cost of misalignment with the high court's initial framing.

Accordingly, the greater the number of member state briefs supplying alternative legal visions, the more they can reduce the Court's alignment with the referring court's rule-making. This effect, however, is weaker for referrals from high courts, where the threat of disengagement is most pronounced. These considerations yield the fourth and fifth hypotheses.

Hypothesis 4 (H4) In cases dealing with EU primary law, the number of EU member state observations decreases rulemaking alignment between the ECJ and the referring court.

Hypothesis 5 (H5) In cases dealing with EU primary law, the negative effect of member state observations on rulemaking alignment weakens as the referring court's judicial hierarchy increases; equivalently, the positive effect of judicial hierarchy on alignment is stronger when member-state observations are fewer.

DATA AND MEASUREMENT

To evaluate rulemaking alignment between domestic courts and the ECJ, I assembled a novel dataset covering all preliminary references submitted between 2008 and 2023.¹⁹ The dataset contains 5,017 referral applications comprising 14,127 legal questions and 26,149 citation points from the referring courts. Complementarily, it includes 4,435 ECJ judgments, encompassing 6,916 paragraphs with 15,510 citation points.²⁰

This dataset includes two key variables: referring court citations and ECJ citations. The first variable, referring court citations, records all in-text EU law citations provided by the referring court parsed for each referral application question. While the second one, ECJ citations, records all in-text EU law citations made by the ECJ in the operative parts where it addresses the question at hand. Using both of these variables I calculated the dependent variable: rulemaking alignment.

To complement this data, I incorporated three additional variables that map to the theorized pathways of influence: 1) a count of member state observations when a case deals with secondary law only, 2) a count of member state observations when a case deals with primary law, and 3) the level in hierarchy of the referring court, all derived from the IUROPA CJEU Database platform (Brekke et al. 2024; Wallerman Ghavanini, Anna et al. 2024).

Crucially, I decomposed the count of member state observations into two variables, rather than treating it as a single exposure because EU member state observations operate through two distinct mechanisms depending on the type of law involved. For primary law cases, the threat of override lacks credibility due to the near-impossibility of treaty amendment (requiring unanimity plus referendums), making information availability the dominant mechanism.²¹ For secondary law cases, frequent updates and the QMV procedure make political pressure through override threats the primary pathway. Both mechanisms produce negative effects but represent fundamentally different causal logics that warrant separate measurement in the dataset.

Measuring Judicial Rulemaking Alignment

Traditional challenges in scaling judgments arise from the multidimensional nature of text. Judicial opinions, in particular, combine a mix of legal provisions, legal principles and

¹⁹Referrals without a judgment as of December 2023 are excluded.

²⁰For details on data collection and citation standardization see Appendix A and B.

²¹Revisions under Article 48 TEU require unanimous approval by all member states, both during inter-governmental conferences (IGCs) and national ratifications. This creates a veto-point minefield, as seen in: Ireland's initial rejection of Lisbon (2008) and the failure of the Constitutional Treaty due to French and Dutch referendums (2005). See Ritleng (2024) and Craig (2011).

interpretative practices that do not easily fit into a single measurement. Despite this, some of the most successful approaches have leveraged citations as means to quantify legal reasoning. One line of work has focused on the costs associated with precedential citations, emphasizing that the numerical count of citing precedent can be resource-intensive, in terms of time and effort, and thus more informative of the court's opinion (Larsson et al. 2017; Lauderdale and Clark 2012; Lupu and Voeten 2012). More sophisticated studies have refined this by examining specific kinds of precedents used by U.S. district courts (e.g., the set of outside-circuit citations) (Choi and Gulati 2008). Yet more recent work by Arnold et al. (2023) considers the entire set of citations within a decision, arguing that when judges choose to cite different procedural bases, it implies a different underlying legal rule.

In the context of the EU's preliminary reference procedure, I subscribe to this more recent approach for measuring rulemaking alignment. As noted in the previous section, when the ECJ receives a preliminary reference application, it already includes the case facts, pertinent national laws (if applicable), and crucially a set of EU laws (Broberg and Fenger 2021; Sarmiento 2023). It is precisely the set of EU law citations which underpin the making of a legal rule.

Consider, for example, *Portuguese Judges* where the ECJ established the principle of effective judicial protection as a fundamental requirement under Article 19 TEU and Article 47 of the EU Charter.²² The Court did not derive this principle *ex nihilo* but rather grounded it in the legal provisions cited in the referral question, demonstrating how legal rulemaking occurs through interpretation rather than through a mere discursive declaration. Or consider, a more technical subject, *Gottwald*, where the ECJ examined whether a residency-based condition for a toll exemption amounted to nationality-based discrimination under Article 12 of the EC Treaty. The referring court provided the relevant EU legal provisions and the ECJ assessed whether the restriction was compatible with them. It ultimately ruled that "Article 12 EC must be interpreted as meaning that it does not preclude a national rule which restricts the issue of an annual toll disc free of charge to those disabled persons who are resident [...]" (para. 42).²³ These cases illustrate how rulemaking alignment can be analyzed by examining the degree to which the ECJ's references to EU law align with those of the referring domestic court (Leloup and Spieker 2024; Lenaerts et al. 2023).

To measure judicial rulemaking alignment, I develop a citation-based metric called Local Information-Adjusted Citation (LIAC) alignment that evaluates referral question-judgment dyads using set-theoretic and information-theoretic principles. The measurement process involves two steps. First, it calculates the Set Citation Alignment Ratio (SCAR) which handles overlaps, missing citations (legal points the ECJ disregarded), and extra citations (legal points the ECJ added beyond the referring court's framing). Second, by applying a local information adjustment it scales these ratios into interpretable alignment units scaled by the referring court's initial citation count.²⁴

²²Case C-64/16, *Associação Sindical dos Juizes Portugueses*, 27 February 2018, ECLI:EU:C:2018:117.

²³Case C-103/08, *Gottwald*, 1 October 2009, ECLI:EU:C:2009:597.

²⁴Full details found in Appendix D.

Positive LIAC values signal net information alignment where courts agree more than they disagree on legal foundations, negative values indicate net misalignment, and zero represents equilibrium.²⁵ This approach captures alignment by quantifying the overlap between referring courts and the ECJ while penalizing both strategic omissions and additions. Importantly, LIAC values are calculated at the question–paragraph level before aggregating them at the referral–judgment dyad level to avoid Simpson’s paradox —the statistical reversal that can occur when disaggregated patterns are obscured by naïve aggregation (Pearl 2009b; Pearl 2013). This provides a reliable metric of inter-court rulemaking alignment.

RESEARCH DESIGN

Estimation

The empirical strategy follows a modern causal inference logic, where I transform the causal structure along with the minimal adjustment set into an estimable functional form (Pearl 2009a; Pearl 2011).²⁶ The resulting causal specification employs a Huber-robust regression of the following form:²⁷

$$y_i = \eta + \gamma + \delta + (\eta \times \gamma) + (\eta \times \delta) + X_i + \lambda_i^p + \varepsilon_i^r \quad (1)$$

Where y_i represents the degree of rulemaking alignment for referral-judgment dyad i , η denotes hierarchical disengagement, γ captures the threat of credible override, and δ measures legal alternatives. The interaction terms $(\eta \times \gamma)$ account for the conditional moderation effect of hierarchical disengagement and credible override, while $(\eta \times \delta)$ denotes the same for hierarchical disengagement and legal alternatives. X_i denotes the vector of confounders used for the minimal adjustment. λ_i^p represents fixed effects that control for ECJ’s field of law classification p (Imai and Kim 2019). Finally, ε_i^r is a robust error term clustered at the level of the referring member state court c to account for within-court correlation (Abadie et al. 2023).²⁸

Considering that the theoretical pathways do not have direct observable measures, I use the following operationalization. For rulemaking alignment (y_i), I use LIAC, which measures citation alignment between courts with information-theoretic adjustments for missing and extra citations. For hierarchical disengagement (η), I use the level in hierarchy of the referring court, where one denotes a court of first-instance in their judiciary, two an appeals court, and three a domestic high court. For the threat of credible override (γ), I use the count of member state observations when the referral includes provisions of EU secondary law only. Finally, for legal alternatives (δ), I use the count of member states observations when the case deals with EU primary law.

²⁵Examples for each of these three scenarios are found in Appendix D.

²⁶Full causal identification details provided in Appendix E

²⁷I use a Huber-robust regression because the outcome variable (LIAC) contains unbalanced negative outliers that can distort parameter estimates. The Huber method down-weights these extreme deviations, thereby preserving the central tendency of the data. Robustness details are provided in Appendix I.

²⁸I do not include any of the β parameters in the equation above because they represent the raw coefficients, which are not the relevant or reliable estimates for this analysis.

For the first test, I use this model to estimate the average marginal effects of each pathway variable on rulemaking alignment.²⁹ For hierarchical disengagement, it shows the effect of moving from lower courts to middle courts, and from lower courts to high courts, respectively. Whereas for the credible override and legal alternatives, the marginal effect will show the effect of one additional member state brief. This is expressed as follows:

$$\beta_i = \frac{\partial \hat{y}}{\partial x_i}, \quad \text{where } x_i \in \{\eta, \gamma, \delta\} \quad (2)$$

For the second test, I estimate the difference in expected values across two condition sets. For the first condition set I compute a cross tabulation between *Credible Override* $\times$ *Hierarchical Disengagement*. Effectively this shows the difference made by high courts at below and above median levels of member state observations. Complementarily, this shows the difference made by above median member state observations when the referral comes from a lower court versus a high court. For the second condition set, I compute a cross tabulation between *Legal Alternatives* $\times$ *Hierarchical Disengagement*. Like before, this shows the difference made by high courts at below and above median levels of member state observations. Complementarily, this shows the difference made by above median member state observations when the referral comes from a lower court versus a high court. Both of these cross tabulations show not only the marginal effects but how the rulemaking alignment changes across these theoretically relevant conditions.

This difference-in-expected-values approach for both sets of cross-tabulations is formalized as:

$$\Delta = \mathbb{E}[y \mid x_1, c] - \mathbb{E}[y \mid x_0, c] \quad (3)$$

where x_1 and x_0 index the two condition sets being compared (such as above vs. below median observations, or lower vs. high court referrals). This difference Δ quantifies the change in expected alignment when moving from one condition to the other.

Since this study uses observational data, rather than experimental, I address confounding bias through research design and my modeling choices informed by the theorized causal structure. First, considering that the unit of analysis is alignment between the referral-judgment dyad, I am effectively comparing how the referring court and the ECJ perceive a legal issue given the same factual circumstances. For each referral, the referring court decides which citations to raise based on the specific facts of the case. These citations are then sent to the ECJ, which determines whether to align with them or not, mitigating any confounding factors related to formalism or ‘case facts’ since both are adjudicating the same matter (Krommendijk 2019; Cameron and Kornhauser 2017, pp.552). Second, since the dependent variable operationalizes EU legal provisions as the basis of its analysis, this mitigates the confounding effect of time. While some provisions may become more widely accepted over time, the key focus remains on the alignment between courts and their

²⁹For all estimates I use the `marginal effects` package from Vincent Arel-Bundock et al. (2024)

strategic choices of when to raise certain provisions for the making of legal rules. Third, the temporal structure of the process, where both the level in hierarchy and the submission of observations precede the issue of judgments make these claims possible.

Additionally, I implement two key theoretically driven statistical adjustments. First, I include fixed effects (λ_i^p) that allow for different intercepts across areas of law, as judicial preferences and decision-making patterns can vary significantly depending on the legal domain (Lauderdale and Clark 2012, pp.850; Wallerman 2019). Second, I employ robust standard errors clustered at the referring court level (ε_i^r) to account for the non-independence of referrals, since multiple cases may originate from the same national courts and thus exhibit correlated error structures (Abadie et al. 2023).

Table 2 presents the summary statistics for the causal variables used for the analysis.

Table 2: Causal Model – Variables Statistics

	<i>n</i>	<i>mean</i>	<i>std</i>	<i>range</i>
Rulemaking Alignment ⁱ	5017	-1.361	4.341	[-44.73, 18.00]
Credible Override ⁱⁱ	5017	1.542	1.716	[0, 13]
Legal Alternatives ⁱⁱⁱ	5017	0.709	1.705	[0, 22]
Primary Law $\langle P \rangle$	5017	0.264	0.441	[0, 1]
EC Submits Observations	5017	0.999	0.037	[0, 1]
Hierarchical Pressure ^{iv}	5017	—	—	3 categories
Area of Law (ECJ)	5017	—	—	41 categories

ⁱ Citation alignment (LIAC) of the ECJ with respect to the referring court.

ⁱⁱ Count of member state observations when referral does not deal with primary law.

ⁱⁱⁱ Count of member state observations when referral deals with primary law.

^{iv} Referring court's position within its own judicial hierarchy.

Operationalization Remarks

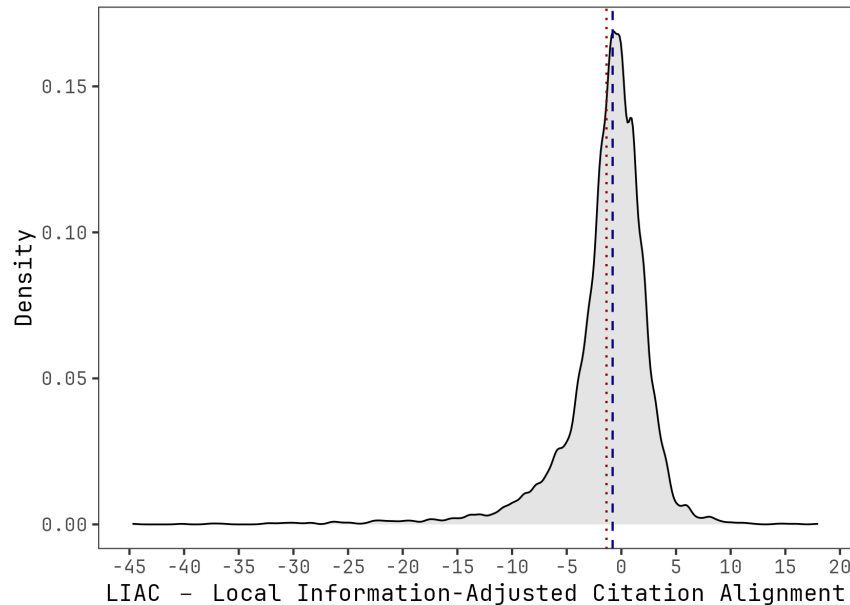
The proxy for legal alternatives (η) measures the range of interpretive options presented to the ECJ when cases involve primary law. These alternatives primarily reflect viable legal interpretations, though they may overlap with non-compliance signals from member states. This measurement design is conservative: legal alternatives appear in all primary law cases, whereas non-compliance threats arise only in contested subsets. The proxy therefore captures the dominant theoretical mechanism (informational persuasion through legal alternatives) while potentially underestimating its effect if non-compliance signals strengthen rather than weaken the measured pathway.

RESULTS

Computing the LIAC-based citation alignment for all of the referral-judgment dyads reveals the empirical distribution of rulemaking alignment by the ECJ. As shown in Figure 1, the ECJ typically operates *below* this balanced information exchange point, suggesting they tend to under-engage with referring courts' legal frameworks, rather than finding that natural

dialogue balance. This pattern corroborates the previous qualitative accounts that had focused on the reformulation of preliminary references (Ghavanini 2022; Šadl and Wallerman 2019; van Gestel and de Poorter 2019). This finding is particularly substantial considering that the Court itself views referring judges as their main ‘audience’ as said by the current Vice President of the Court.

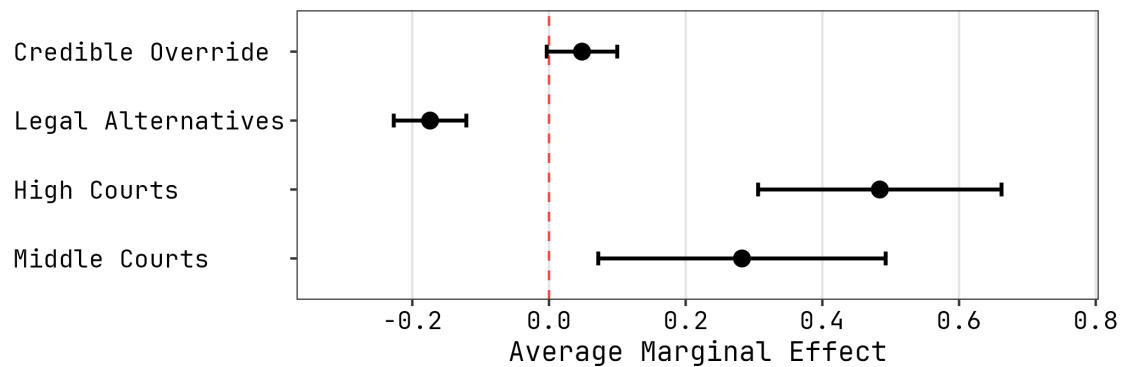
Figure 1: Distribution of Rulemaking Alignment



Note: This figure shows the probability density distribution LIAC scores. The red dashed line represents the mean (-1.36) and the blue dashed line represents the median (-0.8). The peak of the distribution occurs around -1.0 , indicating that most rulemaking processes exhibit negative alignment scores.

Moreover, by examining the entire distribution, three insights emerge. First, 56% of the time the ECJ engages in a kind of *altered dialogue*, meaning that the number of missing or extra citations in the operative part is greater than the number of mutual citations from the initial framing, causing significant deviation from the legal bases. Second, 10% of the time, it engages in *balanced dialogue*, meaning the number of citation changes is equal to the number of initial citations, but still addressing many citations from the original framing. Third, 34% of the time, the ECJ engages in *affirmative dialogue*, meaning that the number of changed or missing citations is always fewer than the initial number, or there are none at all, indicating that the ECJ has addressed some or all of the original citations. Taken together, these results highlight that the Court’s engagement with domestic framing is neither random nor uniformly affirmative, but patterned in ways that we can leverage to test the theoretical expectations.

Figure 2: AME of Theorized Influence Pathways on Citation Alignment (LIAC).



Exposure	$\frac{\partial \hat{y}}{\partial x}$	SE	CI 2.5%, 97.5%	Pr(> z)
Credible Override	0.048	0.026	(-0.003, 0.100)	0.066
Legal Alternatives	-0.174	0.027	(-0.227, -0.121)	< 0.001***
High Courts	0.484	0.091	(0.306, 0.662)	< 0.001***
Middle Courts	0.282	0.107	(0.072, 0.493)	0.008**

Note: Marginal effect estimates were constructed using Huber robust OLS. Confidence intervals and p-values were constructed using cluster-robust standard errors at the referring court level.

Beyond these descriptive findings, the marginal effects presented in Figure 2 along with the differences shown in Table 3 and Table 4 provide the empirical evidence necessary to evaluate the hypotheses. First, concerning *H1*, *hierarchical disengagement* has a strong positive effect on rulemaking alignment. Specifically, referrals from high courts increase the alignment by +0.484 points, while middle court referrals show a smaller effect of +0.282 points, both relative to the first instance court baseline.³⁰ Moreover, Table 3 shows across both conditions when there's above and below median member state observations the effect remains positive at +0.463 and +0.222. Similarly, this pattern is also present on Table 4 where the effect is +0.553 and +1.194. Jointly, this confirms that as the level of the referring court increases the more the ECJ cares about addressing referred questions. These empirical findings substantiate the theoretical claims advanced by Pavone and Kelemen (2019) and van Gestel and de Poorter (2019). The consistent positive effect of court hierarchy confirms the substantive importance of maintaining good relationships with its subordinates for the ECJ.

Moving to *H2* on the threat of a *credible override*, the findings disconfirm with the long-established wisdom that the ECJ is constrained by the external risk of override from member states (Carrubba et al. 2008; Larsson and Naurin 2016). Instead, I find the opposite effect: each additional member state brief increases rulemaking alignment by +0.048.³¹ This effect is more clear in Table 3, where member state briefs at above median levels increases

³⁰These results are substantively robust, as court levels were modeled as unordered categorical factors, allowing each court type to have independent effects rather than forcing hierarchical ordering.

³¹Although the average marginal effect of a single member state brief is not statistically significant on average, it is statistically significant when assessed at levels above and below the median.

citation alignment by +0.485 and +0.245 when the referral comes from lower court and a high court respectively. While this does not entirely negate the possibility of override threats —such threats may still operate at the case disposition level— it suggests that they do not translate into changes in EU legal bases. These findings provide sufficient evidence to reject the second hypothesis.

Also, equivalently surprising are the unexpected findings concerning *H4* on *legal alternatives*. First, it was theorized that the effect of member states briefs, when the case deals with primary law, should be negative but smaller than the credible override since that’s when the member states have more formal power. Contrary to this, the marginal effect of legal alternatives is -0.174 . More pressing still, is the difference shown in Table 4, where member state briefs at above median levels decreases alignment by -2.163 and -1.522 when the referral comes from lower court and a high court respectively. This finding also contradicts views that emphasize formal power and shows that the “responsiveness” of the ECJ is more than mere lip service (Lindholm et al. 2025, pp.21). These findings provide sufficient evidence to reject the fourth hypothesis.

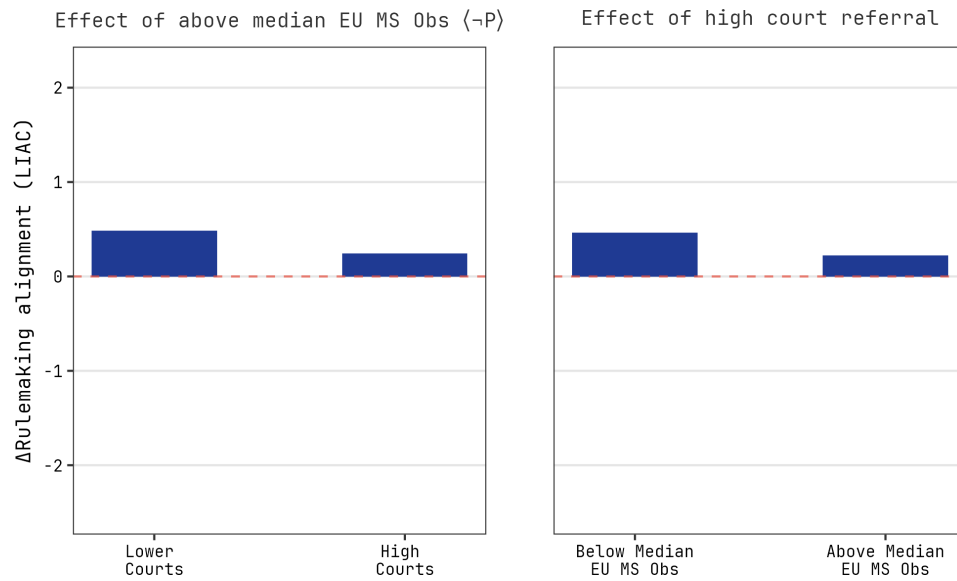
Putting both of these findings together reveal a fundamental paradox in judicial politics: Formal power and informal influence work in opposite directions. Member states are most influential precisely when they have the least formal leverage — a finding that challenges basic assumptions about judicial politics in multi-level governance systems.

Table 3: Cross-Tabulation of Credible Override $\times$ Hierarchical Disengagement

	Lower courts	High courts	Δ
EU MS obs $\langle \neg P \rangle x < \tilde{x}$	-1.246	-0.783	$+0.463$
EU MS obs $\langle \neg P \rangle x > \tilde{x}$	-0.761	-0.538	$+0.222$
Δ	$+0.485$	$+0.245$	$+0.467$

Note: Expected values across all condition pairs. Bottom delta (Δ) is the difference made by having above median EU MS observations (*credible override*). Top-right delta is difference made by high courts (*hierarchical pressure*). All values are estimated $\mathbb{E}[y \mid x_1, c] - \mathbb{E}[y \mid x_0, c]$. Confidence intervals, standard errors, and p-values were obtained via bootstrap with 1,000 replications, and estimates remained stable across runs.

Figure 3: Difference Credible Override $\times$ Hierarchical Disengagement



Note: According to $H2$ and $H3$ expectations, the left panel should have been negative and larger for when referrals came from lower courts yet we see the opposite effect.

Given the findings from $H1$, $H2$, and $H4$, $H3$ is definitionally rejected. The hypothesis presupposed competing forces between credible override and hierarchical pressure, yet both mechanisms consistently increase alignment, invalidating the theoretical basis for moderation. The combined effect increases rulemaking alignment by +0.467.

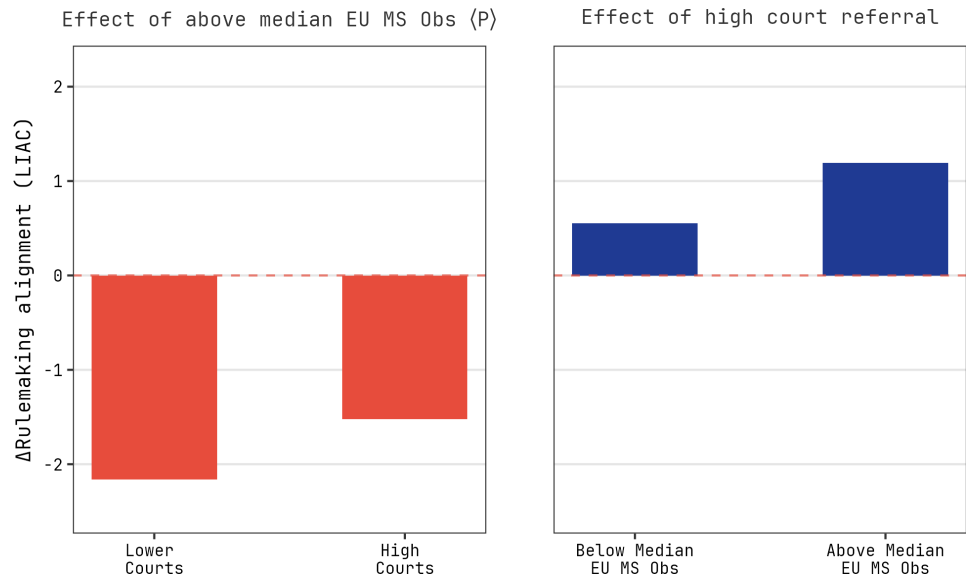
More interesting, however, are the expectations from $H5$ which place *legal alternatives* $\times$ *hierarchical disengagement* at odds. First, Figure 4 shows how the negative effect of above median observations decreases from -2.163 to -1.522 or 24% decrease in the effect. This demonstrates that referrals coming from influential courts can tame the misaligning effect. Yet, contrary to expectations the positive effect of a high court referral is higher when there is above median level of member state observations rather than below median, moving from $+0.553$ to 1.194 or 115% increase in the effect. This finding suggests that the effect of hierarchical disengagement pressure is most useful when there are actually objections raised by the member states, and when they are not, hierarchy ceases to play a significant role. Lastly, at this cross condition of a high court referral and the above-median effect of legal alternatives overwhelms hierarchical disengagement pressures by resulting in -0.328 . Jointly these findings prove the first part of $H5$ and disprove the second.

Table 4: Cross-Tabulation of Legal Alternatives $\times$ Hierarchical Disengagement

	Lower courts	High courts	Δ
EU MS obs $\langle P \rangle$ $x < \tilde{x}$	-1.504	-0.951	+0.553
EU MS obs $\langle P \rangle$ $x > \tilde{x}$	-3.668	-2.473	+1.194
Δ	-2.163	-1.522	-0.328

Note: Expected values across all condition pairs. Bottom delta (Δ) is the difference made by having above median EU MS observations (*legal alternatives*). Top-right delta is difference made by high courts (*hierarchical pressure*). All values are estimated $\mathbb{E}[y \mid x_1, c] - \mathbb{E}[y \mid x_0, c]$. Confidence intervals, standard errors, and p-values were obtained via bootstrap with 1,000 replications, and estimates remained stable across runs.

Figure 4: Difference Legal Alternatives $\times$ Hierarchical Disengagement



Note: According to $H4$ and $H5$ expectations, the left panel correctly shows negative effects, unexpectedly the effect is larger than for credible override (See Fig. 3.)

CONCLUSION

The findings reveal a profound paradox that challenges fundamental assumptions in EU judicial politics. Member states exert their greatest influence precisely when they lack formal power to override ECJ decisions —particularly in cases involving EU primary law where legal alternatives decrease alignment by -0.174 points compared to +0.048 for credible override scenarios. The ECJ proves more responsive to sophisticated legal arguments than to explicit institutional threats, overturning conventional wisdom that formal political power dictates judicial behavior. This counterintuitive finding suggests that courts and member states may be fundamentally more “legally minded” than strategic models assume, giving credence to the points raised by Friedman (2006) about taking law seriously prompting a revaluation of power dynamics within multi-level governance systems.

These patterns likely extend beyond the EU context. Any apex court dependent on lower court cooperation while facing political override threats whether constitutional courts in federal systems, international tribunals, or national supreme courts with judicial review powers must navigate similar trade-offs between hierarchical maintenance and political accommodation.

Second, incorporating hierarchical disengagement pressures in ECJ decision-making reveals that while high court referrals consistently increase alignment (+0.484 points), this effect amplifies by over 115% when the ECJ faces contestation from multiple member state observations. Rather than simply wielding institutional authority, prestigious domestic courts serve as strategic legitimacy shields that bolster the ECJ’s resilience against external pressures. This dynamic reinforces the paradox identified above: the ECJ’s responsiveness appears driven more by the legal sophistication and institutional prestige of the interlocutor than by their formal override capacity.

Undergirding these empirical discoveries are three critical methodological innovations. First, this study decomposes member state observations into distinct causal pathways—political pressure through credible override threats versus informational influence via legal alternatives—resolving conceptual conflations that plagued previous research. Second, the LIAC (Local Information-Adjusted Citation) alignment measure developed here allows for systematic measurement of legal argument sophistication, enabling researchers to distinguish between mere political posturing and substantive legal discourse. Third, I develop a unified framework that standardizes legal identifiers, resolving structural inconsistencies across EU legislation. This allows precise, hierarchical referencing of complex legal texts, supporting more reliable and reproducible analysis. Together, these advances facilitate an unprecedented quantitative examination of judicial rulemaking alignment.

Finally, while deriving from the EU context, these findings suggest that judicial strategy operating through legal discourse may be common across various judicial systems and case types. Recognizing that strategic behavior and legal reasoning are intertwined challenges scholars to reassess judicial behavior models broadly, accounting for how judges across different contexts use legal argumentation to navigate political pressures and maintain legitimacy.

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