

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

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Agenda

Puzzle

Theory

Research Design

Preliminary Results

Conclusion



TL:DR

1. Puzzle: *Under what conditions do apex courts align with lower courts when constructing legal rules?*



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2. Theory: Apex courts must balance demands from **judicial hierarchy** with pressures from **external political actors** ⇒ A theory of strategic rulemaking.



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7. Results: Preliminary for now...



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Background

- Rulemaking is a hallmark feature of apex courts within a judicial hierarchy.¹

¹Carrubba and Tom S. Clark 2012; Lax 2007

²Beim 2017; Hansford et al. 2013; Tom S. Clark and Kastellec 2013; Carrubba and Tom S. Clark 2012



Background

- Rulemaking is a hallmark feature of apex courts within a judicial hierarchy. ¹
- In a hierarchical judicial structure it implies a degree of delegation to lower courts. ²

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Background

- Rulemaking is a hallmark feature of apex courts within a judicial hierarchy. ¹
- In a hierarchical judicial structure it implies a degree of delegation to lower courts. ²
- Lower courts function as decentralized repositories of legal rules which may be reaffirmed, modified, or overturned upon reaching an apex court docket.

¹Carrubba and Tom S. Clark 2012; Lax 2007

²Beim 2017; Hansford et al. 2013; Tom S. Clark and Kestellec 2013; Carrubba and Tom S. Clark 2012



Why the ECJ?

You might ask: *why would the ECJ care about domestic courts?*

1. Historically domestic courts as the ‘main allies’ of the ECJ in the judicial construction of Europe ³

³Weiler 1991; Alter 1996; Slaughter et al. 1998

⁴Davies 2012



Why the ECJ?

You might ask: *why would the ECJ care about domestic courts?*

1. Historically domestic courts as the ‘main allies’ of the ECJ in the judicial construction of Europe³
2. EU MS courts are need to enforce its caselaw in cases that do not require a referral⁴



³Weiler 1991; Alter 1996; Slaughter et al. 1998

⁴Davies 2012

Why the ECJ?

Yet, we also know: *The ECJ care about EU MS positions...*

1. Member states observations (*amici curiae*) influence the ECJ significantly when solving case dispositions ⁵.



⁵Larsson and Naurin 2016; Carrubba, Gabel, et al. 2008.

Research Question

*Under what conditions does the **European Court of Justice** align its legal basis usage with **national courts** when constructing legal rules?*



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Optimizing Hierarchy: managing the judiciary

- Apex courts need to optimize for lower court compliance with their decision rules⁶



⁶Carrubba and Tom S. Clark 2012; Tom S Clark 2016; Lax 2012; Sunstein 2001

⁷Staton and Vanberg 2008

Optimizing Hierarchy: managing the judiciary

- Apex courts need to optimize for lower court compliance with their decision rules⁶
- Apex courts strike a balance between crafting a highly specific legal rule (bright line) or a broader one with more uncertain outcomes⁷



⁶Carrubba and Tom S. Clark 2012; Tom S Clark 2016; Lax 2012; Sunstein 2001

⁷Staton and Vanberg 2008

Lessons from Optimizing Hierarchy

- With limited resources, the apex court will prefer a high-quality rule over a lower-quality one requires rectification.
- The number of lower court cases percolating on the same legal issue increases, they become more representative of the facts.



Constrained Flexibility: adjusting to political signals

- Apex courts strategically adjust to external political demands.⁸



⁸Glick 2009; Larsson and Naurin 2016; Carrubba, Gabel, et al. 2008

⁹Staton and Vanberg 2008

¹⁰Larsson, Naurin, et al. 2017

Constrained Flexibility: adjusting to political signals

- Apex courts strategically adjust to external political demands.⁸
- Courts may preemptively use vagueness to mitigate political backlash.⁹



⁸Glick 2009; Larsson and Naurin 2016; Carrubba, Gabel, et al. 2008

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Constrained Flexibility: adjusting to political signals

- Apex courts strategically adjust to external political demands.⁸
- Courts may preemptively use vagueness to mitigate political backlash.⁹
- Strategic use of citations to strengthen their legal justifications.¹⁰

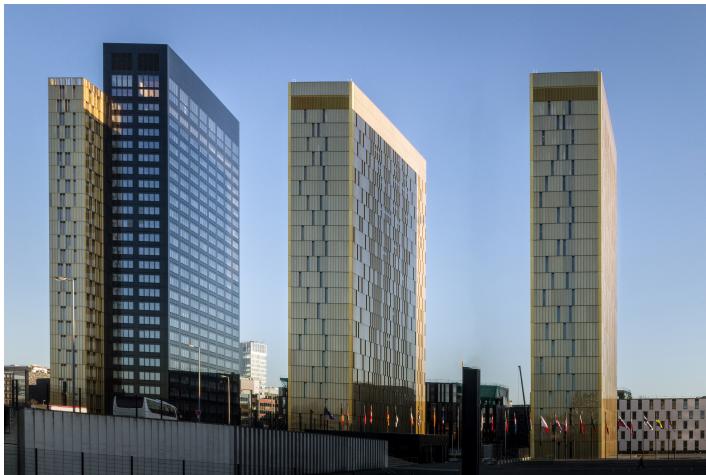
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Strategic Rulemaking Alignment by the ECJ



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¹¹The three towers: Rocca, Montesquieu and Comenius

Strategic Rulemaking Alignment by the ECJ

	Cause	Mechanism	Direction of Effect
<i>Informational Pathways</i>	(1) Information aggregation	More referrals on the same legal issue provide a more factual representation of relevant facts to the ECJ, increasing rulemaking alignment with domestic courts.	+
	(2) Legal alternatives	More member state observations provide plausible alternative legal arguments to the ECJ, decreasing rulemaking alignment with domestic courts.	—



Strategic Rulemaking Alignment by the ECJ

	Cause	Mechanism	Direction of Effect
<i>Political Management Pathways</i>	(3) Heighten disengagement	A threat of disengagement by domestic high courts increases rulemaking alignment with the ECJ.	+
	(4) Credible override	A credible threat of override from EU member states reduces rulemaking alignment with the ECJ.	—



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Data

1. Data from 2008 to 2023 (N=5075) Referral Judgment Dyads¹²

Variable	Count
Referral Applications Texts	5,075
Referral Applications Citations	14,601
ECJ Judgement Texts	4,435
ECJ Judgement Citations	7,207



¹²For preliminary estimates data changes due to missing data at tbc

Measurement MSCAR

Figure A.5: Referral Question-Judgment Paragraph Dyad \Rightarrow Set Citation Agreement Ratio

Referral Question with citation items
1. Article 6(2)(b) of Directive 1999/62/EC of the European Parliament and of the Council on the charging of heavy goods vehicles for the use of certain infrastructures (1) provides for the possibility for a Member State to exempt certain categories of vehicle. In this context, is the authorisation given to France by the Commission on 20 June 2005 (2), in Decision 2005/449/EC , to exempt certain categories of vehicles directly applicable to individuals or, as it concerns an authorisation decision addressed to France, is a measure transposing it into national law necessary?
31999L0062_MAIN000_A0000 ; 31999L0062_MAIN000_A0006

+

Paired Judgment Paragraph with citation items
9. By its question, the referring court asks essentially whether Decision 2005/449 approving, pursuant to Article 6(2)(b) of Directive 1999/62 , the exemption from axle tax envisaged by the French Republic may be relied on by an individual against that Member State in order to obtain the benefit of that exemption upon the notification or publication of that decision.
31999L0062_MAIN000_A0000 ; 31999L0062_MAIN000_A0006

↓



Measurement MSCAR

X	Y
REF_2008_0018FR_Q001	JUD_2008_0018_Q001
31999L0062 MAIN000 A0000	31999L0062 MAIN000 A0000
31999L0062 MAIN000 A0006	31999L0062 MAIN000 A0006



SELECT case from Set Citation Agreement Ratio()

$$\frac{|\{x_q\} \cap \{y_q\}|}{|\{x_q\}| + |\{y_q\} \setminus \{x_q\}|}$$



Measurement MSCAR



CALCULATE the Set Citation Agreement Ratio()

X (IN)	$\{X \setminus Y\}$	$X \cap Y$	Y (OUT)	$\{Y \setminus X\}$	SCAR
2	0	2	2	0	1.00



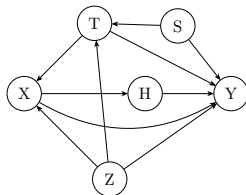
Measurement MSCAR

$$\text{SCAR}()_q = \begin{cases} \frac{|x_q \cap y_q|}{|x_q| + |y_q \setminus x_q|} & \text{if } x_q \setminus y_q = \emptyset \\ \frac{|x_q \cap y_q|}{|x_q \cap y_q| + |x_q \Delta y_q|} & \text{if } x_q \setminus y_q \neq \emptyset \text{ and } x_q \cap y_q \neq \emptyset \\ \alpha \times \frac{1}{|x_q| + |y_q|} & \text{if } x_q \setminus y_q \neq \emptyset \text{ and } x_q \cap y_q = \emptyset \\ \alpha \times \frac{1}{|x_q| + |y_q|} & \text{if } y_q \setminus x_q \neq \emptyset \text{ and } x_q \cap y_q = \emptyset \end{cases} \quad (1)$$



Estimation Strategy

Figure A.8: Effects of Political Pathways



Symbol	Variable
Y	Rulemaking Alignment
X	Hierarchical Threat
H	Heighten Disengagement
T	Threat Override
S	Secondary Law
Z	Policy Area (λ), Number Questions



OLS Model

$$y_i^j = \beta_1 \theta_m + X^m + \lambda_i^p + \varepsilon_i^c$$

1. Let y_i^j be degree of rulemaking alignment for referral-judgment dyad i in case j .



¹³Following Abadie et al. 2023 advice.

OLS Model

$$y_i^j = \beta_1 \theta_m + X^m + \lambda_i^p + \varepsilon_i^c$$

1. Let y_i^j be degree of rulemaking alignment for referral-judgment dyad i in case j .
2. Let θ_m be the predictor variable when indexing for pathway m .



¹³Following Abadie et al. 2023 advice.

OLS Model

$$y_i^j = \beta_1 \theta_m + X^m + \lambda_i^p + \varepsilon_i^c$$

1. Let y_i^j be degree of rulemaking alignment for referral-judgment dyad i in case j .
2. Let θ_m be the predictor variable when indexing for pathway m .
3. Let X^m is the set of necessary adjustments for model predictor m .



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OLS Model

$$y_i^j = \beta_1 \theta_m + X^m + \lambda_i^p + \varepsilon_i^c$$

1. Let y_i^j be degree of rulemaking alignment for referral-judgment dyad i in case j .
2. Let θ_m be the predictor variable when indexing for pathway m .
3. Let X^m is the set of necessary adjustments for model predictor m .
4. Let λ_i^p be fixed effects to control for court classification policy areas i (or fields of law).



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OLS Model

$$y_i^j = \beta_1 \theta_m + X^m + \lambda_i^p + \varepsilon_i^c$$

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4. Let λ_i^p be fixed effects to control for court classification policy areas i (or fields of law).
5. Let ε_i^c is a robust error term clustered at the referring member state court c .¹³



¹³Following Abadie et al. 2023 advice.

OLS Model

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4. Let λ_i^p be fixed effects to control for court classification policy areas i (or fields of law).
5. Let ε_i^c is a robust error term clustered at the referring member state court c .¹³
6. Let β be the vector of coefficients for model m



¹³Following Abadie et al. 2023 advice.

Conditional Effects Estimation

$$CATE_{(c)} = \mathbb{E}[y_i^j \mid do(T_m = 1), C_n = c] - \mathbb{E}[y_i^j \mid do(T_m = 0), C_n = c]$$

1. Let $C^n = c$ be the condition being tested.



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Raw Estimates Political Pathways

	<i>Dependent variable:</i>		
	Mean Set Citation Alignment Ratio (MSCAR)		
	(1)	(2)	(3)
Sum of EU MS Observations	-0.025*** (0.003)	-0.020*** (0.003)	-0.019*** (0.003)
Court Hierarchical Level	0.034*** (0.006)	0.031*** (0.005)	0.029*** (0.005)
Secondary Law			-0.456*** (0.030)
EU MS Observations X Secondary Law			0.017** (0.008)
Policy Area Fixed Effects		Yes	Yes
Information Controls	Yes	Yes	Yes
Observations	5,179	5,179	5,179
Adjusted R ²	0.020	0.206	0.256

Note:

*p<0.1; **p<0.05; ***p<0.01



Raw Estimates Informational Pathways

	<i>Dependent variable:</i>		
	Mean Set Citation Alignment Ratio (MSCAR)		
	(1)	(2)	(3)
Sum of EU MS Observations	-0.025*** (0.003)	-0.020*** (0.003)	-0.022*** (0.003)
Sum Joined Cases	-0.0003 (0.003)	-0.006** (0.003)	-0.002 (0.002)
Primary Law			-0.642*** (0.028)
EU MS Observations X Primary Law			0.020*** (0.008)
Policy Area Fixed Effects		Yes	Yes
Hierarchical Controls	Yes	Yes	Yes
Observations	5,179	5,179	5,179
Adjusted R ²	0.020	0.207	0.178

Note:

*p<0.1; **p<0.05; ***p<0.01



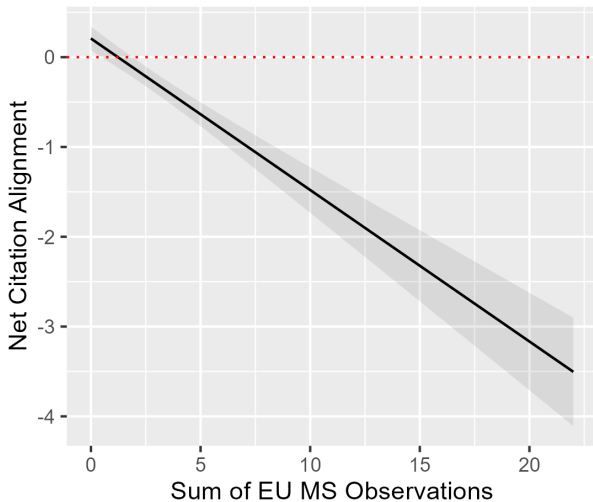
ME of Political Pathways: Credible Override

Marginal effect of one Member State brief when case deals with secondary law is -0.152

MS Obs	Estimate (95% CI)		p-value
0	-0.256	(-0.341, -0.170)	<0.001***
1	-0.408	(-0.474, -0.342)	<0.001***
2	-0.560	(-0.615, -0.505)	<0.001***
3	-0.712	(-0.770, -0.654)	<0.001***
22	-3.601	(-4.167, -3.035)	<0.001***



ME of Political Pathways: Credible Override



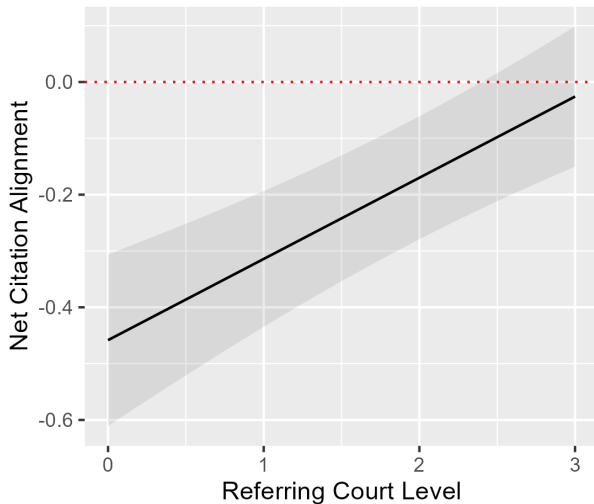
ME of Political Pathways: Hierarchical Pressure

Marginal effect of moving up one level in hierarchy +0.144

Court Level	Estimate (95% CI)	p-value
0	-0.876 (-0.994, -0.758)	<0.001***
1	-0.732 (-0.806, -0.659)	<0.001***
2	-0.588 (-0.643, -0.533)	<0.001***
3	-0.444 (-0.525, -0.362)	<0.001***



ME of Political Pathways: Hierarchical Pressure



ME of Informational Pathways: Alternative Legal Visions

Marginal effect of one Member State brief when case deals with primary law is -0.173

MS Obs	Estimate (95% CI)		p-value
0	-0.207	(-0.296, -0.119)	<0.001***
1	-0.380	(-0.447, -0.313)	<0.001***
2	-0.552	(-0.607, -0.497)	<0.001***
3	-0.725	(-0.782, -0.667)	<0.001***
22	-4.001	(-4.593, -3.408)	<0.001***



ME of Informational Pathways: Alternative Legal Visions

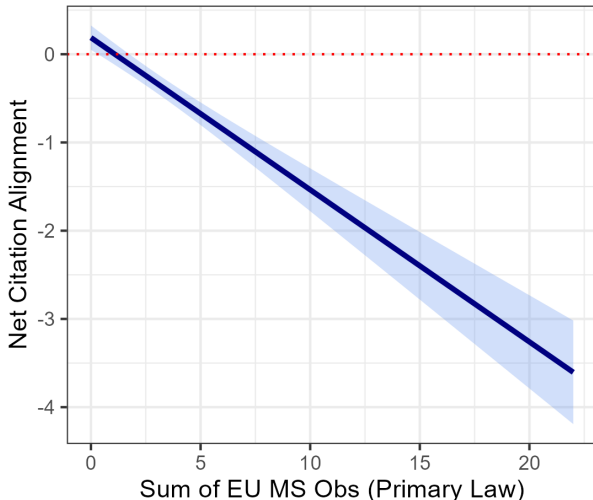


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Some thoughts...



Feedback Questions

Thank you for your time!!!

Please feel free to ask any questions and comments.

Contact

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