The Apex Court's Dilemma:

Rulemaking Alignment Under Hierarchical and Political Constraints

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Agenda

Puzzle

Application

Research Design

Results

Implications

TL:DR

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

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3. **Research Design**:
   - Dataset – Referrals and Judgments Texts 2008-2023 (N=5,017).
   - LIAC – Local Information-Adjusted Citation alignment.
   - $\mathcal{D}$ – Disentangle effects of *hierarchical disengagement*, *credible override*, and *legal alternatives*.

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Table of Contents

Puzzle

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Research Design

Results

Implications

Apex Courts Make Legal Rules §

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Quote

"The Court considers the Maltese practice of 'golden passports' incompatible with European Union (EU) law, thus intervening in a manifest case of abuse. This is certainly applaudable. The problem lies not with the decision's outcome, but in the way the Court reaches it" Spieker, L. D. & Weber, F.(2025)

Apex Courts Make Legal Rules §

27 June 2025

The European Union's Fantastical Constitution

A Response to von Bogdandy and Spieker

Somewhat counterintuitively, constitutional scholarship can be like writing fantasy novels. Within certain parameters, constitutional scholars can create their own expanded universe, proposing new constitutional realities and offering audacious suggestions for constitutional reform. But like fantasy writing, constitutional reasoning can become fantastical if the plot twists are too death-defying and the ground rules of the fantasy world broken too often. And just as fantasy fans might at that point say, "enough is enough, this is no longer true to the original story", constitutional scholars should do the same.

In recent years, Armin von Bogdandy and Luke Dimitrios Spieker have proven to be among the most creative readers of the EU constitution. Their constitutional reasoning is thought-provoking and their proposals daring. Their work is used in our academic teaching and their policy courage has been appreciated by the EU institutions (here). Yet having followed their work closely, we feel it is no longer true to the original story: the narrative is no longer convincing, and the ground rules are too often broken. In fact, it seems to us that von Bogdandy and Spieker have become trapped in their own story, trying to create a constitutional universe that by now is fantastical.

Recently, von Bogdandy and Spieker decided to boldly go where not even they had dared to go before. To overcome the possible Hungarian veto on prolonging EU sanctions against Russia, they propose that the explicit requirement in Article 31(1) TEU for such decisions to be taken by the Council acting unanimously should be overcome on the basis of Article 2 TEU. In their view, a Hungarian veto against further sanctions would violate the value of solidarity and the Hungarian vote should therefore not count. In this post, we argue that this would launch us into a whole new, and in our view, dangerous galaxy.

Martijn van den Brink
Dr. Martijn van den Brink is Assistant Professor in EU Law at Leiden University.

Mark Dawson
Mark Dawson is a Professor of European Law and Governance at the Hertie School of Governance in Berlin.

Explore posts related to this:
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Other posts about this region:
Europa

1 comment

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Help us protect the constitution!

The constitution is increasingly under pressure. To protect it, we need knowledge. And we make that knowledge freely accessible to everyone. **Open access.**

Apex Courts Make Legal Rules §

31 August 2025

Overcoming Objections to Overcome the Hungarian Veto

A Rejoinder to Dawson and van den Brink

This June, we proposed ways to overcome a Hungarian veto on EU sanctions against Russia. Our proposal prompted Mark Dawson and Martijn van den Brink to write a sharp response, arguing that we had ventured beyond the confines of serious legal scholarship into the realm of the fantastical. To recall, our proposal addressed a veto that threatens existential interests of the Union and breaches the solidarity enshrined in Article 2 TEU. On this basis, we advanced two independent paths to overcome Hungary's obstruction.

First, Hungary's breach of Article 2 TEU is of such severity that it affects the veto's very existence. In consequence, Hungary's vote has never been validly cast, so a Council decision can be adopted without Hungary. Second, the CFSP's unanimity rule in Article 31(1) TEU can be interpreted in light of Article 2 TEU as not covering exceptional situations that threaten the Union's peace, its values, and the well-being of its peoples, so that qualified majority applies.

Armin von Bogdandy
Armin von Bogdandy is Director at the Max-Planck-Institute for Comparative Public Law and International Law, Heidelberg, and a Professor for Public Law at the Goethe University of Frankfurt.

Luke Dimitrios Spieker
Luke Dimitrios Spieker is a Postdoctoral Researcher at DFG Research Training Group: DynamInt at Humboldt University of Berlin, a Senior Research Fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and Associate Editor at Verfassungsblog.

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3 comments

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What we know from theory...

§ Historically domestic courts as the 'main allies" of the ECJ in the judicial construction of Europe

What we know from theory...

- Historically domestic courts as the 'main allies" of the ECJ in the judicial construction of Europe
- EU MS courts are necessary to enforce its caselaw in cases that do not require a referral

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

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§ Historically domestic courts as the 'main allies" of the ECJ in the judicial construction of Europe

§ EU MS courts are necessary to enforce its caselaw in cases that do not require a referral

- Member states observations (*amici curiae*) influence the ECJ significantly when solving case dispositions.
- These observations construed to carry credible threat of non-compliance and/or override.

What ECJ thinks...

[1]

[1] Thomas von Danwitz, Vice President to the ECJ

What ECJ thinks...

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, tells 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.'

— Thomas von Danwitz, Vice President to the ECJ,

Borderlines Podcast #3, 1 Nov 2024

Research Question

Under what conditions does the European Court of Justice align its legal basis usage with domestic courts in constructing legal rules?

Table of Contents

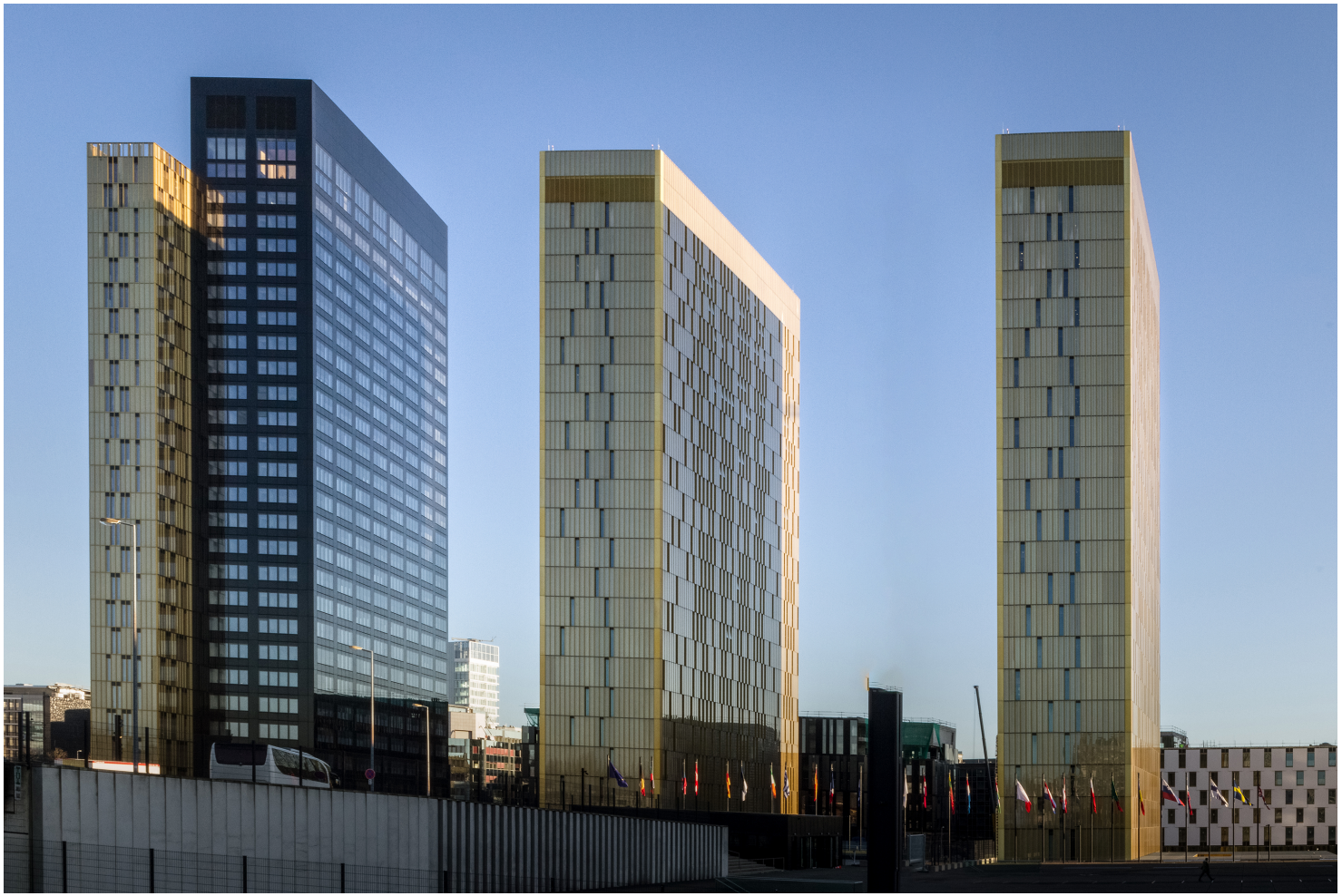
Puzzle

Application

Research Design

Results

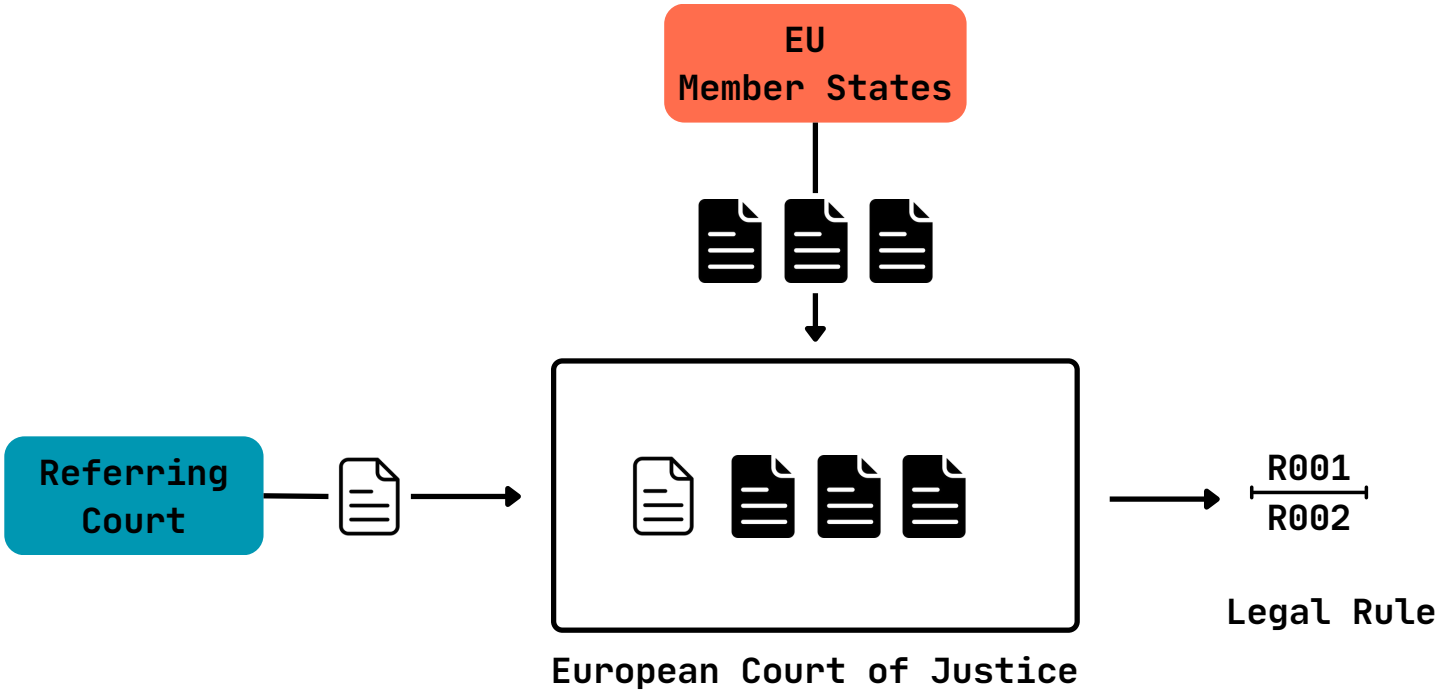
Implications



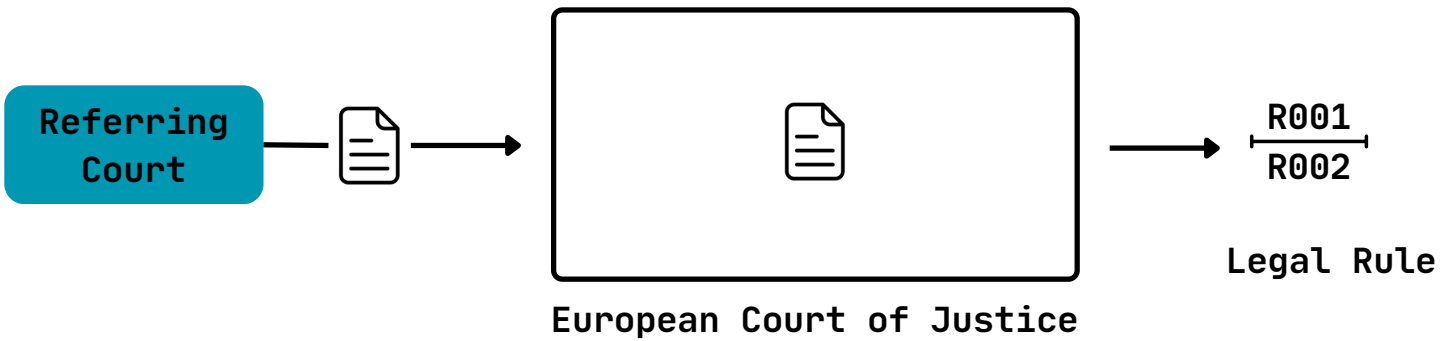
2

[2]The three towers: Rocca, Montesquieu and Comenius

Strategic Rulemaking Alignment by the ECJ



Strategic Rulemaking Alignment by the ECJ



Theoretical Expectations

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

	Cause	**Mechanism**	**Direction of Effect**
Political Management Pathways	(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.	−
Informational Pathway	(3) Legal alternatives	Alternative legal arguments to the ECJ decreasing rulemaking alignment with domestic courts.	−

Table of Contents

Puzzle

Application

Research Design

Results

Implications

Dataset

Variable	**Count**
Referral Applications texts	5,017
Referral Questions	14,127
Referral Questions Citations	26,149
ECJ Operative texts	4,435
ECJ Operative Judgment Paragraphs	6,916
ECJ Operative Judgment Citations	15,510

Citation Standardization

Example 1

Both `11951K` and its annex variant `11951KN01` are standardized into the unified base identifier `1:ECSC:1951:0001:00`, resolving internal celex structural ambiguity.

Example 2

"Article 1, Paragraph 3 of Annex 2 of Directive 2008/48/EC" is encoded with full granularity as: `3:DIRV:2008:0048:00_ANX0002_00_BDY00000:ART00001:PAR00003`

Example 3

ELI "`https://eur-lex.europa.eu/eli/dir/2008/48/art_1/par_3`" is encoded as: `3:DIRV:2008:0048:00_MAIN001_00_BDY00000:ART00001:PAR00003`

Measurement LIAC

Referral Question with citation items
1. Do Article 49 TFEU and Article 54 TFEU require that the acquiring company is entitled to deduct in its taxation losses incurred in previous years by a company merging with it, which has resided in another Member State where it has incurred the losses in connection with business activities, when the acquiring company will not have a fixed place of business in the resident state of the acquired company and when, under national legislation, the acquiring company is entitled to deduct the losses of an acquired company, if the acquired company was Finnish or if the losses had been incurred in a fixed place of business located in this state?
1:TFEU:2008:0001:00_MAIN001_00_BDY00000:ART00049:00000000:00000000; 1:TFEU:2008:0001:00_MAIN001_00_BDY00000:ART00054:00000000:00000000

+

Measurement LIAC

Paired Judgment Paragraph with citation items
Articles 49 TFEU and 56 TFEU do not, in the circumstances of the main proceedings, preclude national legislation under which a parent company merging with a subsidiary established in another Member State, which has ceased activity, cannot deduct from its taxable income the losses incurred by that subsidiary in respect of the tax years prior to the merger, while that national legislation allows such a possibility when the merger is with a resident subsidiary. Such national legislation is none the less incompatible with European Union law if it does not allow the parent company the possibility of showing that its non-resident subsidiary has exhausted the possibilities of taking those losses into account and that there is no possibility of their being taken into account in its State of residence in respect of future tax years either by itself or by a third party
1:TFEU:2008:0001:00_MAIN001_00_BDY00000:ART00049:00000000:00000000;
1:TFEU:2008:0001:00_MAIN001_00_BDY00000:ART00056:00000000:00000000

Measurement LIAC

X	Y
REF_2011_0123FI_Q001	OJC_2011_0123_PAR001
1:TFEU:2008:0001:00_MAIN001_00_BDY00000:ART00049	1:TFEU:2008:0001:00_MAIN001_00_BDY00000:ART00049
1:TFEU:2008:0001:00_MAIN001_00_BDY00000:ART00054	1:TFEU:2008:0001:00_MAIN001_00_BDY00000:ART00056

$\Downarrow$

Measurement LIAC

SELECT case from `Set Citation Agreement Ratio()`

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

$$\Downarrow$$

CALCULATE the `Set Citation Agreement Ratio()`

X (IN)	$\{X \setminus Y\}$	$X \cap Y$	Y (OUT)	$\{Y \setminus X\}$	SCAR
2	1	1	2	1	0.333

Measurement LIAC

CALCULATE the Alignment in `Local Information-Adjusted Citations()`

$$\texttt{LIAC}_q = (\texttt{SCAR}_q \times |\{x_q\}|) - ((1 - \texttt{SCAR}_q) \times |\{x_q\}|)$$

$$\Downarrow$$

$$\texttt{LIAC}_q = (0.333 \times 2) - ((1 - 0.333) \times 2) = -0.668$$

Causal Identification Strategy

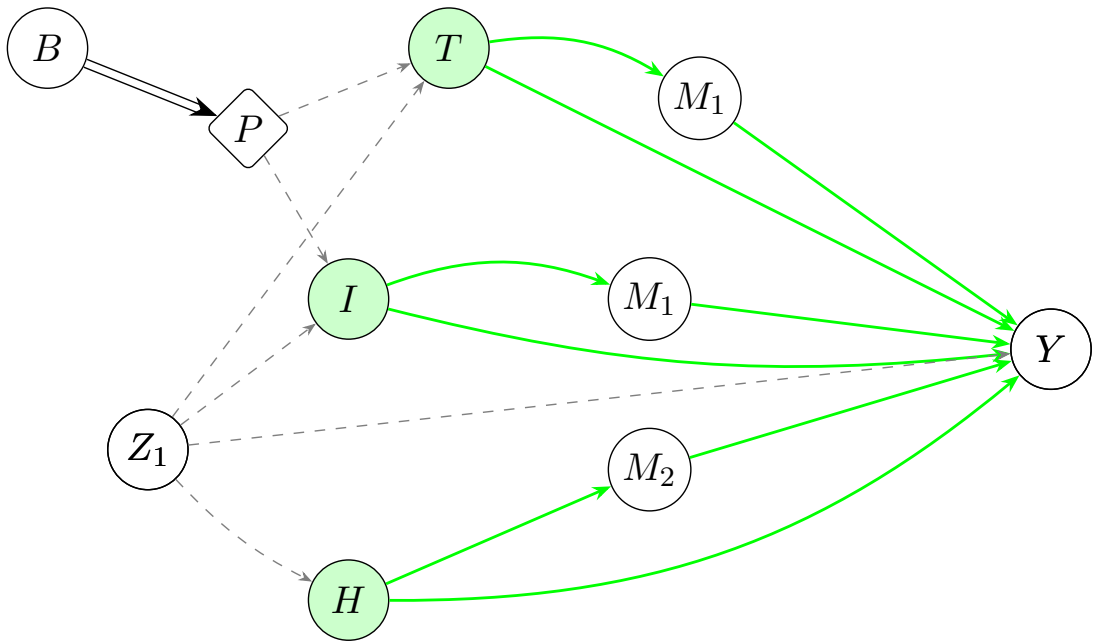


Figure A.7: Unified Theory Conditional Rulemaking Alignment

Estimation

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

y_i: Degree of rulemaking alignment for referral-judgment dyad i

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λ_i^p: Fixed effects controlling for ECJ's field of law classification p

ε_i^r: Robust error term clustered at referring member state court c level

Table of Contents

Puzzle

Application

Research Design

Results

Implications

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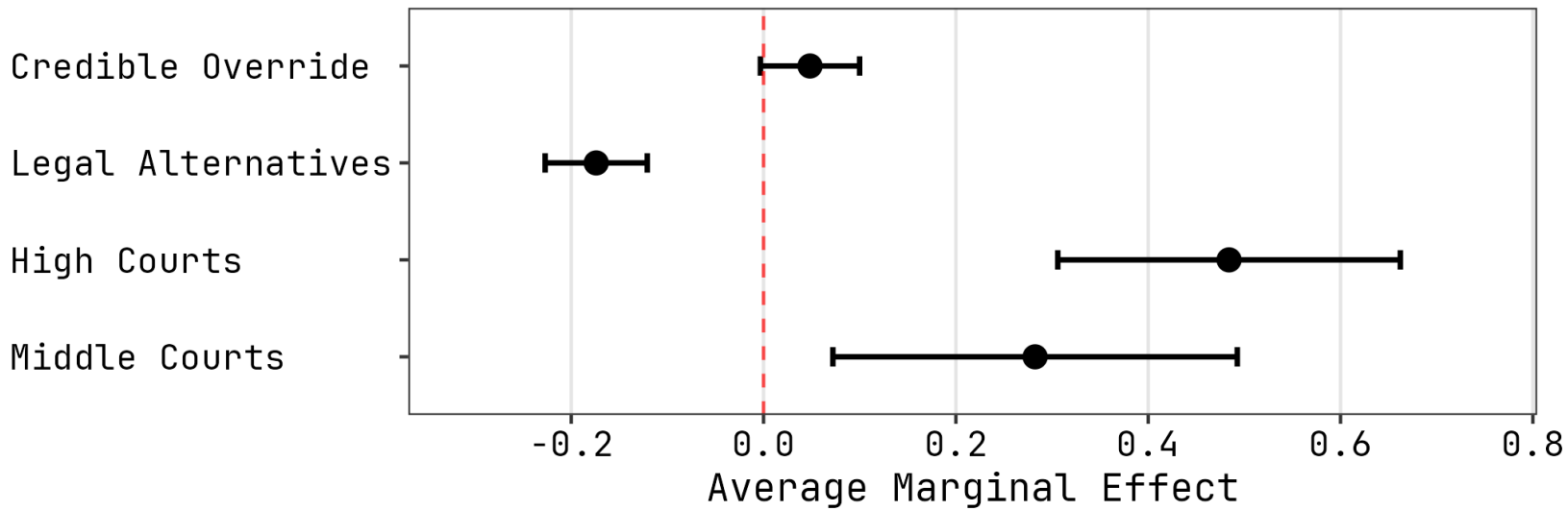
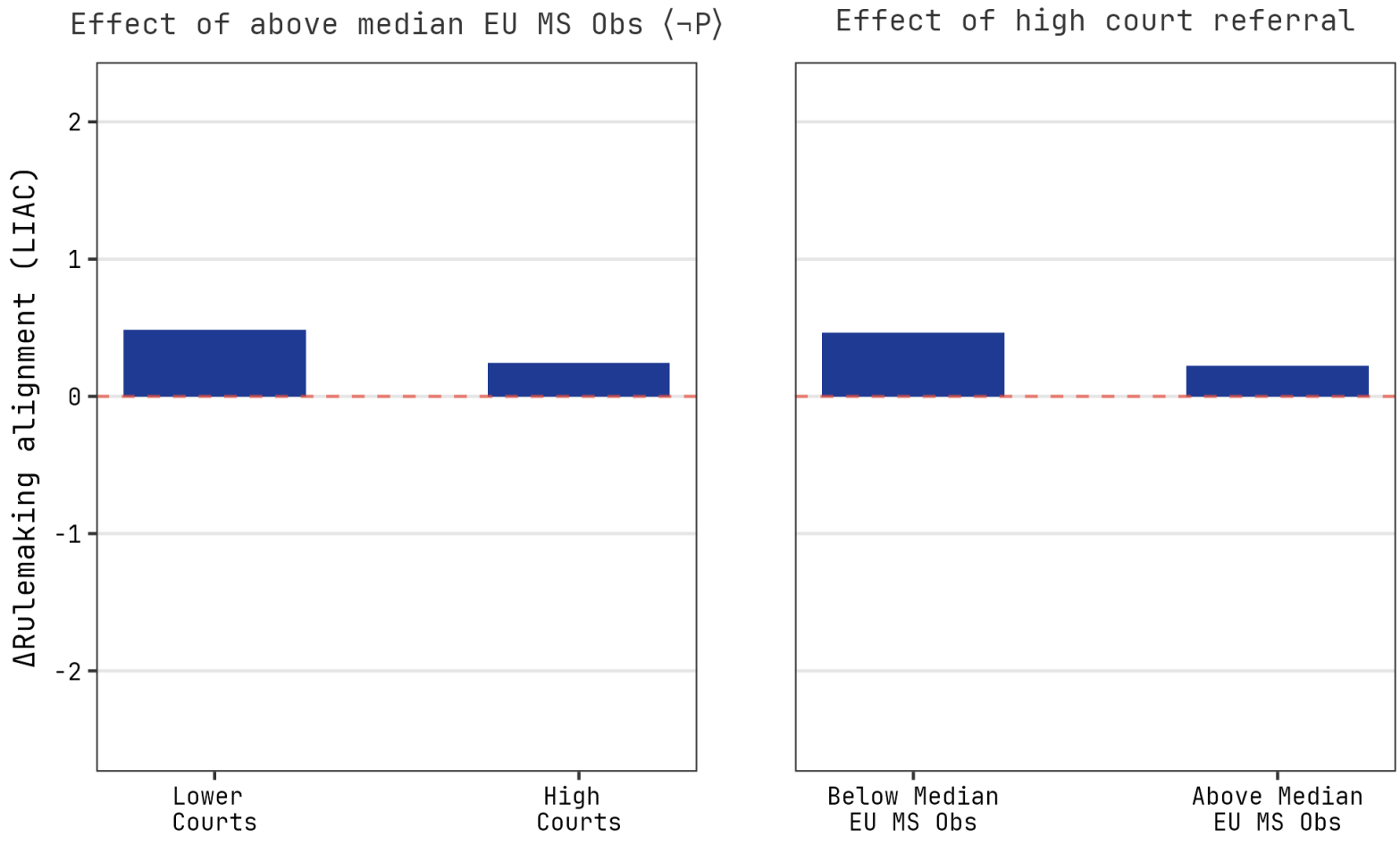

Credible Override
Legal Alternatives
High Courts
Middle Courts
-0.2
0.0
0.2
0.4
0.6
0.8
Average Marginal Effect

Results II

Results II


Effect of above median EU MS Obs ⟨¬P⟩
ΔRulemaking alignment (LIAC)
2
1
0
-1
-2
Lower Courts
High Courts
Effect of high court referral
Below Median EU MS Obs
Above Median EU MS Obs

Results III

Results III

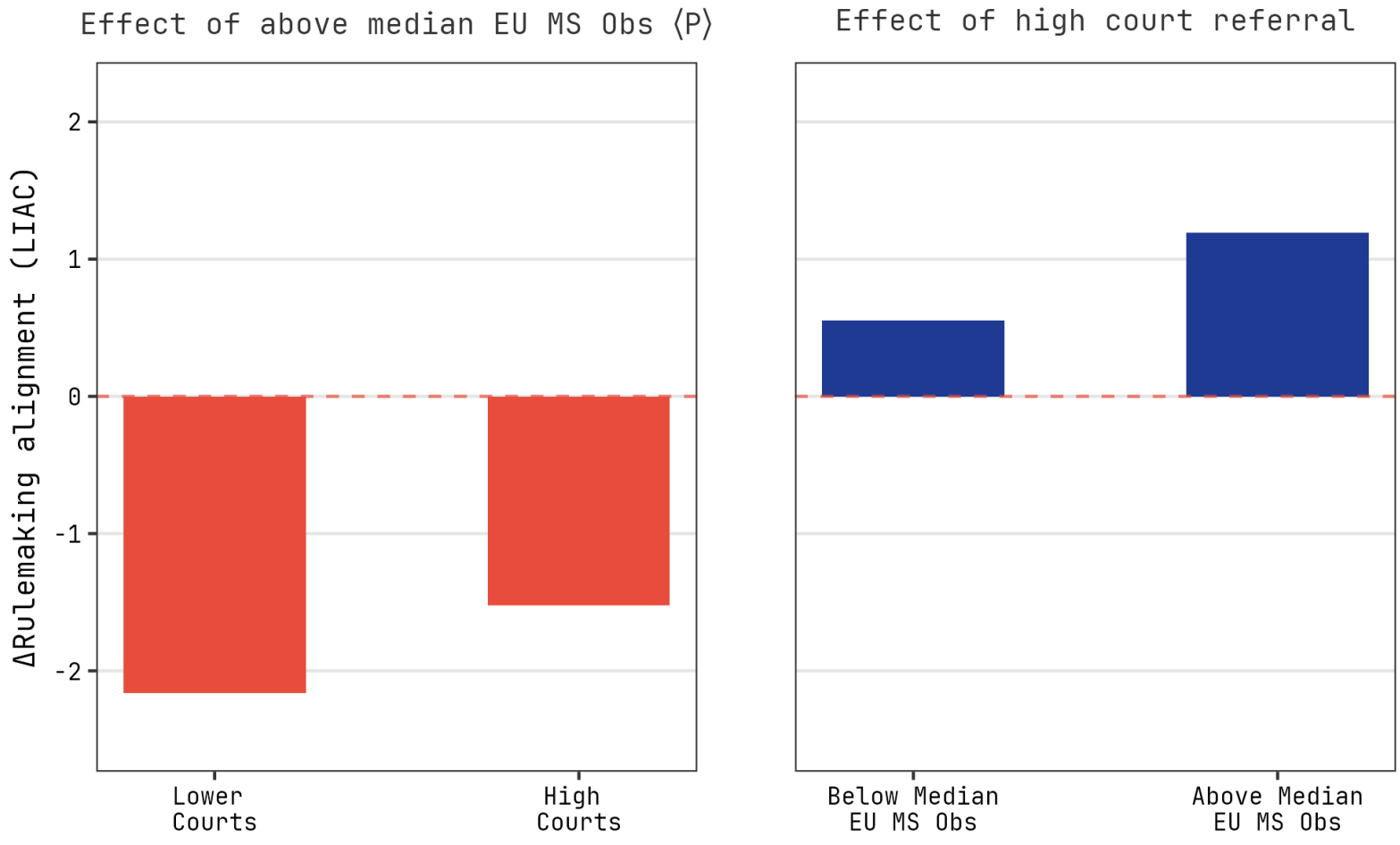

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Table of Contents

Puzzle

Application

Research Design

Results

Implications

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3. Any time you model ECJ behavior you *MUST* hold referring court hierarchy constant.
4. The LIAC alignment useful for anyone doing citation comparison between two agents.
5. Revisit previous studies disentangling theoretically distinct causal pathways.

Feedback Questions

Thank you for your time!!!
Please feel free to ask any questions and comments.

Contact
Email: m.m.manriquez@arena.uio.no