

Why Do Courts Defer to Administrative Agency Judgment?

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Puzzle

Rulemaking = Deference

- “deference should be accorded to the agency’s interpretation” (*Chevron v. NRDC* 1984)
- “APA notice and comment [rulemaking] is designed to assure due deliberation” (*US v. Mead Corp.* 2001)

Rulemaking ≠ Deference

- “because there is more at stake” (Elliott and Schuck 1990, Richards et al. 2006)

Abstract

I investigate the conventional wisdom that courts are more likely to uphold federal agency policies made through notice-and-comment rulemaking. I find that Supreme Court Justices have different preferences for deference, but overall, are actually less likely to show deference in rulemaking cases. The evidence does not suggest that this is due to justices voting more ideologically due to the greater stakes in rulemaking cases as implied by previous research. I then investigate potential selection effects at the circuit court and certiorari stages that could cause rulemaking cases to lose at the Supreme Court. The results offer no evidence that deference differs between circuit courts and the Supreme Court. While the Supreme Court may disproportionately opt to review rulemaking cases, it does not appear to do this in order to systematically discipline lower courts. Finally, I examine elements of the rulemaking process itself that may affect judicial review. Greater participation in rulemaking correlates with deference, as does an agency’s choice to regulate less rather than more. The puzzling negative relationship between rulemaking and deference remains unresolved, but, contrary to previous research, preliminary results suggest that justices may defer more to agency rulemaking on more salient issues where stakes are highest.

Data and Methods

Data

- All Supreme Court cases and a random sample of 175 federal circuit court cases 1984-2000 that mention “Administrative Law” in the LexisNexis headnotes.
 - Conservative-Liberal Ideology: Justices = Segal-Cover scores (-1:1), Policy = Spaeth criteria (-1, 0, 1)
 - Parties, briefs, opinions, outcomes
- Final Rule documents from federal register archives.
 - Notice of Proposed Rulemaking (NPRM)
 - Comments filed during notice-and-comment rulemaking

Logistic regression with two-tailed tests.

H2(disciplining)

Policymaking → Circuit Courts → Supreme Court

H3.1(expertise)
H3.2(accountability)
H3.3(participation)

H1(stakes)
H1.1(agreement)

Question

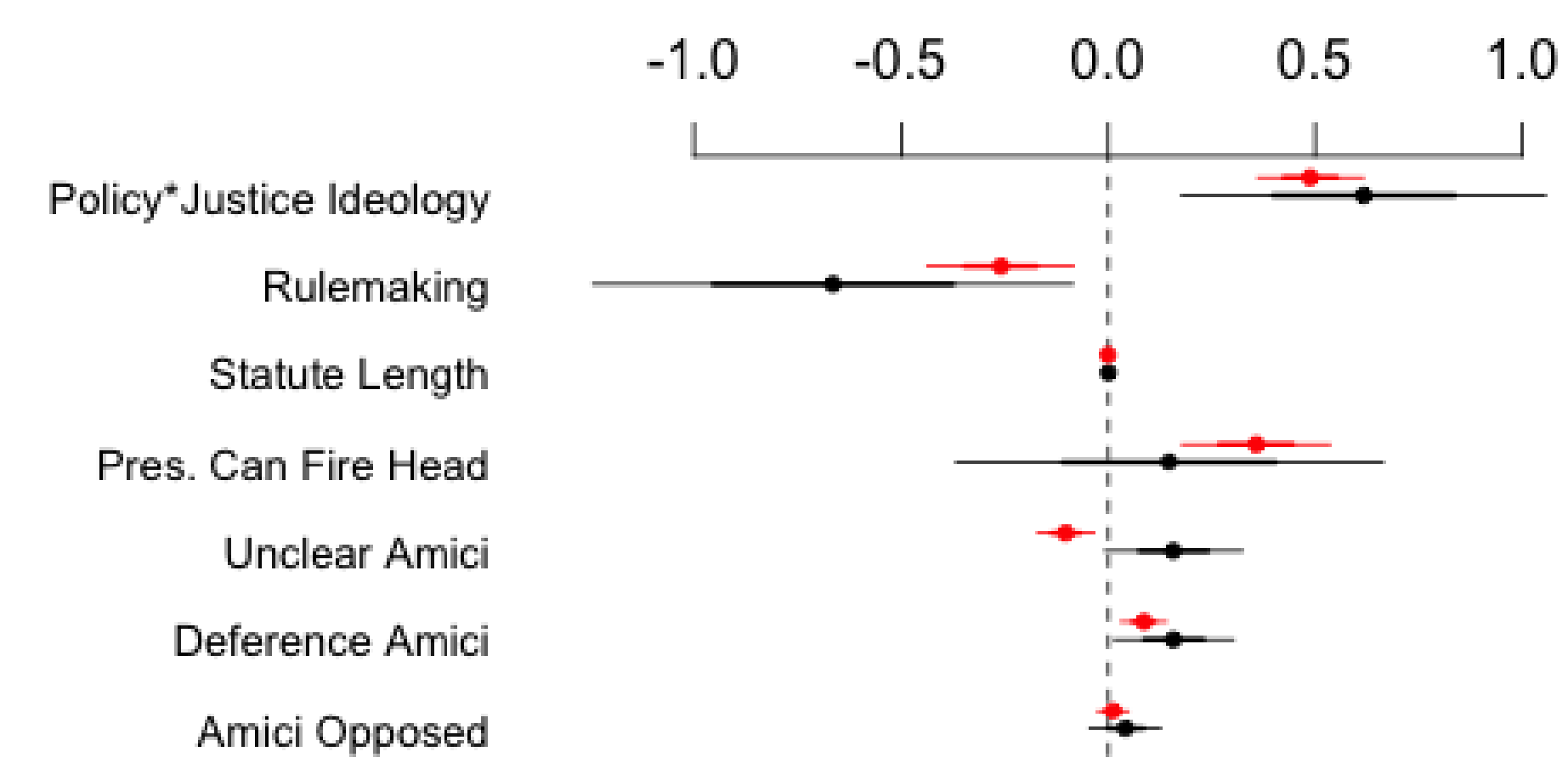
What makes bureaucratic policy legitimate?
Specifically, why do courts uphold agency policies?

- 1 How justices decide
- 2 How policies are challenged and selected for review
- 3 How policy is made

Results

- ☒ H1: Rulemaking cases lose because stakes are high
- ☒ H1.1: Justices vote more ideologically in rulemaking cases

Figure 1: Votes for Agency in Administrative Law Cases (Logit Coefficients)



*All administrative law cases. “Rulemaking” = Rule-like policymaking cases
*Rule-like policymaking cases. “Rulemaking” = Notice-and-comment rulemaking cases

- ☒ H2: SCOTUS disciplines lower courts for being too deferential
 - ☒ H2.1: Circuit courts are more deferential to rulemaking
 - ☒ H2.2: Circuit courts defer in different kinds of cases

Table 1: Votes for Agency in Circuit Court Administrative Law Cases

	Dependent variable:
	Deference Vote
Rulemaking	-1.429*** (0.465)
Pro-Deference Briefs	2.250*** (0.613)
Anti-Deference Briefs	0.274** (0.118)
Ideology*Agency Policy	-2.156*** (0.727)
Ideology*Policy*Rulemaking	-0.767 (1.507)
Constant	-1.122 (0.784)
Observations	410
Log Likelihood	-246.870
Akaike Inf. Crit.	527.739

(See Paper for Full Model) *p<0.1; **p<0.05; ***p<0.01

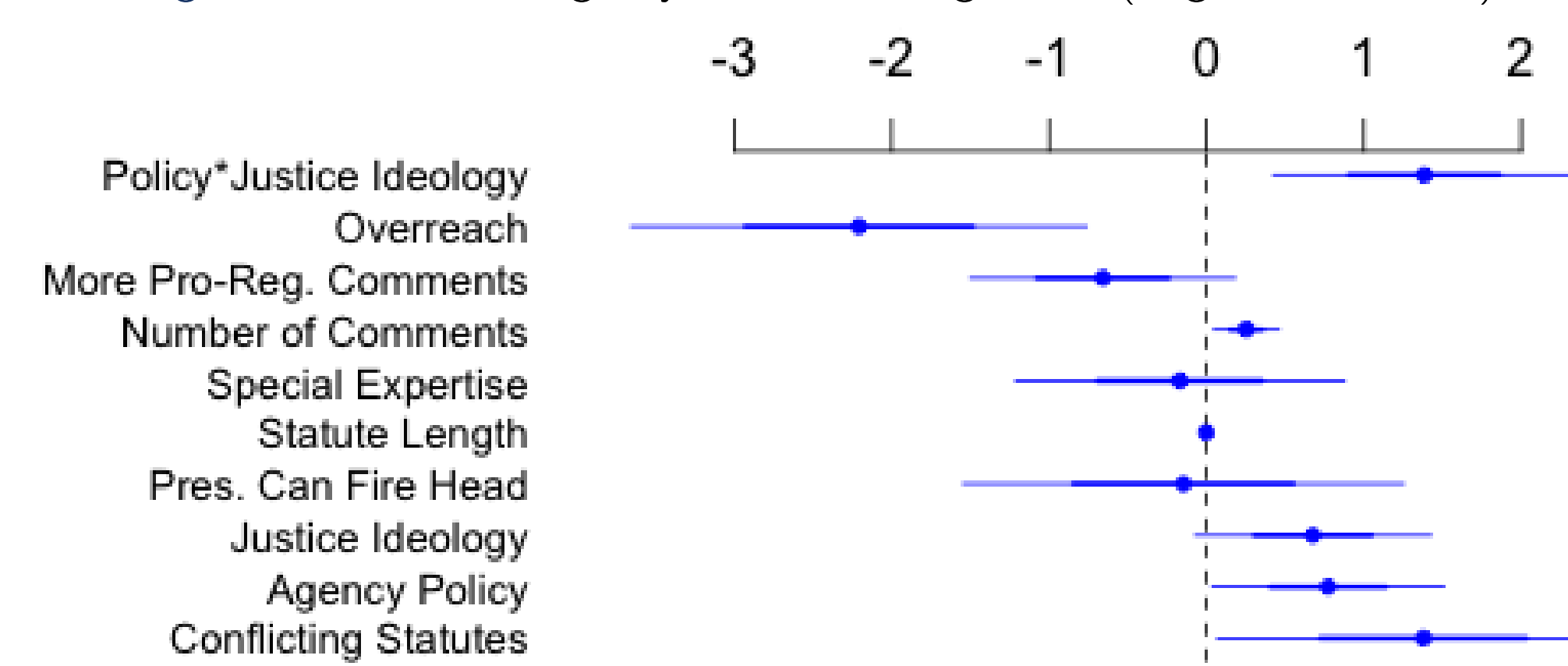
- ☒ H3: The process by which policy is made affects judicial review

- ☒? H3.1: when requiring special expertise
- ☒? H3.2: when accountable to political principals
- ☒? H3.3: when participatory

Table 3: Expectations for Policymaking Variables

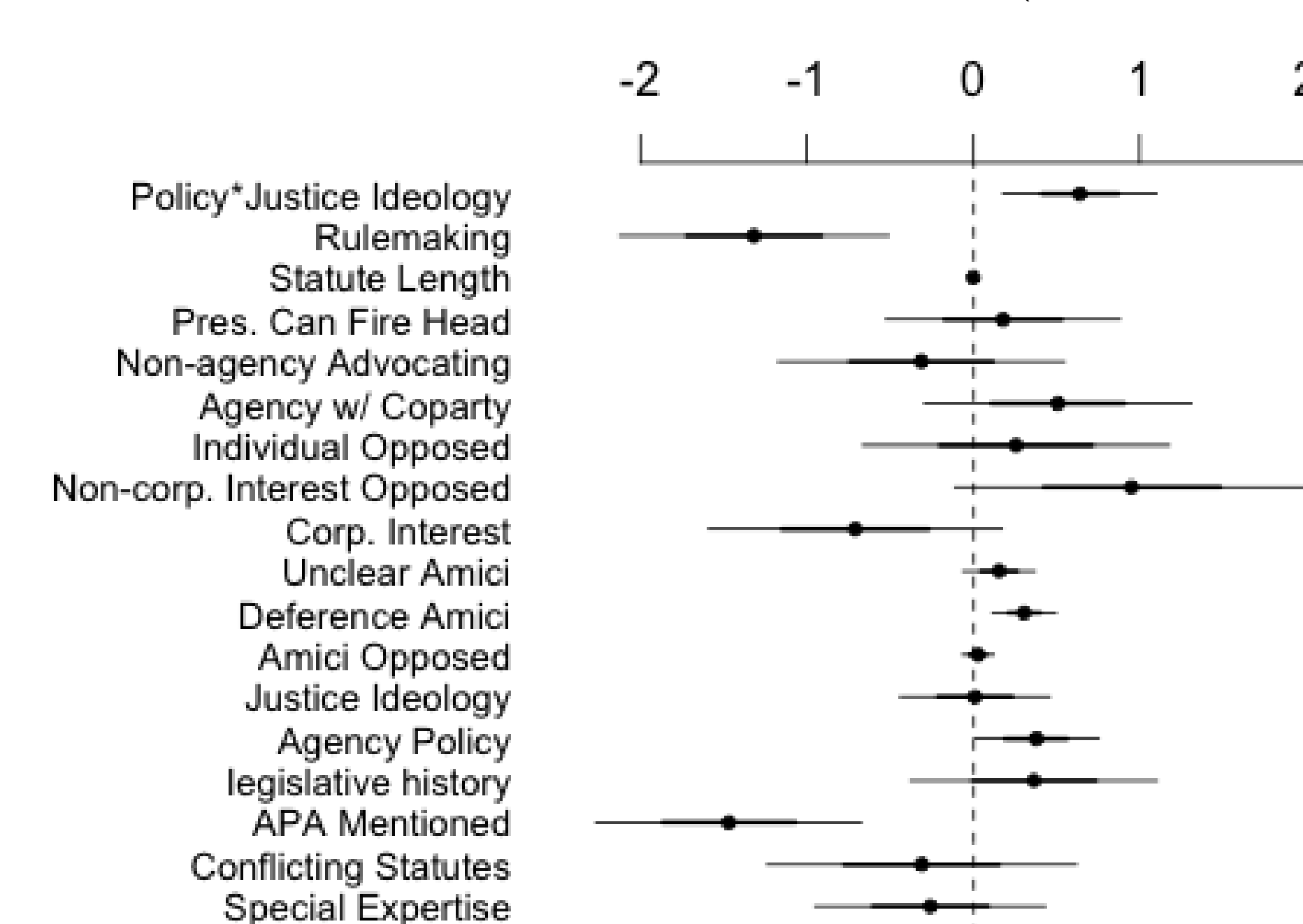
	If deference is due to:			
	Ideology	Expertise	Accountability	Participation
Ideology*Policy	+			
Pres. Can Fire Head			+	
Statute Length		?	?	
Rulemaking-like Policy	+			
Rulemaking (NPRM)	+	+	+	
Rule Complexity	+	-?	-	
Special Expertise		+	-?	-
Conflicting Statutes		+	?	
Justices Mention APA		?	?	?
Comment Deadline Extended			+	+
Number of Comments		+	+	+
More Pro-Regulation Comments			+	+
Agency Overreach			?	
Bad Faith		-	-	-

Figure 2: Votes for Agency in Rulemaking Cases (Logit Coefficients)



*Notice-and-comment rulemaking cases only.

Figure 3: Votes for Agency in Policymaking Cases (Logit Coefficients)



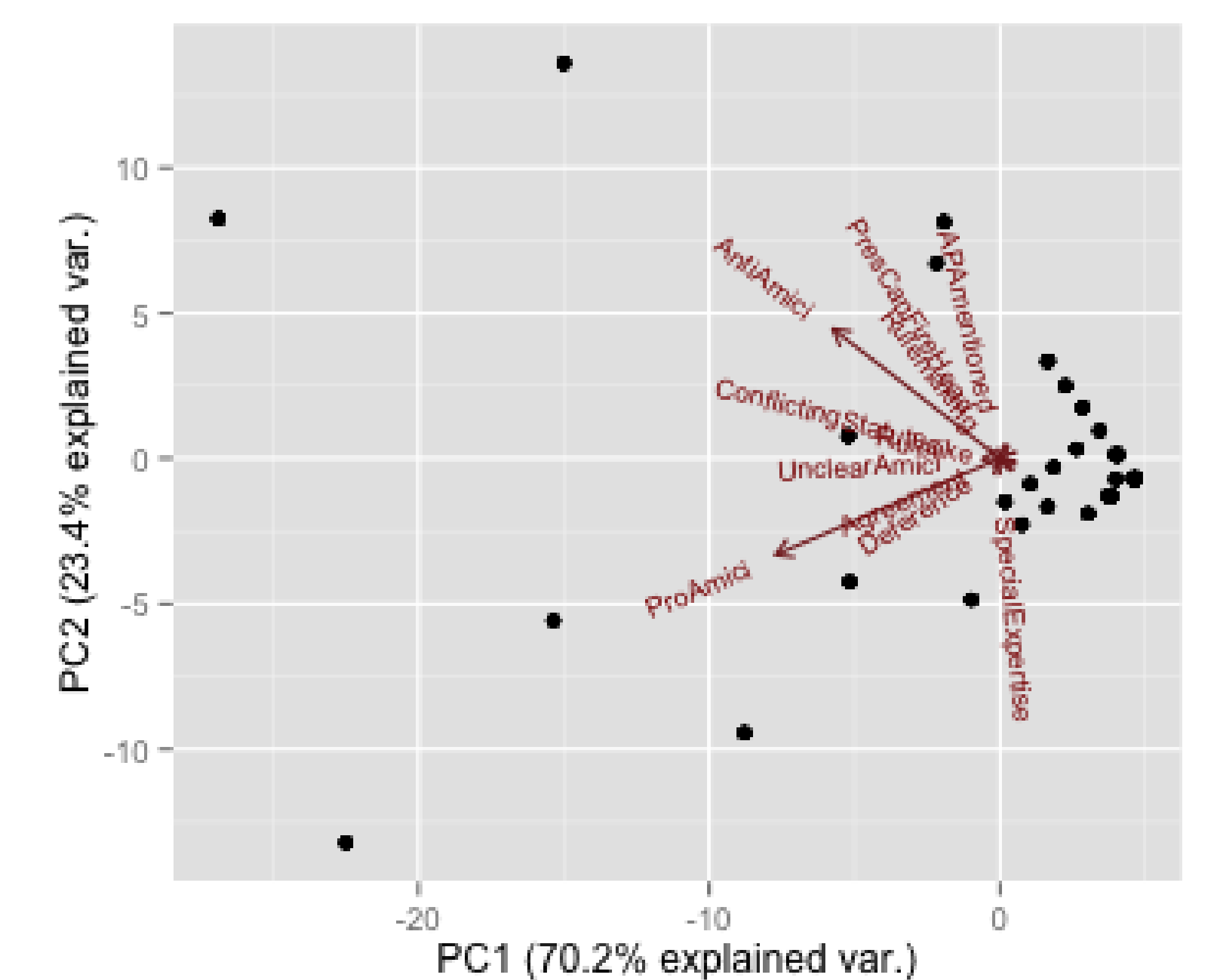
*Rule-like policymaking cases. “Rulemaking” = Notice-and-comment rulemaking.

Conclusion: The Puzzle Persists

Why are agencies more likely to lose when they use rulemaking?

- Not the high stakes
 - Not more ideological
 - Less deference than for policies with similar stakes
- Not disciplining circuit courts
 - No difference in deference or ideological voting
- Policy process may matter, but in unexpected ways
 - More controversial rules get more deference
- Salience and Administrative Procedures Act compliance?
 - Amicus briefs, rule comments = deference
 - APA = procedural liabilities

Figure 4: Principal Components Analysis, Supreme Court Rulemaking Cases



The process by which policies are made affects how courts treat them. Yet, observed patterns are not entirely consistent with theories of legitimacy in the literature on bureaucratic policymaking. I identify new factors that predict judicial deference, including the number of comments a policy received and whether it is challenged as doing more or less than Congress intended. I also suggest new interpretations of previously identified variables.

References

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- Elliot, Donald, and Peter Schuck. 1990. “To the Chevron Station: An Empirical Study of Federal Administrative Law.” *Yale Law School Faculty Scholarship Series*. Paper 2204.
- Richards, Mark, Joseph Smith, and Herbert Kritzer. 2006 “Does *Chevron* Matter?” *Law & Policy* 28(4): 444-469.



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