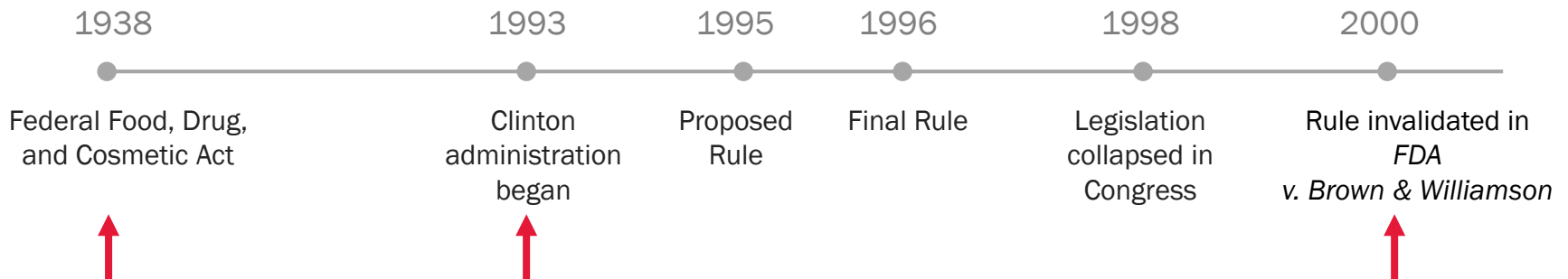


# Examining the Lifecycle of a Rule: Legislation, Executive Review, and the Courts

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# 1996 FDA Tobacco Regulation

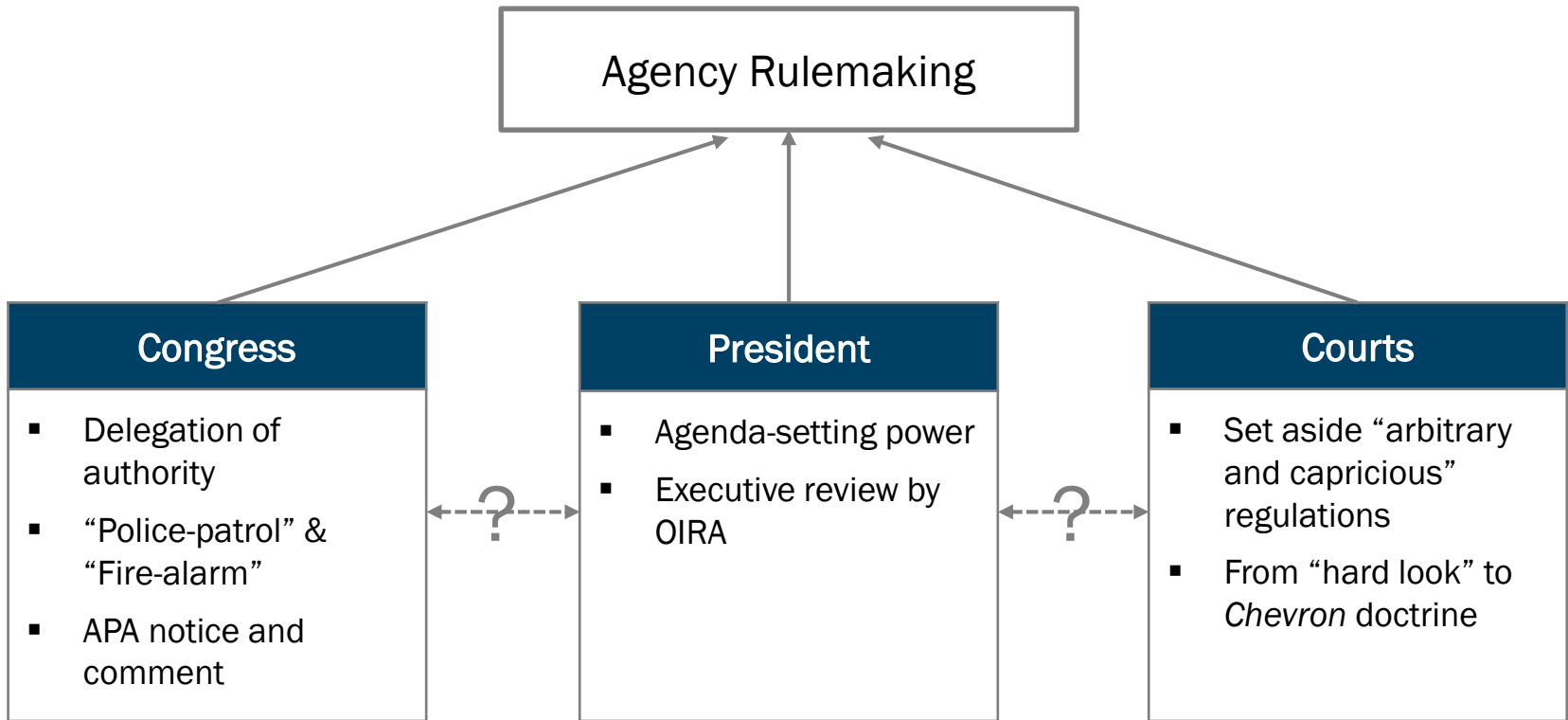


“For decades the FDA resisted pressure from public health groups to regulate cigarettes, saying it lacked the authority. When it changed course in 1996, it said it was because of new studies showing how nicotine affected the body.” (Washington Post, Mar 22, 2000)

“The Clinton administration called the 1996 initiative the FDA's most important public health and safety effort in the past 50 years.” (NCBI, Apr 1, 2000)

“Such authority is inconsistent with the intent that Congress has expressed in the FDCA's overall regulatory scheme and in the tobacco-specific legislation that it has enacted subsequent to the FDCA.” (Justice O'Connor in *FDA v. Brown & Williamson*)

# Political Mechanisms for Agency Control



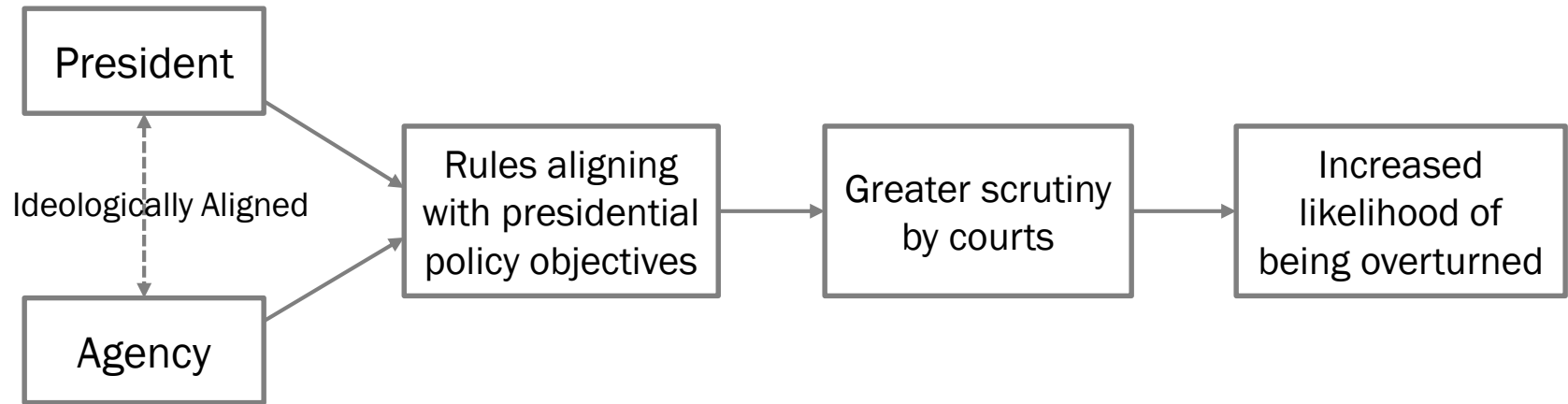
How can the institutions the political principals employ be used to affect each other’s efforts to control agency rulemaking?

# Research Questions

Do the courts use the power in judicial review as a mechanism to limit the president's capacity to influence agency rulemaking?

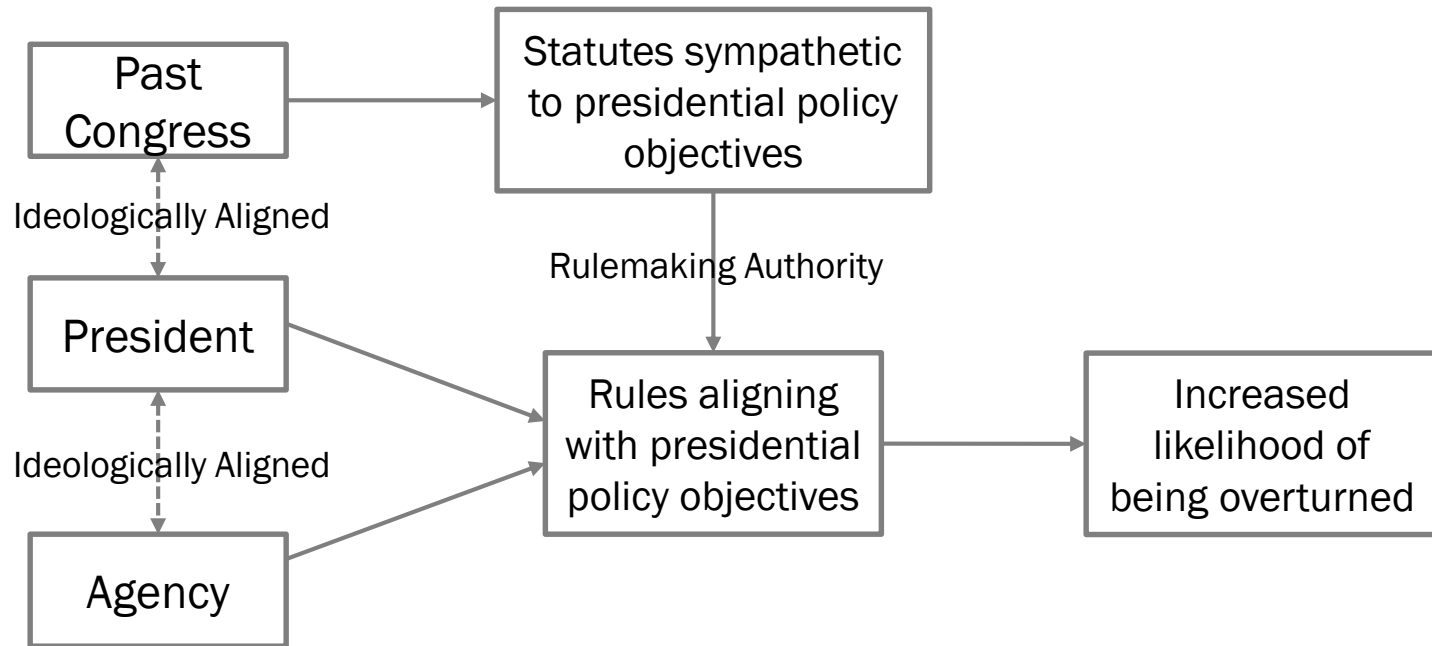
- What mechanism(s) does the president use to pursue his policy objectives when facing congressional constraints?
- Does the mechanism serve as a passageway by which courts check the president's ability to achieve his influence?

# Hypothesis 1



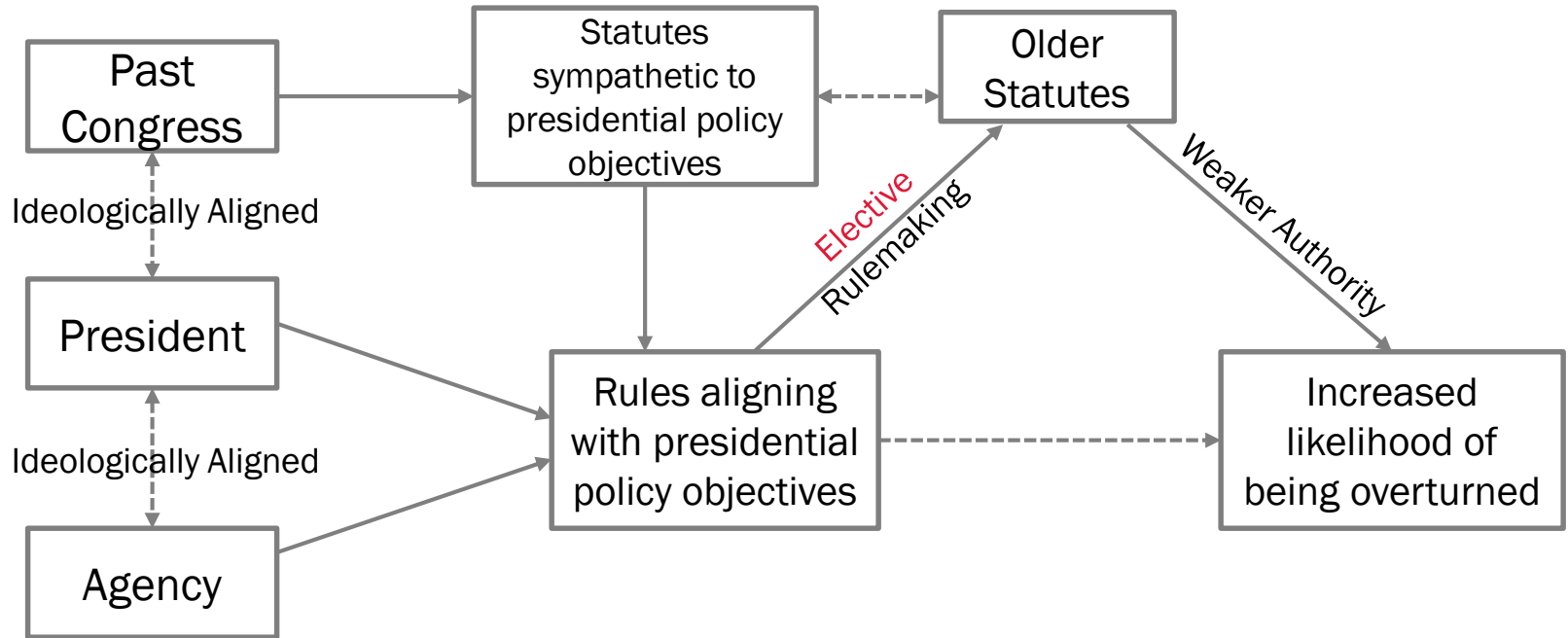
*H1: Courts will be more likely to overturn a rule when the agency promulgating it and the president in power are more ideologically aligned.*

# Hypothesis 2



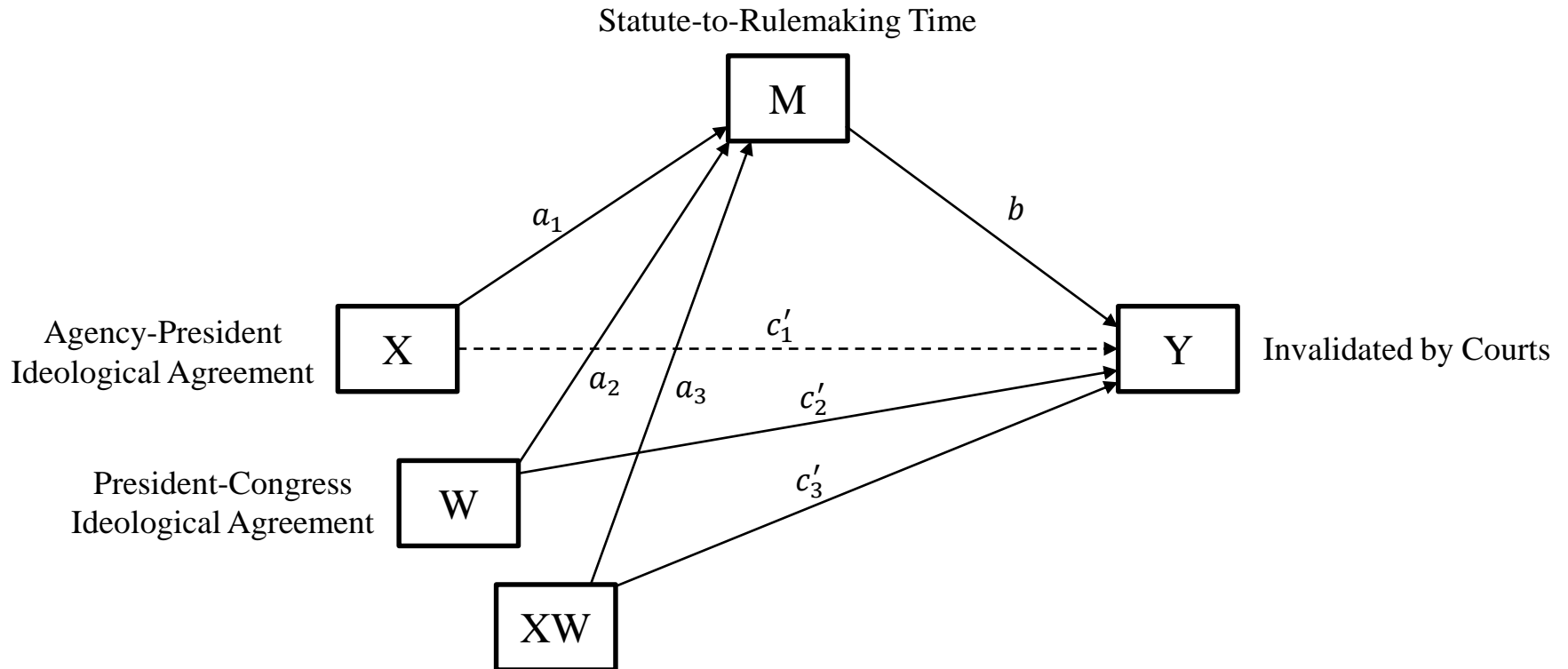
*H2: Courts will be especially likely to overturn a rule promulgated by an agency ideologically aligned with the president when the authorizing statute for the rulemaking was passed by a Congress whose ideological position also aligns with the agency and the president.*

# Hypothesis 3



*H3: The extent to which a rule is elective represents one pathway by which courts overturn rules characterized by ideological agreement between the president, regulatory agency, and the congressional authority upon which that agency relied.*

# A Conditional Process Model in Context



Notes: Adapted from the conditional process model in Hayes (2017). Similar models are also delineated by Baron and Kenny (1986), Muller, Judd and Yzerbyt (2005), and Morgan-Lopez and MacKinnon (2006).



# Methodology

- Regression Analysis:

$$Y = i_1 + c_1X + c_2W + c_3XW + \gamma C + e_Y \quad (1)$$

$$M = i_2 + a_1X + a_2W + a_3XW + \delta C + e_M \quad (2)$$

$$Y = i_3 + c'_1X + c'_2W + c'_3XW + bM + \theta C + e'_Y \quad (3)$$

Total Effect:  $X \rightarrow Y$  conditional on  $W$   $c_1 + c_3\omega$

Direct Effect:  $X \rightarrow Y$  conditional on  $W$  and controlling for  $M$   $c'_1 + c'_3\omega$

Indirect Effect:  $X \rightarrow M \rightarrow Y$  conditional on  $W$   $(a_1 + a_3\omega)b$

where  $i$  is the constant,  $C$  represents a set of control variables,  $e$  is the error term, and  $\omega$  is a given value of  $W$ .

- Bootstrap Test for Indirect Effect:

Hayes (2017) PROCESS macro

# Data and Sources

<b>Data coverage:</b>	182 “economically significant” rulemakings (RINs) for which the first proposal was submitted for OIRA review between 2007 and 2010.	Reginfo.gov
<b>Y:</b> Invalidated by courts	=1 if any of the <i>Code of Federal Regulations</i> (CFR) sections added or revised by the final rule(s) promulgated under the rulemaking was invalidated by courts through judicial review; =0 otherwise.	Westlaw
<b>X:</b> Agency-president ideological agreement	= positive value if the rulemaking agency is ideologically aligned with the president in office when the rulemaking was initiated; = negative value otherwise.	Kasdin and Lin (2015)
<b>W:</b> President-Congress ideological agreement	= positive value if the Congress passing the authorizing statute is ideologically aligned with the president in office when the rulemaking was initiated; = negative value otherwise.	Brookings Vital Statistics on Congress
<b>M:</b> Statute-to-rulemaking time	Time elapsed from the date the authorizing statute was passed by Congress to the date the first executive review was received by OIRA.	Reginfo.gov; Federal Register

# Control Variables

Category	Variable
Rule type	<ul style="list-style-type: none"><li>▪ Interim final rule</li></ul>
Administration	<ul style="list-style-type: none"><li>▪ Obama in office</li></ul>
Complexity and controversy	<ul style="list-style-type: none"><li>▪ Budget regulation</li><li>▪ Length of Federal Register preamble</li><li>▪ Number of public comments received</li><li>▪ Number of interest group meetings &amp; number of groups</li></ul>
Rulemaking deadlines	<ul style="list-style-type: none"><li>▪ Statutory and judicial deadlines</li></ul>
Scope of rulemaking	<ul style="list-style-type: none"><li>▪ Length of the authorizing statute</li></ul>
Agency characteristics	<ul style="list-style-type: none"><li>▪ Effective independence from politicians</li><li>▪ Non-departmental agency</li><li>▪ Policy concentration</li></ul>

# Regression Results

	(1) Logit		(2) OLS		(3) Logit	
VARIABLES	$Y:$	Invalidated by court	$M:$	Statute-to-rulemaking time	$Y:$	Invalidated by court
$X:$ Agency-president ideological agreement	$c_1$	2.1418* (0.072)	$a_1$	1.0134 (0.203)	$c'_1$	2.0160 (0.104)
$W:$ President-Congress ideological agreement	$c_2$	-4.8513 (0.254)	$a_2$	-12.1324 (0.141)	$c'_2$	-2.8139 (0.459)
$XW:$ Agency-president ideological agreement X President-Congress ideological agreement	$c_3$	26.6053* (0.059)	$a_3$	21.9330*** (0.008)	$c'_3$	25.1123* (0.087)
$M:$ Statute-to-rulemaking time					$b$	0.1308** (0.012)
Observations		182		182		182
Pseudo R2		0.174		0.330		0.211
Prob>F		0.0989		0.0000		0.0136

Notes: Statute-to-rulemaking time is in thousand days. Coefficients on the control variables are omitted.

Robust p-value in the parentheses. \*\*\*  $p < 0.01$ , \*\*  $p < 0.05$ , \*  $p < 0.1$ .

# Coefficients and Bootstrap Tests

$\omega$	Indirect Effect		Direct Effect		
	$(a_1 + a_3\omega)b$	90% Bootstrap Confidence Interval	$c'_1 + c'_3\omega$	$se$	$p$
-0.1065	-0.1730	-0.7020 to 0.2311	-0.6584	1.6046	0.6815
-0.0690	-0.0654	-0.4455 to 0.2819	0.2833	1.2606	0.8222
-0.0240	0.0637	-0.1869 to 0.4135	1.4133	1.1913	0.2355
<b>0.0780</b>	<b>0.3564</b>	<b>0.0019 to 0.9880</b>	<b>3.9748</b>	<b>2.2638</b>	<b>0.0791</b>
<b>0.1105</b>	<b>0.4496</b>	<b>0.0070 to 1.2182</b>	<b>4.7909</b>	<b>2.7382</b>	<b>0.0802</b>

Notes: The values in the  $\omega$  column represent the 5th, 25th, 50th, 75th, and 95th percentile of the ideological agreement between the president and the Congress passing the authorizing statute. Results are generated using the Process macro from Hayes (2017).

# Conclusion

- Courts are more likely to set aside rules that are promulgated by agencies ideologically aligned with the president, especially when the rules are authorized by statutes passed by a likeminded Congress.
- Those agencies tend to rely on elective rules by using authority from older statutes that were passed by a Congress whose ideological leaning accords with them and the president.
- Such tendency increases the likelihood that the associated final rule will be invalidated by courts through judicial review, suggesting a potential pathway by which courts check the executive's ability to influence agency policy directions.

# Next Steps & Future Research

- 95% confidence interval → expand the data?
- Statute-to-rulemaking time only explains a small proportion of the relationship → other institutional mechanisms?
- Future research on the interactions between political principals in exercising influences over the bureaucracy.

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