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Why Congress Should Repeal the Congressional Review Act

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I. Introduction

The Congressional Review Act (CRA) provides expedited congressional procedures for reviewing and repealing certain agency rules. Under the CRA, Congress may pass a joint resolution of disapproval by a simple majority in both Houses. If the President signs the resolution into law, the rule cannot take effect or continue in effect, and the agency may not reissue a rule that is "substantially the same" as the disapproved rule.

A little-used statute during its first two decades of existence, the CRA has experienced both revival and transformation during the Trump Administration. The CRA's usage exploded after January 2017, as the total number of joint resolutions signed under the CRA rose from one to seventeen within a little over a year. Further, Congress and President Trump have used the CRA in novel and previously unanticipated ways, expanding the CRA's reach to years-old informal guidance documents.

Given these developments, how should a Democratic Congress treat the CRA after President Trump leaves office? Congress originally passed the CRA through a bipartisan effort to increase congressional oversight of executive agencies, arguably promoting democratic values by in effect returning some rulemaking authority to elected officials. Ultimately, however, the CRA has emerged as a threat to sound administrative governance by expert agencies and should be repealed for five principal reasons.

First, the CRA is a hazard to future regulation. The meaning of the phrase "substantially the same" remains ambiguous, as neither the CRA's text nor its legislative history provides clear guidance on the matter, and the phrase has never been tested in court. Commentators have speculated as to a range of plausible interpretations, including the possibility that a joint resolution of disapproval could prevent rulemaking in an entire regulatory area. Thus, while the consequences of CRA disapprovals are unclear, their preclusive effect on future agency rulemaking could be sweeping. In any event, they introduce an element of uncertainty for future rulemaking in areas affected by CRA disapprovals.

Second, the CRA disregards the normal rulemaking framework established under the Administrative Procedure Act (APA), which is intended to promote reasoned decision-making. The CRA provides a blunt instrument that allows Congress only to disapprove of entire rules but not modify them; disregards the reasoning of expert agencies; and affords limited notice and public debate regarding regulatory changes.

Third, the CRA threatens rule of law principles. By diminishing certainty, predictability, and participatory deliberation within the rulemaking process, the CRA threatens reliance interests and reduces the incentive to comply with existing regulations.

Fourth, the CRA exacerbates partisanship in rulemaking. Because the President whose administration promulgates a rule is unlikely to sign a joint resolution of disapproval repealing that rule, the CRA is most likely to be successfully used following a presidential transition. Partisanship is therefore baked into the CRA's use itself.

Finally, the CRA weakens the independence of independent agencies, over which the President is understood to have limited supervisory authority: it provides an additional avenue through which a President may exert influence over independent agency rulemaking by signing, or threatening agencies with, CRA disapprovals.

The CRA jeopardizes the ability of agencies to promulgate future regulation and undermines key aspects of the administrative process. Accordingly, if Democrats regain control of Congress, they should repeal the CRA rather than normalize its use.

II. The Congressional Review Act

A. Overview

On March 29, 1996, President Bill Clinton signed the Congressional Review Act (CRA)[1] into law.[2] Congress enacted the CRA in an attempt to establish greater oversight over executive branch agencies, reacting specifically to the Supreme Court's decision in *INS v. Chadha*,[3] which held the one-house veto unconstitutional.[4] Passed as title III of the Small Business Regulatory Enforcement Fairness Act of 1996, the CRA "received broad support in the House and the entire bill passed in the Senate by unanimous consent."[5]

The CRA provides Congress with expedited procedures for reviewing and passing joint resolutions of disapproval on certain rules promulgated by executive branch agencies.[6] Under the CRA, before any rule[7] can take effect, the promulgating agency must submit the rule to Congress for review.[8] Congress may then pass a joint resolution of disapproval by a simple majority in both Houses, generally within 60 legislative days of the rule being submitted to Congress or published in the *Federal Register*.[9] If the President signs such a resolution into law, the rule cannot take effect or continue in effect.[10] Further, the agency may not reissue the disapproved rule in "substantially the same form," nor may it issue "a new rule that is substantially the same" unless "specifically authorized" by a later-enacted law.[11]

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[1] 5 U.S.C. §§ 801–808.

[2] 142 Cong. Rec. 8197 (1996).

[3] 462 U.S. 919 (1983).

[4] *See* 142 Cong. Rec. 8197 (1996).

[5] *Id.*

[6] *See* RICHARD S. BETH, CONGRESSIONAL RESEARCH SERVICE, DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT 1 (2001).

[7] The CRA adopts the definition of "rule" set forth in the APA, *see* 5 U.S.C. § 804(3) (citing 5 U.S.C. § 551(4)), with three specified exceptions. The first exception is for "any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof, or accounting practices or disclosures bearing on any of the foregoing." *Id.* § 804(3)(A). The second is for "any rule relating to agency management or personnel." *Id.* § 804(3)(B). The third is for "any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties." *Id.* § 804(3)(C).

[8] *See id.* § 801(a)(1).

[9] *See id.* § 802.

[10] *Id.* § 801(b)(1).

[11] *Id.* § 801(b)(2).

B. "[S]ubstantially the same"

Section 801(b)(2) restricts any federal agency from issuing any rule that is "substantially the same" as any disapproved rule.[12] Because no agency has attempted to pass a rule that might be considered "substantially the same" as its predecessor, this provision has never been tested in court, so its meaning has never been clarified.

The CRA itself leaves the meaning of "substantially the same" ambiguous. The statute does not define "substantially the same" in its definitions section.[13] And the phrase's plain text itself raises more questions than it answers. For instance, at what point would a subsequent rule be considered "substantially" the same? In what way must a subsequent rule not be "the same" as its predecessor? The ordinary meaning fails to reveal answers to these questions.

The CRA's legislative history provides limited additional guidance. In fact, Congress prepared no formal legislative history documents in the course of passing the CRA, since the final statutory language "was the product of negotiation" between the two Houses and "did not go through the committee process."[14] Thus, about one month after President Clinton signed the CRA into law, the CRA's sponsors in the Senate—Don Nickles (R-Okla.), Harry Reid (D-Nev.), and Ted Stevens (R-Alaska)—submitted a joint statement for the record to "cure this deficiency."[15] This joint statement is as close to a legislative history as is available, yet because it was drafted after the CRA's enactment, its interpretive weight may be limited.

The joint statement noted that a joint resolution of disapproval "may have a different impact on the issuing agency depending on the nature of the underlying law that authorized the rule."[16] For example, "if the law that authorized the disapproved rule provides broad discretion to the issuing agency regarding the substance of such rule, the agency may exercise its broad discretion to issue a substantially different rule."[17] Likewise, "if an agency is mandated to promulgate a particular rule and its discretion in issuing the rule is narrowly circumscribed, the enactment of a resolution of disapproval for that rule may work to prohibit the reissuance of any rule."[18]

The joint statement did not, however, specifically define "substantially the same."[19] Instead, it simply asserted that "[i]t will be the agency's responsibility in the first instance when promulgating the rule to determine the range of discretion afforded under the original law and whether the law authorizes the agency to issue a substantially different rule. Then, the agency must give effect to the resolution of disapproval."[20] While this indicates that agencies may have some leeway in promulgating a substantially *different* rule from the one disapproved by Congress, it does not clarify the contours of "substantially the same" itself.

Given this ambiguity, commentators have "imagine[d]" the range of interpretations of "substantially

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[12] *See id.*
[13] *See id.* § 804.
[14] 142 Cong. Rec. 8197 (1996).
[15] *Id.*
[16] *See id.* at 8199.
[17] *Id.*
[18] *Id.*
[19] *See id.*
[20] *Id.*

the same."[21] For example, Adam Finkel and Jason Sullivan propose seven possible interpretations of the phrase, in order of least to most severe:

The first two possible interpretations consider changed external conditions. Finkel and Sullivan first propose that the CRA's "substantially the same" language may mean that "[a]n identical rule can be reissued if the agency asserts that external conditions have changed."[22] Alternatively, they propose that this language may mean that "[a]n identical rule can be reissued if external conditions truly have changed."[23]

The next three possible interpretations consider various degrees of modification that might be required for a rule to avoid being considered "substantially the same." For instance, the "substantially the same" language may mean that "[t]he reissued rule must be altered so as to have significantly greater benefits and/or significantly lower costs than the original rule."[24] Alternatively, it may mean that, "[i]n addition to changing the overall costs and benefits of the rule, the agency must fix all of the specific problems Congress identified when it vetoed the rule."[25] Further, the prohibition on reissuing a rule in "substantially the same form" may mean that, "[i]n addition to changing the costs and benefits and fixing specific problems, the agency must do more to show it has 'learned its lesson.'"[26] This "expansive" construction would elevate the importance of "form" as compared to the rule's actual substance.[27] "In other words," under this reading, "the original rule deserved a veto because of how it was issued, not just because of what was issued, and the agency needs to change its attitude, not just its output."[28]

The final two possible interpretations imagine more drastic readings of "substantially the same." For example, this language may mean that, "[i]n addition to the above, the agency must devise a wholly different regulatory approach if it wishes to regulate in an area Congress has cautioned it about."[29] Finally, it may mean that "[a]n agency simply cannot attempt to regulate (in any way) in an area where Congress has disapproved of a specific regulation."[30]

Finkel and Sullivan's first two possible interpretations—focusing on changed external condition—seem highly implausible, since the CRA's text specifies that the subsequent *rule* may not be substantially the same but makes no reference to external conditions. The remaining five possibilities however, all represent plausible readings of the phrase, given the statute's ambiguity. Finkel and Sullivan themselves argue that courts should read "substantially the same" using the third interpretive approach, which focuses on a rule's costs and benefits.[31] At least one subsequent commentator has written favorably about this approach.[32] Another commentator, however, has criticized this reading on

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[21] *See, e.g.*, Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can Osha Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 734 (2011).
[22] *Id.*
[23] *Id.*
[24] *Id.* at 735.
[25] *Id.* at 736.
[26] *Id.*
[27] *See id.*
[28] *Id.*
[29] *Id.*
[30] *Id.* at 737.
[31] *Id.* at 740.
[32] *See* Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer to Agencies Under Chevron*, 70 ADMIN. L. REV. 53, 89–94 (2018).

the grounds that "[a] new rule that is identical to the one that Congress and the President disapproved is 'substantially similar' to the original rule . . . regardless of any change in its effect."[33] Finkel and Sullivan themselves note that "[t]he set of less opportunistic interpretations" of "substantially the same" has "a well-defined center of gravity, and "most legal and political science scholars . . . seem to agree that a veto under the CRA is at least a harsh punishment, and perhaps a death sentence."[34]

Members of Congress made "the majority of all the statements ever made interpreting the meaning of 'substantially the same'" during floor debates leading up to Congress' first successful disapproval under the CRA, which repealed an ergonomics rule promulgated by the Occupational Safety and Health Administration (OSHA).[35] Those opposed to the disapproval adopted versions of the more drastic interpretations, describing the disapproval's consequences in "almost apocalyptic terms."[36] Under one view, the disapproval would render OSHA "powerless to adopt an ergonomics rule" unless "Congress [gave] it permission."[37] Yet those in favor of the disapproval occupied the other "extreme," making "statements trivializing the effect of the veto, such as, 'the CRA will not act as an impediment to OSHA should the agency decide to engage in ergonomics rulemaking.'"[38]

Simply put, "[t]he scope of this prohibition remains unclear."[39] Given the wide range of plausible interpretations, one can only speculate as to how a court would assess whether a rule challenged under the CRA is "substantially the same" as a disapproved rule. Proponents of the administrative state therefore should assume that a more severe interpretation could prevail when this language is ultimately tested.

C. Judicial Review

If Congress successfully disapproves of a rule under the CRA, a claim that a subsequent rule is "substantially the same" as the disapproved rule would be reviewable by the courts. But this is not necessarily obvious from the text of the statute. Under section 805 of the CRA, "[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review."[40]

Lower courts are divided about the extent of this prohibition. The majority of courts to have addressed section 805 have held that its prohibition on judicial review applies to any "determination, finding, action, or omission" by either Congress or a federal agency.[41] Only two courts have held otherwise,

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[33] *See* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 252 (2018).
[34] Finkel and Sullivan, *supra* note 21, at 738–39.
[35] *Id.* at 737; *see also infra* Section III.A.
[36] *See* Finkel and Sullivan, *supra* note 21, at 737.
[37] *Id.*
[38] *Id.*
[39] Daniel A. Farber, *Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 383, 395 (2019).
[40] 5 U.S.C. § 805.
[41] *See Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009); *Via Christi Reg'l Med. Ctr. v. Leavitt*, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007); *Kansas Nat. Res. Coal. v. U.S. Dep't of the Interior*, 382 F. Supp. 3d 1179 (D. Kan. 2019); *United States v. Carlson*, 2013 U.S. Dist. LEXIS 130893 (D. Minn. 2013); *United States v. Ameren Mo.*, 2012 U.S. Dist. LEXIS 95065 (E.D. Mo. 2012); *Forsyth Mem'l Hosp. v. Seblius*, 667 F. Supp. 2d 143, 150 (D.D.C. 2009); *Provena Hosps. v. Sebelius*, 662 F. Supp. 2d 140, 154-55 (D.D.C. 2009); *New York v. Am. Elec. Power Serv. Corp.*, 2006 U.S. Dist. LEXIS 32829 (S.D. Ohio 2006); *United States v. Am. Elec. Power Serv. Corp.*, 218 F. Supp. 2d 931, 949 (S.D. Ohio 2002); *Tex. Savings & Cmty. Bankers Assoc. v. Fed. Hous. Fin. Bd.*, 1998 U.S. Dist. LEXIS 13470, *27 (W.D. Tex. 1998).

concluding that section 805 applies only to determinations, findings, actions, or omissions by Congress.[42]

Under either interpretation, however, section 805's prohibition on judicial review extends only to determinations, findings, actions, or omissions *arising under the CRA*—for example, whether an agency violated the CRA's procedures with respect to submitting final rules to Congress. Thus, section 805 would not prevent a court from reviewing the consequences of a joint resolution of disapproval once such a resolution is enacted into law.[43] Because any joint resolution of disapproval requires bicameralism and presentment, a claim that a subsequent rule is "substantially the same" as a disapproved rule could be reviewed by a court like any other validly enacted piece of legislation. Indeed, the Senate sponsors' joint statement asserts that "[a] court with proper jurisdiction may treat the congressional enactment of a joint resolution of disapproval as it would treat the enactment of any other federal law."[44] Such a court thus "may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule."[45]

III. Use of the CRA[46]

A. Before 2017

Prior to 2017, the CRA was successfully used only once.[47] OSHA issued a rule in November 2000 establishing standards for workplace ergonomics.[48] Following the presidential transition between the Clinton and Bush Administrations, Congress passed a joint resolution of disapproval,[49] which President George W. Bush signed into law on March 20, 2001, repealing the rule.[50] OSHA has never attempted to reissue the rule or one that might be considered "substantially the same."[51]

The CRA has rarely been used, in part, because the President whose administration promulgates a rule would be unlikely to sign a joint resolution of disapproval.[52] This dynamic creates de facto supermajority requirement for most rules.[53] For example, during his second term, President Obama vetoed five joint resolutions of disapproval that had successfully passed both Houses of Congress.[54] As such, the CRA is most likely to be successfully used following a presidential transition,[55] especially when the new President holds a different political party affiliation from his or her predecessor.

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[42] *See Tugaw Ranches, LLC v. United States Dep't of the Interior*, 362 F. Supp. 3d 879 (D. Idaho 2019); *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692CMS, 2002 WL 31427523, at *5 (S.D. Ind. Oct. 24, 2002).

[43] *See* Cole, *supra* note 32, at 65.

[44] 142 Cong. Rec. 8199 (1996).

[45] *Id.*

[46] See the Appendix for a complete overview of all successful uses of the CRA to date.

[47] *See* MAEVE P. CAREY ET AL., CONGRESSIONAL RESEARCH SERVICE, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 5 (2016).

[48] *Id.*

[49] Pub. L. No. 107-5 (2001).

[50] CAREY ET AL., *supra* note 47, at 5.

[51] *See id.*

[52] Larkin, *supra* note 33, at 251.

[53] *Id.*; CAREY ET AL., *supra* note 47, at 4–5.

[54] CAREY ET AL., *supra* note 47, at 5; *see* H.R. Res. 88, 114th Cong. (2016); S. Res. 24, 114th Cong. (2015); S. Res. 23, 114th Cong. (2015); S. Res. 22, 114th Cong. (2015); S. Res. 8, 114th Cong. (2015).

[55] CAREY ET AL., *supra* note 47, at 4–5.

B. During the Trump Administration

Following President Trump's inauguration, "Congress made aggressive use of the CRA against Obama Administration regulations."[56] As of November 2019, President Trump has signed a total of sixteen joint resolutions of disapproval into law, fourteen of which he signed within the first four months of his term.[57] Of these overturned rules, three were promulgated by the Department of the Interior under federal natural resources statutes.[58]

Most recently, Congress used the CRA in May 2018 to repeal for the first time an informal guidance document: a Consumer Financial Protection Bureau (CFPB) bulletin regarding indirect auto lending and compliance with the Equal Credit Opportunity Act.[59] Remarkably, the CFPB published the bulletin on March 21, 2013—not 60 legislative days before the joint resolution was passed, but *over five years prior*.[60] This novel invocation of the CRA gives rise to two interpretive questions.

First, does an informal guidance document of this nature count as a "rule" under the CRA? When asked, the Government Accountability Office (GAO) responded affirmatively, concluding that the bulletin was "a general statement of policy that offers clarity and guidance on the Bureau's discretionary enforcement approach," and "prior [GAO] decisions have held that non-binding general statements of policy are rules under CRA."[61] This is consistent with the APA's definition of "rule," which broadly includes any "agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[62]

The implications of this reading are unclear. Disapproval of agency guidance could operate the same way as disapproval of a regulation carrying the force of law, restricting any "substantially the same" future guidance. Yet under one view, "[i]f agency guidance is an interpretation of existing statutes and regulations, and Congress repeals only the guidance/interpretation, but not the existing statutes (or regulations, if applicable), it is possible that an agency could simply attempt to return to its initial stance . . . ."[63]

Second, can Congress pass a joint resolution of disapproval for a "rule" issued more than 60 legislative days prior? Congress obviously thought so. The CRA's text states that the 60-day countdown does not begin until "the later of the date on which . . . Congress receives the report" required by the statute or

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[56] Daniel A. Farber, *Regulatory Review in Anti-Regulatory Times*, 94 CHI.-KENT L. REV. 383, 395 (2019).

[57] *See* Pub. L. No. 115–4 (2017); Pub. L. No. 115–5 (2017); Pub. L. No. 115–8 (2017); Pub. L. No. 115–11 (2017); Pub. L. No. 115–12 (2017); Pub. L. No. 115–13 (2017); Pub. L. No. 115–14 (2017); Pub. L. No. 115–17 (2017); Pub. L. No. 115–20 (2017); Pub. L. No. 115–21 (2017); Pub. L. No. 115–22 (2017); Pub. L. No. 115–23 (2017); Pub. L. No. 115–24 (2017); Pub. L. No. 115–35 (2017); Pub. L. No. 115–74 (2017); Pub. L. No. 115–172 (2018).

[58] *See* Pub. L. No. 115–5 (2017) (disapproving of the Office of Surface Mining Reclamation and Enforcement's "Stream Protection Rule"); Pub. L. No. 115–12 (2017) (disapproving of the Bureau of Land Management's "Planning 2.0" regulations establishing procedures for preparing, revising, or amending land use plans pursuant to the Federal Land Policy and Management Act of 1976); Pub. L. No. 115–20 (2017) (disapproving of the Fish and Wildlife Service's rule regarding "Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska").

[59] *See* Pub. L. No. 115–172 (2018).

[60] *See* CFPB BULLETIN 2013-02 (Mar. 21, 2013).

[61] Letter from Thomas Armstrong, General Counsel, Government Accountability Office, to Senator Patrick Toomey 4–5 (Dec. 5, 2017).

[62] 5 U.S.C. § 551(4).

[63] Kris D. Kully et al., *Congress Invalidates CFPB's Indirect Auto Lending Guidance*, CONSUMER FINANCIAL SERVICES REVIEW (May 8, 2018), https://www.cfsreview.com/2018/05/congress-invalidates-cfpbs-indirect-auto-lending-guidance/.

the date on which "the rule is published in the Federal Register, if so published."[64] Thus, although the CFPB issued the bulletin in 2013, it "did not submit to Congress a report on the bulletin or publish it in the *Federal Register*, so arguably the 60-day clock did not begin in 2013."[65] If Congress may invoke the CRA to "invalidate agencies' non-rule guidance that was not reported to Congress or published in the *Federal Register*, it is unclear what, if any, timing boundaries apply."[66] A lack of timing boundaries for guidance documents "could implicate a large swath of informal agency guidance issued since the CRA's passage."[67] Indeed, "there might be hundreds or even thousands of sub-regulatory statements that should have been submitted to Congress, but were not."[68]

This second implication is more controversial than the first. However, given section 805's prohibition on judicial review, any procedural violation by Congress in disapproving a years-old informal guidance document likely would be unreviewable in court.[69] While a court could still assess whether a subsequent agency action violates the congressional disapproval for being "substantially the same" as the disapproved rule, Congress may be effectively unbounded by the CRA's procedural limits.[70]

It is also notable that the rescission of the CFPB bulletin represents one of six disapprovals of rules promulgated by independent agencies.[71] Although the scope of the President's authority over independent agencies is hotly debated, "it is generally assumed that the President has limited supervisory authority over independent agencies."[72] The CRA therefore provides the President with a greater degree of influence over independent agency rulemaking than previously available.[73]

IV. Normative Assessment of the CRA

As demonstrated, the CRA is an unusual and little-understood statute. Yet given what is known about the CRA, what is its normative value as a tool within the larger rulemaking process? By increasing congressional oversight over executive agencies, the CRA arguably promotes representative democratic values. Nevertheless, the CRA (1) is a hazard to future regulation; (2) disregards the APA's framework for reasoned decision-making; (3) threatens rule-of-law principles; (4) exacerbates partisanship in rulemaking; and (5) weakens the independence of independent agencies.

A. Justifications for the CRA

Congress passed the CRA in response to the increased "number and complexity of federal statutory programs," which have led "more and more of Congress' legislative functions" to be "delegated to

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[64] *See* 5 U.S.C. § 802(b).
[65] Kully et al., *supra* note 63.
[66] *Id.*
[67] *Id.*
[68] Larkin, *supra* note 33, at 213 (internal quotation marks omitted).
[69] *See supra*, Section II.C.
[70] *See id.*
[71] *See* Pub. L. No. 115–4 (2017) (Securities and Exchange Commission); Pub. L. No. 115–8 (2017) (Social Security Administration); Pub. L. No. 115–11 (2017) (General Services Administration and National Aeronautics and Space Administration, along with the Department of Defense); Pub. L. No. 115–22 (2017) (Federal Communications Commission); Pub. L. No. 115–74 (2017) (CFPB); Pub. L. No. 115–172 (2018) (CFPB).
[72] Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2181 (2009).
[73] *See id.* at 2181–82 (noting that the CRA provides the President with "real power in the case of political review of rulemaking by independent agencies").

federal regulatory agencies."[74] Concerned that Congress has "abdicated its constitutional role as the national legislature," proponents of the CRA therefore have justified the CRA on the primary grounds that it increases congressional oversight of executive agencies.[75] "Not only can Congress use the CRA to overturn agency rules, but certain provisions of the CRA may help to increase congressional awareness of federal agency actions in general"—for example, the "requirement for agencies to submit their rules to Congress, and the subsequent referral of each rule to the committee of jurisdiction."[76] This increased congressional oversight arguably promotes democratic values by returning some rulemaking authority to Congress and the President—elected officials, as opposed to unelected bureaucrats.

Additionally, the CRA arguably protects reliance interests that could develop in the absence of expedited procedures for reviewing regulation. For instance, if following a presidential transition Congress wanted to repeal a rule in the absence of the CRA, normal congressional procedures could lead to a prolonged period of uncertainty, during which the old rule remained in place while Congress continued to debate a new one. The CRA's expedited procedures attempt to minimize this period of uncertainty by allowing for timely congressional action in responding to regulatory changes.

B. Critiques of the CRA

1. The CRA is a hazard to future regulation.

Given the uncertainty surrounding the phrase "substantially the same," successful joint resolutions of disapproval passed under the CRA have unknown implications for future agency rulemaking. For example, it is unclear if a CRA disapproval of, say, a Trump-era anti-environment regulation would preclude *all* future pro-environment regulation in the same area. This vagueness could chill agency rulemaking in a related area even if a subsequent rule is not in fact "substantially the same" as the old one. And these concerns are amplified by the most recent use of the CRA to repeal a five-year-old guidance document, as the CRA's potential breadth may be even greater than previously thought.

2. The CRA disregards the normal APA rulemaking framework, which is intended to promote reasoned decision-making by expert agencies.

The APA establishes a framework that promotes reasoned decision-making by expert agencies.[77] As the Supreme Court noted in *State Farm*, any agency engaging in notice-and-comment rulemaking under the APA "must cogently explain why it has exercised its discretion in a given manner," and the explanation must be sufficient "to enable [the court] to conclude that the [agency's action] was the product of reasoned decisionmaking."[78] As a result, "an agency may generate an administrative record totaling thousands of pages" when performing agency actions.[79] This decision-making framework has become so engrained in the country's administrative process that

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[74] 142 Cong. Rec. 8197 (1996).

[75] CAREY ET AL., *supra* note 47, at 2.

[76] *Id.*

[77] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983); *see also* Gary Lawson, *Outcome, Procedure and Process: Agency Duties of Explanation for Legal Conclusions*, 48 RUTGERS L. REV. 313, 319 (1996) (noting that, "[w]henever an agency has legal discretion, the 'arbitrary or capricious' test requires the agency to exercise that discretion rationally.").

[78] *State Farm*, 463 U.S. at 48, 52.

[79] Aram A. Gavoor & Steven A. Platt, *Administrative Records and the Courts*, 67 U. KAN. L. REV. 1, 10 (2018).

some have described the APA as having "quasi-constitutional status."[80]

The CRA, however, shirks this framework in three significant ways. First, congressional disapproval is a blunt instrument. Under the CRA, Congress can only disapprove of an entire rule; it cannot modify a rule to the extent necessary for it to deem the rule acceptable.[81] Further, disapproval under the CRA merely creates a gap within the regulatory landscape, as opposed to affirmative legislation intended to address a deficiency in the law.

Second, Congress lacks the expertise of agencies. One of the primary justifications for the administrative state is Congress' lack of expert knowledge. Indeed, "the expertise rationale is built into modern administrative law," and "the desire to enhance agency expertise was a central reason the Administrative Procedure Act provided for participation in rulemaking."[82] Hasty disapprovals under the CRA not only ignore the reasoning of these expert agencies but also do not go through the full committee process, thus likely failing to make proper considerations of relevant information.

Third, there is limited notice or public debate under CRA disapproval, which by definition occurs on an accelerated basis. This both hinders reasoned decision-making and diminishes the CRA's ability to promote democratic values. A study of the first fifteen successful CRA disapprovals during the Trump presidency noted that "staff at the agencies that issued these rules reviewed a total of over 420,000 public comments," which came from a "diverse collection of individual members of the public as well as from businesses, public interest groups, and state and local officials."[83] By contrast, congressional disapprovals under the CRA "have been driven largely by just one segment of society: industry."[84] Further "Congress is not required to respond to public comments or to explain its decisions," and it "managed to repeal all fifteen rules combined in fewer than 2,000 words—what amounts to roughly six double-spaced pages of text in total."[85] Although the CRA shifts some rulemaking authority from unelected bureaucrats back to elected officials, democratic values are promoted not just through representation but also through participation and transparency.[86] Thus, CRA disapproval is in some ways *less* democratic than notice-and-comment rulemaking.

3. The CRA threatens rule-of-law principles.

The normal administrative process promotes rule-of-law principles, such as certainty, predictability,

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[80] *See* Kathryn E. Kovacs, *Superstatute Theory and Administrative Common Law*, 90 IND. L.J. 1207, 1208 (2015).

[81] CAREY ET AL., *supra* note 47, at 4.

[82] Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1326 (2016).

[83] *See* Cary Coglianese & Gabriel Scheffler, *What Congress's Repeal Efforts Can Teach Us About Regulatory Reform*, 3 ALR ACCORD 43, 52 (2017).

[84] *Id.*

[85] *Id.* at 52–53.

[86] *See* Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1515 (1992) ("[H]aving administrative agencies set government policy provides the best hope of implementing civic republicanism's call for deliberative decisionmaking informed by the values of the entire polity."); Kenneth F. Warren, ADMINISTRATIVE LAW IN THE POLITICAL SYSTEM 269 (4th ed. 2004) ("Rulemaking is . . . democratically accountable, especially in the sense that decisionmaking is kept aboveboard and equal access is provided to all."); Michael Asimow, *On Pressing McNollgast to the Limits: The Problem of Regulatory Costs*, 57 LAW & CONTEMP. PROBS. 127, 129 (1994) (referring to rulemaking as "refreshingly democratic"); Cynthia R. Farina et al., *Rulemaking 2.0*, 65 U. MIAMI L. REV. 395, 402 (2011) (referring to rulemaking as "the most transparent and participatory decision-making process" in government).

and participatory deliberation.[87] The "basic conception" for the rule of law is "opposition to the arbitrary exercise of power"[88] and, as such, rule of law is "often distinguished from 'rule of men.'"[89] Consistency and stability in the law in turn promote respect for and compliance with regulation.[90]

CRA disapprovals create instability and unpredictability in rulemaking, endangering these rule-of-law principles. The chance of sudden changes in the law under the CRA threatens reliance interests and may result in decreased likelihood of compliance with regulation. For example, if a regulated entity planned to comply with a certain regulatory regime, the chance that changing political power could suddenly alter the regulatory landscape—without even the procedural protections of notice and comment—would threaten that reliance interest and decrease the incentive to comply with existing regulations.

4. The CRA exacerbates partisanship in rulemaking.

As discussed above, the CRA is most likely to be successfully used following a presidential transition, given that the President whose administration promulgates a rule usually is unlikely to sign a joint resolution of disapproval.[91] Use of the CRA therefore is an inherently partisan endeavor, primarily limited to moments in which a party different from that of the previous administration gains control of the presidency.[92] This partisanship detracts from efforts to depoliticize agency rulemaking through technocratic means. President Trump and Congress have intensified this dynamic, transforming the CRA into an explicitly partisan tool by aggressively repealing Obama-era regulations.[93]

5. The CRA weakens the independence of independent agencies.

Independent agencies are administrative bodies intended to be "insulated from political control."[94] The CRA, however, undermines this independence. The de facto supermajority requirement—typically understood to confine CRA usage to presidential transition periods—does not necessarily apply in the case of independent agencies, as there is a heightened chance that a President will disagree with agencies over which he or she lacks direct control. Therefore, "it is more likely that the President would

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[87] Robert L. Glicksman & Emily Hammond, *The Administrative Law of Regulatory Slop and Strategy*, 68 DUKE L.J. 1651, 1687 n.197 (2019); *see also* Robert F. Blomquist, *Rethinking the Citizen As Prosecutor Model of Environmental Enforcement Under the Clean Water Act: Some Overlooked Problems of Outcome-Independent Values*, 22 GA. L. REV. 337, 351 (1988).

[88] Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. OF INT'L L. 361, 377 (2018).

[89] Todd S. Aagaard, *Agencies, Courts, First Principles, and the Rule of Law*, 70 ADMIN. L. REV. 771, 781 (2018) (distinguishing "authority derived from principle" from "power vested in the person").

[90] *See* Florentin Blanc, *Tools for Effective Regulation: Is "More" Always "Better"?*, 9 EUR. J. RISK REG. 465, 468 (2018) (arguing that "certainty more strongly influences people's behavior than severity") (quoting Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 302 (2003)).

[91] *See supra*, Section III.A.

[92] *See* Thomas O. McGarity, *Administrative Law As Blood Sport: Policy Erosion in A Highly Partisan Age*, 61 DUKE L.J. 1671, 1717 (2012) ("Invocation of the Congressional Review Act is an available strategy for regulated entities during blood-sport rulemakings," in which regulated entities devote enormous financial and political resources to influence agency regulations.).

[93] *See supra*, Section III.B.

[94] *See* David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L REV. 1487, 1490 (2015); *see also Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935).

seek to disapprove an independent agency action," significantly increasing the probability of a successful CRA disapproval.[95]

V. Conclusion

The CRA is a dangerous tool for anyone who believes in the administrative state. Should Democrats regain control of Congress and the Presidency, it might be tempting for them to use the CRA in a retaliatory manner, disapproving of Trump-era rules. In fact, Senate Democrats recently supported a failed resolution to repeal Trump Administration guidance making it easier for states to obtain waivers from Affordable Care Act requirements.[96]

But proponents of the administrative state should resist this temptation. To avoid the CRA's potential negative effects, a Democratic Congress should repeal the CRA rather than engage in a partisan battle that may have unintended consequences—both for specific areas of regulation and for the administrative process more broadly. If Congress decides that it disagrees with a regulation, it should change the law through affirmative legislation, rather than through a disapproval-based system.

Other tools may provide heightened congressional oversight of executive branch agencies without the CRA's most detrimental effects. In fact, Congress could maintain some of the CRA's less drastic procedural mechanisms, such as requiring agencies to submit their rules to Congress, so that Congress can stay informed of agency activities. With that increased transparency, Congress may be better equipped to modify or repeal rules through the normal legislative process. Moreover, Congress can always exercise oversight over agencies by controlling or withholding funding.[97] The core of the CRA as currently written, however, fails to strike a proper balance between providing for congressional oversight of executive agencies and safeguarding the reasoned decision-making process so vital to our modern democracy.

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[95] *The Mysteries of the Congressional Review Act*, *supra* note 72, at 2181.

[96] *See* S. Res. 52, 116th Cong. (2019); *see also* Laura Castro Lindarte, *Senate Democrats to force vote on Trump health care rule*, ROLL CALL (Aug. 1, 2019), https://www.rollcall.com/news/congress/senate-democrats-to-force-vote-on-trump-health-care-rule.

[97] *See* O'REILLY, ADMINISTRATIVE RULEMAKING § 20:2 (2019 ed.).

Appendix: Agency Rules Disapproved Under the Congressional Review Act

No.	Public Law	Date Enacted	Promulgating Agency	Topic of Disapproved Rule
1	Pub. L. No. 107–5	Mar. 20, 2001	Department of Labor	Ergonomics standards
2	Pub. L. No. 115–4	Feb. 14, 2017	Securities and Exchange Commission	Disclosure of payments by resource extraction issuers
3	Pub. L. No. 115–5	Feb. 16, 2017	Department of the Interior, Office of Surface Mining Reclamation and Enforcement	Stream protection
4	Pub. L. No. 115–8	Feb. 28, 2017	Social Security Administration	Implementation of the NICS Improvement Amendments Act
5	Pub. L. No. 115–11	Mar. 27, 2017	Department of Defense, General Services Administration, and National Aeronautics and Space Administration	The Federal Acquisition Regulation
6	Pub. L. No. 115–12	Mar. 27, 2017	Department of the Interior, Bureau of Land Management	Procedures to prepare, revise, or amend land use plans pursuant to the Federal Land Policy and Management Act ("BLM Planning 2.0")
7	Pub. L. No. 115–13	Mar. 27, 2017	Department of Education	Accountability and state plans under the Elementary and Secondary Education Act
8	Pub. L. No. 115–14	Mar. 27, 2017	Department of Education	Teacher preparation issues
9	Pub. L. No. 115–17	Mar. 31, 2017	Department of Labor	Drug testing of unemployment compensation applicants
10	Pub. L. No. 115–20	Apr. 3, 2017	Department of the Interior, Fish and Wildlife Service	Non-subsistence takes of wildlife, and public participation and closure procedures, on national wildlife refuges in Alaska
11	Pub. L. No. 115–21	Apr. 3, 2017	Department of Labor	Clarification of employer's continuing obligation to make and maintain an accurate record of each recordable injury and illness
12	Pub. L. No. 115–22	Apr. 3, 2017	Federal Communications Commission	The privacy of customers of broadband and other telecommunications services
13	Pub. L. No. 115–23	Apr. 13, 2017	Department of Health and Human Services	Compliance with Title X requirements by project recipients in selecting subrecipients
14	Pub. L. No. 115–24	Apr. 13, 2017	Department of Labor	Savings arrangements established by qualified state political subdivisions for non-governmental employees
15	Pub. L. No. 115–35	May 17, 2017	Department of Labor	Savings arrangements established by states for non-governmental employees
16	Pub. L. No. 115–74	Nov. 1, 2017	Consumer Financial Protection Bureau	Arbitration agreements
17	Pub. L. No. 115–172	May 21, 2018	Consumer Financial Protection Bureau	Indirect auto lending and compliance with the Equal Credit Opportunity Act