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Reframing the Question: Why *Chevron*—and Not a One-Size-Fits-All Interpretation of "Substantially the Same"—Should Guide a Court's Interpretation of the Congressional Review Act's Limitations on Future Rulemaking

ANDREW LANDOLFI* & CARLY L. HVIDING**

ABSTRACT

The Congressional Review Act (the CRA) is a Congressional oversight tool used to overturn rules issued by federal agencies. Beyond the immediate effect of blocking an undesirable agency rule, the CRA bars an agency from issuing another rule in "substantially the same form" as the disapproved rule. But the scope of this provision's future effect on agency rulemaking remains unclear: the statute is silent as to what criteria should be considered in evaluating whether or when a subsequent rule falls into the "substantially the same" category, and the provision has gone untested in court. Rather than proposing a uniform interpretation of "substantially the same," this Article proposes that courts adopt a case-by-case approach to allegations that an agency is barred from enacting a particular rule due to a prior CRA resolution. Specifically, the Article argues that courts should apply Chevron *and, where appropriate, defer to an agency's conclusion that a rule is not substantially the same as a rule blocked by an earlier CRA resolution. In reaching this conclusion, the Article contends a CRA resolution effectively amends an agency's organic statute, thereby permitting courts to apply* Chevron *to an agency's determination of whether a rule does or does not fall within the CRA's prohibitive scope.*

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INTRODUCTION

A little after 10 a.m. on an unseasonably warm day in June 1983, Chief Justice Warren E. Berger and the eight Associate Justices of the United States Supreme Court took to the bench to announce the Court's decision in *INS v. Chadha*, "a relatively minor immigration case,"[1] challenging the authority of one House of Congress "to invalidate [a] decision of the Executive Branch[.]"[2] The decision proved to be anything but minor.[3] Speaking to a

1. Linda Greenhouse, *Supreme Court, 7-2, Restricts Congress's Right to Overrule Actions by Executive Branch*, N.Y. TIMES, (June 24, 1983), https://www.nytimes.com/1983/06/24/us/supreme-court-7-2-restricts-congress-s-right-overrule-actions-executivebranch.html [https://perma.cc/3EVF-6MA6].

2. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 923 (1983) (granting *certiorari* to determine the constitutionality of an immigration statute) ("[This case] presents a challenge to the constitutionality of . . . the Immigration and Nationality Act authorizing one House of Congress, by resolution, to invalidate the decision of the Executive Branch, pursuant to authority delegated by Congress to the Attorney General of the United States, to allow a particular deportable alien to remain in the United States." (citations omitted)).

3. *See, e.g.*, Sierra Club v. Trump, 977 F.3d 853, 865 (9th Cir. 2020), *vacated*, 142 S. Ct. 56 (mem.) (2021) (describing *Chadha* as a "landmark Supreme Court decision"); Synar v. United States, 626 F.Supp. 1374, 1402 (D.D.C. 1986) (describing *Chadha* as a "landmark decision").

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"half empty" courtroom,[4] Chief Justice Berger, who authored the majority opinion, announced that the Court was affirming the decision of the Ninth Circuit,[5] which held the legislative veto was unconstitutional.[6] In reaching this conclusion, the Court not only invalidated more than 200 veto provisions in more than 100 federal laws,[7] but also took from Congress an increasingly used method of checking and, in some instances, overturning rules promulgated by administrative agencies.[8]

Thirteen years after the Supreme Court's decision in *Chadha*, Congress enacted, and the President signed into law, the Congressional Review Act[9]—a Congressional oversight tool designed to provide Congress with an expedited method of overturning rules promulgated by administrative agencies but crafted to address the Constitutional shortcomings of the legislative veto.[10] Procedurally, the CRA requires that all federal agencies submit a report on final agency rules to each House of Congress before a rule can take effect.[11] If Congress introduces a joint resolution of disapproval within the statutory review period, and the President signs the joint resolution into law or Congress overrides the President's veto, then the "rule shall not take effect."[12] Perhaps more importantly, the CRA provides that "[a] rule that does not take effect . . . may not be reissued in substantially the same form[.]"[13] Thus, the CRA provides Congress and the President with both immediate and future control over an agency's discretionary rulemaking authority.[14]

Though enacted in 1996, the CRA was infrequently used in the years following its codification in the U.S. Code.[15] This changed in 2016, when

4. *See* Greenhouse, *supra* note 1.

5. *Id.*

6. *See* Chadha v. Immigr. & Naturalization Serv., 634 F.2d 408, 411 (9th Cir. 1980) *aff'd sub nom.* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

7. LAWRENCE C. DODD & BRUCE I. OPPENHEIMER, CONGRESS RECONSIDERED 368 (3d ed. 1985).

8. *See* David A. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 VA. L. REV. 253, 259 (1982).

9. Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 251, 110 Stat. 847, 868–74 (1996).

10. *See* Cary Coglianese & Gabriel Scheffler, *What Congress's Repeal Efforts Can Teach Us About Regulatory Reform*, 3 ADMIN. L. REV. 43, 47 (2017).

11. *See* 5 U.S.C. § 801(a)(1)(A).

12. § 801(b)(1), (a)(2)(B)(3)(B), (c)(1)–(2).

13. § 801(b)(2).

14. *See* § 801(b)(1)–(2), (c)(1).

15. *See* Stephen Santulli, Essay, *Use of the Congressional Review Act at the Start of the Trump Administration: A Study of Two Vetoes*, 86 GEO. WASH. L. REV. 1373, 1380 (2018)

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President-elect Donald Trump's win in the general election—coupled with continued Republican control of both the Senate and the House of Representatives[16]—provided Congress and the new Administration with a unique opportunity to employ the rarely-used CRA to repeal a handful of Obama-era regulations.[17] And the Trump Administration did just that. Indeed, the Administration used the CRA to roll back fourteen Obama-era regulations between January and May 2017.[18] But the Trump Administration did not stop there. The Administration would go on to use the CRA two more times: once to invalidate a Trump-era Consumer Financial Protection Bureau (CFPB) rule related to arbitration,[19] and again to reject CFPB guidance related to indirect auto lending and compliance with the Equal Credit Opportunity Act.[20]

When the Democrats took back the White House in January 2021, Democratic control of Congress provided the newly elected Administration with an opportunity to use the CRA to nix rules promulgated in the waning hours of the Trump Administration.[21] Unsurprisingly, the Biden Administration took advantage of the opportunity. On June 30, 2021, President Biden signed three CRA resolutions, which cast aside Trump-era rules

(noting that between 1996 and 2017, the CRA was only used once to invalidate an OSHA ergonomics rule) ("Because [CRA] resolutions of disapproval require a presidential signature and an administration generally will not issue regulations with which it disagrees, CRA [resolutions of disapproval] are likely to succeed only in periods following a presidential transition from one party to the other.") *But see* Act of Nov. 1, 2017, Pub. L. No. 115-74, 131 Stat. 1243 (providing for congressional disapproval of Trump-era rule submitted for Congressional review by Consumer Financial Protection Bureau relating to arbitration agreements).

16. *See* Eric Bradner, *Republicans Keep Control of Congress*, CNN: POLITICS (Nov. 9, 2016, 3:08 AM), http://www.cnn.com/2016/11/08/politics/congress-balance-of-power-2016-election/index.html [https://perma.cc/9F2P-YBUJ].

17. *See* Emmarie Huetteman, *How Republicans Will Try to Roll Back Obama Regulations*, N.Y. TIMES (Jan. 30, 2017), https://www.nytimes.com/2017/01/30/us/politics/congressional-review-act-obama-regulations.html [https://perma.cc/T8SB-547W].

18. *See* Eric Lipton & Jasmine C. Lee, *Which Obama-Era Rules Are Being Reversed in the Trump Era*, N.Y. TIMES (May 18, 2017), https://www.nytimes.com/interactive/2017/05/01/us/politics/trump-obama-regulations-reversed.html [https://perma.cc/P9TY-BLJA].

19. *See* 131 Stat. at 1243.

20. *See* Act of May 21, 2018, Pub. L. No. 115-172, 132 Stat. 1290.

21. Ann Navaro et al., *Will Congress Rollback Trump Regulatory Actions to Advance the Biden Policy Agenda?*, JD SUPRA (Jan. 25, 2021), https://www.jdsupra.com/legalnews/will-congress-rollback-trump-regulatory-7039286/ [https://perma.cc/QB8U-KFBN].

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related to methane emissions, third-party lending, and workplace discrimination.[22]

While the CRA has become an increasingly effective regulatory oversight tool, its increased use has raised several legal questions. Indeed, a party affected by a rule rejected by the Trump Administration in April 2017 filed suit in federal court alleging the CRA is unconstitutional because it violates the constitutionally mandated process for lawmaking—bicameralism and presentment—set forth in Article I of the U.S. Constitution.[23] Further, the extent of the CRA's prohibition on future rulemaking remains largely undefined, as courts have not handled challenges alleging agency action, or perhaps inaction, conflicted with the CRA's "substantially the same form" provision.[24]

And the latter uncertainty could be costly. Although the exact cost of formulating a rule is unclear,[25] loose estimates suggest that rule development costs can total in the millions of dollars.[26] Accordingly, an agency acting under the assumption that it is permitted to promulgate a rule only to have the rule stricken for violating the CRA's future rulemaking prohibition could impose substantial and unnecessary costs on taxpayers. Conversely, an agency using the CRA to justify inaction notwithstanding an agency statute requiring action could also impose high costs on taxpayers via losses in regulatory benefits.[27]

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22. *See* Act of June 30, 2021, Pub L. No. 117-22, 135 Stat. 294; Act of June 30, 2021, Pub. L. No. 117-23, 135 Stat. 295; Act of June 30, 2021, Pub. L. No. 117-24, 135 Stat. 296.

23. *See* Brief of Plaintiff-Appellant at 22, Ctr. for Biological Diversity v. Bernhardt, 946 F.3d 553 (9th Cir. 2019) (No. 18-35629); *see also* Ctr. for Biological Diversity v. Zinke, 313 F. Supp. 3d 976, 988 (D. Alaska 2018), *aff'd sub nom.*, *Bernhardt*, 946 F.2d 553 (9th Cir. 2019) (concluding the CRA did not violate Article 1 of the U.S. Constitution); *Bernhardt*, 946 F.3d at 562 (affirming district court decision). Though the Supreme Court has yet to weigh in on the merits of a Constitutional challenge to the CRA and the issue therefore remains unresolved, this Article focuses solely on the CRA's effect on future rulemaking, and does not consider or address arguments related to the CRA's constitutionality.

24. 5 U.S.C. § 801(b)(2).

25. *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-205, FEDERAL RULEMAKING: IMPROVEMENTS NEEDED TO MONITORING AND EVALUATION OF RULES DEVELOPMENT AS WELL AS TO THE TRANSPARENCY OF OMB REGULATORY REVIEWS 2–3 (2009) ("[A]gency officials informed [GAO] . . . that little systematic information existed within agencies on the time, staffing, and contracting costs associated with the development of individual rules or the required analyses that support rulemakings.").

26. *See id.* at 21–23.

27. A draft executive document estimated the annual economic benefits of 24 EPA clean air rules ranged from $171.1 to $667.9 billion. OFF. OF INFO. AND REGUL. AFF., OFF. OF. MGMT. AND BUDGET, 2016 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM

This Article aims to reduce the uncertainty surrounding the CRA by providing a legal framework for courts dealing with allegations that agency action or inaction is unlawful because of a prior CRA resolution of disapproval. Part II provides background on the development and use of the CRA. Part III discusses the CRA's provisional uncertainty. Part IV argues courts need not adopt a uniform interpretation of the CRA's "substantially the same form" provision and that courts should use *Chevron* to evaluate whether a reissued rule runs afoul of a CRA resolution of disapproval. Part V suggests courts should not compel agency action following a CRA resolution unless discrete agency action is required by law.

I. THE DEMISE OF THE LEGISLATIVE VETO AND THE RISE OF THE CRA

After the Supreme Court struck down the legislative veto,[28] Congress adopted the CRA as a workable alternative.[29] Although Congress rarely used the CRA in its early years, the CRA has emerged as a frequently invoked regulatory oversight tool.[30]

A. The Legislative Veto: A Fifty-Year Reign to Rein in Regulators

Unofficially referred to by some as "the fourth branch of government,"[31] administrative agencies have long been a double-edged sword for Congress.[32] While administrative agencies offer legislators a practical tool to more efficiently regulate in an "increasingly complex world"[33] by delegating broad policymaking authority to administrative agencies, Congress

ACT 10 (2016). The estimated cost imposed by these regulations was between $41 and $47.9 billion. *Id.* Accordingly, agency action in the context of clean air regulations had a positive economic impact. *See id.*

28. *See infra* Section II(A).

29. *See infra* Section II(B).

30. *See infra* Section II(B)(i)–(ii).

31. Jonathan Turley, *The Rise of the Fourth Branch of Government*, WASH. POST (May 24, 2013), https://www.washingtonpost.com/opinions/the-rise-of-the-fourth-branch-of-government/2013/05/24/c7faaad0-c2ed-11e2-9fe2-6ee52d0eb7c1_story.html [https://perma.cc/W2MH-B4ZP].

32. *See* Michael Rappaport, *A Stronger Separation of Powers for Administrative Agencies*, THE REGULATORY REV. (Dec. 18, 2019), https://www.theregreview.org/2019/12/18/rappaport-stronger-separation-powers-administrative-agencies/ [https://perma.cc/8ACX-PVA6].

33. Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2164 (2009).

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has long been concerned with retaining control over these agencies.[34] The legislative veto arose as a pragmatic solution to this concern.[35]

Beginning in the early 1930s, legislative veto provisions provided Congress with control over administrative agencies by requiring congressional review and approval of administrative policy decisions before implementing policy determinations.[36] During the congressional review period, Congress could reject or approve agency action via a joint resolution of both Houses, a resolution of either House, or an act of the relevant standing committee.[37] Notably, legislative veto provisions did not require the President's signature, which ensured congressional disapproval of agency action was not subject to a presidential veto, and therefore provided Congress with more autonomous decision-making.[38] As a result, the legislative veto provided both "a means whereby Congress [could] write legislation giving the executive broad discretion . . . over the fleshing out of policy while retaining for Congress the ultimate authority to approve or disapprove administrative actions."[39]

Although scholars have debated the effectiveness of the legislative veto as a check on agency policymaking discretion,[40] the legislative veto nevertheless became an increasingly common component of congressional legislation after first emerging in executive branch reorganization proposals in the early 1930s.[41] While including veto provisions more frequently in legislation does not necessarily indicate Congress viewed the legislative veto as an effective check on administrative action, it suggests Congress at least recognized the symbolic value these provisions offered.[42] For proponents of either deregulation or increased agency oversight, legislative veto provisions offered apparent victories to elected officials who promised regulatory accountability.[43]

But it is likely that the legislative veto was more than a symbolic boilerplate employed to appease constituents. Presidents Truman and

34. *See* JESSICA KORN, THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO 4–5 (1996).

35. *See id.* at 4.

36. *See* LAWRENCE C. DODD & RICHARD L. SCHOTT, CONGRESS AND THE ADMINISTRATIVE STATE 229–32 (1979).

37. *See id.*

38. *See id.* at 229–30.

39. *Id.* at 230.

40. *See* KORN, *supra* note 34, at 33–34.

41. *See* DODD & SCHOTT, *supra* note 36, at 230–32 tbl.6-1.

42. *See* KORN, *supra* note 34, at 44.

43. *See id.*

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Eisenhower both vetoed a number of bills because of veto provisions included in the legislation,[44] which suggests sitting presidents recognized the substantive power of the legislative veto. Further, the frequent inclusion of legislative veto provisions in legislation implies Congress recognized that the legislative veto provided an additional administrative oversight tool, regardless of whether it was the most effective or frequently used oversight tool.[45] Justice Byron R. White even noted that the "prominence of the legislative veto mechanism in our contemporary political system . . . can hardly be overstated. It has become a central means by which Congress secures the accountability of executive and independent agencies."[46]

But claims that the legislative veto was or was not an *effective* oversight tool does little to undermine the contention that the legislative veto was nevertheless an oversight tool available to members of Congress beginning in the early 1930s and continuing through the early 1980s.[47] Further, the frequent inclusion of legislative veto provisions in legislation ensured this oversight tool was widely available even if the provisions were used infrequently or ineffectively.[48]

This changed in 1983 when the Supreme Court issued its decision in *INS v. Chadha*, which effectively invalidated more than 200 legislative veto provisions included in 126 different federal laws.[49] In *Chadha*, the Court found the legislative veto provision at issue constituted lawmaking because it had "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch."[50] The Court reasoned that since the legislative veto constituted lawmaking, it should adhere to the bicameralism and presentment requirements of Article I.[51] Because the legislative veto used in *Chadha* was subject to neither bicameralism nor

44. *See* JOSEPH P. HARRIS, CONGRESSIONAL CONTROL OF ADMINISTRATION 313–14 (1964).

45. *See* KORN, *supra* note 34, at 43 (stating that out of fourteen legislative techniques, the legislative veto ranked ninth in effectiveness and fourteenth in frequency of use; referencing findings from Joel D. Aberbach's comprehensive study of congressional oversight mechanisms); *see also* DODD & OPPENHEIMER, *supra* note 7, at 380 ("[T]he very existence of the device sensitizes officials to anticipate and forestall congressional criticism.").

46. Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 967–68 (1983) (White, J., dissenting).

47. *See* KORN, *supra* note 34, at 43; *see also* DODD & OPPENHEIMER, *supra* note 7, at 368.

48. *See* KORN, *supra* note 34, at 43; *see also* DODD & SCHOTT, *supra* note 36, at 230–32.

49. *See Chadha*, 462 U.S. at 959; *see also* DODD & OPPENHEIMER, *supra* note 7, at 368.

50. *Chadha*, 462 U.S. at 952.

51. *See id.* at 956–58.

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presentment, the Court held the one-House legislative veto was unconstitutional.[52]

The implications of the *Chadha* decision have been far-reaching. Although the Court made it clear that the unconstitutional veto provision in *Chadha* could be severed from the otherwise lawful statute,[53] the holding nevertheless affected a significant number of federal laws.[54] As noted above, there were more than 200 veto provisions included in 126 different federal laws when the Court issued its decision in 1983.[55] Consequently, the Court's decision invalidated over 200 legislative veto provisions, while leaving the question of severability to a case-by-case determination.[56] Beyond the decision's effect on statutes enacted prior to the Court's ruling, the decision also affected future legislation. The Court's decision made it unconstitutional for Congress to include legislative veto provisions in future legislation absent compliance with Article I.[57]

B. The CRA: A Response to Chadha

Eleven years after *Chadha*, Congress underwent an ideological shift when the 1994 election gave Republicans sizable majorities in both Houses of Congress.[58] Among the goals of this new Republican-controlled Congress was loosening the regulatory vice squeezing small businesses and decreasing the overall number of federal regulations.[59] After a proposed moratorium on administrative regulations failed,[60] a bipartisan group of Senators crafted and unanimously passed legislation that contained an

52. *See id.* at 956–59.

53. *See id.* at 931–35 (noting § 244 of the Immigration and Nationality Act "survives as a workable administrative mechanism without the one-House veto.").

54. *See* DODD & OPPENHEIMER, *supra* note 7, at 368.

55. *See id.*

56. *See* James L. Sundquist, *The Legislative Veto: A Bounced Check*, THE BROOKINGS REVIEW, Fall 1983, at 13, 15.

57. *See Chadha*, 462 U.S. at 958 ("To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President.").

58. *See* 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, 711–12 (2011).

59. *See id.* at 712 ("[P]arty leaders were aggressive in their support of regulatory reform.").

60. *See id.* at 716–17.

oversight tool reminiscent of the legislative veto invalidated by *Chadha*.[61] Although the House initially declined to consider the bill,[62] a version of the bill was eventually included in Title II of the Contract with America Advancement Act of 1996 (Contract with America), which was signed into law by President Clinton on March 29, 1996.[63]

Known as the CRA, this administrative oversight tool is similar to the legislative veto, though it attempts to address the constitutional deficiencies identified in *Chadha*.[64] Indeed, the *Chadha* Court was clear: legislative veto provisions that do not mandate compliance with the bicameralism and presentment requirements of Article I are unconstitutional.[65] In reaching this conclusion, however, the Court suggested that legislative review provisions similar to the legislative veto with streamlined lawmaking provisions could be permissible if Congress simply complied with Article I.[66] The CRA was drafted with this in mind. [67]

Specifically, the CRA provides that agencies must submit all rules to Congress for review before they can take effect.[68] Further, the CRA requires that all "major rules"[69] may not take effect for sixty days after the rule is submitted to Congress for review.[70] During the review period, Congress may enact a joint resolution of disapproval invalidating the rule.[71] If Congress passes a joint resolution of disapproval and the President signs the

61. *See* Contract with America Advancement Act of 1996, Pub. L. No. 104-121, § 251, 110 Stat. 847, 868-874 (1996).

62. *See* Finkel & Sullivan, *supra* note 58, at 717–18.

63. *See id.* at 718; *see also* 110 Stat. at 868-874.

64. *See* 5 U.S.C. §§ 801–08; *see also* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 197 (2018) ("The CRA was Congress's attempt to devise a lawmaking procedure that would approximate a legislative veto as closely as *Chadha* would allow.").

65. *See* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 956–58 (1983).

66. *See id.* at 958 n.23 ("[Compliance with Article I] does not mean that legislation must always be preceded by debate; on the contrary, we have said that it is not necessary for a legislative body to 'articulate its reasons for enacting a statute.'" (quoting U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980))).

67. *See* §§ 801–08.

68. *Id.* § 801(a)(1)(A).

69. A "major rule" is any rule that the Office of Management and Budget (OMB) finds will, or will likely, cause "(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises[.]" *Id.* §§ 804(2)(A)–(C).

70. *Id.* §§ 801(a)(3)(A)(i)–(ii).

71. *See id.* § 801(b)(1).

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resolution into law or Congress overrides the veto,[72] then the rule will not take effect and the agency issuing the rule is barred from reissuing the rule "in substantially the same form" absent an affirmative act of Congress.[73] While it is unclear what "substantially the same form" means, there is no doubt that this phrase gives the CRA its teeth.[74]

Without any additional procedural components, the CRA would not provide oversight advantages otherwise available to Congress via traditional lawmaking procedures.[75] Unsurprisingly then, the CRA adopts the Court's suggestion in *Chadha* and incorporates streamlined and hybrid lawmaking procedures to provide the CRA with existing oversight advantages.[76] The CRA provides a mechanism for senators to bring disapproval resolutions directly to the Senate floor when the relevant committee fails to issue a timely report on a proposed rule.[77] If a committee fails to issue a report on a proposed rule after twenty days, a petition signed by thirty senators will bring the resolution directly to the Senate floor for consideration.[78] The CRA does not give the House a similar committee bypass procedure, though House committee review may be bypassed "when a disapproval resolution is sent from the Senate to the House[.]"[79] When the Senate sends a disapproval resolution to the House, the House may not refer the resolution to a committee for review.[80]

The CRA also prevents the use of filibusters in the Senate by setting the debate period for disapproval resolutions at no more than ten hours.[81] Additionally, the CRA provides a "special extended review period for major rules that are submitted to Congress in the final sixty days of a congressional session."[82] Specifically, Congress is given seventy-five days to issue a joint resolution of disapproval for major rules beginning at the start of a subsequent congressional session when a rule is submitted in the final sixty days

72. *See id.* § 801(a)(3)(B).

73. *Id.* § 801(b)(2).

74. *Id.*; *see also* Finkel & Sullivan, *supra* note 58, at 708–09.

75. *See* Note, *supra* note 33, at 2165.

76. *See* § 802 (requiring participation of both Houses of Congress when enacting a joint resolution); *see also* Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 956–58 (1983).

77. *See* § 802(c).

78. *See id.*

79. Note, *supra* note 33, at 2168.

80. *See id.*

81. *See* § 802(d)(2).

82. Note, *supra* note 33, at 2168; *see also* §§ 801(d), 802(e)(2).

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of the preceding congressional session.[83] Further, the CRA also provides a legislative template for issuing resolutions of disapproval.[84] This template expedites the legislative process by ensuring resolutions passed in either House of Congress are identical and can therefore "proceed to the President without the need for a conference report."[85]

1. The CRA in Inaction

Notwithstanding the CRA's streamlined lawmaking procedures, Congress rarely used the CRA prior to 2017.[86] Although all rules issued by administrative agencies after March 1996 have been subject to CRA review, Congress only successfully used the CRA once between 1996 and 2017.[87] In 2001, President George W. Bush signed a joint resolution voiding a Clinton-era Occupational Safety and Health Administration (OSHA) ergonomics rule.[88] Between 2001 and 2017, Congress passed only five joint resolutions of disapproval.[89] These were all vetoed by President Barack Obama.[90]

Unsurprisingly, commentators have been quick to criticize the effectiveness of the CRA as a practical "restraint on the administrative process,"[91] noting that the CRA is best suited for presidential transition periods.[92] And this critique makes sense: "a President would be expected to veto a joint resolution disapproving a rule issued by the President's own Administration."[93] Despite scholarly contentions that the CRA is most

83. *See* § 802(e)(2).

84. § 802(a) ("'Congress disapproves the rule submitted by the ____ relating to ____, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in).").

85. Note, *supra* note 33, at 2168.

86. *See id.* at 2169.

87. *Id.*

88. *See* Act of Mar. 20, 2001, Pub. L. No. 107-5, 115 Stat. 7 ("*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That Congress disapproves the rule submitted by the Department of Labor relating to ergonomics (published at 65 Fed. Reg. 68261 (2000)), and such rule shall have no force or effect.").

89. *See* MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS 5 n.19 (2021).

90. *Id.*

91. Note, *supra* note 33, at 2183.

92. *See id.* at 2169; *see also* Finkel & Sullivan, *supra* note 58, at 729 ("[T]he CRA may be at its most useful when there is a significant realignment in party control over the Legislative and Executive Branches[.]"); CAREY & DAVIS, *supra* note 89, at 6 ("During a transition following the inauguration of a new President . . . the CRA is more likely to be used successfully.").

93. CAREY & DAVIS, *supra* note 89, at 4.

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effective during times of presidential transitions, scholars have observed that past practice suggests that even in the context of presidential transitions, the CRA may not be an administration's preferred administrative oversight tool.[94]

2. The CRA in Action

Despite commentary questioning the effectiveness of the CRA, the Trump and Biden Administrations effectively used the CRA.[95] For example, the Trump Administration signed sixteen joint resolutions of disapproval into law between January 2017 and May 2018.[96] The negated rules include a Department of the Interior rule limiting permissible hunting techniques for certain animals at Alaskan wildlife refuges,[97] a Federal Communications Commission rule requiring broadcasting companies to solicit consumer consent before collecting and selling consumer data,[98] and a Social Security Administration rule (SSA) providing the SSA with a reporting system to provide the Department of Justice with information on mentally unstable individuals who should be barred from purchasing a firearm.[99] Included among the now invalidated rules were rules promulgated by independent agencies.[100] Prior to the Trump Administration, the CRA had never invalidated independent agency rules.[101]

94. *See* Note, *supra* note 33, at 2175–76 (noting that although twenty-two rules finalized near the end of Bush's second term were subject to CRA review and repeal, the Obama Administration used alternative tools to rescind unpopular Bush-era administrative rules rather than the CRA).

95. *See Uses of the Congressional Review Act During the Biden Administration*, BALLOTPEDIA, https://ballotpedia.org/Uses_of_the_Congressional_Review_Act_during_the_Biden_administration [https://perma.cc/K35T-A92U].

96. *See* Paul J. Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 16 GEO. J.L. & PUB. POL'Y 505, 509 (2018).

97. *See* Act of Apr. 3, 2017, Pub. L. No. 115-20, 131 Stat. 86; *see also* Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska, 81 Fed. Reg. 52248 (Fish and Wildlife Serv., Aug. 5, 2016).

98. *See* Act of Apr. 3, 2017, Pub. L. No. 115-22, 131 Stat. 88; *see also* Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 Fed. Reg. 87274 (FCC, Dec. 2, 2016).

99. *See* Act of Feb. 28, 2017, Pub. L. No. 115-8, 131 Stat. 15; *see also* Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 91702 (SSA, Dec. 19, 2016).

100. *See, e.g.*, 131 Stat. 88 (invalidating rule promulgated by the FCC); Act of Feb. 14, 2017, Pub. L. No. 115-4, 131 Stat. 9 (invalidating rule promulgated by the SEC).

101. Before 2017, the CRA had only invalidated the OSHA Ergonomics rule. OSHA is an executive agency located in the Department of Labor. *See* CAREY & DAVIS, *supra* note 89, at 28 app. A.

In addition to invalidating Obama-era regulations, President Trump signed a joint resolution negating one of his own Administration's CFPB rules prohibiting certain financial institutions from using pre-dispute arbitration agreements to bar consumer class actions.[102] It was the first time a sitting President used the CRA to invalidate an agency rule promulgated by his own Administration.[103] Use of the CRA continued when President Biden assumed the presidency.[104] On June 30, 2021, President Biden signed three CRA Resolutions into law, which invalidated three administrative rules enacted late in the Trump Administration.[105]

Going forward, it appears the CRA's frequent use is poised to continue. Indeed, the Trump and Biden Administrations have both displayed the potency of the CRA as a check on not only a previous administration's late term rulemaking (sometimes referred to as "midnight" rules)[106] but also on independent agencies.[107] This, coupled with alternating single-party control of the White House and Congress "at the beginning of a new president's term,"[108] and an increasingly polarized climate where "[m]ost . . . intense partisans believe the opposing party's policies 'are so misguided that they threaten the nation's well-being[,]'"[109] suggests we have not seen the last of the CRA.

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102. *See* Act of Nov. 1, 2017, Pub. L. No. 115-74, 131 Stat. 1243; *see also* Arbitration Agreements, 82 Fed. Reg. 33210 (CFPB, July 19, 2017).

103. Prior to the Trump Administration, the CRA had only been used once by President George W. Bush to invalidate a Clinton-era ergonomics rule. *See* CAREY & DAVIS, *supra* note 89, at 28 app. A. Under the Trump Administration, the CRA's initial use only invalidated Obama-era regulations. *See* Lipton & Lee, *supra* note 18.

104. *See* Joe Biden, President, Exec. Off. of the President, Remarks by President Biden Signing Three Congressional Review Act Bills into Law: S.J.Res.13; S.J.Res.14; and S.J.Res.15 (June 30, 2021) (transcript available at https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/06/30/remarks-by-president-biden-signing-three-congressional-review-act-bills-into-law-s-j-res-13-s-j-res-14-and-s-j-res-15/?utm_source=link [https://perma.cc/HGW6-VGRH]).

105. *Id.*

106. *See* Lipton & Lee, *supra* note 18; *see also* Note, *supra* note 33, at 2163.

107. *See supra* notes 15–24 and accompanying text.

108. *See* Katherine Schaeffer, *Single-Party Control in Washington is Common at the Beginning of a New Presidency, but Tends Not to Last Long*, PEW RESEARCH CENTER (Feb. 3, 2021), https://www.pewresearch.org/fact-tank/2021/02/03/single-party-control-in-washington-is-common-at-the-beginning-of-a-new-presidency-but-tends-not-to-last-long/ [https://perma.cc/HD22-6EU9].

109. PEW RESEARCH CENTER, POLITICAL POLARIZATION IN THE AMERICAN PUBLIC 6 (2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/ [https://perma.cc/XHE7-DP2E] ("Republicans and Democrats are more divided

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II. UNCERTAINTY IS CERTAIN: THE CRA'S PROVISIONAL QUESTION MARKS

While use of the CRA has increased, so too have concerns regarding the CRA's future effect. Indeed, when a rule is invalidated, agencies are necessarily left with a burning question: "[w]hat kind of phoenix, if any, is allowed to rise from [its] ashes . . . ?"[110] Admittedly, if the CRA's "substantially the same form" prohibition is interpreted too broadly, congressional invalidation of an agency rule may create tension between the joint resolution and an agency's delegated rulemaking authority.[111] Conversely, if the CRA's prohibition on reissuing a rule in "substantially the same form" is interpreted too narrowly, the joint resolution does little to limit an agency's future rulemaking discretion.[112]

Given the uncertainty surrounding the CRA's effect on future rulemaking, it should come as no surprise that several scholars have set out to unpack the meaning of the CRA's "substantially the same form" provision.[113] Of particular relevance is the scholarship of Adam Finkel and Jason Sullivan. In their article, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, Finkel and Sullivan provide an overview of the CRA and lay out seven plausible interpretations of the "substantially the same form" provision. We briefly summarize each approach below, as Finkel's and Sullivan's scholarship provides good insight into how scholars have set out to interpret the "substantially the same form" provision of the CRA.[114]

As noted above, Finkel and Sullivan identify seven possible interpretations of the CRA's "substantially the same form" provision.[115] The scholars then arrange these seven competing approaches on a spectrum ranging from "least troublesome" to an issuing agency to "most daunting."[116] According to Finkel and Sullivan, the narrowest, and therefore least troubling,

along ideological lines—and partisan antipathy is deeper and more extensive – than at any point in the last two decades.").

110. Finkel & Sullivan, *supra* note 58, at 709.

111. 5 U.S.C. § 801(b)(2); *see also* Finkel & Sullivan, *supra* note 58, at 759 ("If the bar against reissuing a rule 'in substantially the same form' applied to a wide swath of rules that could be promulgated within the agency's delegated rulemaking authority, this would be tantamount to substantively amending the organic statute.").

112. § 801(b)(2); *see also* Finkel & Sullivan, *supra* note 58, at 734.

113. *See, e.g.*, Finkel & Sullivan, *supra* note 58, at 734–37.

114. *Id.* at 709–11.

115. *Id.* at 734.

116. *Id.*

approach to interpreting the CRA's effect on future rulemaking would permit agencies to reissue rules identical to one previously invalidated under the CRA as long as the agency asserts external conditions have changed.[117] Under this interpretation, an "agency could . . . simply claim that although the regulation was . . . in 'substantially the same form,' the effect of the rule is now substantially different . . . ."[118] A related, but slightly broader interpretation advanced by Finkel and Sullivan provides for the issuance of a rule identical to a previously rejected rule if external conditions have truly changed.[119] In this case, an identical rule may be substantially different even if the language itself has not changed, because the effects of the regulation changed over time.[120]

A third interpretation of the "substantially the same" provision is that the reissued rule must be altered so as to change the overall cost benefit analysis (CBA) of the disapproved rule.[121] Under this approach, the sameness of rules would depend on a comparison of the costs and benefits, and not the text of the rule itself.[122] A related, but slightly broader iteration of the CBA approach to the CRA would require agencies to both alter the costs and benefits of the rule and fix all issues Congress identified with the rejected rule prior to reissuing the rule.[123]

An even broader approach to determining which rules are substantially similar is for an agency to show it has "learned its lesson" in addition to changing the costs and benefits of the rule and fixing specific problems with the invalidated rule.[124] A related, but again broader, interpretation would require agencies to devise a wholly different regulatory approach if it wishes to regulate in the same area as the invalidated rule in addition to adjusting the CBA, fixing specific problems with the rule, and showing Congress the agency learned its lesson.[125]

Finally, Finkel and Sullivan suggest what may be the broadest interpretation of the provision: an agency simply cannot regulate in an area where Congress disapproved a specific regulation.[126] This expansive

117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* at 734–35.
121. *Id.* at 735.
122. *Id.*
123. *Id.* at 736.
124. *Id.*
125. *Id.*
126. *Id.* at 737.

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reading of "substantially the same form" has perhaps the greatest possible chilling effect on future regulatory action.[127]

The range of interpretations proposed by Finkel and Sullivan highlight the ambiguity inherent in the CRA's "substantially the same form" provision. But these interpretations also highlight an error in the scholarly approach to interpreting the CRA's effect on future rulemaking. Indeed, scholars interpreting the CRA have incorrectly focused on what sameness means with respect to the CRA, rather than what sameness means in the context of the statute authorizing the agency to regulate. This Article proposes a different approach to understanding the future effects of a successful joint resolution of disapproval by reframing the issue. We ask not what the "substantially the same form" provision means in isolation, but instead focus on what a CRA resolution does to an agency's organic statute.

III. PROPOSAL: APPLYING *CHEVRON* TO REISSUED RULES

Courts should apply *Chevron* deference to allegations that a proposed agency rule violates the "substantially the same form" restriction because the claim involves the lawfulness of an agency's interpretation of its own statute as modified by the CRA. Under this framework, agencies should be permitted to justify inaction when alleging that promulgating a rule would violate a CRA resolution unless rule promulgation is a discrete agency action required by law.[128]

A. Why Chevron *Applies*

The growth of the administrative state in the twentieth century,[129] coupled with the Administrative Procedure Act's (APA) judicial review provisions,[130] all but ensured courts would be involved in determining whether regulations fall within or beyond an agency's delegated rulemaking authority. But the court's role in determining the lawfulness of agency rulemaking

127. *See id.*

128. *See infra* Section IV(B).

129. *See* Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 122–27 (2016) ("[T]he New Deal . . . established many new regulatory agencies[.]" *Id.* at 123.) ("[I]n 1970, Congress began chartering new programs of so-called 'social regulation' devoted to public health and safety, environmental quality, and consumer protection." *Id.* at 125.).

130. *See* 5 U.S.C. § 706. The APA provides that courts may hold unlawful agency actions that are "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law" or "in excess of statutory . . . authority . . . or short of statutory right." 5 U.S.C. § 706(2)(A), (C).

was not without tension. Indeed, reviewing an agency's interpretation of its own organic statute pitted "the courts . . . quintessential judicial task of statutory interpretation"[131] against Congress's decision to delegate broad regulatory authority to an agency with expertise in a particular regulatory area.[132] Implicit in this broad delegation of regulatory authority is an agency's authority to fill in any statutory ambiguities.[133]

In 1984, the Supreme Court put the issue to rest when it rubber stamped a test to determine when lower courts should afford agency interpretations of their organic statutes heightened deference.[134] The test has two prongs.[135] The first prong asks if the organic statute is clear.[136] Under this inquiry, the court must determine "[i]f the intent of Congress is clear" by evaluating "whether Congress has directly spoken to the precise question at issue."[137] If the court concludes Congress has not addressed the issue directly and the statute is ambiguous, then the court applies the second prong, which simply determines whether the agency's interpretation of the ambiguous statute is a "permissible construction of the statute."[138] Accordingly, "the court does not simply impose its own construction of the statute" under the test outlined in *Chevron*.[139] Instead, a court will generally find an agency's interpretation is a permissible construction of the statute unless its interpretation is "arbitrary or capricious in substance, or manifestly contrary to the statute."[140] This affords agencies significant interpretive deference.[141]

Applying *Chevron* deference to a party challenging an agency's alleged violation of the "substantially the same form" prohibition is not straightforward.[142] Although the phrase "substantially the same form" is

131. DeMuth, *supra* note 129, at 135.

132. *See* Melanie E. Walker, *Congressional Intent and Deference to Agency Interpretations of Regulations*, 66 U. CHI. L. REV. 1341, 1341 (1999).

133. *See id.*

134. *See* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984).

135. *See id.*

136. *See id.*

137. *Id.* at 842.

138. *Id.* at 843.

139. *Id.*

140. Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 53 (2011) (quoting Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004)).

141. *See* Kerne H.O. Matsubara, *Domicile Under Immigration and Nationality Act Section 212(c): Escaping the* Chevron *"Trap" of Agency Deference*, 82 CALIF. L. REV. 1595, 1620 ("[O]nly the most egregious or erroneous interpretations . . . will fail under *Chevron* step two.").

142. *See* 5 U.S.C. § 801(b)(2).

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inherently ambiguous, *Chevron* deference is only afforded to an agency's interpretation of its own statute.[143] And the CRA is a statute applicable to rulemaking generally and is therefore not applicable to a single agency.[144] Accordingly, some scholars have concluded that courts should not afford agencies *Chevron* deference when a party seeks to prevent enactment of a proposed rule on the grounds that it violates the CRA's "substantially the same form" prohibition because an agency enacting a rule post-CRA nullification amounts to agency interpretation of a shared statute.[145] Instead, these scholars suggest the courts should review these challenges *de novo*.[146]

Although these scholars are correct in concluding *Chevron* is ordinarily inapplicable to statutes of general applicability, their analysis is too conclusory. While the CRA is a statute of general applicability and is not administered by a single agency,[147] the passage of a joint resolution has the effect of modifying a statute administered by a single agency.[148] Thus, an agency enacting a rule after Congress enacts a joint resolution of disapproval is not interpreting the CRA; it is interpreting its organic statute *as amended* by a joint resolution passed pursuant to the CRA.[149] Accordingly, a challenge to an agency's proposed rule on the grounds that it is "substantially the same form" as a rule voided under the CRA should be entitled to *Chevron* deference because the proposed rule is an agency's interpretation of its statute as modified by a CRA joint resolution.[150]

Although an agency reissuing a rule may be entitled to *Chevron* deference, the agency will still have to show that its interpretation of the statute as amended by the CRA is a "permissible construction" of the statute if it receives *Chevron* deference.[151] To do so, an agency will need to show that the rule is not "'arbitrary or capricious in substance, or manifestly

143. *See id.*; *see also* Sam Batkins & Adam J. White, *Should We Fear 'Zombie' Regulations?*, 40 REGUL. 16, 21 (2017) ("[A]s the courts have stressed, *Chevron* deference is appropriate only when the statute at issue is one that has been committed to that particular agency's exclusive administration[.]").

144. *See* § 801(a)(1)(A) ("Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress . . . a report containing . . . a copy of the rule.").

145. § 801(b)(2); *see also* Batkins & White, *supra* note 143, at 21.

146. *See* Batkins & White, *supra* note 143, at 21.

147. *See supra* notes 144–47 and accompanying text.

148. *See infra* notes 166–68 and accompanying text.

149. *See infra* notes 166–68 and accompanying text.

150. *See* § 801(b)(2); *see also* Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837, 841–44 (1984).

151. *Chevron*, 467 U.S. at 843.

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contrary'" to its modified statute.[152] Accordingly, the agency will need to provide a plausible interpretation of its CRA-modified statute that explains why the reissued rule is not "substantially the same" as a rejected rule.[153] While courts have never dealt with this issue directly, scholars have nevertheless proposed agency interpretations of the CRA that could support an agency's decision to reissue a rule.[154] Although a solution to this particular issue is beyond the scope of this Article, it is worth noting that "only the most egregious or erroneous interpretations" will fail under this part of the analysis.[155]

That *Chevron* should apply finds support in the legislative history accompanying the CRA's enactment. As noted in Part II(B), the CRA was originally standalone legislation developed in bipartisan negotiations between the House and Senate before being added to the Contract with America.[156] Because of the somewhat circuitious development of the CRA, there are no committee or conference reports.[157] That said, some of the context surrounding the CRA's development and passage can be found in floor statements and an identical statement of legislative history approved by House and Senate sponsors.[158]

Senator Don Nickles and Congressman Henry Hyde submitted nearly identical statements for the Senate and the House, respectively, to the Congressional Record.[159] Because of the way the legislative history was

152. Mayo Found. for Med. Educ. & Rsch. v. United States, 562 U.S. 44, 53 (2011) (quoting Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 242 (2004)).

153. *See id.*; 5 U.S.C. § 801(b)(2);

154. *See* Finkel & Sullivan, *supra* note 58, at 734–37. An agency could argue that a reissued rule is no longer substantially the same as an invalidated rule if it shows that external conditions have changed such that an otherwise identical rule has a different effect now than it did at the time of invalidation. *See id.* at 734–35. Further, an agency could argue that an otherwise identical rule is not substantially the same as an invalidated rule by showing that the reissued rule has greater benefits or reduced costs than the original rule. *See id.* at 735–36.

155. *See* Matsubara, *supra* note 141, at 1620.

156. *Congressional Review Act Legislative History*, RED TAPE ROLLBACK, https://www.redtaperollback.com/cra/legislative-history/ [https://perma.cc/XV9F-CKBG]; *see* 142 CONG. REC. S3683–87 (daily ed. Apr. 18, 1996) (statement of Rep. Nickles) (submitting statement for the record regarding Congressional Review Title of H.R. 3136); 142 CONG. REC. E571–79 (daily ed. Apr. 19, 1996) (statement of Rep. Hyde) (providing for Consideration of H.R. 3136, Contract with America Advancement Act of 1996).

157. *See Congressional Review Act Legislative History*, *supra* note 156.

158. *See id.* (noting that "scholars and courts have credited [the joint floor statement] as the best evidence of congressional intent regarding and the meaning of the CRA's text.").

159. *See id.*; 142 CONG. REC. S3683–87; 142 CONG. REC. E571–79.

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developed, there is no recorded floor debate and no recorded disagreement over the meaning of the text.[160]

Especially relevant to this article is the excerpt below:

> Subsection 801(b)(1) provides that: "A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule." Subsection 801(b)(2) provides that such a disapproved rule "may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule." Subsection 801(b)(2) is necessary to prevent circumvention of a resolution disapproval. Nevertheless, it may have a different impact on the issuing agencies depending on the nature of the underlying law that authorized the rule.
>
> 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. If the law that authorized the disapproved rule did not mandate the promulgation of any rule, the issuing agency may exercise its discretion not to issue any new rule. Depending on the law that authorized the rule, an issuing agency may have both options. But 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. The authors intend the debate on any resolution of disapproval to focus on the law that authorized the rule and make the congressional intent clear regarding the agency's options or lack thereof after enactment of a joint resolution of disapproval. It 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.[161]

The legislative history is particularly revealing. The sponsors of the bill did not intend the debate around the scope of "substantially the same form" to apply to the generally applicable CRA statute.[162] Indeed, Congress intended for the agency to give effect to the joint resolution of disapproval in conjunction with the law that authorized the disapproved rule to

160. *See Congressional Review Act Legislative History*, *supra* note 156.

161. 142 CONG. REC. S3683–87; *see also* 142 CONG. REC. E571–79.

162. *See* 142 CONG. REC. S3683–87; 142 CONG. REC. E571–79.

determine if there is room to issue a new rule.[163] For this reason, a broader organic statute would afford the agency more discretion for reissuing a new rule after a disapproval than a more narrow organic statute.[164]

The legislative history of the CRA provides context for its purposeful ambiguity.[165] The meaning of "substantially the same form" will vary depending on the statute authorizing the agency to act.[166] Congress did not define "substantially the same form" or provide criteria to consider when evaluating whether a reissued rule violates the CRA because it is a fact-specific inquiry. Every statute authorizing an agency to act will have a different scope, and each invalidated rule will have different implications on what constitutes "substantially the same."[167] The effect a joint resolution of disapproval has on future rules is dependent on the scope of the underlying statute authorizing the agency to act, and not what "substantially the same form" means within the CRA. Under these conditions, the future effects of the CRA may look different depending on the authorizing statute and the disapproved rule.[168]

Applying *Chevron* deference to reissued rules is consistent with the text and with the legislative history. The agency would have to show that the interpretation is a permissible construction of the statute and the joint resolution of disapproval. To survive the standard, the agency must explain why the reissued rule is not "substantially the same" as a rejected rule (giving effect to a resolution of disapproval). Applying *Chevron* deference as the standard for reviewing reissued rules provides reviewing courts with a workable standard, allows for agency action, and is consistent with the congressional intent of the CRA.

B. How Chevron *Applies—An Illustrative Example*

In 2015, the Middle Class Tax Relief and Job Creation Act (Pub. L. No. 112-96) was amended to allow states to conduct two types of drug testing to determine eligibility for unemployment benefits.[169] First, it expanded

163. *See* 142 CONG. REC. S3683–87; 142 CONG. REC. E571–79.

164. *See* 142 CONG. REC. S3683–87; 142 CONG. REC. E571–79.

165. *See* ROBERT A. KATZMANN, JUDGING STATUTES 4 (2014) ("[H]ow Congress makes its purposes known, through text and reliable accompanying materials constituting legislative history, should be respected, lest the integrity of legislation be undermined.").

166. *See* 142 CONG. REC. S3683–87; *see also* 142 CONG. REC. E571–79.

167. *See* 142 CONG. REC. S3683–87; *see also* 142 CONG. REC. E571–79.

168. *See* 142 CONG. REC. S3683–87; *see also* 142 CONG. REC. E571–79.

169. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 2105, 126 Stat. 156, 162–63.

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the state option to use drug tests to disqualify Unemployment Compensation (UC) applicants who were discharged from employment with their most recent employer for unlawful drug use.[170] Second, it allowed states to use drug tests for UC applicants for whom suitable work is available only in an occupation that regularly conducts drug testing, to be determined under new regulations issued by the Secretary of Labor.[171]

The Department of Labor (the Department) promulgated rules under the statute to implement the provisions related to drug testing applicants for whom suitable work is available only in an occupation that regularly conducts drug testing.[172] In the rule, the Department provided a list of the applicable occupations that regularly conduct drug testing.[173] In the section of the regulations following the list, the rule limited a state's ability to conduct a drug test on UC applicants to those individuals who are *only* available for work in an occupation that regularly conducts drug testing.[174] In effect, this section limited a state's ability to subject an individual to drug testing, regardless of whether the individual's previous occupation may have been listed, as long as the individual was currently able, available, and searching for work in at least one unlisted occupation.[175]

Stakeholders voiced concerns over the UC drug testing provisions and the final rule.[176] Some critics claimed that the rule did not address the policy problem, and others wanted states to have more flexibility to implement drug testing than what was offered under the Department's rule.[177] The disagreement with the Department's rule led to the introduction of a CRA resolution. Supporters of the resolution argued that the intent of the underlying law was "to provide states the ability to determine how best to implement

170. *Id.*

171. *Id.*

172. Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants, 81 Fed. Reg. 50298 (Emp. and Training Admin., Aug. 1, 2016) [hereinafter 2016 Drug Testing Regulations]; Allen Smith, *DOL Makes It Easier to Drug Test Unemployment Compensation Applicants*, SHRM (Oct. 4, 2019) https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/unemployment-compensation-drug-testing.aspx [https://perma.cc/CY3J-5KPG].

173. 2016 Drug Testing Regulations, *supra* note 172.

174. *Id.*

175. *See id.*

176. *See, e.g.*, Letter from Scott Sanders, Exec. Dir., Nat'l Ass'n State Workforce Agencies, to Kevin Brady, Chairman, House Ways & Means Comm. (Mar. 8, 2017), https://www.naswa.org/government-relations/congressional-testimony/naswa-support-letter-for-repeal-of-ui-drug-test-rule [https://perma.cc/S9BM-78K9].

177. *See id.*

drug testing programs but the final regulation narrowed the law to circumstances where testing is legally required . . . and removed state discretion" in conducting the UC program drug testing.[178] Those arguing in opposition to the resolution of disapproval said there was "no evidence unemployed workers have higher rates of drug abuse than the general population."[179]

The CRA joint resolution of disapproval passed the House and the Senate and was signed by President Trump in March 2017, thereby invalidating the rule.[180] Without the rule, there was no list of occupations requiring drug testing, and the ability to prospectively test UC claimants based on occupation was no longer available to states.[181] The underlying law still included the provision that the Secretary of Labor could issue regulations regarding states' ability to drug test UC applicants from occupations designated by the rule, but the CRA resolution made the future of rulemaking in this area unclear.[182]

In November 2018, the Department published a notice of proposed rulemaking (NPRM) to reissue a rule pursuant to Pub. L. No. 112-96.[183] The reissue requirements of the CRA prohibit an agency from reissuing a rule in "substantially the same form" as the disapproved, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.[184] The statute was not repealed or amended following the joint resolution of disapproval, so the Department considered the underlying statute, the 2016 rule, and the congressional notice of disapproval.[185]

In the 2018 NPRM, the Department explained how the reissued rule proposes a "substantially different and more flexible approach to the statutory requirements than the [2016 rule.]"[186] The reissued rule would enable states to enact legislation to require drug testing for a larger group of UC applicants than the 2016 rule and lays out "a flexible standard that States

178. JULIE M. WHITTAKER & KATELIN P. ISAACS, CONG. RSCH. SERV., RECENT LEGISLATIVE AND REGULATORY DEVELOPMENTS IN STATES' ABILITY TO DRUG TEST UNEMPLOYMENT COMPENSATION APPLICANTS AND BENEFIARIES 3 (2018).

179. *Id.*

180. S.J. Res. 23, 115th Cong. (2017).

181. WHITTAKER & ISAACS, *supra* note 178, at 2.

182. *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 2105, 126 Stat. 156, 162–63.

183. 2018 Drug Testing Regulations, *supra* note 172.

184. *Id.*; *see also* WHITTAKER & ISAACS, *supra* note 178, at 3.

185. WHITTAKER & ISAACS, *supra* note 178, at 2.

186. 2018 Drug Testing Regulations, *supra* note 172.

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can individually meet under the facts of their specific economies and practices."[187]

The 2018 rule includes the same occupations listed in the invalidated 2016 rule and

> also provides for two additional types of occupations: those identified by state laws as requiring drug testing . . . and those where states have a "factual basis for finding that employers hiring employees in that occupation conduct pre- or post-hire drug testing as a standard eligibility requirement for obtaining or maintaining employment in that occupation."[188]

This was the first time any agency had reissued a rule after the original version was disapproved under the CRA.[189] To date, the rule has not been challenged for violating the "substantially the same form" provision.[190] To illustrate how a challenge would be considered under the framework provided in this paper, we assume a party has challenged the Department's rule as unlawful because of the previous CRA resolution.

First, the reviewing court would consider whether the administrative interpretation at issue was issued by the agency charged with administering the statute being construed. In this case, the Department had the authority under Pub. L. No. 112-96 to issue regulations to determine the occupations in which drug testing regularly occurs. Because the Department has the authority to issue rules and interpret Pub. L. No. 112-96, the reviewing court would apply *Chevron* to determine whether the agency's interpretation should be accorded deference.

The reviewing court will then look to the statute as effectively amended by the joint resolution of disapproval. If the statute is unambiguous, and there is, for example, no room for the agency to regulate in light of the joint resolution of disapproval, then the inquiry stops there. In that case, the agency would be accorded no deference and the court would apply the law as written. However, if there is ambiguity and Congress has not spoken to the precise question through the statute and joint resolution of disapproval, then the reviewing court moves to *Chevron* step 2. In the drug testing example, the underlying statute granted broad authority to issue regulations to determine the occupations in which drug testing regularly occurs. Additionally, the 2016 rule was struck down for the lack of flexibility the

187. *Id.*

188. WHITTAKER & ISAACS, *supra* note 178, at 3.

189. CAREY & DAVIS, *supra* note 89, at 19.

190. *See id.*

rule gave to the states to determine how to implement the drug testing program. A reviewing court would likely find that the statute in conjunction with the joint resolution of disapproval was ambiguous, and the agency had room to interpret their authority to regulate in this area.

Last, a reviewing court would determine whether the agency's interpretation is reasonable, even if the court would have chosen an alternative interpretation. In the case of the drug-testing rule, the reviewing court would consider whether the agency's interpretation of the statute and the joint resolution of disapproval was reasonable. In the NPRM, the Department explained how they approached the rulemaking in light of the invalidated 2016 rule.[191] The Department structured the 2018 rule to set a flexible standard for states to individually meet "under the facts of their specific economies and practices."[192] The Department's record of their reasoning and substantially different scope and approach to the rulemaking would likely be considered reasonable, and therefore the agency's interpretation would likely be accorded *Chevron* deference and the rule would survive the challenge.[193]

The drug testing rule is a helpful example of how a reviewing court could use *Chevron* deference to solve the problem of what "substantially the same" means in a specific challenge. However, the drug-testing example is especially straightforward because there was legislative history to reveal what Congress disapproved of in the 2016 rule,[194] the Department clearly explained their approach to create a substantially different rule in the NPRM,[195] and the underlying statute was sufficiently broad to allow the agency to make a rule after the 2017 joint resolution of disapproval.[196] A *Chevron* analysis may not be so easy to apply to different facts. For example, the underlying statute could be narrow, there could be a lack of legislative history explaining the reason for striking the previous rule,[197] or the

191. 2018 Drug Testing Regulations, *supra* note 172.

192. *Id.*

193. It is worth noting that pursuant to the CRA, a reissued rule would still have to be submitted to Congress for review and would potentially be subject to disapproval again. A reviewing court may view Congress not issuing a joint resolution of disapproval is signaling Congressional approval of the rule, therefore adding to the court's confidence in the agency's reasonable interpretation.

194. *See* 163 CONG. REC. H1200–01 (2017).

195. *See* 2018 Drug Testing Regulations, *supra* note 172.

196. *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 2105, 126 Stat. 156, 162–63.

197. If courts were to apply *Chevron* deference as the standard for reviewing reissued rules, it would be beneficial for Congress to include a statement with the joint resolution of disapproval explaining why the rule was struck down.

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agency could promulgate the reissued rule without giving context to the changes made.

IV. DECLINING TO ACT: WHY COURTS SHOULD PERMIT AGENCY INACTION UNLESS THERE IS A LEGAL REQUIREMENT TO ACT

A litigant could challenge an agency's decision to withhold action pursuant to the CRA.[198] In response, an agency will likely raise two defenses.[199] Indeed, an agency declining to act would likely argue "that the CRA resolution stripped the agency of its authority, and that the agency would exercise discretion not to promulgate the new regulation even if the CRA did not prevent it."[200] Each argument is addressed separately.

An agency will likely argue a CRA resolution effectively stripped its regulatory authority over a given subject when it rejects a party's rulemaking petition.[201] Although a court reviewing an agency's decision not to promulgate a rule is "extremely limited" and "highly deferential,"[202] this is likely the weaker of the two arguments.[203] The Supreme Court has

198. *See* Batkins & White, *supra* note 143, at 21.

199. *See id.*

200. *Id.* An agency could also be subject to suit for failing to respond to a rulemaking petition filed under 5 U.S.C. § 553(e). Indeed, 5 U.S.C. § 706(1) permits a court to compel agency action when it is "unreasonably delayed." To determine whether agency action is unreasonably delayed, courts use a fact-specific balancing test. *See* Telecomm. Rsch. & Action Ctr. v. FCC, 750 F.2d 70, 80 (D.C. Cir. 1984). Under this analysis, the court considers whether Congress has indicated how quickly the agency should act, whether inaction poses a threat to public health, whether an agency has competing priorities, what interests would be prejudiced by agency delay, and whether the agency's delay is within reason. *Id.* Although courts may review agency action for unreasonable delay, courts are often reluctant to compel agency action. *See id.* at 81 (holding FCC is required to submit reports documenting progress on resolution of refund disputes but declining to mandate immediate action after five-year delay); *see also In re* Blue Water Network & Ocean Advocs., 234 F.3d 1305, 1315–16 (D.C. Cir. 2000) (using TRAC factors to determine if agency action was unreasonably delayed even though agency missed statutory deadline by eight years). In the event a court compels a response to a rulemaking petition, the agency's response would be a final agency action subject to judicial review. *See* 5 U.S.C. § 706(2); *see also* Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1037 (D.C. Cir. 2002).

201. *See* Batkins & White, *supra* note 143, at 21.

202. Nat'l Customs Brokers & Forwarders Ass'n v. United States, 883 F.2d 93, 96 (D.C. Cir. 1989).

203. This argument assumes the challenge to agency inaction occurs before the courts determine the circumstances in which an agency's reissuance of a rule violates the CRA's "substantially the same" prohibition. *See* 5 U.S.C. § 801(b)(2). Indeed, if a party challenges an agency's inaction after the courts give meaning to the "substantially the same form" prohibition, an agency's better argument for inaction may be that it lacks regulatory authority.

previously rejected an agency's contention that it lacked regulatory authority over a given subject matter and directed the agency to reconsider adopting a particular regulation.[204] Accordingly, a court could reject an agency's contention that a CRA resolution stripped its regulatory authority over a given subject matter, find the litigant's proposed rule is not "substantially" similar to a nullified rule, and direct an agency to "consider the merits of a new regulation."[205] While this does not necessarily require an agency to adopt a new rule, it requires additional consideration of a litigant's proposed rule.[206]

An agency contending it is exercising regulatory discretion not to act when confronted with the contention that action is being unlawfully withheld is likely the better argument.[207] The Supreme Court has held that a challenge to agency inaction "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*."[208] This is a high bar for a complainant to overcome. Indeed, the D.C. Circuit Court of Appeals has even held that the term "shall" may be an insufficient indication that an agency is required to act.[209] Given the significant "discretion not to undertake a rulemaking process,"[210] an agency would be inclined to defend a litigant's claim that it is withholding promulgation of a rule by arguing it is doing so pursuant to its regulatory discretion.[211] Further, unlike the previous argument, this argument permits an agency to retain broader regulatory authority because it does not force the agency to concede that a CRA resolution has reduced its regulatory authority.[212] Thus, an agency contending it is exercising discretion when it declines to reissue

For the purposes of this Article, however, we assume the courts have not defined the meaning of the CRA's "substantially the same form" prohibition.

204. *See* Massachusetts v. Env't Prot. Agency, 549 U.S. 497, 533 (2007).

205. Batkins & White, *supra* note 143, at 21.

206. *See Env't Prot. Agency*, 549 U.S. at 533 (noting an agency can still avoid rulemaking in its regulatory area "if it provides some reasonable explanation as to why it cannot or will not exercise" its rulemaking discretion).

207. *See* Batkins & White, *supra* note 143, at 21. *But see supra* note 203 and accompanying text.

208. Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004).

209. Sierra Club v. Jackson, 648 F.3d 848, 856–57 (D.C. Cir. 2011).

210. Batkins & White, *supra* note 143, at 21.

211. *See id.*

212. *See id.* (noting an agency defending inaction on the grounds that it lacks regulatory authority after a joint resolution necessarily concedes it has lost some regulatory authority it may have otherwise retained).

a rule potentially barred under the CRA can both defend its inaction and retain regulatory authority it may want in the future.[213]

CONCLUSION

The once-obscure CRA emerged as a potent oversight tool in 2017. While this emergence discounted claims that it was ineffective, its frequent use has generated legal uncertainty surrounding the "substantially the same form" provision. This Article reframes the question surrounding the meaning of "substantially the same form" and provides a workable standard for courts to evaluate reissued agency rules on a case-by-case basis, therefore addressing some of the questions pertaining to the CRA's effect on future rulemaking.

213. *Id.*