THE UNTAPPED POTENTIAL OF THE CONGRESSIONAL REVIEW ACT

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The Congressional Review Act ("CRA") authorizes fast-track procedures for resolutions disapproving agency rules. The near-universal assumption is that the CRA is relevant only when a new President seeks, with the support of Congress, to cancel regulations promulgated during the previous administration. Yet the CRA has substantially greater unrealized potential. When the agency, the President, and congressional majorities agree on their preferred interpretation of a statute, they can secure formal legislative endorsement of this interpretation through the following two-step maneuver: first, the agency promulgates an interpretive rule that construes the statute to have the opposite of the meaning the agency actually wants—for example, by interpreting a statute to prohibit a regulation that the agency would like to adopt. Next, Congress and the President use the CRA to disapprove that interpretive rule—thus establishing, via a formal exercise of legislative power, that the statute has the meaning the agency rule rejected. This double-negative maneuver would be a lawful way for the Executive and Legislative Branches to clarify, or even to change, statutory law in a manner that bypasses the filibuster and other legislative roadblocks. This Article develops this legal argument and also discusses the practical, political, and normative implications of this novel use of the CRA.

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Introduction

Imagine there was a statute that allowed federal agencies to seek and promptly receive from Congress formal endorsements of their statutory interpretations—and that Congress could provide such endorsements via special fast-track procedures requiring only a simple majority vote, without the possibility of filibuster or amendment. This expedited process would make it easier for agencies to resolve uncertainties about their legal authority—uncertainties that have multiplied as agencies increasingly interpret old statutes to confront new problems.[1] By enabling Congress to weigh in quickly to resolve questions of statutory meaning, such a mechanism could fundamentally re-balance the respective roles of Congress and the courts in shaping and constraining agency policymaking. Moreover, this tool could be used by agencies, in collaboration with sympathetic congressional majorities, to amend—rather than merely clarify—the relevant statutes. After all, if an agency proposed an interpretation that contravened the existing statutory text, but Congress subsequently endorsed that interpretation through a formal exercise of legislative power, Congress effectively would have amended the statute to permit the agency's proposed interpretation.

No special framework law is required for agencies to request, or for Congress to adopt, legislation clarifying or amending a statute.[2] But as a practical matter, numerous features of the legislative process make it very hard for agencies to secure formal legislative endorsement of their legal views, even when majorities in both chambers of Congress are supportive. The greatest obstacle is almost certainly the Senate filibuster, but there are others as well, including the possibility that a proposal will get bottled up in committee or bogged down with amendments. For these reasons, Congress rarely uses its formal Article I powers to confirm administrative agencies'

[1] *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. Pa. L. Rev. 1, 69–70 (2014).

[2] *See, e.g.*, Bijal Shah, *Judicial Administration*, 11 U.C. Irvine L. Rev. 1119, 1185–86 (2021).

interpretive positions, even during periods of unified government.[3] A framework statute that guaranteed a fast-track, filibuster-proof, amendment-free, up-or-down majority vote on whether to endorse an agency's proposed interpretation of its legal authority would therefore be a game changer.

It turns out that this framework law already exists, though nobody seems to have noticed. That law is the Congressional Review Act ("CRA").[4] The CRA, enacted in 1996 as part of the Small Business Regulatory Enforcement Fairness Act,[5] authorizes special fast-track procedures for Congress to pass a joint resolution disapproving an agency rule. The CRA is universally viewed as a negative instrument that the President and Congress may use to "cancel" agency regulations. That perception is understandable given the CRA's framing, history, and original purpose. Moreover, the prevailing assumption is that presidents will usually veto CRA resolutions that disapprove rules issued by the sitting President's own administration. That assumption implies that the CRA is relevant only in the few months after a presidential transition, when the incoming administration can nullify rules adopted late in the prior administration. And this has indeed been the pattern to date.[6]

Yet the CRA has substantially greater unrealized potential. Unlocking that potential requires embracing two important but overlooked facts about the CRA. First, nothing in the CRA's text or structure requires that the Congress and President that use the CRA to veto a rule actually have different views from the agency that promulgated the rule. Instead, these entities may cooperate to secure an outcome that they all favor. Second, although the CRA only applies to joint resolutions of disapproval, not joint resolutions of approval, any disapproval can be converted into an approval by framing the original statement in negative terms. Therefore, when the President and Congress are aligned, an agency seeking to secure fast-track legislation endorsing a given statutory interpretation can do so by promulgating a rule that announces the opposite of the interpretation that the agency actually wants—for example, by interpreting a statute to prohibit a regulation that the agency would like to adopt—and inviting Congress and the President to use the CRA to disapprove that rule. The trick here is, in essence, a legal double-negative: disapproving the statement "X is *not* permitted" is equivalent (linguistically and legally) to approving the statement "X *is* permitted." Once one recognizes this fact, the transformative potential of the CRA snaps into focus.

The goal of this Article is to call attention to this neglected possibility. After Part I provides some background on the CRA, Part II develops in

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[3] *See* Note, *A* Chevron *for the House and Senate: Deferring to Post-Enactment Congressional Resolutions that Interpret Ambiguous Statutes*, 124 HARV. L. REV. 1507, 1507–08 (2011).

[4] 5 U.S.C. §§ 801–08.

[5] Pub. L. No. 104–121, 110 Stat. 847, 868 (1996).

[6] *See infra* notes 32–34 and accompanying text.

greater detail the argument sketched above, explaining how agencies, working in concert with the President and supportive majorities in the House and Senate, can use the CRA to clarify, or even to alter, the scope of the agency's statutory authority. Part III considers and rejects several legal objections to this novel use of the CRA. Finally, Part IV turns to some practical, political, and normative implications of using the CRA as we have proposed.

We acknowledge, right at the outset, that our proposed use of the CRA would be a dramatic departure from prevailing assumptions about how that statute is supposed to operate. We are not aware of any prior work that even hints at something like the proposal we advance.[7] We therefore anticipate that many readers will be skeptical. Our objective in this Article is to overcome this skepticism. By responding as clearly and methodically as we can to the principal legal objections, we hope to convince dubious readers that our proposed use of the CRA, while admittedly novel, is just as valid and legitimate as other maneuvers that deploy existing laws or procedural rules in unanticipated ways.[8]

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[7] Some commentators have noted the potential to use the CRA as a pro-regulatory rather than anti-regulatory tool, since an administration can use the CRA process to reverse rules that eliminate or weaken existing regulations. *See, e.g.*, Sam Batkins, *Congress Strikes Back: The Institutionalization of the Congressional Review Act*, 45 MITCHELL HAMLINE L. REV. 351, 381 (2019); Bethany A. Davis Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 10–11 (2019). This suggestion contrasts with the more conventional portrayal of the CRA as an instrument to block regulations. *See, e.g.*, Paul J. Larkin, Jr., *The Trump Administration and the Congressional Review Act*, 16 GEO. J.L. & PUB. POL'Y 505, 508–12 (2018); Cary Coglianese & Gabriel Scheffler, *What Congress's Repeal Efforts Can Teach Us About Regulatory Reform*, 3 ADMIN. L. REV. ACCORD 43, 51–54 (2017); Bridget C.E. Dooling, *Into the Void: The GAO's Role in the Regulatory State*, 70 AM. U. L. REV. 387, 398–99 (2020); Jake Moore, *The Congressional Review Act, Presidential Transitions, and the Act's Reporting Requirement: How the Act May Finally Be Used to Successfully Overturn Agency Regulations Again*, 48 CUMB. L. REV. 283, 299 (2017). But this debate remains narrowly focused on how the CRA can be used by an incoming administration to *undo* the regulatory policies of a prior administration. The literature has not considered the possibility that the CRA could be used proactively by an administration working hand in glove with Congress and the agency to settle debates over statutory meaning.

[8] In that respect, this Article is related to other work that suggests novel and arguably aggressive uses of existing legal mechanisms—while operating within the existing constitutional and statutory framework—to improve the functioning and democratic character of U.S. institutions. *See, e.g.*, Jonathan S. Gould, Kenneth A. Shepsle & Matthew C. Stephenson, *Democratizing the Senate from Within*, 13 J. LEGAL ANALYSIS 1 (2021) (arguing that the Senate could adopt an alternative "popular-majoritarian cloture rule" in which ending debate would require not a supermajority of senators, but rather a majority of senators who collectively represent a majority of the U.S. population); Adam Schleifer, *Interstate Agreement for Electoral Reform*, 40 AKRON L. REV. 717 (2007) (advocating an interstate compact in which participating states would pledge to allocate their electoral votes to whichever presidential candidate won the popular vote); Matthew C. Stephenson, *Can the President Appoint Principal Officers Without a Senate Confirmation Vote?*, 122 YALE L.J. 940 (2013) (arguing that if the Senate fails to vote on a presidential nominee to an Executive Branch office within a reasonable period of time, that inaction should be treated as implied consent to the appointment); Nicholas Stephanopoulos, *Congress's Forgotten Electoral Power*, DEMOCRACY DOCKET (Feb. 1, 2021), https://www.democracydocket.com/news/congresss-forgotten-electoral-power/ [https://perma.cc/H8SN-V9FT] (arguing that Congress could use its constitutional power to be "the Judge of the Elections [and] Returns of its own Members," U.S. CONST. art. I, § 5, cl. 1, to establish rules to prohibit voter suppression and partisan gerrymandering); Gregory Koger &

This is not merely an academic exercise. The dysfunction of the modern Congress justifies exploring unconventional methods for overcoming obstructionism.[9] We recognize that for practical and political reasons, our proposed use of the CRA, even if accepted as legitimate, might be used relatively sparingly, and to settle simpler legal propositions—at least initially. But in principle, the CRA, used in the manner we describe, could be a powerful and flexible tool for achieving important changes in law and public policy.

I. A Brief Overview of the Congressional Review Act

The CRA was enacted to create a constitutionally permissible alternative to the "legislative veto," a device that the Supreme Court had invalidated in its 1983 decision in *Immigration and Naturalization Service v. Chadha*.[10] For roughly a half-century before *Chadha*, Congress had routinely inserted legislative veto provisions into statutes that delegated authority to agencies;[11] these provisions empowered Congress, by a majority vote of one or both chambers, to block certain agency actions from going into effect.[12] Supporters defended the legislative veto as a way for Congress to retain a degree of control over how executive agencies exercised the powers conferred on them by broad statutory delegations.[13] The *Chadha* Court, however, held that the legislative veto was unconstitutional.[14] The Court first concluded that congressional invalidation of an agency decision was an exercise of Congress's legislative power.[15] But, the Court continued, an exercise of legislative power is valid only if it satisfies the requirements of Article I, Section 7 of the U.S. Constitution—bicameral passage and presentment to the President.[16] A one-house legislative veto violates both of these requirements; a two-house legislative veto, though consistent with bi-

Sergio J. Campos, *The Conventional Option*, 91 Wash. U. L. Rev. 867 (2014) (documenting various means that the Senate could use, and has used, to avoid the filibuster under existing Senate rules and precedents).

[9] *See* Freeman & Spence, *supra* note 1, at 8–17 (discussing Congress's inability to respond to modern environmental and energy policy challenges due to legislative inaction and gridlock).

[10] 462 U.S. 919, 921–22 (1983).

[11] The legislative veto was first adopted as a check on the President's power to reorganize the Executive Branch, and later to control other presidential actions such as raising tariffs and adjusting federal pay rates. *Id.* at 968–70 (White, J., dissenting). Congress then expanded use of the veto to exert greater control over agency rulemaking. *See* David A. Martin, *The Legislative Veto and the Responsible Exercise of Congressional Power*, 68 Va. L. Rev. 253, 259 (1982).

[12] There were other varieties of legislative veto as well, including provisions that vested the veto power with a single congressional committee or committee chair. *See* Martin, *supra* note 11, at 257 n.9.

[13] *See, e.g.*, James Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 Ind. L.J. 323, 334 (1977).

[14] *Chadha*, 462 U.S. at 959.

[15] *Id.* at 952.

[16] *See id.* at 956–57.

cameralism, still violates the presentment requirement. To nullify an agency's exercise of lawfully delegated power, the *Chadha* Court held, Congress must pass a bill through both chambers of Congress and either get the President's signature or override a presidential veto.

The *Chadha* decision, and its highly formalistic reasoning, prompted consideration of whether it might be possible to craft an alternative to the legislative veto that would perform a similar function but avoid the constitutional problems that *Chadha* identified.[17] The CRA emerged out of these discussions.[18] Under the CRA, Congress can override an agency rule by enacting a joint resolution that goes through the full Article I, Section 7 process. But the CRA creates special streamlined legislative procedures, especially in the Senate, to facilitate passing such a resolution.

More specifically, the CRA provides that before a federal agency rule can take effect, the agency must submit the text of the proposed rule, together with some additional information, to both houses of Congress and the Comptroller General.[19] This submission (or the publication of the rule in the *Federal Register*, whichever is later) triggers the beginning of a period of sixty legislative days during which members of the House or Senate may introduce a joint resolution of disapproval.[20] The CRA specifies a mandatory

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[17] The most influential contribution to this discussion was a lecture that then-Judge Stephen Breyer delivered only a few months after *Chadha* was decided. *See generally* Stephen Breyer, *The Legislative Veto After* Chadha, 72 GEO. L.J. 785 (1984). Judge Breyer pointed out that Congress could implement something similar to the legislative veto by making certain exercises of agency power contingent on passage of a "confirmatory law," adopted by both houses of Congress pursuant to the same streamlined procedures that had been used for legislative veto resolutions, and then presented to the President. *See id.* at 793–96. Judge Breyer did not actually advocate this proposal. In fact, he concluded his lecture with, as he put it, "a strong note of skepticism as to the need for the [legislative] veto in the regulatory area." *Id.* at 798. Others advanced similar ideas. *See, e.g.*, Elliott H. Levitas & Stanley M. Brand, *Congressional Review of Executive and Agency Actions After* Chadha*: "The Son of Legislative Veto" Lives On*, 72 GEO. L.J. 801, 804–07 (1984); Laurence H. Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1, 18–20 (1984).

[18] 142 CONG. REC. S3122 (daily ed. Mar. 28, 1996) (statement of Sen. Levin); 142 CONG. REC. S3684 (daily ed. Apr. 18, 1996) (joint statement of Sens. Nickles, Reid, and Stevens). The CRA did not go as far as what Judge Breyer and others had suggested might be possible. *See generally* Breyer, *supra* note 17. Most importantly, the CRA did not require agencies to secure a confirmatory resolution, enacted through the legislative process, to promulgate regulations or take other actions. Legislation that would impose such a requirement has been proposed, but not passed. *See* Regulations from the Executive in Need of Scrutiny Act of 2021, S. 68, 117th Cong. (2021); *see also* Ronald M. Levin, *The REINS Act: Unbridled Impediment to Regulation*, 83 GEO. WASH. L. REV. 1446, 1464 (2015); Jonathan R. Siegel, *The REINS Act and the Struggle to Control Agency Rulemaking*, 161 N.Y.U. J. LEGIS. & PUB. POL'Y 131, 136 n.22 (2013).

[19] 5 U.S.C. § 801(a)(1)(A)–(B). The CRA imposes some additional requirements for rules designated as "major" according to the criteria used by the Office of Information and Regulatory Affairs. *Id.* §§ 801(a)(2)–(3), 804(3).

[20] *Id.* § 802(b)(2). Note that because this period is calculated using legislative days (that is, days in which the House and Senate are in session) rather than calendar days, the time allowed for disapproving a rule can last for as long as six months. *See* MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 15–16 (2020). In some cases, when the agency has not submitted its rule to Congress or published it in the Federal Register, but the Government Ac-

template for such resolutions: the joint resolution must state, after the resolving clause, "That Congress disapproves the rule submitted by the ___ relating to ___, and such rule shall have no force or effect," with "[t]he blank spaces being appropriately filled in."[21]

Although such a joint resolution is initially referred to the appropriate legislative committee,[22] the CRA provides that in the Senate, if the committee with jurisdiction has not acted on a proposed disapproval resolution within twenty calendar days, a group of thirty senators may file a discharge petition that bypasses the committee and places the resolution on the Senate calendar.[23] And critically, once a disapproval resolution has passed out of Senate committee, or the committee has been discharged, a motion to consider that resolution must be taken up immediately,[24] and is subject only to limited debate followed by an up-or-down vote.[25] In other words, there is no possibility of amendment or filibuster.[26] Furthermore, if one chamber passes a CRA resolution, then the other chamber must immediately take up the resolution without referring it to committee.[27]

If both chambers pass a joint resolution of disapproval, the resolution is presented to the President. If the President signs the resolution, or if Congress overrides a presidential veto, then the agency's rule "shall not take effect (or continue)."[28] Furthermore, the agency is prohibited from issuing the disapproved rule "in substantially the same form" and from issuing a "new rule that is substantially the same as" the disapproved rule, unless that reissued or new rule is "specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule."[29] Disapproval

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countability Office ("GAO") issues an opinion to the effect that the CRA applies to the rule in question, Congress is willing to treat the GAO opinion as triggering the start of the sixty-day clock. *See* VALERIE C. BRANNON & MAEVE P. CAREY, CONG. RSCH. SERV., R45248, THE CONGRESSIONAL REVIEW ACT: DETERMINING WHICH "RULES" MUST BE SUBMITTED TO CONGRESS 25 (2019).

[21] 5 U.S.C. § 802(a).

[22] *Id.* § 802(b)(1).

[23] *Id.* § 802(c).

[24] *Id.* § 802(d)(1).

[25] *Id.* § 802(d)(2)–(3).

[26] The CRA does not contain parallel provisions for the House, but the House leadership has sufficient control over the process that typically a joint CRA resolution is considered under a closed special rule that permits no amendments. *See* CAREY & DAVIS, *supra* note 20, at 14.

[27] 5 U.S.C. § 802(f).

[28] *Id.* § 801(b)(1).

[29] *Id.* § 801(b)(2). Because the CRA does not provide further guidance on what "substantially the same" means, and the issue has not yet been litigated, there is considerable uncertainty and debate regarding the scope of this prohibition. *See, e.g.*, Keith Bradley & Larisa Vaysman, *CRA Resolutions Against Agency Guidance*, 4 U. PA. J.L. & PUB. AFF. 459, 469 (2019); Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 244–46 (2018); 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, 83–88 (2018); 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, 734–37 (2011).

resolutions are not judicially reviewable, although agency actions made pursuant or subsequent to them may be.[30]

The fact that a CRA disapproval resolution goes through the full Article I, Section 7 process means that the CRA does not run into the constitutional problems emphasized in *Chadha*. But for this same reason, the CRA is a less potent constraint on agencies than its proponents had hoped. If the President supports the agency's rule—which in most cases is likely, especially for Executive Branch agencies—then the President would almost certainly veto a CRA disapproval resolution, and overriding a presidential veto is very hard.[31] It is therefore unsurprising that the CRA has so far been used exclusively when there has been a recent change in partisan control of the White House, the new President's party has majorities in both chambers of Congress, and there are rules from the previous administration for which the sixty-legislative-day clock has not yet run out. These circumstances describe all twenty of the successful uses of the CRA to date: the CRA was used to veto an agency rule once in the early days of the George W. Bush administration to overturn a Clinton-era workplace safety rule,[32] sixteen times during the early Trump administration to overturn various Obama administration rules,[33] and three times during the Biden administration to undo Trump ad-

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[30] The CRA provides that "no determination, finding, action, or omission under this chapter shall be subject to judicial review." 5 U.S.C. § 805.

[31] The presidential veto is an especially formidable obstacle in this context because CRA resolutions cannot be bundled into a larger bill that might contain measures the President favors. *See* Midnight Rulemaking: Shedding Some Light: Hearing Before the Subcomm. on Commercial and Administrative Law of the H. Comm. on the Judiciary, 111th Cong. (2009) (testimony of Curtis W. Copeland, Ph.D., Specialist in American National Government, Government and Finance Division, Congressional Research Service).

[32] Pub. L. No. 107-5, 115 Stat. 7 (2001) (overturning Ergonomics Program, 65 Fed. Reg. 68,261 (Nov. 14, 2000)).

[33] Pub. L. No. 115-4, 131 Stat. 9 (2017) (overturning Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,359 (July 27, 2016)); Pub. L. No. 115-5, 131 Stat. 10 (2017) (overturning Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016)); Pub. L. No. 115-8, 131 Stat. 15 (2017) (overturning Implementation of NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 91,702 (Dec. 19, 2016)); Pub. L. No. 115-11, 131 Stat. 75 (2017) (overturning Federal Acquisition Regulation, 81 Fed. Reg. 58,562 (Aug. 25, 2016)); Pub. L. No. 115-12, 131 Stat. 76 (2017) (overturning Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016)); Pub. L. No. 115-13, 131 Stat. 77 (2017) (overturning Elementary and Secondary Education Act of 1965, as Amended by Every Student Succeeds Act, 81 Fed. Reg. 86,076 (Nov. 29, 2016)); Pub. L. No. 115-14, 131 Stat. 78 (2017) (overturning Teacher Preparation Issues, 81 Fed. Reg. 75,494 (Oct. 31, 2016)); Pub. L. No. 115-17, 131 Stat. 81 (2017) (overturning Federal-State Unemployment Compensation Program, 81 Fed. Reg. 50,298 (Aug. 1, 2016)); Pub. L. No. 115-20, 131 Stat. 86 (2017) (overturning Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska, 81 Fed. Reg. 52,247 (Aug. 5, 2016)); Pub. L. No. 115-21, 131 Stat. 87 (2017) (overturning Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness, 81 Fed. Reg. 91,792) (Dec. 19, 2016)); Pub. L. No. 115-22, 131 Stat. 88 (2017) (overturning Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 Fed. Reg. 87,274 (Dec. 2, 2016)); Pub. L. No. 115-23, 131 Stat. 89 (2017) (overturning Compliance with Title X Requirements by Project Recipients in Selecting Subrecipients, 81 Fed. Reg. 91,852 (Dec. 19, 2016)); Pub. L. No. 115-24, 131 Stat. 90 (2017) (overturning Savings Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees, 81 Fed. Reg. 92,639 (Dec. 20,

ministration rules.[34] In all these cases, CRA disapproval resolutions were enacted by a political party different from the party that controlled the agency at the time the agency adopted the disapproved rule.[35]

The conventional wisdom is therefore that the CRA will lie dormant most of the time, but there will be occasional bursts of CRA activity when a new administration has the opportunity, with the support of congressional majorities, to undo some of the eleventh-hour regulations adopted by its predecessor.[36] When these brief windows of opportunity close, the prevailing assumption is that the CRA will fade back into relative obscurity, at least until the next time a change in partisan control of the White House coincides with unified government.

II. How to Use the CRA to Clarify or Alter Statutory Authority

Securing fast-track legislative endorsement of statutory positions that the agency wants to adopt and entrench would be straightforward if the CRA

2016)); Pub. L. No. 115-35, 131 Stat. 848 (2017) (overturning Savings Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees, 81 Fed. Reg. 59,464 (Aug. 30, 2016)); Pub. L. No. 115-74, 131 Stat. 1243 (2017) (overturning Arbitration Agreements, 82 Fed. Reg. 33,210) (July 19, 2017)); Pub. L. No. 115-172, 132 Stat. 1290 (2018) (overturning Consumer Fin. Prot. Bureau Bull., 2013-02, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (2013)).

[34] Pub. L. No. 117-22, 135 Stat. 294 (2021) (overturning Update of Commission's Conciliation Procedures, 86 Fed. Reg. 2974 (Jan. 14, 2021)); Pub. L. No. 117-23, 135 Stat. 295 (2021) (overturning Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57,018 (Sept. 14, 2020)); Pub. L. No. 117-24, 135 Stat. 296 (2021) (overturning National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020)).

[35] Not all of these resolutions were adopted on party-line votes, though most were. Republican Senators Susan Collins, Lindsey Graham, and Rob Portman, for instance, supported disapproval of the Trump administration's methane rule. *See* 167 Cong. Rec. S2283–84 (daily ed. April 28, 2021) (roll call vote on S.J. Res. 14). Democratic Senators Catherine Cortez Masto, Joe Donnelly, Heidi Heitkamp, Joe Manchin, Claire McCaskill, Bill Nelson, and Jon Tester voted with Republicans to disapprove of an Obama Department of Education rule. *See* 163 Cong. Rec. S1666 (daily ed. Mar. 8, 2017) (roll call vote on H.R.J. Res. 58).

[36] *See, e.g.*, Note, *The Mysteries of the Congressional Review Act*, 122 Harv. L. Rev. 2162, 2162 (2009); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 Duke L.J. 963, 1002 (2001). It is possible, however, that the CRA might be used more extensively than conventionally thought. Because the window for introducing a CRA disapproval resolution starts only once the rule is formally submitted to Congress or published in the *Federal Register*, whichever is later, 5 U.S.C. § 802(b)(1), and because agencies often fail to submit their rules to Congress, even older rules may be subject to CRA disapproval resolutions. Some commentators have advocated taking advantage of this fact to secure CRA disapproval of a substantially greater number of agency rules. *See* Kimberly A. Strassel, *A GOP Regulatory Game Changer*, Wall St. J. (Jan. 27, 2017), http://www.wsj.com/articles/a-gop-regulatory-game-changer-1485478085 [https://perma.cc/2QGV-7L6U]. That has not yet occurred on a large scale, but the Trump administration used this technique once to disapprove a Consumer Financial Protection Bureau guidance document on indirect auto lending. *See* Pub. L. No. 115-172, 132 Stat. 1290 (2018) (overturning Consumer Fin. Prot. Bureau Bull., 2013-02, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (2013)). *See also* Batkins, *supra* note 7, at 353.

provided for fast-track enactment of joint resolutions of approval. It does not. But because the product of two negatives is a positive, in language as well as arithmetic, the CRA as written can be used to accomplish much the same thing.

We can illustrate this proposition with a series of stylized examples based on the "net neutrality" controversy, focusing in particular on the question of whether the Federal Communications Commission ("FCC") may, must, or may not regulate broadband internet service providers as "common carriers" under the Communications Act of 1934.[37] Simplifying somewhat, the answer to this question turns on whether broadband internet service is an "information service" or a "telecommunications service," statutory terms that appear in the Telecommunications Act of 1996.[38] If broadband is an information service, rather than a telecommunications service, then it is not subject to common carrier regulations. Advocates of net neutrality—the idea that network providers should allow for open and equal internet access—favor the telecommunications service interpretation because it allows the FCC to restrict providers' ability to give preferential treatment.[39]

Suppose that a new President has named a new FCC Chair, and that in line with their shared policy preferences, the FCC wants to mandate net neutrality. Suppose, however, that there is some legal uncertainty over whether the FCC has the statutory authority to regulate broadband providers as common carriers. The agency, its congressional allies, and the President could clearly establish that the FCC has such authority through the following choreographed two-step.[40]

First, the FCC would issue an interpretive rule taking the position that is the *opposite* of what the agency actually wants.[41] That rule might declare, "The Commission interprets the Telecommunications Act of 1996 to *prohibit* the classification of broadband internet service as a telecommunications

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[37] Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified as amended at 47 U.S.C. § 153 et seq.).

[38] Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 151 et seq.). There has been a great deal of rulemaking activity and litigation over this question. The Supreme Court in 2003 addressed the question we use in the example—whether broadband internet service is an information service or a telecommunications service—and ruled that the statute is sufficiently ambiguous that the FCC's classification of broadband was entitled to deference. *See* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 989, 997 (2005). The subsequent debate over net neutrality has involved a range of other, more complicated legal issues. *See, e.g.*, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014); U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016); Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019) (per curiam).

[39] Patricia Moloney Figliola, Cong. Rsch. Serv., R40616, The Federal Net Neutrality Debate: Access to Broadband Networks 1 (2021).

[40] For all of these examples, we will assume that the President and House and Senate majorities would support the agency's position, but that getting a bill endorsing that position through the normal legislative process would be difficult or impossible, given the filibuster or other legislative roadblocks.

[41] The agency could also issue this interpretation in the form of a legislative rule, though we discuss below why it would be wiser for an agency employing this mechanism to issue an interpretive rule. *See infra* note 67.

service, and the Commission therefore lacks the statutory authority to subject broadband providers to the common carrier regulations of the Communications Act of 1934." To clarify what the agency is doing and why, the agency might, and almost certainly should, preface this interpretive rule with a preamble that expressly states that the agency is promulgating this interpretation in order to give Congress an opportunity to disapprove it via a CRA resolution.

Second, pursuant to the CRA's fast-track procedures, Congress would pass a joint resolution disapproving the FCC's rule. That resolution would declare "[t]hat Congress disapproves the rule submitted by the Federal Communications Commission relating to the agency's erroneous statement that the Telecommunications Act prohibits the Commission from classifying broadband internet service as a telecommunications service subject to common carrier regulation, and such rule shall have no force or effect." This formulation follows the template explicitly laid out in the text of the CRA.[42]

This resolution, which the President would sign, establishes that the FCC *does* have the statutory authority to adopt net neutrality regulations. After all, Congress and the President, acting through a formal exercise of legislative power pursuant to Article I, Section 7, expressly *disapproved* an interpretation of the Telecommunications Act that would *prohibit* the classification of broadband internet as a telecommunications service. That decision logically entails the conclusion that Congress, by formal legislative action, has declared that the Telecommunications Act *permits* (that is, does not prohibit) the classification of broadband internet as a telecommunications service. Such a resolution would not *compel* the FCC to make such a classification. The opposite of "may not" is "may," not "must," and the FCC might still conclude that such regulation, though legally authorized, is unwise. But the resolution would clearly establish the FCC's statutory authority to adopt net neutrality rules, thus alleviating the concern that a court might interpret the (original) text of the Telecommunications Act differently. Moreover, a future FCC could not decline to treat broadband providers as common carriers solely on the grounds that the Commission lacks the statu-

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[42] 5 U.S.C. § 802(a). Note that this proposed version of the disapproval resolution includes the adjective "erroneous" when describing the substance of the rule being disapproved. This is not strictly necessary, but it serves to emphasize Congress's express rejection of the interpretation articulated in the rule. Doing this may remove any lingering uncertainty as to whether the resolution disapproves of the substance of the interpretation, or merely disapproves of the agency having announced the interpretation in the form of a rule. *See infra* Section III.B.

It is possible that the Senate Parliamentarian would deem the specific language characterizing the agency's interpretation as "erroneous" to be extraneous to the resolution because such language is typically not included in disapproval resolutions. We think that determination would be wrong as a matter of law, *see infra* Section III.A.3, but we recognize that the decision would likely fall to the Senate Parliamentarian, to whom Senate leadership typically defers. Even without the clarifying language, however, we believe that a more minimal resolution simply disapproving the agency rule would have the same effect. *See infra* Section III.B.

tory authority to do so, because Congress, through the CRA, would have already rejected that proposition.[43]

Now suppose that a pro-net neutrality FCC wanted to go further, working with its congressional allies and the President to establish not only that the Commission *may* classify broadband internet as a telecommunications service rather than an information service, but that this classification is *required* by the statute. In this case, the FCC would issue a rule that states, "The Commission concludes that the Telecommunications Act of 1996 *does not require* the classification of broadband internet service as a telecommunications service, and therefore the Commission is not obligated to subject broadband providers to the common carrier regulations of the Communications Act of 1934." Congress then would pass, with the President's signature, a CRA resolution that disapproves the FCC rule "relating to the agency's erroneous statement that the Telecommunications Act does not require the agency to classify broadband internet service as a telecommunications service subject to common carrier regulation[.]" Passing this resolution would obligate the FCC to impose common carrier regulations on broadband service providers—because Congress disapproved the FCC's rule stating that such regulation is *not* obligatory. For the FCC to decline to impose net neutrality after Congress passed such a resolution would be to maintain an interpretive position that Congress expressly and formally disapproved.

Alternatively, suppose that the FCC, the President, and majorities in the House and Senate oppose net neutrality and want not only to classify broadband as an information service, but also to entrench that classification against future administrative reversal. In this case, the FCC could issue a rule stating that the Commission "interprets the Telecommunications Act of 1996 to *permit* the classification of broadband internet service as a telecommunications service, thus subjecting broadband providers to common carrier regulations." Congress would then pass a CRA resolution disapproving the FCC's rule "relating to the agency's erroneous statement that the Telecommunications Act permits the agency to classify broadband internet service as a telecommunications service subject to common carrier regulation[.]" As a result, absent further legislative action, the FCC would be barred from issuing a rule classifying broadband as a telecommunications service.

Finally, imagine a situation in which the FCC and its allies are skeptical of net neutrality, but the Commission wants to keep its options open. Imagine further that the Commission is concerned that a court might interpret the Telecommunications Act to *require* the classification of broadband as a telecommunications service, and the Commission wants to avoid having its hands tied in that way. In this case, the FCC could promulgate a rule that "interprets the Telecommunications Act of 1996 to *require* the classification

[43] The agency might still decline to impose common carrier regulations but could only do so if this decision could be justified on other legal grounds.

of broadband internet service as a telecommunications service." Congress and the President would then enact a joint resolution disapproving the FCC's "erroneous statement that the Telecommunications Act requires the agency to classify broadband internet service as a telecommunications service subject to common carrier regulation[.]" This resolution would not bar the FCC from classifying broadband as a telecommunications service at some later stage; rejecting the view that such a classification is *required* does not imply that such a classification is *prohibited*. The resolution would, however, rule out the possibility that the statute obligates the FCC to mandate net neutrality.[44]

In sum, if an administrative agency, the White House, and majorities in Congress can agree on their preferred view of the agency's statutory authority, they can use the CRA to secure speedy legislative endorsement of that position. The four basic versions of this maneuver, illustrated by each of the four examples sketched above, can be summarized as follows:

(1) To *permit* an agency to do X, the agency should promulgate, and Congress should disapprove, a rule that says the statute *prohibits* X;
(2) To *prohibit* an agency from doing X, the agency should promulgate, and Congress should disapprove, a rule that says the statute *permits* X;
(3) To *require* an agency to do X, the agency should promulgate, and Congress should disapprove, a rule that says the statute *does not require* X;
(4) To ensure that an agency is *not required* to do X, the agency should promulgate, and Congress should disapprove, a rule that says the statute *requires* X.

These four possibilities illustrate how an agency can tailor the format of a rule sent to Congress for disapproval specifically to achieve the desired statutory interpretation. Importantly, the argument here is not that one can *infer* from Congress's disapproval of the agency's interpretive rule that Congress must actually favor the opposite of that interpretation. Rather, the argument is that the text of the disapproval resolution *formally adopts* that latter view as binding statutory law. (That said, it is worth noting that even if the CRA resolution does not have the formally binding legal effect that we assert, passing the resolution would, at the very least, send a strong signal to the courts regarding Congress's view of the law. Such passage might at a minimum help overcome claims, which appear occasionally in judicial opinions, that Congress's inaction on some issue suggests that there is no majority for any settlement of the question.)

[44] This fourth scenario is similar to the first; both preserve flexibility for the agency to regulate as it prefers. The difference is that in the first scenario Congress clarifies that a certain type of regulation—here the imposition of net neutrality—is *not prohibited*, while in the fourth example Congress clarifies that such regulation is *not required*.

Critically, in all of the scenarios described above, the agency's rule is never intended to go into effect. The only purpose of the rule is to provide Congress the opportunity to pass legislation using the CRA's fast-track process. Once Congress enacts that disapproval resolution—which, upon enactment, becomes a Public Law of the United States, recorded in the *Statutes at Large*, with the same legal status as an ordinary statute[45]—then the resolution, not the rule, becomes the operative legal instrument. That the joint resolution expresses this position using somewhat convoluted double-negative language—language disapproving an agency rule taking the opposite view—results from the requirements of the CRA, which only provides fast-track procedures for resolutions that are framed as disapprovals of agency rules. But the joint resolution's form is irrelevant to its legal status or effect.

The four scenarios sketched above capture all of the relevant possibilities. To standardize the approach, however, Congress could use the following universal template, which consists of a preamble, interpretive rule, and disapproval resolution.

First, the preamble to the agency's interpretive rule would read as follows:

> "For purposes of enabling Congress to use the special procedures of the Congressional Review Act ("CRA") to clarify the meaning of [*Statute*], we are today issuing an interpretive rule that sets out an understanding of what that Act does *not* mean.
>
> As the interpretive rule is framed in negative form, a CRA resolution disapproving this rule is equivalent to a formal exercise of Congress's legislative power to declare that [*Statute*] in fact *does* have the meaning that the rule rejects.
>
> [*Agency*] will not make any changes to policy or practice on the basis of the interpretation announced in today's rule before the expiration of the sixty-legislative-day period during which Congress may consider a joint resolution of disapproval pursuant to the expedited procedures established by the CRA.
>
> This preamble forms no part of the interpretive rule today issued and submitted to Congress for consideration.

The interpretive rule itself would take the following form:

> [*Statute*] does *not* have the following meaning:

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[45] *See* Ctr. for Biological Diversity v. Bernhardt, 946 F.3d 553, 562 (9th Cir. 2019) (holding that "because the [CRA] Joint Resolution passed both houses of Congress and was signed by the President into law[,] . . . the Joint Resolution is enforceable *as a change to substantive law*, even though it did not state that it constituted an amendment to the [relevant statutes].") (emphasis added). The *Statutes at Large* takes precedence over the U.S. Code when the two conflict. *See* 1 U.S.C. § 112 (declaring that "[t]he United States Statutes at Large shall be legal evidence of laws . . . in all the courts of the United States"); *see also* Stephan v. United States, 319 U.S. 424, 426 (1943).

> [*Here the agency would insert the full text of the what the agency, White House, and congressional majorities have agreed that the statute ought to mean. This preferred meaning could be framed in permissive or mandatory terms, and could be as short or long, and as general or detailed, as deemed appropriate.*]

For the second step in the process, Congress would enact, and present to the President for signature, a CRA disapproval resolution that would read:

> 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 [*Agency*] relating to [*Agency's*] erroneous statement that [*Statute*] does not have the following meaning:
>
> > [*Here Congress would insert the identical text to that which appears in the agency's interpretive rule.*]
>
> and such rule shall have no force or effect."

This universal template would enable Congress to use the CRA to secure virtually any desired interpretation of a statute as long as the agency, the President, and legislative majorities in the House and Senate all agree to support the legal position being advanced. The resolution's phrasing is admittedly convoluted, but that is an inevitable consequence of framing a potentially complex legal directive in double-negative terms. Still, when Congress formally disapproves the agency's statement that the law does *not* mean X, it formally embraces the view that the law *does* mean X.

Before proceeding, we offer two additional examples where the CRA double-negative mechanism could be used to resolve contested questions regarding an agency's statutory authority. Both examples are drawn from current controversies over the Biden administration's efforts to address climate change. In terms of the CRA's mechanics, these examples are not meaningfully different from the stylized net neutrality examples above, but by offering two concrete real-world illustrations concerning a pressing policy issue, we hope to give a fuller sense of the mechanism's potential.

The first example involves the Biden administration's decision, announced in a January 2021 executive order, to pause new oil and natural gas leases on public lands, pending a comprehensive review of the federal government's leasing policies to take climate impacts into account.[46] Whether the Department of the Interior ("DOI"), which administers the leasing program, in fact has the authority under the Mineral Leasing Act ("MLA") to unilaterally pause or suspend new leases is disputed. States opposed to the pause succeeded in getting a preliminary injunction from a district court in

[46] Exec. Order No. 14008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

part on the grounds that the MLA requires the DOI to hold lease sales for eligible lands on a quarterly basis.[47]

If the Biden administration wanted to clarify that the MLA authorizes the pause, and majorities in the House and Senate agreed, they could use the CRA double-negative mechanism to do so. First, the DOI would publish an interpretive rule declaring that it interprets the MLA to prohibit the Secretary from pausing or suspending oil and gas leases. Then, Congress would pass and President Biden would sign a joint resolution declaring that Congress "disapproves the rule submitted by the Department of the Interior, relating to the Department's erroneous assertion that the Mineral Lease Act prohibits the Secretary of the Interior from pausing new oil and gas leases, and such rule shall have no force or effect."

The same technique could be used to address an even more consequential question concerning how the Environmental Protection Agency ("EPA") is to set emission standards for greenhouse gases ("GHGs") from power plants. Under section 111 of the Clean Air Act ("CAA"), the EPA must set a performance standard for stationary sources of pollution that "reflects the degree of emission limitation achievable through the application of the best system of emission reduction."[48] The key legal question is how to define "best system." One possibility, favored by those power companies and states opposed to stringent regulation, is that the EPA may only take into account what individual plants can do to reduce emissions at their facilities—an approach known as staying "within the fence line."[49] Another approach, favored by environmental advocacy groups, some power companies, and states that prefer more demanding regulation, holds that the EPA may set standards for emission reductions based on what is achievable through a broader set of emission-reduction strategies deployable on the electric power grids, including substituting cleaner forms of energy or renewable energy for higher-polluting fossil fuels, a strategy known as generation-shifting.[50] This so-called "beyond-the-fence-line" approach to determining the emissions reductions that are "achievable" would produce much more stringent emissions limitations for individual sources than would the strictly within-the-fence-line approach.[51]

The Obama administration embraced the beyond-the-fence-line approach in its Clean Power Plan ("CPP") by considering generation-shifting, but the Trump administration rescinded that rule and replaced it with a weaker rule adopting a strictly within-the-fence-line approach. The D.C. Cir-

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[47] Louisiana v. Biden, 543 F. Supp. 3d 388, 413, 418 (W.D. La. 2021).

[48] 42 U.S.C. §§ 7411(a)(1), (d)(1).

[49] *See* Robert M. Susman, *Power Plant Regulation Under the Clean Air Act: A Breakthrough Moment for U.S. Climate Policy*, 32 VA. ENV'T L.J. 97, 119 (2014).

[50] *See* Eric Anthony DeBellis, *In Defense of the Clean Power Plan: Why Greenhouse Gas Regulation Under Clean Air Act Section 111(d) Need Not, and Should Not, Stop at the Fenceline*, 42 ECOLOGY L.Q. 235, 251–52 (2015).

[51] *See* Jody Freeman, *The Environmental Protection Agency's Role in U.S. Climate Policy—A Fifty Year Appraisal*, 31 DUKE ENV'T L. & POL'Y F. 1, 63 (2020).

cuit invalidated the Trump administration's rule as unlawful, and in doing so rejected the claim that section 111 obligates the EPA to consider only within-the-fence-line measures.[52] The Supreme Court took the case and heard oral argument in February 2022;[53] the Court had not yet issued a decision in the case before this Article went to press, so we will use this issue to illustrate how our mechanism might work on the assumption that the Court does not definitively resolve the question whether section 111 permits consideration of certain outside-the-fence-line measures when determining the best system. (Later we will consider how our mechanism might be used if the Court holds that only within-the-fence-line measures may be considered.[54]) If the question remains unresolved and the Biden administration decides to move ahead with a replacement rule,[55] the EPA will again need to consider whether to embrace a beyond-the-fence-line understanding of "best system," although it has already indicated that it will not reinstate the CPP. The risks are considerable: it likely would take the EPA at least twelve to eighteen months to develop, propose, and finalize a new power plant rule,[56] and litigation over the rule could take another two years or more[57]—with the possibility that in the end, the Supreme Court might reject the EPA's interpretation of section 111 as inconsistent with the statutory text.

The administration and its congressional allies could mitigate that legal risk by employing the CRA double-negative maneuver to secure a legislative clarification, up front, that the EPA may take into account certain beyond-the-fence-line measures when determining the emission reductions "achievable" through the "best system." First, before the EPA promulgates its new legislative rules on GHG reductions at power plants, the EPA would issue an interpretive rule (accompanied by an appropriate preamble) stating that the agency "interprets section 111 of the Clean Air Act to *prohibit* the EPA from defining 'best system of emission reduction' in a manner that includes grid-

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[52] Am. Lung Ass'n v. EPA, 985 F.3d. 914, 930 (D.C. Cir. 2021).

[53] West Virginia v. EPA, No. 20-1530 (U.S. argued Feb. 28, 2022).

[54] *See infra* notes 60–63 and accompanying text.

[55] *See* Brady Dennis & Juliet Ellperin, *EPA to Jettison Major Obama Climate Rule, as Biden Eyes a Bigger Push*, WASH. POST (Feb. 12, 2021), https://www.washingtonpost.com/climate-environment/2021/02/12/epa-jettison-major-obama-climate-rule-biden-eyes-bigger-push/ [https://perma.cc/756Z-AYQQ].

[56] *See* Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 959 n.180 (2008) (finding that it took the EPA an average of 622 days to complete a rulemaking); Stephen M. Johnson, *Ossification's Demise? An Empirical Analysis of EPA Rulemaking from 2001–2005*, 38 ENV'T L. 767, 784 (2008) (finding that economically significant EPA rules were published an average of 566 days after their initial publication as proposed rules); Wendy Wagner, Katherine Barnes & Lisa Peters, *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 145 (2011) (finding that the EPA takes an average of 1.5 years to promulgate a final rule after publication of a proposed rule).

[57] *Cf.* Sidney A. Shapiro & Thomas O. McGarity, *Not So Paradoxical: The Rationale for Technology-Based Regulation*, 1991 DUKE L.J. 729, 737–38 (reporting that judicial review delays the implementation of occupational safety and health standards by an average of two years).

wide measures, such as generation-shifting, that are not implementable at any individual stationary source." The House and Senate would then pass, pursuant to the CRA's fast-track procedures, a joint resolution declaring "that Congress disapproves the rule submitted by the EPA, relating to the EPA's erroneous assertion that section 111 of the Clean Air Act prohibits the EPA from defining 'best system of emissions reduction' in a manner that uses a grid-wide approach that takes into account the potential for generation-shifting, and such rule shall have no force or effect." Once the President signs the joint resolution, it becomes the law. The EPA could then proceed to issue its legislative rule on GHG emissions; the statement of legal authority for that rule could and should cite to the joint resolution (by its Public Law number) as conclusive support for the agency's assertion that it has the authority to define "best system" as including such beyond-the-fence-line measures. After all, Congress explicitly rejected the EPA's previous assertion that it lacked such authority.[58] While it is impossible to be certain what the Supreme Court would do, the odds that the Court would uphold this understanding are substantially higher than they otherwise would be.[59]

If the administration were disinclined for political or other reasons to use the CRA in this manner *before* a judicial ruling on the statutory interpretation question, or if it did not have time to do so before the decision is issued, the maneuver could be deployed in response to such a ruling.[60] Continuing with the preceding example, suppose the Supreme Court rules that section 111 only permits consideration of certain within-the-fence-line measures. (Indeed, by the time this article is published, this may already have occurred.) At that point, if the administration and congressional majorities wanted to override this decision, thereby enabling the EPA to adopt a section 111 rule that considered the outside-the-fence-line measures, they could do so by deploying the CRA as follows: First, the EPA would issue an interpretive rule restating the Court's interpretation of the statute. Congress would then pass a CRA resolution disapproving that interpretation. After the disapproval, the agency would no longer be bound by the Court's ruling on the

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[58] This technique could be used even more aggressively to insulate this understanding of the statute against future unilateral administrative reversal. The EPA could propose, and Congress could formally disapprove, a rule stating that the EPA "is not required to take into account grid-wide measures that are not implementable at any individual source, such as fuel substitution, when determining the 'best system of emission reduction' within the meaning of section 111 of the Clean Air Act." The congressional rejection of that proposition would establish that the EPA, now and until such time as the joint resolution is superseded by another statute, *must* use the beyond-the-fence-line approach.

[59] *See infra* Part III (discussing legal arguments in support of the CRA double-negative maneuver).

[60] This decision might be influenced by a political calculation about whether it is more or less likely that the administration could secure the necessary support in Congress for the administration's preferred interpretation before or after the agency issues the rule. For example, an administration whose party controls Congress after a presidential election may fear losing that control after the next elections. Thus, the administration may wish to use the CRA maneuver earlier, before the agency issues the rule, rather than run the risk that it will lose majority support by the time the agency issues it and a court adjudicates the agency's authority.

meaning of section 111, because Congress would have *changed* the meaning of section 111 to exclude the Court's reading of the statute. Other than the unusual form of this statutory override, there is nothing particularly odd or novel about it. Congress can and often does override the Supreme Court's statutory decisions by amending the underlying statute.[61] And, as elaborated in greater detail below, a CRA resolution is, as a formal matter, a statutory amendment.[62] Thus, while some scholars have called for creating a mechanism similar to the CRA to facilitate fast-track disapproval of judicial decisions regarding statutory meaning,[63] the CRA can already be used for that purpose, so long as an agency triggers the process by promulgating an interpretive rule that adopts the Court's reading of the statute.

These examples demonstrate the practical utility of the mechanism we have proposed. As long as a given proposition can be articulated in an interpretive rule and framed in double-negative terms, this technique could be used to resolve a wide variety of interpretive questions, in fields as disparate as immigration, voting rights, and labor law. That said, the more complex the legal proposition to be established, and the more that proposition seems like a change to statutory law rather than a clarification of an existing ambiguity, the more difficult it may be practically and politically to negotiate and orchestrate the maneuver. But in principle, even these more ambitious and complex applications of the CRA are possible.

III. Legal Questions

Would the maneuver that we describe above be lawful? Would it have the legal effect that we say it would? We can understand the skeptical instinct that the answers to these questions must be no, given the extent to which our proposal diverges from longstanding assumptions about how the CRA works. But on closer inspection, the legal case for using the CRA in the nontraditional manner described above is strong. We develop that case here by raising, analyzing, and rebutting what we view as the most plausible legal objections to the CRA two-step process laid out in Part II.

Those objections fall into three categories. The first category, which we address in Section III.A, consists of arguments that some feature of either the original agency rule or the wording of the disapproval resolution would render the resolution ineligible for the CRA's fast-track procedures. The second objection, which we address in Section III.B, insists that even if Congress enacts a CRA disapproval resolution rejecting an agency's interpretive

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[61] *See* Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 Tex. L. Rev. 1317, 1317 (2014).

[62] *See infra* Section III.B.

[63] *See* Ganesh Sitaraman, *How to Rein in an All-Too-Powerful Supreme Court*, Atlantic (Nov. 16, 2019), https://www.theatlantic.com/ideas/archive/2019/11/congressional-review-act-court/601924/ [https://perma.cc/SH4E-FF7Q].

rule, doing so neither amounts to amending the statute to bar the interpretation advanced in the rule, nor means that Congress has endorsed that interpretation's opposite. In Section III.C, we turn to a broader objection that the proposed use of the CRA is unlawful because it is inconsistent with the CRA's purpose.

A. Eligibility of the Disapproval Resolution for Privileged Status Under the CRA

The principal advantage—indeed, the only advantage—of using the maneuver described in Part II rather than simply amending the statute through the ordinary legislative process is that CRA resolutions are eligible for special fast-track procedures. We must therefore consider arguments that the CRA's special procedures may not be used in the manner we have proposed. We focus on three such arguments. The first claims that CRA resolutions may not be used to disapprove interpretive rules, which have no independent legal force or effect. The second argument is that an agency rule promulgated for the sole purpose of inviting congressional disapproval is not a valid rule, and that CRA procedures may not be used to disapprove invalid rules. The third argument rejects as impermissible the proposed resolution language that characterizes the agency's interpretation as "erroneous."

Before considering the merits of these objections, it is important to emphasize that the principal responsibility for resolving these questions would fall not to the courts, but to the Senate Parliamentarian.[64] Once a legislative act has been properly authenticated, the enrolled bill doctrine bars courts from invalidating that act on the grounds that proper legislative procedures were not followed in its passage.[65] Furthermore, the CRA specifically prohibits judicial review of any "determination, finding, action, or omission" taken under the CRA,[66] which would seem to preclude judicial invalidation of a disapproval resolution on the grounds that the resolution should not

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[64] Because the CRA fast-track procedures apply to the Senate and not the House, the Senate Parliamentarian is in practice the relevant decisionmaker on whether a particular resolution qualifies for the CRA's fast-track procedures or must proceed instead through the normal legislative process. The procedural advice of the parliamentarians is virtually always treated by congressional leadership as controlling, even though Congress is not formally bound to follow it. For discussions of the role played by the parliamentarians in advising on congressional rules and procedures, see VALERIE HEITSHUSEN, CONG. RSCH. SERV., RS20544, THE OFFICE OF THE PARLIAMENTARIAN IN THE HOUSE AND SENATE 1–2 (2018); Anthony J. Madonna, Michael S. Lynch & Ryan D. Williamson, *Questions of Order in the U.S. Senate: Procedural Uncertainty and the Role of the Parliamentarian*, 100 SOC. SCI. Q. 1343, 1345–48 (2019); Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946 (2020).

[65] *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892). *See also* Pub. Citizen v. U.S. Dist. Ct. for D.C., 486 F.3d 1342, 1349 (D.C. Cir. 2007). The enrolled bill doctrine does not apply when a statute's validity has been challenged on *constitutional* grounds, *see* United States v. Munoz-Florez, 495 U.S. 385, 391 n.4 (1990), but that limitation is clearly inapplicable to the question of whether a joint resolution was entitled to privileged status under the CRA.

[66] 5 U.S.C. § 805.

have been considered under the CRA's fast-track procedures.[67] On the flip side, if the Parliamentarian were to rule that a given resolution did not qualify for fast-track consideration under the CRA, and Congress were to accept that judgment, there would be no way for a court to reverse it. For these reasons, the main audience for the legal arguments in this subsection would be the Senate Parliamentarian, not the judiciary.

1. CRA Disapproval of Interpretive Rules

An agency seeking to use the mechanism outlined here likely would want to promulgate the to-be-disapproved interpretation as an interpretive rule rather than as a legislative rule.[68] But some may question whether the CRA disapproval procedure is available for interpretive rules. The CRA specifies that a disapproved rule lacks "force [and] effect," but an interpretive rule never has the force and effect of law to begin with. One might infer from this that the CRA can only be used to disapprove rules that have legal "force and effect"—that is, legislative rules.[69]

This argument can be dispensed with quickly, as it contravenes the CRA's text, explicit statements from the CRA's principal drafters, the long-standing and consistent gloss on the statute by the Government Accountability Office ("GAO"), and prior congressional practice. Start with the text. The CRA's definition of a "rule" explicitly incorporates the definition of "rule" found in section 551 of the Administrative Procedure Act ("APA"),[70] with a handful of specific exceptions.[71] Section 551 defines a rule as including "an agency statement of general or particular applicability and future

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[67] *See* Ctr. for Biological Diversity v. Bernhardt, 946 F.3d 553, 564 (9th Cir. 2019) (holding that the CRA's bar on judicial review bars a court from entertaining a claim "that Congress did not validly enact [a CRA] Joint Resolution"). The CRA's legislative history is also quite explicit about this. *See* 142 CONG. REC. 8197–99 (1996) (joint statement of Sens. Nickles, Reid, and Stevens); *id.* at 6929 (statement of Rep. Hyde).

[68] The principal advantage is that interpretive rules can be issued quickly, without going through the notice-and-comment process that applies to legislative rules. *See* 5 U.S.C. § 553(b)(A). For the same reason, interpretive rules can be withdrawn immediately if for some reason Congress fails to pass a disapproval resolution. *See infra* Section IV.A.1. Additionally, because the agency never intends the rule to go into effect, none of the advantages that might accrue from going through the time-consuming and cumbersome notice-and-comment process apply. The agency neither intends its rule to impose legally binding obligations on the public, nor intends to seek judicial deference for the interpretation it announces. All the agency means to do is to state a legal interpretation that Congress can then reject.

[69] *See* David Zaring, *Guidance and the Congressional Review Act*, REG. REV. (Feb. 15, 2018), https://www.theregreview.org/2018/02/15/zaring-guidance-congressional-review-act/ [https://perma.cc/DQ66-DDAL].

[70] 5 U.S.C. § 551(4).

[71] *Id.* § 804(3). The exceptions are 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), for "any rule relating to agency management or personnel," *id.* § 804(3)(B), or 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).

effect designed to implement, interpret, or prescribe law or policy[.]"[72] That definition includes not only legislative rules (which impose legally binding obligations and therefore "prescribe" law or policy) but also interpretive rules (which are "agency statement[s] of general . . . applicability" that "interpret . . . law").[73] As for the legislative history, the CRA's principal sponsors inserted identical post-enactment statements in both the House and Senate records that confirm what the CRA's text already makes clear: the statute applies not only to legislative rules, but also to guidance documents and interpretive rules.[74] Additionally, the GAO, which is charged with overseeing agency compliance with the CRA's reporting requirements,[75] has consistently maintained that guidance documents and similar materials count as "rules" for CRA purposes,[76] and the Office of Management and Budget has also embraced that view.[77] Finally, Congress has already voted on, and in at least one case passed, CRA resolutions that disapprove of guidance documents, which, like interpretive rules, lack the force and effect of law.[78] In the face of all this, it is implausible to derive from the "force [and] effect" language in the CRA the conclusion that the statute only applies to rules that have legal force and effect.

A related but distinct objection is that the APA's language defines a rule as having "future effect," but the interpretive rule proffered by an agency as part of the CRA maneuver is never intended to go into effect (as the proposed preamble would make crystal clear), and therefore the alleged interpretive rule is not in fact a "rule" in the relevant legal sense, so the CRA cannot be used to invalidate it.[79] But of course the rule as written would have "future effect" if it were implemented—the rule announces a general legal

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[72] *Id.* § 551(4).

[73] *Id.*

[74] *See* 142 Cong. Rec. 8197–99 (1996) (joint statement of Sens. Nickles, Reid, and Stevens); *id.* at 6929 (statement of Rep. Hyde).

[75] Though the GAO lacks the authority to issue binding rulings regarding the CRA's meaning, the GAO issues non-binding but influential legal opinions, typically at the request of a member of Congress, as to whether a particular agency document is a "rule" for CRA purposes. *See* Brannon & Carey, *supra* note 20, at 22–23; Dooling, *supra* note 7, at 412.

[76] *See, e.g.*, U.S. Gov't Accountability Off., GAO B-329129, Bureau of Consumer Financial Protection: Applicability of the Congressional Review Act to Bulletin on Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act 1 (2017); U.S. Gov't Accountability Off., GAO B-287557, Opinion on Whether Trinity River Record of Decision is a Rule (2001); U.S. Gov't Accountability Off., GAO B-316048, Applicability of the Congressional Review Act to Letter on State Children's Health Insurance Program (2008).

[77] *See* Off. of Mgmt. & Budget, Exec. Off. of the President, No. M-19-14, Guidance on Compliance with the Congressional Review Act 3 (2019).

[78] *See* Pub. L. No. 115-172, 132 Stat. 1290 (2018) (overturning Consumer Fin. Prot. Bureau Bull., 2013-02, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (2013)). *See also* S.J. Res. 44, 110th Cong. (2008) (resolution to disapprove a policy statement issued by the Secretary of Health and Human Services).

[79] *See* Adam White, *The Temptation of "Good-Faith Faithless Execution"*, Yale J. on Reg.: Notice & Comment (Aug. 15, 2021), https://www.yalejreg.com/nc/the-temptation-of-good-faith-faithless-execution/ [https://perma.cc/2TTD-8Q4Z].

interpretation to govern future actions, not the application of law to past actions (the defining characteristic of orders, as distinct from rules, under the APA). The objection cannot be that the rule has not yet become effective, because many rules are subject to CRA review before they go into effect. Indeed, the CRA requires that certain rules do not go into effect until the expiration of the legislative review period.[80] Rather, the objection appears to be that because the agency has made clear, in separate communications with the public, that the agency intends to rescind the rule if Congress does not disapprove it, the rule in question will not actually have "future effect," and the so-called interpretive rule is not actually a rule at all. This novel objection would require that the Parliamentarian look past the formal statement of the rule itself—which, again, does have future effect—and treat the agency's stated intention to rescind a rule as sufficient to place the rule outside the CRA's scope. But "intention to implement" has never been part of the test for whether an agency statement is a genuine rule, and we doubt that the Senate Parliamentarian would embrace such a drastic revision of administrative law doctrine, particularly when the agency itself has characterized its document as a rule.[81]

2. Adopting a Rule Solely to Facilitate Congressional Reversal

A second line of objection claims that it is unlawful for an agency to promulgate a legal interpretation that is the opposite of what the agency actually wants. Therefore, the argument continues, a rule espousing such an interpretation cannot serve as the basis for a CRA disapproval resolution. This objection involves two distinct legal claims. The first claim is that it is unlawful for an agency to promulgate a rule that the agency does not actually support, even if the agency explains that it is doing so to facilitate congressional review. The second claim is that it is unlawful for Congress to use the CRA's fast-track procedures to pass a resolution disapproving an agency rule if that rule is legally invalid. Both claims must hold true for this legal objection to succeed. Yet on closer inspection, neither claim is persuasive.

Consider first the objection that when an agency promulgates an interpretation that the agency believes to be wrong, for the sole purpose of triggering the CRA, the agency has acted unlawfully. Presumably the argument

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[80] *See* 5 U.S.C. § 801(B)(3).

[81] Note that this intent-to-implement theory would also produce odd results in other cases. Suppose that in the final month of a presidential administration, an agency promulgates a new set of auto fuel efficiency standards that will become effective in two years' time. The week that the new administration takes office, the agency announces its intention to rescind these new standards as expeditiously as possible. Shortly afterwards, a joint resolution disapproving the fuel efficiency standards is introduced in Congress. If the agency's subjective desire and declared intent to rescind the rule means the set of fuel efficiency standards is not a "rule" at all, then the CRA cannot be employed to pass a resolution disapproving those standards. That odd result highlights the pitfalls of looking to the agency's stated intentions, rather than to the rule itself, when deciding whether a rule has "future effect" in the relevant legal sense.

would be that such a rule is "arbitrary, capricious, [and] an abuse of discretion" within the meaning of section 706(2)(A) of the APA.[82] But it is not at all clear why it would be improper for an agency to adopt a rule specifically to enable Congress to express an authoritative view on the meaning of the law. The maneuver is, to be sure, a maneuver. But it does not involve any subterfuge or obfuscation. The rule's preamble would explicitly state why the agency is doing what it is doing. The fact that the agency is articulating its rule this way is due to the asymmetric structure of the CRA, but that structure is hardly the agency's fault. And the agency's strategy is carefully thought through, not arbitrary. Neither the APA nor any case law prohibits an agency from promulgating an interpretation for the eminently rational purpose of facilitating expedited congressional review.[83] And at no point would the agency proffer any legal or policy arguments in support of the to-be-disapproved rule, so there is no concern about the agency proffering a justification for the rule that the agency does not actually believe.

For this reason, the Supreme Court's decision in *Department of Commerce v. New York*,[84] which invalidated an agency action because the agency's explanation, though rational, was a mere pretext, poses no bar to the maneuver we suggest here. One critic of our proposal has suggested otherwise, writing that:

> [I]t is hard . . . to imagine how an agency could credibly write an interpretive rule that justifies the interpretation under the basic rules of administrative law, while at the same time making clear from the outset that the agency doesn't actually *believe* what it's saying in the substantive part of the rule. And to the extent that the agency does make a convincing case for the substantive interpretation that it actually opposes, it is hard . . . to imagine how such an explanation would not be illegally pretextual under the *Department of Commerce* case.[85]

The objection presumes that the to-be-disapproved interpretive rule must include a statement that "justifies," on legal and policy grounds, this interpretation. But while legislative rules must indeed include, in their statement of basis and purpose, an explanation of the legal and policy justifications for the rule, no such requirement applies to interpretive rules. An interpretive rule can consist of nothing more than a standalone declaration regarding statutory meaning. At no point would the agency need to make any substantive arguments to "justify" the interpretation that the agency

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[82] 5 U.S.C. § 706(2)(A).

[83] The key to overcoming this instinctive objection is appreciating that the rule has no independent importance other than to fulfill the necessary condition for Congress to adopt the disapproval resolution. The agency is not acting in bad faith—far from it. Critically, again, the rule is never intended to go into effect.

[84] 139 S.Ct. 2551 (2019).

[85] White, *supra* note 79.

does not actually support, much less make a "convincing case" for the interpretive rule's validity.

Furthermore, as noted above, the decision whether to allow CRA procedures would rest not with a court but with the Senate Parliamentarian. It is possible that the Parliamentarian might decide that a CRA resolution loses its privileged status because the original rule that is the subject of the resolution is arbitrary and capricious under the APA, but we think that doing so would be improper. Such a legal determination goes well beyond the normal role and traditional expertise of congressional parliamentarians, who are experts in the intricacies of legislative procedure, not administrative law.[86]

The second claim—that the original rule's alleged invalidity precludes Congress from using CRA procedures to enact a resolution disapproving that rule—is even less convincing. Nothing in the CRA's text suggests that disapproval resolutions are ineligible for fast-track consideration if they are prompted by procedurally or substantively invalid agency rules. By the statute's plain terms, if an agency has reported a rule to Congress pursuant to the CRA's provisions, then Congress can use fast-track procedures to disapprove that rule. The only way to argue otherwise is to assert that an unlawful rule is not a "rule" at all—but that has never been the law. In fact, several of the agency rules that have been subject to CRA disapproval resolutions have been challenged as unlawful.[87] Some of those rules have later been invalidated as arbitrary and capricious.[88] But to the best of our knowledge, the

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[86] Things might look somewhat different if a court had invalidated the rule *before* members of Congress vote on the disapproval resolution, but this is unlikely. For one thing, if the agency, Congress, and the White House have agreed to use this maneuver, they are likely to proceed as expeditiously as possible and should be able to enact the disapproval resolution within a few months, or possibly weeks. Given the glacial pace of judicial review of agency rules—a process that often takes years, *see* Shapiro & McGarity, *supra* note 57, at 737–38—it seems inconceivable that there would be a final disposition of the merits of an APA challenge to the interpretive rule before Congress is able to vote on the joint resolution of disapproval. While it might be possible to secure a preliminary injunction or emergency stay more quickly, those measures by definition do not constitute a definitive ruling on the legality of the rule. While it is impossible to know how the Parliamentarian would rule in this situation, we think that it would be quite unlikely, and clearly wrong, for the Parliamentarian to declare that a rule that has merely been stayed or preliminarily enjoined is not a "rule" that can be disapproved via a CRA resolution. Also, it is possible that no party would have standing to challenge the agency's interpretive rule before Congress passes the CRA resolution, especially if the agency declares that the interpretation will not become effective for sixty legislative days.

[87] *See, e.g.*, California v. Regan, No. 20-1357 (D.C. Cir. dismissed Aug. 25, 2021) (litigation, commenced in September 2020, challenging the EPA rule entitled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review," 85 Fed. Reg. 57,018 (Sept. 14, 2020)); Pub. L. No. 117-23, 135 Stat. 295 (2021) (joint resolution overturning that rule) (signed into law by President Biden on June 30, 2021).

[88] *See, e.g.*, S.J. Res. 53, 116th Cong. (2019) (CRA resolution to disapprove Trump administration rule, codified at 84 Fed. Reg. 32,520 (July 8, 2019), that repealed the Clean Power Plan and replaced it with weaker emissions standards); 165 CONG. REC. S5869 (daily ed. Oct. 17, 2019) (S.J. Res. 53 defeated 53–41 in a floor vote); Am. Lung Ass'n v. EPA, 985 F.3d 914, 930 (D.C. Cir. 2021) (subsequently invalidating the Trump administration rule on grounds that it was arbitrary and capricious and inconsistent with the Clean Air Act). Although it would have been obvious at the time that this rule would be challenged as unlawful, there is no indication anywhere in the public record that anyone even suggested that the rule's possible

Senate Parliamentarian has never considered the legality of the underlying rule when deciding whether a disapproval resolution is entitled to privileged status under the CRA.[89] Nor should she, as doing so would call for an administrative law determination beyond her purview. The validity of the original agency rule is irrelevant to the legitimacy of using CRA procedures to disapprove that rule and to the validity of the resulting resolution.[90]

3. Clarifying Language in the Text of the Disapproval Resolution

All of the sample CRA disapproval resolutions in Part II include specific language to the effect that Congress disapproves the erroneous statement of the law contained in the agency rule. For example, in the first net neutrality example, the proposed resolution stated "[t]hat Congress disapproves the rule submitted by the Federal Communications Commission relating to the agency's *erroneous* statement that the Telecommunications Act prohibits the Commission from classifying broadband internet service as a telecommunications service subject to common carrier regulation, and such rule shall have no force or effect." Including an evaluative term like "erroneous" is not the usual practice; most CRA resolutions simply identify the rule by name and citation, or occasionally by subject. Including the evaluative language, while not necessary to our proposed maneuver, helpfully clarifies that the disapproval resolution rejects the substance of the interpretation contained in the rule, rather than merely nullifying the announcement of that interpretation in the form of an agency rule.[91]

A critic might object that this evaluative language is extraneous and that its inclusion destroys the resolution's privileged status under the CRA. Evaluating this objection turns on how one construes the CRA section that specifies the proper form of a disapproval resolution. According to that section, the portion of the resolution following the resolving clause must state "[t]hat Congress disapproves the rule submitted by the ___ relating to ___,

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legal invalidity precluded the Senate from considering and voting on the CRA disapproval resolution.

[89] Although the Office of the Parliamentarian keeps a record of its rulings and informal advice, these materials are very difficult to access for anyone outside that office, including legislators themselves. *See* Gould, *supra* note 64, at 2009 (noting "the opacity of most parliamentary precedent" and reporting that "[t]he issue of access to precedents is most acute in the Senate, where precedents have not been published since a single volume in 1992"). We therefore have no easy way to ascertain whether the Parliamentarian has ever made a ruling on this or any of the other issues we consider.

[90] To be clear, we are not proposing that agencies deliberately circumvent the APA or act in ways that are otherwise unlawful. As we have argued, we believe that an agency rule that is intended to serve as a vehicle to facilitate congressional lawmaking is entirely proper. But even if that position is contestable, we argue that it would be inappropriate and unlikely for a parliamentarian to disallow a CRA resolution on the basis of the theory that a legally invalid rule cannot be the target of a privileged CRA resolution. And once the resolution is enacted, questions over the legal validity of the original rule become irrelevant, because the enacted resolution, not the disapproved rule, is the operative legal document.

[91] *See infra* Section III.B.

and such rule shall have no force or effect," with "[t]he blank spaces being appropriately filled in."[92] The first blank is obviously for the name of the agency that submitted the rule. What about the second blank? The legal objection to including evaluative adjectives like "erroneous" would be that the second blank may only include the rule's basic identifying information—such as its title, date, and *Federal Register* or other citation—and that any other language would not be "appropriate[ ]."

The Senate Parliamentarian might well take the view that CRA resolutions may not include anything other than minimal language identifying the item or action to be disapproved, especially since the universal practice to date has been to include in the second blank only the rule's basic identifying information. Nevertheless, there is a good legal argument that the Parliamentarian should not interpret the CRA so narrowly. Nothing in the text of the CRA or in any congressional rule explicitly says that the second blank in the disapproval resolution may contain only the rule's minimal identifying information. The CRA says only that the blanks be filled in "appropriately." The ordinary meaning of "appropriate" is fitting, proper, or suitable.[93] While this ought to bar wholly irrelevant material from being included in the resolution's text (for example, language purporting to approve or disapprove an entirely different agency action), it is hard to see why additional clarifying language confirming Congress's specific intent as to the resolution's impact on the particular rule being disapproved would not be "appropriate" in the conventional sense of that term. Indeed, the proposed evaluative language is particularly fitting, proper, and suitable because it enables Congress to clarify whether it means to disapprove the substance of an interpretation or only its form, thus eliminating an ambiguity that the courts otherwise would have to resolve.[94] It would seem odd, even perverse, for the Parliamentarian to rely on an aggressively narrow reading of the inherently subjective word "appropriately" to prevent Congress from clarifying its intentions when disapproving an agency rule.[95] Moreover, the CRA's generic limitation to "appropriate" content contrasts with other statutes in which Congress has used more specific language regarding what may and may not be included in a bill or resolution eligible for fast-track procedures.[96] We therefore think that

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[92] 5 U.S.C. § 802(a).

[93] *See, e.g.*, *Appropriate*, MERRIAM-WEBSTER'S UNABRIDGED DICTIONARY, https://www.merriam-webster.com/dictionary/appropriate [https://perma.cc/T7ND-CBEC] (last visited July 1, 2021) (defining "appropriate" as "correct or suitable for some purpose"); *Appropriate*, CAMBRIDGE ENGLISH DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/appropriate [https://perma.cc/HAT9-9QPV] (last visited July 1, 2021) (defining "appropriate" as "suitable or right for a particular situation or occasion").

[94] *See infra* Section III.B.

[95] *Cf.* Sanjaa v. Sessions, 863 F.3d 1161, 1167 n.5 (9th Cir. 2017) (observing, in a different context, that "[t]here is scarcely a word more descriptive of unbridled subjective discretion than 'appropriate' ").

[96] *See, e.g.*, Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 310, 88 Stat. 297 (codified at 2 U.S.C. § 641). A resolution for the budget must deal with government spending, a change in revenue, the statutory limit on public debt, or a combi-

the better reading of the CRA is that it permits including, in the second blank space of the template, evaluative language characterizing the disapproved agency rule as erroneous.

We recognize that including such language would differ from past practice, and that the Parliamentarian might need to be persuaded in advance, by congressional leadership, that this reading is in fact the better one.[97] We also recognize that such attempts at persuasion might prove unsuccessful. Yet even if the Parliamentarian ruled that the evaluative language would destroy a CRA resolution's privilege, and the congressional leadership accepted that ruling, a joint resolution containing only the minimal identifying language in the second blank would still have the legal effect that we claim. So, while it would be helpful if Congress could be more explicit about its intent, it is not strictly necessary to successfully execute the CRA double-negative maneuver.[98]

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nation of the three. 2 U.S.C. § 641(a)(1)–(4). The House may not consider amendments to reconciliation bills that would "have the effect of increasing any specific budget outlays" beyond what was provided for in the original bill without "at least an equivalent reduction in other specific budget outlays, an equivalent increase in other specific Federal revenues, or an equivalent combination thereof." *Id.* § 641(d)(1). Similarly, the Senate may not consider amendments to reconciliation bills that would decrease reductions in outlay or reduce federal revenue increases without "a reduction in other specific budget outlays, an increase in other specific Federal revenues, or a combination thereof." *Id.* § 641(d)(2). Additionally, changes to the Social Security Act cannot be proposed through budget reconciliation. *Id.* § 641(g).

[97] Members of Congress often consult with the Parliamentarian ahead of time and try to persuade them that a particular motion, measure, or other action would be permitted under the chamber's rules. *See* Gould, *supra* note 64, at 1967–69 (discussing informal consultations between Members and the Parliamentarian); *id.* at 1971–73 (discussing quasi-adjudicative proceedings in which the Parliamentarian considers arguments from opposing sides and issues rulings on whether certain language may be included in reconciliation bills).

[98] There are two other ways that Congress could clarify that the resolution disapproves the substance of the interpretation, not just the form.

First, Congress could add a preamble explaining that the resolution intended to reject the substance of the interpretation contained in the agency rule (something like, "*Whereas* the agency's rule incorrectly states that X is not the law . . . ," or, more simply, "*Whereas* X is the law . . . "). The preambles of joint resolutions are formally part of the resolution and are included in the Statutes at Large. While it has not been the usual practice, on occasion members of Congress have introduced CRA resolutions that contain preambles. *See, e.g.*, H.R.J. Res. 178, 104th Cong. (1996); S.J. Res. 25, 105th Cong. (1997); S.J. Res. 22, 110th Cong. (2007). None of these resolutions received a floor vote, however, and it is possible that the Senate Parliamentarian might determine that including a preamble would destroy a resolution's privileged CRA status. Indeed, a Congressional Research Service ("CRS") report cautions that while the issue is unsettled, a joint resolution's preamble might not be entitled to fast-track CRA procedures. *See* CAREY & DAVIS, *supra* note 20, at 13–14. We nevertheless believe that a privileged CRA resolution may include a preamble, a view that is strengthened by the fact that some statutes providing for fast-track Senate procedures explicitly prohibit a preamble to the fast-tracked resolution. *See, e.g.*, National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 2908(a)(1), 104 Stat. 1817 (1990) (codified at 110 U.S.C. § 2687 note) (providing that, in order to be eligible for [fast-track] consideration, a joint resolution blocking the closure or realignment of military installations must not contain a preamble). *See also* 12 U.S.C. § 5612(d)(4)(B) (provision of the Dodd-Frank Act mandating that, to be eligible for fast-track consideration, a joint resolution to increase the maximum guarantee amount for emergency loans may not contain a preamble); 2 U.S.C. §§ 907a(a)(2)(B), 907c(e)(3) (provisions of the Balanced Budget and Emergency Deficit Control Act mandating that a fast-track

B. The Legal Effect of a Disapproval Resolution

The previous subpart focused on whether a disapproval resolution of the sort described in Part II would be eligible for the CRA's fast-track procedures. Even if one is persuaded that the answer is yes, a critic might insist that, contrary to our core argument, a CRA resolution disapproving an agency's interpretive rule does not mean that Congress has rejected the substance of the interpretation announced in that rule. Rather, this objection would continue, the disapproval resolution merely vacates the interpretative rule, without necessarily invalidating the interpretation contained therein.[99]

This objection is easy to overcome if the Senate Parliamentarian allows the CRA resolution to include evaluative language clarifying that the resolution rejects as "erroneous" (or "mistaken" or "incorrect" or some other equivalent formulation) the interpretation contained in the agency's rule.[100] Such language clarifies beyond reasonable dispute that the resolution rejects the interpretation announced in the rule. The issue is somewhat harder if the Parliamentarian decides that including the evaluative language would deprive the resolution of its privileged CRA status. But even without the express evaluative language, the better reading of a disapproval resolution is that it rejects the substance of the agency's rule.[101]

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joint resolutions under certain provisions of that act shall not contain any preamble). Such a restriction is conspicuously absent from the CRA.

Members of Congress could also signal their intent to disapprove an interpretive rule's substance by making explicit statements to that effect in the relevant committee reports and during formal floor debate on the resolution. (The CRS report noted above suggests this alternative to including a formal preamble. *See* CAREY & DAVIS, *supra* note 20, at 14.) Such a statement might say that "a resolution that 'disapproves' an agency's interpretive rule is intended and understood by this Congress as a disapproval of the interpretation stated in that rule, and is a declaration by Congress that this interpretation is inconsistent with the law." A committee report or statement might also emphasize that "a vote in favor of this resolution, which disapproves of the agency declaration that [X] is [*prohibited/permitted/required/not required*] will have the effect of a legislative determination that [X] is [*permitted/prohibited/not required/required*]." By specifically clarifying how Congress understands the *text* of the resolution, rather than invoking some general purpose, such statements might assuage judicial skepticism about the probative value of legislative history.

[99] *See* Bradley & Vaysman, *supra* note 29, at 472; Jonathan H. Adler, *Could Congress Use the Congressional Review Act to Expand Agency Authority?*, VOLOKH CONSPIRACY (Aug. 19, 2021), https://reason.com/volokh/2021/08/19/could-congress-use-the-congressional-review-act-to-expand-agency-authority/ [https://perma.cc/TN2X-LZ4E].

[100] *See supra* Section III.A.3.

[101] Also, as noted above, the issue might be resolved if the Parliamentarian permits the resolution to include a formal preamble clarifying its intended effect, and formally stating Congress's view of the law. *See supra* note 83. Likewise, including statements in the legislative history articulating and embracing the arguments developed below might help persuade an uncertain court that the text of the disapproval resolution is in fact best read to reject the substance of the interpretation, not just its form. *See id.* In fact, Congress has on occasion included statements in the legislative history clarifying that a CRA disapproval resolution rejects the substance of the legal interpretation that the agency had advanced in its rule. *See, e.g.*, H.R. Rep. No. 117-64, at 3 (2021) (emphasizing that the proposed CRA resolution, if passed, would "specifically reject[ ]" the EPA's assertions regarding the CAA's meaning, and would "indicate[ ] Congress' support and desire to immediately reinstate" the agency's earlier interpretation of the law); *id.* at 8 (declaring that "[p]assage of the resolution of disapproval indi-

For one thing, a congressional "disapprov[al]" of an agency's declaration regarding the meaning of the statute is more naturally understood, as a matter of ordinary linguistic meaning, as a rejection of the agency's interpretive assertion, rather than an objection solely to the fact that the agency announced this interpretation in the form of a rule.[102] We expect that a member of Congress who votes to disapprove an agency rule is moved to do so because the rule would effect a substantive result to which the member objects. Corroboration for this intuition can be found in the House Report on the 2021 CRA resolution disapproving an EPA rule on the regulation of methane emissions.[103] That rule included, among its provisions, an explicit interpretation of section 111 of the CAA.[104] The House Report made clear that passage of the CRA disapproval resolution would "indicate Congress' disapproval of . . . and specifically reject[ ]" the EPA's assertions regarding the CAA's meaning.[105] The House Report's language reinforces the intuitive understanding that disapproving a rule that advances a claim about statutory meaning constitutes a rejection of that claim. That understanding also accords with the prevailing assumptions of most academic commentators.[106] And the fact

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cates Congress's intent to make clear that" the EPA erred in its assertions regarding the CAA's meaning).

[102] Those who insist that a disapproval resolution nullifies the rule without otherwise indicating a congressional decision on the substance make much of the last clause in the disapproval resolution template ("and such rule shall have no force or effect"). *See* Bradley & Vaysman, *supra* note 29; Adler, *supra* note 99. But the key question at issue concerns the meaning of "disapproves." The nub of the critics' argument is that the "shall have no force or effect" clause fully defines the consequences of the "disapproval" in the first clause. But while that is one possible reading, it is also possible, and probably more natural, to read the term "disapprove" as indicating a broader substantive rejection of the rule's content. The text alone cannot resolve which of these understandings is correct, but for the reasons elaborated in the remainder of this subsection, we think the latter reading accords better both with likely congressional understanding and with the overall structure of the CRA.

[103] *See, e.g.*, H.R. Rep. No. 117-64, at 3 (2021).

[104] *See* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57,018, 57,034 (Sept. 14, 2020) (finalizing, as part of the rule, a "Legal Interpretation Concerning the Air Pollutants That Are Subject to CAA Section 111").

[105] H.R. Rep. No. 117-64, at 3 (2021). *See also id.* at 8 (stating that "[p]assage of the resolution of disapproval indicates Congress's intent to make clear that" the EPA had erred in its assertions regarding the CAA's meaning).

[106] *See, e.g.*, Larkin, *supra* note 29, at 244 (stating that a CRA joint resolution "nullifies not only the *outcome* that the rule directs, but also whatever *construction* the agency gave to the relevant statute") (emphasis in original); *id.* at 246 (explaining that if an agency issues an interpretive rule saying "that '[Statute *X*] means X_1, X_2, and X_3[,]' [and] Congress passes a joint resolution disapproving that rule [which the President signs, this] resolution has the effect of deeming X_1, X_2, and X_3 to be erroneous interpretations of *X*[; t]hat is, Congress by law has now revised the meaning of *X* to exclude X_1, X_2, and X_3, as possible interpretations"); Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 Fordham L. Rev. 1823, 1847 (2015) (asserting that the CRA provides Congress with a mechanism to "disapprove [statutory] interpretations that it does not like," and that a disapproval resolution "express[es] disagreement with an agency interpretation contained in a rule"); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 Wake Forest L. Rev. 745, 770 (1996) (observing, in the context of critiquing the uncertainty of the consequences of a CRA resolution disapproving a legislative rule, that such a disapproval, at minimum, "necessarily entailed a judgment that the agency's action was or ought to be outside its legal author-

that the CRA applies to interpretive rules and guidance documents—which, by definition, lack the force and effect of law—is at least suggestive that a disapproval resolution has an impact beyond depriving the disapproved rule of legal force and effect.[107]

With respect to the intent of the CRA's drafters, to the extent that this is relevant, the one piece of evidence we have on this question is rather unclear. The post-enactment explanation that the CRA's principal sponsors inserted into the *Congressional Record* states the CRA defined "rule" broadly in order to prevent agencies from "circumvent[ing]" the requirements of the CRA by "trying to give legal effect to [non-legislative rules]."[108] This passage is confusing because the non-legislative rules in question do not have "legal effect" in the formal sense, and this had been clearly established before the CRA was enacted.[109] The most plausible reading of the passage is that the CRA's drafters were concerned that agencies sometimes treat non-legislative rules as if they had legal effect—making decisions based on them in adjudicative proceedings, or using them to pressure regulated entities—even though these statements are technically non-binding. While this is of limited help in addressing the question of whether a resolution disapproving an interpretive rule rejects the interpretation advanced in that rule, treating the disapproval resolution as rejecting the substance of the rule seems more consistent with the worry expressed in the explanatory statement. That worry is chiefly that agencies will seek to bind parties to a particular interpretation

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ity"); *see also* MAEVE P. CAREY & VALERIE C. BRANNON, CONG. RSCH. SERV., IF11096, THE CONGRESSIONAL REVIEW ACT: DEFINING A "RULE" AND OVERTURNING A RULE AN AGENCY DID NOT SUBMIT TO CONGRESS 2 (2019) (noting that although the impact of a CRA disapproval resolution on rules that lack the force of law is not entirely clear, "congressional action to overturn such an agency action may communicate that Congress believes the agency has exceeded the intended scope of its authority or otherwise chosen a course of action that conflicts with congressional intent or preferences"). *But see* Bradley & Vaysman, *supra* note 29, at 471–72 (observing that "[agency] interpretations do not need to be rules," and insisting that although a CRA resolution disapproving an interpretive rule would "prevent the agency from 'issu[ing] [a] rule' stating [the] interpretation [contained in the disapproved rule], that restriction would not stop the agency from having the same view or effectuating it in . . . other ways"); Adler, *supra* note 99 (advancing a similar claim).

[107] We recognize that nullifying a rule without force and effect of law could have some consequences even if the disapproval is not treated as expressing congressional disagreement with the interpretation adopted in the rule. For example, courts may be somewhat more deferential to agency rules announced in interpretive rules than to interpretations advanced for the first time in litigation briefs. Additionally, disapproval of an interpretive rule would preclude an agency from subsequently adopting the same interpretation in a legislative rule. Nullifying the interpretive rule might also limit the agency's ability to impose penalties in a subsequent adjudicative proceeding without having those penalties deemed impermissible for lack of fair warning. But we think it is unlikely that the CRA would have defined "rule" so broadly if the only point in doing so was to achieve such marginal adjustments to judicial deference, or the availability of estoppel defenses to agency enforcement actions.

[108] 142 CONG. REC. S3684, S3686 (daily ed. Apr. 18, 1996) (joint statement of Sens. Nickles, Reid, and Stevens); 142 CONG. REC. E571, E577 (daily ed. Apr. 19, 1996) (statement of Rep. Hyde).

[109] *See, e.g.*, Pacific Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 40 (D.C. Cir. 1974); Am. Mining Cong. v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993).

of a statute as a practical matter, even if it is through an interpretive rule and not a legally binding rule. That concern implicates the substance of the interpretation that the agency seeks to adopt and impose, not merely the expression of that interpretation in rule form.

Finally, and perhaps most significantly, treating a CRA resolution disapproving an interpretive rule as having no bearing on the substantive correctness of the interpretation in the rejected rule produces odd results when one considers how such a conclusion would interact with other provisions of the CRA and other administrative law doctrines. The CRA bars an agency from reissuing any rule that is "substantially the same" as a disapproved rule.[110] So, if an agency embraces a particular view of statutory meaning and announces that view in an interpretive rule, but Congress disapproves this rule via a CRA resolution, the agency may not announce that interpretive view again in the form of a rule. But if the disapproval resolution has no bearing on the validity of the *substance* of the interpretation in the disapproved rule, then the CRA's prohibition on the agency reissuing that interpretation could give rise to a host of problems.

For instance, if a court treats a CRA resolution as nullifying an agency's interpretive rule but as having no implications for the legal correctness of the interpretation stated in that rule, the court could end up interpreting the statute in a way that would require the agency to adopt a rule that the CRA prohibits the agency from adopting. Consider the following hypothetical scenario based on the controversy over whether the EPA may consider beyond-the-fence-line measures when determining the "best system of emissions reduction" under CAA section 111.[111] Suppose that before the EPA issues any legislative rule on GHG emissions, it issues an interpretive rule stating that the CAA requires consideration of certain beyond-the-fence-line measures when determining the "best system," but Congress disapproves that rule. Because the CRA precludes the EPA from reissuing the disapproved rule, the EPA proceeds to issue a legislative rule setting GHG standards using only inside-the-fence-line measures. Suppose that a reviewing court treats the CRA resolution as nullifying the agency's interpretive rule but not rejecting the agency's substantive interpretation of section 111. Suppose further that the court concludes the agency's new rule, which sets GHG standards by considering only inside-the-fence-line measures, is based on an incorrect statement of the law.[112] Under the APA, the court is supposed to

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[110] 5 U.S.C. § 801(b)(2). The prohibition on reissuing a disapproved rule presumably bars incorporating the text of a disapproved rule into another, larger rule. Otherwise, the CRA's prohibition on reissuing disapproved rules could be easily evaded by bundling a reissued rule together with other provisions in a single rule.

[111] *See supra* Part II.

[112] *Cf.* Am. Lung Ass'n v. EPA, 985 F.3d 914, 944 (D.C. Cir. 2021) (holding that section 111 "does not, as the EPA claims, constrain the Agency to identifying a best system of emission reduction consisting only of controls 'that can be applied at and to a stationary source,'" and therefore "vacat[ing the rule] and remand[ing] to the Agency 'to interpret the statutory language anew'") (first quoting ACE Rule, 84 Fed. Reg. 32,534 (July 8, 2019); and then quot-

hold unlawful an agency rule that is based on an incorrect reading of the relevant statutes.[113] But a court may not order an agency to do something that the agency may not lawfully do.[114] If the CRA resolution does not affect the meaning of the CAA—that is, if the resolution does not bind the court—the court is in a dilemma: the court would either need to uphold a rule that the court concludes is unlawful, or else the court must order the agency to do something unlawful.[115]

Furthermore, if the disapproval resolution nullifies the rule but does not reject the interpretation that the rule advances, then an agency might be permitted or required to make policy decisions on the basis of an interpretation of the statute that the agency may not announce publicly. This odd result arises because the public announcement of the interpretation would likely constitute the reissuance of a disapproved rule—something that the CRA expressly forbids. An interpretation of the CRA that would prohibit agencies from giving the public notice of their legal positions is inherently suspect. But the problem goes deeper. Many provisions of law require agencies to issue rules that state the agencies' interpretative views. For example, the Freedom of Information Act ("FOIA") requires agencies to publish, or to make available upon request, many of their legal interpretations.[116] These published statements are best understood as interpretive rules—indeed, it is hard to see what else they could be. But if an agency issues such an interpretive rule and Congress then disapproves the rule via joint resolution, what happens? If the disapproval resolution has no bearing on the legal correct-

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ing Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin., 471 F.3d 1350, 1354 (D.C. Cir. 2006)).

[113] *See* 5 U.S.C. § 706(2)(C).

[114] *See, e.g.*, Am. Hosp. Ass'n v. Price, 867 F.3d 160, 167–68 (D.C. Cir. 2017).

[115] It might be tempting to conclude that the dilemma can be avoided if the court invalidates the rule on the ground that the statute does not permit it, and then on remand the agency can simply issue a new emission standard that takes certain beyond-the-fence-line measures into account, but without ever explicitly incorporating into its final rule a declaration that section 111 permits consideration of such measures. In this way, the agency could comply with the court's ruling on the meaning of section 111 without ever "reissuing" the disapproved rule. But this would not work, because the APA has been interpreted to require agencies to explicitly include, in each final rule, a statement of the legal authority on which that rule is based. *See* Glob. Van Lines, Inc. v. Interstate Com. Comm'n, 714 F.2d 1290, 1298 (5th Cir. 1983). *See also* Jerry Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 24–25 (2001) (observing that the APA has been interpreted to require that the agency's final rule incorporate an explanatory statement that includes, among other things, a "comprehensive articulation of the . . . statutory authority that justifies" the rule).

[116] *See* 5 U.S.C. § 552(a)(1)(D) (requiring agencies to publish in the *Federal Register* not only "substantive rules of general applicability" but also "interpretations of general applicability formulated and adopted by the agency"); *id.* § 552(a)(2)(B) (requiring agencies to make available to the public in electronic form other "interpretations adopted by the agency" that are not published in the *Federal Register*). Although courts have generally interpreted these sections not to require publication of interpretive rules that do not have any significant impact on the public, many agency statutory interpretations *do* have a significant impact on the public, and must therefore be published or otherwise made available. *See* JAMES T. O'REILLY, ADMINISTRATIVE RULEMAKING § 3.61 (2021 ed.).

ness of the agency's interpretation, has the resolution created an implicit exemption from FOIA's publication requirement, such that although the agency may (perhaps must) adhere to its previous interpretation, the agency may no longer comply with FOIA's obligation that the rule be published?

In a similar vein, consider the requirement, under section 553 of the APA, that an agency incorporate in any final legislative rule a statement of basis and purpose—a statement that, as the APA makes clear, is part of that final rule.[117] The CRA's prohibition on reissuing a disapproved rule would bar an agency from including in a statement of basis and purpose language that is substantially the same as the language in a disapproved interpretive rule. So what is the agency supposed to do if its only reason for rejecting a proposed alternative submitted during the comment period is the legal view that the agency had previously advanced in a disapproved interpretive rule? If that legal interpretation is still valid—if the CRA resolution did not reject the substance of the interpretation—then the agency cannot adopt the suggested alternative without doing something the agency believes is illegal. But expressly announcing that legal view in the statement of basis and purpose would violate the CRA's prohibition on reissuing disapproved rules. And rejecting the suggested alternative without any explanation would be arbitrary and capricious.[118]

To generalize, the dilemma arises from the combination of three agency obligations: (1) the agency's obligation to adhere to what the agency believes to be the correct interpretation of its statutory authority; (2) the agency's obligation to announce—in rule form—its interpretations of relevant statutory provisions; and (3) the agency's obligation not to reissue a rule that Congress has disapproved via CRA resolution. If a CRA resolution disapproving an interpretive rule does not invalidate the interpretation announced in that rule, it may be impossible for the agency to comply with all three of these obligations simultaneously.

In advancing the above argument, we are applying the familiar interpretive technique of trying, when possible, to read various statutory provisions together so that they form a harmonious, coherent whole. Treating a disapproval resolution as nullifying an agency's interpretive rule but leaving the substantive interpretation unaffected produces a host of tensions and potential conflicts between different statutory obligations. Treating a resolution that disapproves of an agency's interpretive rule as rejecting the interpreta-

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[117] 5 U.S.C. § 553(c) (noting that the statement of a rule's basis and purpose is "incorporate[d]" into the rule); *see also* Kevin M. Stack, *Interpreting Regulations*, 111 MICH. L. REV. 355, 380 (2012) (emphasizing that "[i]ssuing a statement of basis and purpose is not merely a procedural requirement," but rather "the statement of basis and purpose is one part of the agency's product in the rulemaking proceeding," such that "the regulatory text is one part of the twofold act that also includes the statement of basis and purpose").

[118] *See, e.g.*, Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983). An agency's statement of basis and purpose is supposed to include its reasons for rejecting proposed alternatives, including reasons that are grounded in legal interpretation. *See supra* note 101.

tion itself does not. Therefore, insofar as there is any ambiguity as to what it means for Congress to "disapprove" an agency rule, the interest in structural coherence militates in favor of understanding a disapproval resolution to do what most members of Congress and academic commentators have long assumed: the resolution disapproves the agency rule's substance and not just its form.

C. Congressional Intent

In addition to the more specific legal objections discussed above, we must also consider a more general objection, one that builds on the instinctive sense that our proposed use of the CRA is so contrary to the CRA's original purpose, and so inconsistent with the prevailing understanding of how that statute is supposed to operate, that it ought not be allowed. To give this intuition a bit more concrete legal content, one might suggest an analogy to the bar on collusive lawsuits. Just as federal courts will refuse to adjudicate a suit when the nominally adverse parties are in fact colluding with one another,[119] perhaps the CRA should be interpreted (by the parliamentarians, the courts, or both) to prohibit a "collusive" disapproval resolution, in which the agency and Congress—whose interests the CRA presumes to be adverse—have in fact coordinated their actions to achieve a shared objective.

To this we have three responses. First, the notion that an appeal to a statute's general purposes can limit or override the clear meaning of the statute's text is decidedly not the prevailing view of the courts today. That is not to say that all judges are textualists now,[120] or that they should be. But the idea that this use of the CRA is illegitimate simply by virtue of its being unanticipated seems hard to reconcile with contemporary approaches to statutory interpretation.[121] Second, the analogy to collusive lawsuits is inapposite. There is an assumption that lawsuits are supposed to be adversarial, and the Article III judicial power, according to the dominant account, is supposed to extend only to actual controversies between opposing parties. No such principle applies to the relationship between the Executive and Legislative Branches, nor should it. And the strategic maneuvering involved in this potential use of the CRA is not that different from the strategic behavior that political actors routinely employ.[122] Third, the CRA has already been used in

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[119] *See.*, *e.g.*, United States v. Johnson, 319 U.S. 302, 305 (1943); Lord v. Veazie, 49 U.S. (8 How.) 251, 254–55 (1850).

[120] *See* Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg [https://perma.cc/AN2Q-KXES].

[121] That said, we acknowledge that arguments focused on the purpose of procedural statutes may carry substantially more weight with the legislative parliamentarians. *See* Gould, *supra* note 63, at 1987–89. Even here, though, the parliamentarians typically look to statutory purpose only to support interpretive positions that have a textual basis. *See id.* at 1989 n.192.

[122] There are many examples of members of Congress deliberately introducing bills or amendments that they oppose. For example, during the debate over the 1982 amendment to the

an unanticipated way, to reject a guidance document that was adopted not months but years earlier—an application that initially surprised many observers, but came to be accepted as lawful.[123]

As a normative, practical, and political matter, the novelty of our proposal, and its divergence from prevailing understandings, must be taken seriously. In Part IV, we therefore consider whether employing the CRA double-negative maneuver might be improper, unwise, or politically infeasible. But the fact that our proposed use of the CRA diverges from what its drafters envisioned is, as a strictly legal matter, irrelevant.

IV. Practical, Political, and Normative Considerations

The main objective of this Article is to establish that using the CRA in the manner described above would be lawful, and in Part III we addressed what we consider to be the most important legal objections. Here, in Part IV, we discuss practical concerns about the mechanics of our proposal, and we then turn to some broader political and normative implications.

Voting Rights Act ("VRA"), Senator Jesse Helms (R-SC) proposed an amendment that would allow courts to order a jurisdiction to adopt a proportional representation system as a remedy for a VRA violation; Senator Helms wanted this amendment to be defeated, because he hoped that the rejection of the proposed amendment would signal to courts that Congress intended to prohibit proportional representation as a VRA remedy. *See* Roy A. McKenzie & Ronald A. Krauss, *Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment*, 19 Harv. C.R.-C.L. L. Rev. 155, 166–67 (1984). Members also sometimes introduce measures they oppose in order to force their opponents to take hard votes, or to split the other party. For example, during the 2017 debate over health care policy, Senator Steve Daines (R-MT) filed an amendment to implement a single-payer healthcare system ("Medicare for All"), even though Senator Daines himself opposed that policy and voted against his own amendment. *See* Max Greenwood, *Sanders: Dems Won't Vote on 'Sham' Single-Payer Amendment*, Hill (July 26, 2017), https://thehill.com/policy/healthcare/344055-sanders-dems-wont-vote-on-sham-single-payer-amendment [https://perma.cc/7472-KUN7]; Jordain Carney, *Democrats Prep for Next Round of Healthcare Fight*, Hill (Aug. 20, 2017), https://thehill.com/homenews/senate/347175-democrats-prep-for-next-round-of-healthcare-fight [https://perma.cc/N9AL-BBDU]. And then there is the practice of proposing and supporting "poison pill" amendments, which are designed not to improve a bill but rather to reduce the bill's chances of passage. *See, e.g.*, Richard Rothstein, *The Making of Ferguson*, 24 J. Affordable Hous. & Cmty. Dev. L. 165, 178 (2015); William N. Eskridge, Jr., *Vetogates,* Chevron*, Preemption*, 83 Notre Dame L. Rev. 1441, 1445 (2008). All of these examples are obviously quite different from the CRA double-negative maneuver proposed in this Article, but the examples nonetheless demonstrate that strategic behavior—including proposing legal changes that the sponsor does not actually support—is quite common in legislatures.

[123] *See* Pub. L. No. 115-172, 132 Stat. 1290 (2018) (overturning Consumer Fin. Prot. Bureau Bull., 2013-02, Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act (2013)); Batkins, *supra* note 7, at 353 (observing that the use of the CRA to invalidate older agency rules that had not been formally submitted to Congress was "widely dismissed" at first, but that this "new and innovative" use of the CRA was subsequently accepted).

A. Practical Concerns and Constraints

The complicated and counterintuitive mechanics of the maneuver we propose raise a number of practical issues. First, one might worry about what would happen if the choreography breaks down, and Congress fails to enact a resolution disapproving the agency's rule. Second, the legislative bargaining costs of deploying this maneuver may be high, given that this mechanism requires not only agreement on the final policy choice, but also on the appropriateness of using this maneuver to accomplish it—and everything must be sorted out ahead of time. Third, this unusual and unfamiliar device may encounter reluctance or outright resistance within the agencies, especially among the professional staff. We provide some brief observations below about each of these practical concerns.

1. Choreography Breakdowns

If there is a miscalculation or an unexpected change in the political landscape, then Congress might fail to enact a CRA resolution disapproving the agency's rule. In that case, one might worry that the agency would be stuck with an interpretation that is the opposite of what the agency actually wants. Yet as long as the agency promulgates its statutory construction as an interpretive rule rather than a legislative rule, it is unlikely that the agency would be stuck with the unwanted interpretation. Agencies can propose and withdraw interpretive rules quickly, without going through the notice-and-comment process.[124] Indeed, that is one of the reasons we recommend that agencies use interpretive rules as the vehicle for initiating the CRA process.[125] In addition, the agency can and should include a proviso in the rule's preamble clarifying that the rule will not take effect immediately. This delay would give the agency more breathing room in case something goes awry.

Even if the interpretive rule is swiftly withdrawn, a critic might worry that courts would treat Congress's failure to disapprove the rule as evidence that Congress in fact agrees with the view contained in that rule. But this possibility is foreclosed by the CRA's text, which says explicitly that if "Congress does not enact a joint resolution of disapproval . . . respecting a rule, no court or agency may infer any intent of the Congress with regard to such rule, related statute, or joint resolution of disapproval."[126] So while it is

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[124] 5 U.S.C. § 553(b)(A). *See, e.g.*, Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 101 (2015) ("Because an agency is not required to use the [APA's] notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule.").

[125] *See supra* Section III.B.

[126] 5 U.S.C. § 801(g). Another possibility is that a court could treat the agency's promulgation and swift subsequent retraction of an interpretive rule as evidence of interpretive inconsistency, which might count against deference to the agency's interpretation. But this would occur only if a court willfully ignored the fact that the initial rule did not reflect the agency's interpretive genuine position, but rather was an attempt to trigger CRA review.

always possible that Congress will fail to act on the agency's invitation for a CRA reversal, such a breakdown would not have significant adverse consequences.

2. Legislative Bargaining Costs

The CRA two-step outlined in this Article would be viable only if the White House and party leaders could assemble the requisite majorities in both chambers of Congress. The challenge of securing legislative majorities is a general one, but using the device we propose may entail even higher bargaining costs. Members of Congress would need to be persuaded not only to support the underlying legislative proposal, but to agree to use this non-traditional mechanism to pass it.[127] Moreover, because a CRA resolution by-passes the ordinary legislative process—which includes lengthy committee consideration, debates over proposed amendments, and reconciliation of House and Senate bills—the White House and congressional leaders would need to negotiate the final form of the legislative change ahead of time. While almost every significant piece of legislation requires deal making outside of the official processes of committee consideration and floor debate, the CRA double-negative maneuver would require an even greater up-front investment. The legislative bargain would need to be finalized before the formal process began, and the agency would need to frame the interpretation to be disapproved with exactly the right wording, with no room for tinkering later on. We expect the process to be especially time-consuming the first few times it is used, since every constituency would need to acclimate to the novel procedure.

These additional bargaining costs probably mean that even if all of the institutional actors wholeheartedly embraced the maneuver as legitimate, it would be unrealistic to expect them to use it frequently. Still, even if used selectively, the maneuver has benefits that outweigh its higher bargaining costs, at least sometimes. This use of the CRA provides a way to circumvent the filibuster and other legislative roadblocks, thus enabling the president and congressional majorities to advance their legislative agenda. While the higher legislative bargaining costs impose a practical constraint on how frequently the CRA maneuver could be deployed, we conjecture that these costs are not an insurmountable obstacle to its use.

3. Bureaucratic Resistance

Another practical obstacle concerns the possible instinctive resistance of agency officials. Using the CRA double-negative maneuver would require agency staff to deviate from well-entrenched standard practices that agencies use to formulate their rules. The idea that an agency would propose a rule

[127] *See also infra* Section IV.B.4.

that rejects the interpretation that the agency actually wants, so as to facilitate a congressional reversal, is not consistent with how most agency officials think about their role. Agency lawyers might resist the idea that they should, or lawfully could, propose interpretive rules whose content is the opposite of what they actually believe the correct interpretation to be. Using this mechanism would therefore require senior agency officials to be persuaded of its value and legitimacy. It is also possible, however, that agency staff will be the first to appreciate the potential of the CRA to settle important questions of statutory interpretation, enabling them to accomplish their missions more effectively. Rather than needing to be convinced, they may seek to persuade reluctant White House officials or members of Congress of its merits. In any event, something so new, which at first sounds so complex and cumbersome, will require internal champions. Senior administration officials would need to endorse the strategy clearly and remove obstacles to its rapid deployment—for example by creating a fast-track process through the usual internal and inter-agency review processes. While it may be controversial initially, we can imagine the CRA two-step eventually normalizing to the point that it comes to be seen as just one more tool in the policymaking toolbox.

B. Political and Normative Implications

Even if the CRA could be employed as we have described, whether it should be is a separate question. Although we do not comprehensively evaluate this complex issue, we highlight three of the normative and political questions implicated by our proposed use of the CRA: (1) how using this mechanism might reallocate power across and within the three branches of government; (2) the implications of this mechanism for transparency and accountability; and (3) the political legitimacy (as distinct from the legal legitimacy) of deploying the CRA in the manner we suggest.

1. Reallocating Power

While the CRA's fast-track procedures entail multiple features, perhaps the most crucial is avoiding the Senate filibuster. Whether expanding the scope of a filibuster-free legislative track would be a good thing or a bad thing depends largely on what one thinks of the filibuster, a topic that has generated considerable controversy and a voluminous body of scholarly literature.[128] Suffice it to say that those who consider the filibuster an unjustifiable impediment to functional democratic governance would likely embrace an

[128] *See, e.g.*, SARAH A. BINDER & STEVEN S. SMITH, POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE (1997); GREGORY KOGER, FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE (2010); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 184 (1997); Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 467 (2011).

aggressive use of the CRA to sidestep the filibuster,[129] while those who consider the filibuster to be an essential protection for the minority party or small states presumably would be less enthusiastic.[130]

While we do not attempt to sort through all of these arguments here, we do want to highlight a few consequences of this particular filibuster workaround. First, the novel use of the CRA described in this Article could magnify the significance of unified versus divided government. It is already the case that the president can accomplish much more if his or her party also controls the House and Senate. But even during periods of unified government, the dominant party may be limited in what it can do, not only because of the filibuster, but also because of the general complexity of the legislative process. The ability to present a specific question of agency authority to Congress for an up-or-down majority vote likely would expand the scope of what the president can accomplish during periods of unified government, both in absolute terms and relative to periods of divided government.

Furthermore, during periods of unified government, the dominant party not only would be able to ensure that its preferred regulatory policies are permitted, but it would be better able to lock in those policies against future reversal. Under prevailing doctrine, when a statute is ambiguous, the responsible agency usually has the authority not only to resolve that ambiguity, but also to change its position later on.[131] But if the CRA were deployed to clarify that the statute requires or prohibits (as opposed to permits) a given regulation, the agency would be obligated to adhere to that interpretation unless Congress enacted new legislation. Giving the Executive Branch and its congressional allies a greater ability to lock in their preferred interpretations would reduce agency flexibility and, arguably, responsiveness to changing national political preferences. But it would also produce greater clarity and consistency in what the law requires or permits agencies to do.

Broader use of the CRA to clarify statutory meaning would also shift power from the courts to Congress. Right now, when an agency operates near the limits of what a statute appears to permit, the judiciary typically ends up deciding when the agency has acted within, and when beyond, its statutory authority. If Congress were to use the CRA to establish what the agency may or may not do, then resolving these "boundary" issues would depend less on the judges' jurisprudential or ideological views. For those

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[129] *See, e.g.,* ADAM JENTLESON, KILL SWITCH: THE RISE OF THE MODERN SENATE AND THE DECLINE OF AMERICAN DEMOCRACY (2021); Caroline Frederickson, *The Case Against the Filibuster*, BRENNAN CTR. JUST. 30, 2020), https://www.brennancenter.org/our-work/research-reports/case-against-filibuster [https://perma.cc/YN7U-FP47]; Ezra Klein, *The Definitive Case for Ending the Filibuster*, VOX (Oct. 1, 020) https://www.vox.com/21424582/filibuster-joe-biden-2020-senate-democrats-abolish-trump [https://perma.cc/6A7J-HZBN].

[130] *See, e.g.*, RICHARD A. ARENBERG & ROBERT B. DOVE, DEFENDING THE FILIBUSTER: THE SOUL OF THE SENATE (2012); John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 401 n.164 (1999).

[131] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 863 (1984); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 981 (2005).

who think Congress should play a more central and formal role in overseeing how agencies exercise their delegated power—and for those who are concerned about the expansive role of courts—this would be a positive development.[132]

Using the CRA to clarify agency authority might also give the president's allies in Congress greater influence in shaping regulatory policy, relative to the president and his or her appointees in the Executive Branch. If there is no easy way for Congress—even a Congress in which the president's party has majorities in both chambers—to endorse an agency's position on what a statute allows or requires, then agency policy is likely to be shaped principally by what the White House wants, constrained by what the courts are expected to permit. But if the Executive Branch can remove the legal uncertainty surrounding an exercise of agency authority by securing a CRA resolution, this may give Congress—especially centrist members of Congress—more of a role in shaping the position that the agency takes. Consider the earlier example concerning the EPA's approach to regulating GHGs. A Democratic administration that wants to take a more aggressive approach might want to use the CRA maneuver to approve an expansive interpretation of the agency's authority, so as to remove the legal uncertainty about whether the agency's preferred legislation is valid. But some congressional Democrats—more conservative members from states that produce fossil fuels, for example—may be reluctant to support the EPA's favored version of its regulation. These legislators might nonetheless be willing to negotiate a deal in which they would support a CRA endorsement of a somewhat less aggressive regulation, and the administration might be willing to make those concessions in order to put its rules on sounder legal footing. To put this in more general terms, the use of the CRA described in this Article will tend not only to shift power from courts to Congress, but will also shift power from the executive to Congress, especially more centrist members of Congress.

On this point, it is also worth raising the possibility that even in periods of divided government, it might be possible for the White House to attract just enough bipartisan support to use the CRA to authorize a given agency action or other statutory change, so long as the White House makes suffi-

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[132] *See, e.g.*, David L. Markell & Robert L. Glicksman, *Dynamic Governance in Theory and Application, Part I*, 58 ARIZ. L. REV. 563, 567 (2016) (asserting that "[i]deally, Congress, the most accountable policymaking body, in tandem with the President, would direct agency responses [to new and unforeseen situations]," but that the "multiple veto gates of the legislative process," among other factors, make this "unrealistic," and that in practice key decisions are made unilaterally by the President or by agencies, subject to judicial oversight); Shah, *supra* note 2, at 1170 (observing and critiquing the current Supreme Court's growing tendency to "assert[ ] control over the interpretation of a statute by making questionable determinations that statutory language is *un*ambiguous," and by doing so "to assume the policymaking function otherwise entrusted to agencies") (emphasis in original); *see also* Freeman & Spence, *supra* note 1, at 7 ("[C]ongressional dysfunction invites agencies and courts to do the work of updating statutes.").

cient compromises. These days it may seem naïve to imagine that any consequential regulatory policy decision could attract bipartisan support, but that view may be overly pessimistic. Not every policy issue triggers deep and irreconcilable partisan divisions. In fact, two of the three recent uses of the CRA to overturn Trump administration rules attracted a few (though admittedly not many) Republican votes.[133] So it is not outlandish to imagine that the White House might be able to attract enough votes from moderates of the other party to support a CRA resolution, as long as the White House offers sufficient concessions. If that is correct, then the CRA mechanism described here might be more relevant during periods of divided government than the discussion above acknowledged.

2. *Transparency and Accountability*

While most of the political and normative implications associated with the CRA maneuver discussed in this Article are broadly similar to the implications of other proposals to eliminate, limit, or circumvent the filibuster, this particular mechanism also raises a number of distinctive issues, several of which concern transparency and accountability.

In one respect, using the CRA to clarify or revise statutory law would enhance transparency and accountability, because members of Congress would need to take up-or-down votes on specific issues regarding the scope of agency authority. There is no way, under the CRA, to bundle questions or to attach a disapproval resolution to a larger legislative package. Moreover, in order for the maneuver to work, the agency's interpretive rule must be framed as rejecting a precise understanding of the law. So, legislators will find it very difficult to obscure where they stand.[134] While this is arguably good from a transparency perspective, it also means that these proposed clarifications or changes to statutory authority will not be part of larger bargains over more comprehensive legislation, which might be good or bad depending on the circumstances. But the fact that the CRA maneuver requires legislators to take yes-or-no votes on specific, focused questions seems like a gain from a transparency and accountability perspective.

On the other hand, one might be concerned that this use of the CRA could undermine transparency and accountability by confusing voters. After

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[133] *See* Pub. L. No. 117-23, 135 Stat. 295 (2021) (overturning Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review, 85 Fed. Reg. 57,018 (Sept. 14, 2020)); Pub. L. No. 117-24, 135 Stat. 296 (2021) (overturning National Banks and Federal Savings Associations as Lenders, 85 Fed. Reg. 68,742 (Oct. 30, 2020)).

[134] Note that this is in contrast to the more traditional use of the CRA to disapprove legislative rules, where it is not entirely clear what aspect of the legislative rule Congress finds objectionable. *See, e.g.*, Daniel Cohen & Peter L. Strauss, *Congressional Reviews of Agency Regulations*, 49 ADMIN. L. REV. 95, 104–05 (1997); Julie A. Parks, Comment, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187, 200–05 (2003). That problem does not arise when the agency rule does a single thing, stating that a particular legal proposition is not the correct statement of the law.

all, the maneuver depends on the agency first promulgating a rule that says the opposite of what the agency wants. Additionally, passing a disapproval resolution might be read as an embarrassing rebuke to the president rather than as a shared legislative victory—especially since it would typically be a Congress controlled by the president's own party that enacted the resolution. Opportunistic activists and media organizations might deliberately exploit these potential sources of confusion to make voters think that the administration had tried to adopt an unpopular policy, or had conceded the legal incorrectness of its preferred regulatory strategy, or that the president was so politically weak that members of his or her own party were in revolt.

To address this concern, the White House, the agency, and members of Congress supporting the disapproval resolution would need a strong communications strategy. While voters who follow political news closely would likely understand what is going on, there is still some risk that much of the public would believe that a majority in Congress had rebuked an administration led by a president of the same party, when in fact the point of the exercise was to clarify agency authority to enable the president to act. The proposed rule's preamble could explain that the agency is proposing this rule for the sole purpose of giving Congress the opportunity to promptly clarify the agency's authority and credible media outlets would explain the maneuver, much as they explain things like the filibuster and budget reconciliation. Yet a significant number, and perhaps the majority, of voters who do not follow politics or policy closely nevertheless may be confused or misled. So, along with a plan to execute the disapproval resolution, members of Congress and the administration who wish to employ the CRA for this purpose also require a strategy to explain what they are doing and why, in plain terms. Ultimately, once executed, the CRA double-negative maneuver should increase the chance that substantive policy outcomes—which we presume voters care about more than procedural maneuvers—will reflect the agenda of the party in power. Political accountability should increase overall as a result. Nevertheless, as events unfold, it will be important to minimize any public confusion that may arise from using such a counterintuitive process.

3. Consistency with Unwritten Norms

In Part III, we addressed the argument that our proposed use of the CRA would be unlawful because it contravenes the CRA's purpose and original intent.[135] But framing the issue in narrow legal terms may not capture the full force of the concern. Not every lawful political maneuver is appropriate; not every procedural loophole ought to be exploited to its fullest extent (or at all). To put the point in a slightly different way, there may be an established norm or convention that the CRA is to be used only non-collu-

[135] *See supra* Section III.C.

sively to check or limit agency assertions of authority, and political actors should refrain from breaking that norm.[136]

We cannot dismiss such arguments out of hand. It is indisputable that the CRA double-negative maneuver exploits a loophole to accomplish a result that was neither foreseen nor intended by the CRA's drafters. It is virtually certain that the maneuver, if employed, would be denounced by the opposition as an aggressive power-grab—which, in a sense, it would be. These facts might be enough to convince many people that even if it would be legal to use the CRA in the manner described in this Article, it would be inappropriate to do so. Yet the current legislative process is so deeply dysfunctional that bold action is warranted.[137] Moreover, the assertion that this use of the CRA would violate a longstanding norm is less self-evident than it might first appear. A standard difficulty with arguments based on unwritten norms is the level of generality at which the norm is described.[138] If one asks whether there is a norm of using the CRA only to nullify agency rules—and only when the agency that enacted the rule and the Congress that disapproves it are in genuine disagreement—then the answer is yes. But if one frames the question more broadly as whether there is a widely-respected congressional norm against exploiting procedural loopholes in the legislative process—that is, whether there is a general norm against pushing the limits of what is technically permitted under the rules in order to do things that those who created those rules did not intend—the picture looks quite different.

Consider the filibuster itself. Historians agree that creating the filibuster was a historical accident: when the Senate eliminated the so-called "previous question" motion in 1806 as part of a clean-up of the rules, the senators who voted for this change apparently did not consider the fact that doing so would give a single senator the power to grind the body to a halt by continuously holding the floor.[139] It was only several decades later that senators realized the extent to which they could exploit this feature of Senate rules to block legislation.[140] The subsequent attempts to rein in the filibuster by establishing a procedure for cloture votes also had unintended consequences. The reforms to the cloture procedure in the 1970s were not intended to establish a de facto sixty-vote threshold for all ordinary legislation.[141] But sen-

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[136] A variant on this argument, which focuses on the Executive Branch rather than the Legislative Branch, suggests that an agency promulgating an interpretation that it does not actually believe, in order to facilitate a statutory override, would be inconsistent with the president's obligation to faithfully executive the laws. *See* White, *supra* note 79.

[137] *See generally* Gould et al., *supra* note 8.

[138] *See, e.g.*, Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 382 (1997); Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2242 (2018).

[139] *See* Boundurant, *supra* note 128, at 470–73.

[140] *See* Fisk & Chemerinsky, *supra* note 128, at 190–92.

[141] *See* BINDER & SMITH, *supra* note 128, at 14–15; KOGER, *supra* note 127, at 178.

ators later figured out that the structure of the rules permitted this, and aggressively exploited that feature of the rules.[142]

The existing exceptions to the filibuster also tend to involve using procedural devices in ways not anticipated by those who created them. Consider budget reconciliation.[143] Adopted in the 1974 Congressional Budget and Impoundment Control Act,[144] reconciliation was originally intended to relieve Congress of having to vote on multiple controversial bills raising taxes or cutting spending, and instead to allow such measures to be combined into a single package that could be made more politically palatable, and therefore pass more easily.[145] Those who drafted and enacted the 1974 Act had no inkling that budget reconciliation eventually would become the legislative vehicle for doing things like passing the Affordable Care Act—arguably the most significant social and economic legislation since the New Deal—or opening the Arctic National Wildlife Refuge to oil and gas drilling, as the Trump administration did,[146] or adopting an ambitious clean energy plan, as the Biden administration has proposed.[147]

Yet another example of exploiting a technical feature of the procedural rules is the so-called "nuclear option," which was how the Senate eliminated the filibuster for votes to confirm presidential nominees to judgeships and executive offices.[148] Under the Senate's written rules, three-fifths of the senators must vote in favor of cloture on ordinary matters, including confirmation of nominees; proposals to change the written rules are also subject to a filibuster, with a higher cloture threshold of two-thirds rather than three-fifths.[149] But senators found a way to exploit a loophole in the rules to get around this problem. Under the written rules, decisions of the presiding officer can be appealed to the full Senate, which resolves the appeal by majority vote.[150] Such votes establish precedents that supersede the written rules. So if a majority of senators wants to do away with the filibuster for a particular type of vote, this can be accomplished as follows: first, at an appropriate moment in the proceedings—when the Senate is in a non-debatable posture—the majority leader raises a point of order that a cloture vote should be governed by simple majority rule. The presiding officer rules against the point of order on the grounds that it contravenes the Senate's rules (which it

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[142] *See* JENTLESON, *supra* note 129; KOGER, *supra* note 128, at 178.

[143] *See* MOLLY E. REYNOLDS, EXCEPTIONS TO THE RULE: THE POLITICS OF FILIBUSTER LIMITATIONS IN THE U.S. SENATE 81–89 (2017).

[144] Pub. L. No. 93-344, § 310, 88 Stat. 297 (1974) (codified at 2 U.S.C. § 641).

[145] *See* Anita S. Krishnakumar, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995–96 Budget "Train Wreck"*, 35 HARV. J. ON LEGIS. 589, 592 (1998).

[146] Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, § 20001, 131 Stat. 2054.

[147] *See* Rachel Frazin, *White House: Clean Energy Tax Credits, Electricity Standard Are Priorities for Reconciliation Package*, HILL (June 30, 2021), https://thehill.com/policy/energy-environment/560896-white-house-doubles-down-support-for-climate-provisions-left-out-of [https://perma.cc/7RCA-CSJG].

[148] *See* Gould, *supra* note 64, at 2000–01.

[149] S. Res. 285, 113th Cong., at 15–17 (2013) (enacted).

[150] *See id.*

clearly does). The majority leader then appeals the presiding officer's ruling to the full Senate, and this appeal is decided by majority vote without debate. A majority of senators votes to overturn the presiding officer's ruling, thus establishing a new precedent—one that incontrovertibly contradicts the text of the rules, but that now governs cloture votes in this context.[151] Nobody involved in creating the Senate's rules seems to have anticipated that this sequence of moves could be used to circumvent the written procedures for amending those rules. The maneuver—as the "nuclear option" moniker suggests—was viewed as bold and aggressive.[152] But this technique has already been deployed successfully, and many are calling for it to be used far more often.[153]

These examples cast doubt on any assertion that the U.S. Congress is characterized by a general norm of "procedural restraint" that counsels respect for the original intent and expectations of those who established Congress's procedural rules. Indeed, there would be a certain irony bordering on chutzpah for defenders of the filibuster to object to the CRA workaround on the grounds that it is improper to take advantage of technical features of the rules in order to accomplish things that the rules' drafters did not intend.

This is not to say that we should be entirely untroubled by attempts to exploit gaps, loopholes, or ambiguities in procedural rules. Under normal circumstances, we would be reluctant to suggest such aggressive procedural maneuvers. In an ideal world, perhaps norms of restraint, and respect for the rules' original purpose, would prevail. In such an ideal world, senators would agree to end debate when there was nothing of substance left to say about a pending measure, or at the very least would resort to a filibuster only in the most unusual circumstances. In this ideal world, budget reconciliation would be reserved for measures that directly tax and spend, and the presiding officer's procedural rulings would be appealed to the full Senate only when there is a serious question about whether the presiding officer has in fact misconstrued the meaning of the relevant rule. But we do not live in that

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[151] *See* William G. Dauster, *The Senate in Transition or How I Learned to Stop Worrying and Love the Nuclear Option*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 631, 659–65 (2016).

[152] Though the nuclear option has antecedents, when the idea was first floated by Senator Ted Stevens (R-AK) in 2003, the idea was considered "audacious" and "dramatic." Jim VandeHei & Charles Babington, *From Senator's 2003 Outburst, GOP Hatched 'Nuclear Option'*, WASH. POST (May 19, 2005), https://www.washingtonpost.com/archive/politics/2005/05/19/from-senators-2003-outburst-gop-hatched-nuclear-option/c2988770-776c-45d9-a8fa-0150e9c85b85/ [https://perma.cc/D9M9-XFUD]. Senate Majority Leader Trent Lott (R-MS) renamed this gambit the "nuclear option" precisely because this was a procedural maneuver that "once had seemed unimaginable," Bruce Moyer, *Beneath the Filibuster Fracas*, FED. LAW., July 2005, at 14, and would represent "a drastic escalation of tactics," Alexander Bolton, *GOP Triggers 'Nuclear Option,' Gutting Filibuster in Gorsuch Fight*, HILL (Apr. 6, 2017), https://thehill.com/homenews/senate/327591-gop-triggers-nuclear-option-gutting-filibuster-in-gorsuch-fight [https://perma.cc/LX7H-ZVZY]. The first extended written discussion appeared in 2004. *See* Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Overcome the Filibuster*, 28 HARV. J.L. & PUB. POL'Y 205, 260–69 (2004).

[153] *See* Koger & Campos, *supra* note 8.

ideal world. And in our real world, it is not clear why the CRA double-negative maneuver described in this Article would be distinctively illegitimate.

4. Political Viability

In addition to the normative question of whether it would be appropriate to use the CRA double-negative mechanism to do an end-run around the filibuster and the other cumbersome features of the ordinary legislative process, there is the related but distinct question of whether doing so is politically viable. In the previous discussion of practical constraints, we noted that using this mechanism may be especially time consuming and costly because some legislators might be reluctant to employ this novel procedural maneuver. But we can frame the issue as something that goes beyond higher legislative bargaining costs. Even someone who is persuaded that our proposed CRA maneuver is legally and normatively legitimate might nonetheless conclude that it is a political nonstarter. Whether or not using this mechanism would actually be an illegitimate deviation from congressional norms, if a sufficient number of the members of Congress in the majority party believe that deploying this maneuver would be illegitimate, they will not use it. Senators who support the filibuster might balk at this mechanism precisely because it would render the filibuster irrelevant for a much broader swath of legislation.[154]

That may be correct, or it may not be. We do not attempt to thoroughly assess the issue of political feasibility here. The objective of this Article is to develop a legal argument rather than a political strategy. That said, one attractive feature of this proposal, from a political perspective, is that it does not involve eliminating or further restricting the filibuster. Instead, the proposed maneuver takes advantage of existing legislation that already creates an exemption to the filibuster, and channels more decisions through that process. In that sense, it is not different in kind from the more familiar use of the budget reconciliation process, which the Senate's staunchest filibuster defenders seem to view as legitimate. Indeed, the only reason to use the CRA double-negative maneuver, rather than use the nuclear option to eliminate the filibuster for some or all Senate business, is that the former approach would be more acceptable to at least some senators, on the grounds that a mechanism that operates through the Senate's existing written rules—

[154] *Cf.* Joe Manchin, *Why I'm Voting Against the For the People Act*, CHARLESTON GAZETTE-MAIL (June 6, 2021), https://www.wvgazettemail.com/opinion/op_ed_commentaries/joe-manchin-why-im-voting-against-the-for-the-people-act/article_c7eb2551-a500-5f77-aa37-2e42d0af870f.html [https://perma.cc/ES9Q-DKJN]. While some senators may object to filibuster workarounds as a matter of principle, it is also possible that some senators in the majority party may prefer to retain the filibuster because it spares them the need to cast hard votes—votes that the CRA workaround would make more difficult to avoid.

even in a novel manner—is more legitimate than establishing a Senate precedent that flagrantly disregards those rules.

It might nevertheless be advisable, as a matter of political strategy, to use the procedure first in a simpler and less controversial application—one where there is an obvious statutory ambiguity and strong congressional majorities in favor of a given clarification of that ambiguity (coupled, ideally, with widespread frustration that issuing a clarification through the ordinary process is blocked by the filibuster), and where both the agency rule and the disapproval resolution can be framed in straightforward terms. The CRA double-negative technique could, in principle, be used more broadly. But starting modestly might help to overcome initial hesitance and establish procedural precedents that can serve as the foundation for more assertive uses of this technique in the future.

V. Conclusion

It has become commonplace to bemoan gridlock and dysfunction in the U.S. Congress. While these complaints are sometimes exaggerated, Congress often does too little to resolve many of the most pressing policy issues facing the country. As Congress has receded from the scene, the Executive and Judicial Branches have assumed a greater role in setting public policy, frequently in the context of disputes over the interpretation of statutes. And in many of the cases where congressional action is required—where old statutes cannot be pressed into service to meet new challenges—nothing happens. Scholars, activists, and others have proposed and debated a variety of mechanisms that might enable Congress to act more swiftly and decisively to clarify or update statutes.[155] Yet for over a quarter-century at least one such mechanism, the CRA, has been hiding in plain sight.

Though the CRA is universally understood as a rule-nullification statute, one that is practically relevant only in the first few months after a change in partisan control of the White House, it has the potential to be much more than that. The CRA's fast-track procedures are available for any joint resolution that can be framed as disapproving an agency rule—including an agency rule that consists solely of an interpretation of the law, such as a declaration of what a particular statutory provision means. Crucially, although the CRA only applies to resolutions of disapproval, any statement of disapproval can be converted into a statement of approval by using a double-negative construction. Once one appreciates this fact, it becomes clear that the CRA could be deployed far more broadly, enabling congressional major-

[155] *See, e.g.*, Amanda Frost, *Certifying Questions to Congress*, 101 Nw. L. Rev. 1 (2007); Danieli Evans, *What Would Congress Want? If We Want to Know, Why Not Ask?*, 81 U. Cin. L. Rev. 1191 (2013); Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 Iowa L. Rev. 1931 (2020); Sitaraman, *supra* note 63.

ities to avoid the filibuster and other procedural bottlenecks that too often paralyze the legislative process.

The Congress that enacted the CRA did not intend or anticipate this possibility. Indeed, in the quarter-century that the CRA has been on the books, it does not seem to have occurred to anybody that the statute could be used in this way. For these reasons alone, many readers are likely to be skeptical. We acknowledge and sympathize with this skepticism. Whether the White House and congressional majorities should attempt to employ the CRA maneuver described in this Article to sidestep the filibuster is a big question, one that we leave for another day. Our principal objective in this Article is to establish that, at least as a legal matter, this maneuver *could* be used to that end.

By doing so, we have identified an additional tool that can take its place next to the nuclear option, aggressive use of budget reconciliation, and other potential filibuster workarounds. To be sure, the CRA maneuver we propose is aggressive. But given how bad congressional dysfunction has become, exploring nontraditional alternatives to the ordinary legislative process is not merely justified—it is essential to the health of our democracy.