

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*

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## INTRODUCTION

Contrary to popular belief, Congress and the President, in vetoing a rule that they object to under the Congressional Review Act (CRA),<sup>1</sup> may not forever bar the issuing agency from regulating the area of law addressed by the rule. This is because courts should foreclose such an outcome by interpreting the CRA in a non-restrictive manner for agencies. At the same time, however, courts should refrain from granting *Chevron* deference to agency interpretations of the CRA.<sup>2</sup> Courts should instead give deference to agencies under the arbitrary and capricious standard of review. This approach reflects a proper understanding of the relative scope of legislative, judicial, and executive power and responsibility.

To understand these arguments, it is necessary to have some basic knowledge of the CRA. The CRA is a regulatory oversight statute that provides a shortcut mechanism for Congress to overturn agency rules by passing a joint resolution of disapproval.<sup>3</sup> Although Congress has always possessed the power to overturn a specific rule promulgated by an agency, the CRA allows Congress to overturn rules before they go into effect without having to rely on the slow and cumbersome process of amending or repealing the agency's enabling statute.<sup>4</sup> As a result, the CRA provides Congress with the opportunity to preemptively thwart entire lines of regulatory enforcement before they begin.

As a practical matter, “the CRA mechanism is most relevant in times of presidential transition”<sup>5</sup> because the President can always “veto resolutions disapproving rules under the CRA.”<sup>6</sup> This means that the CRA is “unlikely

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1. 5 U.S.C. §§ 801–808 (2012).

2. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

3. 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, 708 (2011).

4. *See id.* at 708–09.

5. Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2162 n.5 (2009).

6. Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1002 (2001).

to be used frequently except in circumstances where a new President,” typically of a newly-elected party with the support of a newly-gained majority in Congress, “seeks to block rules issued by a prior administration.”<sup>7</sup> In such scenarios, the CRA makes it clear that Congress can “kill a regulation with relative ease.”<sup>8</sup>

The question remains, however, whether Congress can use this mechanism not only to kill a regulation, but to, “in effect, [do] to [the] regulation what the Russian nobles reputedly did to Rasputin—poison it, shoot it, stab it, and throw its weighted body into a river—that is, to veto not only the instant rule it objects to, but forever bar an agency from regulating in that area.”<sup>9</sup> This question arises under the key clause in § 801(b)(2) of the statute, which prohibits an agency from issuing a new rule that is “substantially the same” as one vetoed under the CRA.<sup>10</sup>

This “prohibition is a crucial component of the CRA, as without it the CRA is merely a reassertion of authority Congress always had, albeit with a streamlined process.”<sup>11</sup> In other words, Congress would need to enact legislation “invalidating a rule *and* specifically state exactly what the agency could not do to re-issue it,” in order to kill future rules.<sup>12</sup> Under the CRA’s “substantially the same” prohibition, however, “Congress can now kill certain future rules semiautomatically and perhaps render them unenforceable in court.”<sup>13</sup>

The component of judicial involvement makes the interpretation of the “‘substantially the same’ prohibition” into a legal issue, as opposed to merely a political matter.<sup>14</sup> While Congress enjoys the discretion to “choose whether to void a subsequent rule that is substantially similar to an earlier vetoed rule (either for [a] violation of the ‘substantially the same’ prohibition or on a new substantive basis),” the judiciary must interpret “substantially the same” in accordance with established principles of law and jurisprudence.<sup>15</sup> Any determination made by the judiciary “that a reissued rule is . . . ‘substantially

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7. Note, *supra* note 5, at 2162 n.5.

8. Finkel & Sullivan, *supra* note 3, at 708.

9. *Id.* at 709.

10. 5 U.S.C. § 801(b)(2) (2012) (stating that a “rule [that is vetoed under the Congressional Review Act (CRA)] may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule”).

11. Finkel & Sullivan, *supra* note 3, at 709.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

the same” would obligate the court to “treat the new rule as *void ab initio* even if Congress had failed to enact a new veto.”<sup>16</sup>

Problematically, the CRA does not define the phrase “substantially the same.”<sup>17</sup> This raises complex issues involving the judiciary’s interpretation of the term, including whether Congress can constitutionally avoid defining “substantially the same” in the statute, and if so, whether the courts must grant *Chevron* deference to agencies’ interpretations of the term.<sup>18</sup> Further complicating matters, the CRA states that “[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review.”<sup>19</sup> As a result, the questions of whether and how to interpret “substantially the same” have been, in my view, oversimplified, shrouded in mystery, and muddled by misinterpretations. I hope to clarify these issues while paying tribute to their nuance.

To achieve this end, this Article provides a roadmap of the legal issues that would arise if a challenge is filed to a reissued regulation under the CRA. The article also recommends to the courts how to resolve these issues. In Part I, I describe the basic legal framework of the CRA because I believe it is helpful for the reader to understand the legal issues involved. Part II contains five sections, summarizes current literature, and presents original legal arguments. Specifically, in Part II.A, I argue that courts may assert judicial review over rules that are alleged to be out of compliance with the CRA because asserting judicial review is consistent with the language of the statute, its legislative history, and the presumption in favor of judicial review of agency action. This is true despite the fact that the majority of courts have

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16. *Id.*

17. 5 U.S.C. §§ 801–808 (2012) (enumerating the statutory mechanism for congressional review of agency rulemaking without defining “substantially the same”); Finkel & Sullivan, *supra* note 3, at 710 (describing the phrase “substantially the same” as “murky”); see Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95, 104 (1997) (explaining that it is impossible to determine the scope of an agency’s substantive authority regarding whether a reissued rule is “substantially similar” “without [the benefit of] subsequent litigation”); Julie A. Parks, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187, 200 (2003) (describing the “language found in the substantially similar standard” as “unnecessarily vague”).

18. The *Chevron* deference standard of review provides a two-step analytical framework for deciding whether to uphold an agency’s interpretation of a statute. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). The first question courts consider is “whether Congress has directly spoken to the precise question at issue.” *Id.* at 842. If Congress has clearly and unambiguously spoken to the issue at hand, “that is the end of the matter.” *Id.* However, if Congress has not spoken to “the precise question at issue,” the agency’s interpretation of the statutory provision will stand if it is reasonable. *Id.* at 843.

19. 5 U.S.C. § 805.

held that the language of the CRA precludes judicial review. In Part II.B, I contend that, in addition to being able to assert judicial review, the courts have the authority under Article III, Section 2, Clause 1 of the Constitution to decide how to interpret “substantially the same,” regardless of commentators’ concerns that doing so would be an unconstitutional exercise of excessively delegated authority by Congress.

In Part II.C., I address the issue of how to interpret “substantially the same.” I start by summarizing the current literature on the matter. I then explain how the literature has formulated a hierarchy of plausible interpretations that a court could adopt, starting from the least stringent, moving to the most restrictive of interpretations (from the perspective of federal agencies).<sup>20</sup> I also argue that one of the interpretations advocated for in the literature—that a reissued rule need only be “altered so as to have significantly greater benefits . . . or significantly lower costs than the original rule,” if not both, to not be “substantially the same”—is a generally valid approach.<sup>21</sup> In making this argument, I go beyond the literature by testing the validity of the “cost-benefit” interpretation in other regulatory scenarios, concluding that the approach is useful in most (but not all) scenarios.

In Part II.D, I argue that courts, in adopting a cost-benefit interpretation of “substantially the same,” should do so *de novo* and decline to grant *Chevron* deference to agencies on the issue because the CRA is not an agency-specific statute. Granting deference here creates a lack of uniformity on an issue of great economic and political importance without any meaningful judicial input. In arguing this point, I disagree with contentions made in a prior article by Finkel and Sullivan that advocate for the applicability of *Chevron* to the CRA.<sup>22</sup> The arguments made in that article are the only ones of which I am aware that analyze, within a piece of scholarly literature, *Chevron* in the context of the CRA.<sup>23</sup> In disagreeing with these arguments, I offer a fresh perspective to an issue that has received insufficient attention.

Finally, in Part II.E, I conclude that, for pragmatic reasons, courts should apply the deferential arbitrary and capricious standard of review to an agency’s conclusions regarding the relative costs and benefits between its reissued and original rules, despite concerns that deferring may undermine the

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20. See Finkel & Sullivan, *supra* note 3, at 734–37.

21. See *id.* at 735–36.

22. See *id.* at 752–53.

23. Although scholars have discussed the issue, they have not done so in articles considered to be scholarly by any reasonable standard. See, e.g., Arianna Skibell & Geof Koss, *SEC Rule Repeal Sets Stage for Unprecedented Legal Fight*, E&E NEWS DAILY (Feb. 10, 2017) <https://www.eenews.net/eedaily/2017/02/10/stories/1060049856> (news article quoting Cary Coglianese who stated that *Chevron* only applies to agency-specific statutes and not general ones like the CRA).

CRA's purpose of holding agencies accountable.

### I. OVERVIEW OF THE CONGRESSIONAL REVIEW ACT

Understanding the legal arguments related to the CRA requires familiarity with the CRA's legislative background, political history, statutory language, prescribed procedures, and purpose. The CRA was enacted in a bipartisan manner in 1996 after the Republican Party's success in the 1995 midterm elections and as part of the Contract with America Advancement Act of 1996.<sup>24</sup> Following the elections, the new Republican leadership "intended to stop the regulatory process in its tracks by imposing" greater accountability on, and oversight over, agency rulemaking.<sup>25</sup> To meet this goal, the new Republican-controlled Congress implemented the CRA to establish an expedited process for congressional review of agency regulations.<sup>26</sup>

Congress's intention in creating this expedited process is clear. It wanted to "give respect" to the requirements that the Supreme Court had articulated in *Immigration & Naturalization Service v. Chadha*<sup>27</sup> in 1983.<sup>28</sup> There, the Court struck down § 224(c)(2) of the Immigration and Nationality Act (INA) because the provision permitted a single house of Congress to veto the Attorney General's decision to suspend an illegal alien's deportation.<sup>29</sup> The Court held that, for a bill to become law, either both houses of Congress must pass the bill and it must be signed by the President, or Congress must override a presidential veto of the bill with a two-thirds majority in each house.<sup>30</sup> According to the CRA's legislative history, the *Chadha* decision spurred the authors of the CRA to develop a procedure requiring passage by both houses and presentment to the President.<sup>31</sup>

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24. Finkel & Sullivan, *supra* note 3, at 715.

25. *Id.* at 715–16; *see also* Melissa Healy, *GOP Seeks Moratorium on New Federal Regulations*, L.A. TIMES, Dec. 13, 1994, at A32 (reporting that Senate Majority Leader Bob Dole of Kansas and House Speaker Newt Gingrich of Georgia sent an open letter to the White House urging President Clinton to: (1) issue an executive order that imposes a moratorium on new federal rules, (2) "rout out unnecessary or inefficient regulations already on the books," and (3) "provide Congress with the internal analyses supporting its rule-making decisions").

26. *See generally* 5 U.S.C. §§ 801–802 (2012); MAEVE P. CAREY, ALISSA M. DOLAN & CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 11–16 (2016).

27. 462 U.S. 919 (1983).

28. *See* Finkel & Sullivan, *supra* note 3, at 722 n.77 (describing how *Chadha* impacted the way Congress designed the CRA).

29. *Chadha*, 462 U.S. at 959.

30. *See id.* at 958–59.

31. *See* 142 CONG. REC. 6926 (1996) (statement of Rep. Hyde) (noting that, after *Chadha*, "the one-house or two-house legislative veto . . . was thus voided," and as a consequence the

Accordingly, the CRA permits Congress to enact a “joint resolution of disapproval,” which, if “passed by both houses of Congress and signed by the President”—or two-thirds majorities in both houses to overcome a presidential veto—would overturn any rule promulgated by a federal administrative agency.<sup>32</sup> As with a presidential veto, a joint resolution of disapproval must be all-or-nothing, meaning that “all non-offending portions of the vetoed rule

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CRA’s authors developed a procedure that required passage by both houses of Congress and presentment to the President).

32. Parks, *supra* note 17, at 196. The CRA incorporates the broad definition of rule found in the Administrative Procedure Act (APA), which defines a “rule” as:

[T]he whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

5 U.S.C. § 551(4) (2012). The CRA also carves out three major exceptions into the definition of “rule.” The first exception excludes “rules 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.” 5 U.S.C. § 804(3)(A). The second exception covers “any rule relating to agency management or personnel.” 5 U.S.C. § 804(3)(B). Finally, “any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties” is also exempt from the definition of “rule.” 5 U.S.C. § 804(3)(C).

Notably, the CRA likely applies to rules that are exempt from notice-and-comment rule-making procedures, such as interpretive rules or statements of public policy. 5 U.S.C. § 553(b)(3)(B). Although the CRA incorporates the APA’s definition of a “rule” from § 551 (subject to the exceptions listed above), it does not incorporate any of the separate provisions in § 553 that exempt certain types of rules from rulemaking procedures. *See id.* If Congress had intended to incorporate the language of § 553 into the CRA, it would have done so explicitly. As such, agency guidance documents exempt from APA rulemaking procedures are likely subject to the CRA’s requirements. CAREY, DOLAN & DAVIS, *supra* note 26, at 6.

If this was not the case, agencies would otherwise be able to circumvent the accountability goals of the CRA. *See, e.g.*, 142 CONG. REC. 8197 (1996) (joint statement of Sens. Nickles, Reid & Stevens) (reflecting congressional intent to hold agencies accountable for overly burdensome regulations). Specifically, agencies would receive *Skidmore* deference on guidance they issue without regard to whether the guidance is substantially similar to the agencies’ prior, vetoed rules. *See United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) (holding that *Skidmore* deference based on an agency’s “power to persuade” applies to an agency’s guidance documents). As a result, it would be impossible to tell whether the agencies’ interpretations (embodied in their guidance documents) fall outside the agencies’ statutory authority (as amended by Congress’s joint resolutions of disapproval). Thus, applying the CRA to guidance documents is necessary.



must fall along with the offending ones” or the rule cannot be vetoed at all.<sup>33</sup>

In addition, the CRA requires that, before a regulation takes effect, the agency issuing the rule must submit a report that contains, among other things, the rule and its complete cost-benefit analysis (if required), to the Senate, House of Representatives, and the Comptroller General of the Government Accountability Office (GAO).<sup>34</sup> The report is then reviewed by the chairman and ranking member of each relevant committee in each congressional chamber.<sup>35</sup> Some types of rules, including those “relating to agency management or personnel” or those pertaining to the “monetary policy of the Federal Reserve System,” are not subject to this procedure.<sup>36</sup>

From the date that the agency submits its report of the rule, Congress has sixty session or legislative days<sup>37</sup> to pass the joint resolution. This procedure is “further expedited in the Senate, where debate over a joint resolution of disapproval is limited to a maximum of ten hours, effectively preventing any possibility of a filibuster.”<sup>38</sup> These enactment procedures are expedited “to try to provide Congress with an opportunity to act on resolutions of disapproval before regulated parties must invest the significant resources necessary to comply with a major rule.”<sup>39</sup>

Prior to President Donald J. Trump’s election, the CRA had been successfully used only once to overturn a regulation. Specifically, in 2001, with the signature of former President George W. Bush, Congress vetoed a rule on ergonomic standards from the Clinton Administration’s Occupational Safety

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33. Finkel & Sullivan, *supra* note 3, at 740; see 5 U.S.C. § 802 (requiring that a joint resolution of disapproval read: “That Congress disapproves the rule submitted by the \_\_\_ relating to \_\_\_, and such rule shall have no force or effect.”).

34. 5 U.S.C. § 801(a)(1)(A)–(B).

35. 5 U.S.C. § 801(a)(1)(C); Finkel & Sullivan, *supra* note 3, at 721.

36. 5 U.S.C. §§ 804(3), 807; Finkel & Sullivan, *supra* note 3, at 721.

37. A day is counted within the CRA using either legislative days (for the House of Representatives) or session days (for the Senate), and it often excludes counting days where either the House or the Senate is adjourned for more than three consecutive calendar days. Generally, if there are different time periods calculated as a result of differences between legislative days and session days, the CRA prescribes using the time period that gives Congress more time to consider action regarding a rule. 5 U.S.C. §§ 801(a)(3), 802(a); see also Daniel R. Pérez, *Congressional Review Act Fact Sheet*, REG. STUDS. CTR. (Nov. 21, 2016), [https://regulatorystudies.columbian.gwu.edu/congressional-review-act-fact-sheet#\\_ftn1](https://regulatorystudies.columbian.gwu.edu/congressional-review-act-fact-sheet#_ftn1) (explaining the procedures under the CRA).

38. Finkel & Sullivan, *supra* note 3, at 722; see 5 U.S.C. § 802(d)(2); cf. S. Res. 337, 110th Cong. (2007) (enacted) (requiring the affirmative vote of three-fifths of Senators to close debate on most legislative actions).

39. 147 CONG. REC. 2816 (2001) (statement of Sen. Jeffords) (noting that “scarce agency resources are also a concern” that justifies a stay on the enforcement of major rules).

and Health Administration (OSHA).<sup>40</sup> Since President Trump and his Administration took office, however, the White House and Republicans in control of the 115th Congress used the CRA to veto 14 out of the 15 “midnight” regulations promulgated by the Obama Administration.<sup>41</sup> These regulations include the Department of the Interior’s Office of Surface Mining’s Stream Protection Rule, which was intended to protect streams from the negative environmental impacts of coal waste disposal.<sup>42</sup> They also include privacy protections for broadband Internet consumers passed by the

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40. See Act of Mar. 20, 2001, Pub. L. No. 107-5, 115 Stat. 7 (2001) (vetoing rule relating to ergonomics published at 65 Fed. Reg. 68,261 (Mar. 20, 2001)).

41. See Act of Feb. 16, 2017, Pub. L. No. 115-5, 131 Stat. 10 (2017) (vetoing Stream Protection Rule, 81 Fed. Reg. 93,066 (Dec. 20, 2016)); Act of Apr. 3, 2017, Pub. L. No. 115-22, 131 Stat. 88 (2017) (vetoing Protecting the Privacy of Customers of Broadband and Other Telecommunication Services, 81 Fed. Reg. 87,274 (Dec. 2, 2016)); Act of Mar. 27, 2017, Pub. L. No. 115-14, 131 Stat. 78 (2017) (vetoing Teacher Preparation Issues, 81 Fed. Reg. 75,494 (Oct. 31, 2016)); Act of Mar. 27, 2017, Pub. L. No. 115-11, 131 Stat. 75 (2017) (vetoing Federal Acquisition Regulation; Fair Pay and Safe Workplaces, 81 Fed. Reg. 58,562 (Aug. 25, 2016)); Act of Feb. 24, 2017, Pub. L. No. 115-4, 131 Stat. 9 (2017) (vetoing Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,359 (July 27, 2016)); Act of Feb. 28, 2017, Pub. L. No. 115-8, 131 Stat. 15 (2017) (vetoing Implementation of the NICS Improvement Amendments Act of 2007, 81 Fed. Reg. 91,702 (Dec. 19, 2016)); Act of Mar. 31, 2017, Pub. L. No. 115-17, 131 Stat. 81 (2017) (vetoing Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants, 81 Fed. Reg. 50,298 (Aug. 1, 2016)); Act of Apr. 13, 2017, Pub. L. No. 115-23, 131 Stat. 89 (2017) (vetoing Compliance With Title X Requirements by Project Recipients in Selecting Subrecipients, 81 Fed. Reg. 91,852 (Dec. 19, 2016)); Act of Mar. 27, 2017, Pub. L. No. 115-12, 131 Stat. 76 (2017) (vetoing Resource Management Planning, 81 Fed. Reg. 89,580 (Dec. 12, 2016)); Act of Mar. 27, 2017, Pub. L. No. 115-13, 131 Stat. 77 (2017) (vetoing Elementary and Secondary Education Act of 1965, as Amended by the Every Student Succeeds Act-Accountability and State Plans, 81 Fed. Reg. 86,076 (Nov. 29, 2016)); Act of May 17, 2017, Pub. L. No. 115-35, 131 Stat. 848 (2017) (vetoing Savings Arrangements Established by States for Non-Governmental Employees, 81 Fed. Reg. 59,464 (Aug. 30, 2016)); Act of Apr. 13, 2017, Pub. L. No. 115-24, 131 Stat. 90 (2017) (vetoing Savings Arrangements Established by Qualified State Political Subdivisions for Non-Governmental Employees, 81 Fed. Reg. 92,639 (Dec. 20, 2016)); Act of Apr. 3, 2017, Pub. L. No. 115-20, 131 Stat. 86 (2017) (vetoing 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)); Act of Apr. 3, 2017, Pub. L. No. 115-21, 131 Stat. 87 (2017) (vetoing 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)).

42. Stream Protection Rule, 81 Fed. Reg. at 93,066.

Federal Communications Commission.<sup>43</sup> In vetoing the midnight regulations, Congress did not explain its basis for doing so in any of its joint resolutions of disapproval even though the CRA does not explicitly “bar a joint disapproval resolution from having a preamble [that] . . . describ[es] the reasons for, and intent of, a measure.”<sup>44</sup> Either way, the CRA received a lot of attention<sup>45</sup> in the first few months of President Trump’s tenure in the White House because of its widespread use to roll back Obama-era regulations.<sup>46</sup>

Congress had until May 11, 2017, to use the CRA to issue joint resolutions on regulations promulgated on or after June 13, 2016.<sup>47</sup> Although the deadline has since expired, regulated entities and industry groups may nevertheless challenge any reissued regulations in court on the basis that they are substantially the same as prior, vetoed regulations. This would make it necessary

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43. *Id.*; Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 Fed. Reg. at 87,274.

44. See CAREY, DOLAN & DAVIS, *supra* note 26, at 13, 13 n.64.

45. See, e.g., David A. Baay & Robert A. Lemus, *Legal Alert: A Sea of Change: The Congressional Review Act and Energy Regulation*, EVERSHEDES SUTHERLAND (May 24, 2017), <http://www.lexology.com/library/detail.aspx?g=674e68b3-7f03-40be-ad69-7194570c5ada> (describing the rules vetoed by Congress under the CRA); Skibel & Koss, *supra* note 23 (describing the same).

46. The CRA is one of several tools being used by the current Administration and Congress to reduce regulation. On January 30, 2017, President Trump signed an executive order requiring agencies to repeal at least two existing rules when they propose or issue a new rule; anytime agencies issue a new rule, they must repeal at least two existing rules that impose aggregate costs that are at least as large as the costs imposed by the new rule. See Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017). In addition, on January 3, 2017, U.S. Representative John Ratcliffe introduced a bill entitled the “Separation of Powers Restoration Act,” which would modify the scope of judicial review of agency action under § 706 of the APA. See H.R. 76, 115th Cong. § 2 (2017). The bill requires courts reviewing agency action to decide cases de novo, i.e., without giving *Chevron* or *Auer* deference to the agency’s interpretation, on “all relevant questions of law, including the interpretation of: (1) constitutional and statutory provisions, and (2) rules made by agencies.” *Id.*; see *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (providing framework for judicial deference to agency interpretations of statutes); *Auer v. Robbins*, 519 U.S. 452 (1977) (providing framework for deference to agency interpretations of regulations). On January 11, 2017, the House of Representatives passed a separate version of the bill entitled the “Regulatory Accountability Act,” which was introduced by House Judiciary Chairman Bob Goodlatte. The bill has since subsumed H.R. 76. See H.R. 5, 115th Cong. (Jan. 11, 2017). On April 26, 2017, Republican Senator Rob Portman and Democratic Senator Heidi Heitkamp introduced their own bipartisan version of the Regulatory Accountability Act, which, unlike H.R. 76 and H.R. 5, would not eliminate *Chevron* deference. S. 951, 115th Cong. (Apr. 26, 2017). The bills and the executive order fall outside the scope of this Article.

47. Baay & Lemus, *supra* note 45.

for the courts to decide how to interpret “substantially the same.”<sup>48</sup>

The issue is also expected to arise in the aftermath of a recent veto of a Securities and Exchange Commission (SEC) rule, which was promulgated pursuant to § 1504 of the Dodd-Frank Act.<sup>49</sup> Section 1504 requires the SEC to issue rules to make publicly traded companies that extract resources disclose their payments to governments around the world.<sup>50</sup> The SEC complied with its statutory mandate and issued such a rule.<sup>51</sup> On February 14, 2017,

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48. Some prominent attorneys are arguing that the deadline never expired for many rules that were never properly submitted to Congress. Specifically, Todd Gaziano, a “top official at Pacific Legal who was the chief legislative counsel to the CRA’s sponsor, former Rep. David McIntosh (R-Ind.), said over the years agencies have failed to properly report hundreds if not thousands of rules to Congress as mandated by the CRA.” Arianna Skibell, *Conservatives Ponder Expansion of Congressional Review Act*, E&E NEWS DAILY (Mar. 7, 2017), <https://www.ee-news.net/eedaily/stories/1060051033/print>. According to Gaziano, this “renders the rules legally unenforceable.” *Id.* In addition, Wayne Crews, “vice president for policy and director of technology studies at the Competitive Enterprise Institute, said if rules are identified that were not properly submitted to Congress, he expects there will be legal challenges by affected parties.” *Id.* Gaziano states that Pacific Legal is “already looking into adding this argument to currently pending cases against enforced rules, and potentially bringing new lawsuits against rules he said are being enforced illegally, and that “[s]hould agencies choose to send these rules now, the window for congressional disapproval would open, giving lawmakers sixty legislative days to toss rules dating as far back as the law itself.” *Id.* If Congress were to toss any of these rules, and the agencies were to reissue them, this would open the door for private entities to challenge the rules before a judge on the basis that the rules are substantially the same as the vetoed rules, and therefore invalid. This would make it necessary for courts to define “substantially the same.” As a result, the issue is not expected to disappear any time soon.

In fact, the consequences of agencies failing to report their rules are already playing out. On October 24, 2017, Congress vetoed a rule issued by the Bureau of Consumer Financial Protection that had prevented banks and financial institutions from inserting mandatory arbitration language into consumer contracts. Act of Nov. 1, 2017, Pub. L. No. 115-74, 131 Stat. 1243 (2017) (vetoing Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017)). The agency only submitted its report on the rule to the Senate on July 13, 2017. Furthermore, it only published its rule in the Federal Register on July 19, 2017. As a result, the clock for sixty legislative days did not begin ticking until July 19, which allowed Congress plenty of time to veto the rule. Alan S. Kaplinsky, *What is the Deadline for the Senate to Pass a CRA Resolution to Override the CFPB’s Arbitration Rule?*, JDSUPRA (Oct. 3, 2017), <https://www.jdsupra.com/legal-news/what-is-the-deadline-for-the-senate-to-56309/>.

49. 15 U.S.C. § 78m(q)(2)(A) (2012); Act of Feb. 14, 2017, Pub. L. No. 115-4, 131 Stat. 9 (2017) (vetoing Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,359 (July 27, 2016)).

50. 15 U.S.C. § 78m(q)(2)(A). *But see* Financial CHOICE Act, H.R. 10, 115th Cong. (2017) (repealing the Dodd-Frank Act’s financial disclosure requirement if enacted).

51. Disclosure of Payments by Resource Extraction Issuers, 81 Fed. Reg. 49,359 (July

however, Congress, with the President's signature, vetoed the rule under the CRA.<sup>52</sup> This is problematic because, like any joint resolution of disapproval, the resolution does not alter the SEC's underlying mandate in its enabling statute that requires the SEC to issue payment disclosure rules. This imposes on the agency a Hobson's Choice. Namely, the agency is required under the Dodd-Frank Act to issue a new rule and interest groups could sue the agency for failing to do so—but if it does, the agency runs the risk of having its new rule struck down for being substantially the same as the old rule. Experts believe that this dilemma illustrates a tension between the CRA and the Dodd-Frank Act, which will require the courts to define “substantially similar” for the first time in the CRA's twenty-year history.<sup>53</sup> As a result, the issue of how to interpret “substantially the same” is very timely. Therefore, it is useful to have a roadmap of the various related issues that will likely arise at litigation, as well as recommendations on how to resolve them.

## II. ANALYSIS

### *A. The Courts May Assert Judicial Review over Cases Arising Under the Congressional Review Act*

Before addressing the issue of how to interpret “substantially the same” or whether the courts can interpret the phrase, it is necessary to address whether the courts can assert judicial review under the CRA at all. Resolving this issue requires analysis of § 805 of the CRA.

Section 805 states that “[n]o determination, finding, action, or omission under this chapter shall be subject to judicial review.”<sup>54</sup> The question is whether this language precludes the courts from asserting judicial review over any claims arising under the CRA. The short answer is “no.” Rather, § 805's language should be interpreted to allow judicial review of a rule even if Congress itself declines to overturn the rule. Such an interpretation is consistent with the CRA's language, its legislative history, and the presumption in favor of judicial review of agency action.

#### *1. The Majority of Federal Courts Have Declined to Assert Judicial Review Under the Congressional Review Act*

Most courts up to this point have concluded that the CRA does not permit judicial review. These courts have analyzed § 805 and determined that it

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27, 2016) (to be codified at 17 C.F.R. pts. 240, 249b).

52. See Act of Feb. 14, 2017, Pub. L. No. 115-4, 131 Stat. 9 (2017).

53. See Skibell & Koss, *supra* note 23.

54. 5 U.S.C. § 805 (2012).

unambiguously precludes judicial review of any issue arising under the CRA.<sup>55</sup> Specifically, they have interpreted § 805 broadly while rejecting the argument that it “only forecloses review of any ‘determination, finding, action, or omission’” made *by Congress*.<sup>56</sup> For example, in *Texas Savings v. Federal Housing Finance Board*,<sup>57</sup> the district court reasoned that it must follow the “plain language” of the statute, which bars review of *actions* generally—including agency action—and does not limit its scope to actions *by Congress under this chapter*.<sup>58</sup> According to the court, “the language could not be plainer” and any alleged failure to comply with the CRA “is not subject to review.”<sup>59</sup>

The D.C. Circuit Court of Appeals, in *Montanans for Multiple Use v. Barbouletos*,<sup>60</sup> likewise held that § 805 of the CRA unequivocally precludes a court from deciding any issue arising under the statute.<sup>61</sup> Accordingly, the court rejected the argument that a regulation can be invalidated when an agency allegedly fails to comply with the reporting requirements of the CRA. In addition, the Tenth Circuit Court of Appeals rejected a challenge to an agency action based on the statute, stating in a footnote that “[t]he Congressional Review Act specifically precludes judicial review of an agency’s compliance with its terms.”<sup>62</sup>

55. CAREY, DOLAN & DAVIS, *supra* note 26, at 18; *see, e.g.*, *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009); *Via Christi Reg’l Med. Ctr. v. Leavitt*, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007); *United States v. Carlson*, No. 12-305 (DSD/LIB), 2013 WL 5125434, at \*15 (D. Minn. Sept. 12, 2013); *United States v. Ameren Mo.*, No. 4:11-CV-77 RWS, 2012 WL 2821928, at \*3–4 (E.D. Mo. July 10, 2012); *Forsyth Mem’l Hosp. v. Sebelius*, 667 F. Supp. 2d 143, 150 (D.D.C. 2009); *Provena Hosps. v. Sebelius*, 662 F. Supp. 2d 140, 154–55 (D.D.C. 2009); *New York v. Am. Elec. Power Serv. Corp.*, Nos. 2:04-CV-1098, 2:05 CV 360, 2006 WL 1331543, at \*13–15 (S.D. Ohio Mar. 21, 2006); *United States v. Am. Elec. Power Serv. Corp.*, 218 F. Supp. 2d 931, 949 (S.D. Ohio 2002); *Tex. Sav. & Cmty. Bankers Ass’n v. Fed. Hous. Fin. Bd.*, No. A 97 CA 421 SS, 1998 WL 842181, at \*7 n.15 (W.D. Tex. June 25, 1998).

56. *See, e.g.*, *Texas Savings*, 1998 WL 842181, at \*7 n.15.

57. *Id.*

58. *Id.* at \*6–7.

59. *Id.* at \*7; *see* Sean D. Croston, Recent Development, *Congress and the Courts Close Their Eyes: The Continuing Abdication of the Duty to Review Agencies’ Noncompliance with the Congressional Review Act*, 62 ADMIN. L. REV. 907, 912–15 (2010) (describing *Texas Savings* and the rest of the case law pertaining to judicial review under the CRA); CAREY, DOLAN & DAVIS, *supra* note 26, at 18–19 (same).

60. 568 F.3d 225 (D.C. Cir. 2009).

61. *Id.* at 229.

62. *Via Christi Reg’l Med. Ctr. v. Leavitt*, 509 F.3d 1269, 1271 n.11 (10th Cir. 2007); *see also* CAREY, DAVIS & DOLAN, *supra* note 26, at 12 (stating that “it is unlikely that an affected party would be able to challenge in court an agency’s failure to submit a rule to Congress

By contrast, in *United States v. Southern Indiana Gas & Electric Co.*,<sup>63</sup> a federal district court reached the opposite conclusion and held that courts could review a claim based on an agency's non-compliance with the CRA.<sup>64</sup> Specifically, the court stated that the statute could be reasonably interpreted in two ways. First, the statute could be read broadly to prohibit judicial review of any question arising under the CRA, the approach taken by the majority of courts.<sup>65</sup> Second, the statute could be read to "preclude judicial review [only] of Congress' own determinations, findings, actions, or omissions made under the CRA after a rule has been submitted to it for review."<sup>66</sup>

Ultimately, the court rejected the broad interpretation, reasoning that agencies would be able to "evade the strictures of the CRA [once the sixty legislative day period expires] by simply not reporting new rules."<sup>67</sup> The court reasoned that this outcome conflicts with the CRA's goal of preventing agencies from "essentially legislat[ing] without Congressional oversight."<sup>68</sup> As a result, the court disagreed with the majority trend articulated in *Texas Savings* and concluded that it was allowed to hear a regulated entity's challenge to a rule alleging non-compliance with the CRA.

## 2. *The Minority Viewpoint in the Caselaw Asserting Judicial Review is More Consistent with the Language of the Statute*

Although the holding in *Southern Indiana Gas & Electric Co.* reflects a minority viewpoint among the federal courts, it should be adopted for a host of reasons. First, asserting judicial review comports with the language of the CRA. As stated above, § 805 only precludes judicial review of a "determination, finding, action, or omission *under this chapter*."<sup>69</sup> As the court stated in *Southern Indiana Gas & Electric Co.*, "[a]gencies do not make findings and determinations under this chapter," but Congress does.<sup>70</sup> Thus, it is reasonable to conclude that § 805 precludes judicial review only of congressional "determinations, findings, actions, or omissions"—as opposed to findings or determinations made *by an agency* that a reissued rule is not substantially the same

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pursuant to the CRA, because the statute explicitly states that 'no determination, finding, action, or omission under [the CRA] shall be subject to judicial review.'").

63. No. IP99-1692-C-M/S, 2002 WL 31427523, at \*1 (S.D. Ind. Oct. 24, 2002).

64. *See id.* at \*10.

65. *See id.* at \*5.

66. *Id.* (emphasis added).

67. *Id.*

68. *Id.*

69. 5 U.S.C. § 805 (2012) (emphasis added).

70. *S. Ind. Gas & Elec. Co.*, 2002 WL 31427523, at \*5.

as the prior version of the rule.<sup>71</sup>

In addition, if Congress wanted the applicability of the provisions of the CRA to be precluded from judicial review, it would have explicitly said so; however, Congress chose not to do so.<sup>72</sup> Instead, it “limited its judicial review preclusion by referring to determinations, findings, actions and omissions made under the CRA.”<sup>73</sup> Furthermore, the existence of the “substantially the same” language in § 801(b)(2) implies that Congress intended to allow for judicial review of agency action under the CRA. If the courts cannot assert review, they will be unable to define what “substantially the same” means. This would render the phrase meaningless. Although Congress itself would be able to rely on the “substantially the same” phrase to veto a rule, Congress does not need to do so because it can strike down rules on a new substantive basis or even no basis at all.<sup>74</sup> That Congress specifically included “substantially the same” in the statute implies that Congress intended for the courts to carry out their judicial function by interpreting the phrase and enforcing it against agencies that exceed their statutory authority. The judiciary’s ability to do this would be hampered if it cannot assert judicial review.

For similar reasons, precluding judicial review here would conflict with the rule against redundancy of statutory construction. The rule against redundancy “presumes that when drafting a statute, Congress means what it says and that each word is the result of thoughtful and careful deliberation.”<sup>75</sup> The reasoning “is that Congress makes sure to choose its words carefully in drafting a statute and therefore each word should have independent force.”<sup>76</sup> Under this technique of statutory construction, the courts should preserve the independent meaning of “substantially the same” by allowing themselves to interpret it. They cannot do so without asserting review.

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71. *Id.*

72. *Id.* at \*6.

73. *Id.*; see also Croston, *supra* note 59, at 916–17.

74. See generally 5 U.S.C. §§ 801–808; see also Finkel & Sullivan, *supra* note 3, at 709 (stating that Congress may veto a rule “either for [a] violation of the ‘substantially the same’ prohibition or on a new substantive basis”).

75. Michael J. Cole, *Avoiding a Hobson’s Choice: Why EPA’s Tailoring Rule is a Valid Act of Agency Discretion*, 28 J. LAND USE & ENVTL. L. 261, 326 (2013); see *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883) (holding that the courts should “give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed”).

76. Cole, *supra* note 75, at 326; see *Bailey v. United States*, 516 U.S. 137, 146 (1996) (rejecting an interpretation that would have made “uses” and “carries” redundant in a statute penalizing using or carrying a firearm in commission of the offense involved on the basis that the court could assume Congress used two terms with the intention of each having a “particular, non-superfluous meaning”).



### 3. *The Legislative History of the Congressional Review Act Supports Judicial Review*

The courts' ability to assert review is also supported by the legislative history of the statute.<sup>77</sup> The Congressional Record makes clear that a court may decide whether an agency whose rule has been struck down has the legal authority to issue a “substantially different” rule.<sup>78</sup> The CRA only places one limitation on this general rule—it prohibits a court from inferring that Congress intended to support a rule merely on the basis that Congress declined to disapprove of the rule when it had the chance.<sup>79</sup> In other words, a court may not use the fact that Congress declined to disapprove of a new rule to infer that it is not substantially the same as an old rule. This implies, however, that a court may—in fact, *must*—use its *own* independent judgment to determine whether a challenged rule is “substantially the same as the prior rule” and hence invalid.<sup>80</sup>

To make this determination, however, the courts must assert judicial review under the CRA. To do so, they need to interpret the preclusive language in § 805 narrowly to cover only determinations, findings, actions, or omissions of Congress and not determinations or findings of agencies. If agencies find that their reissued rules are not substantially the same as their prior, vetoed rules,<sup>81</sup> that finding must be reviewable.

### 4. *The APA's Presumption of Judicial Review and its Constitutional Underpinnings Apply to Agency Action Under the Congressional Review Act*

Refraining from applying § 805's preclusive language to agencies is a valid approach that is bolstered by the presumption in favor of judicial review of

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77. See Finkel & Sullivan, *supra* note 3, at 732 n.122.

78. See 142 CONG. REC. 8199 (1996) (statement of Sens. Nickles, Reid & Stevens) (“[A] court with proper jurisdiction may review the resolution of disapproval and the law that authorized the disapproved rule to determine whether the issuing agency has the legal authority to issue a substantially different rule.”).

79. See 5 U.S.C. § 801(g) (“If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.”).

80. See Finkel & Sullivan, *supra* note 3, at 732 n.122 (making this argument to contend that the legislative history supports judicial review under the CRA).

81. Presumably, agencies would make a finding of substantial dissimilarity in the preambles to their reissued rules. See Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed*, 80 GEO. WASH. L. REV. 1414, 1427–28 (2012) (explaining that heightened standards of judicial review force agencies to assemble the record and draft a preamble justifying the rule in order to explain how it meets judicial requirements).

agency action. This presumption arises under § 701(a)(1)<sup>82</sup> of the Administrative Procedure Act (APA) and is judicially created. The language in § 701(a)(1) provides that judicial review of agency action does not apply “to the extent” that statutes preclude judicial review.<sup>83</sup> Determining whether statutes preclude review becomes more complicated, however, when statutes like the CRA do not *expressly* preclude review of agency action.<sup>84</sup> In such situations, the courts typically presume that Congress intends for review to be available unless evidence exists to the contrary.<sup>85</sup>

The seminal case creating this presumption of judicial review is *Abbott Laboratories v. Gardner*.<sup>86</sup> Leading up to the case, the Food and Drug Administration (FDA) had issued a regulation under the amendments to the Federal Food, Drug, and Cosmetic Act (FFDCA) that required prescription drug manufacturers to include generic names for drugs each time they used the drugs’ commercial names on any labels or promotional materials.<sup>87</sup> The purpose of the rule was to “bring to the attention of doctors and patients the fact that many drugs were available in a much cheaper generic form than that sold by a particular manufacturer under a commercial name.”<sup>88</sup>

The rule was “challenged by 37 drug manufacturers and their trade association.”<sup>89</sup> “Although neither the language of the [FFDCA] nor its amendments explicitly “precluded judicial review . . . , the government argued that because the [FFDCA] provided specific procedures for judicial review of certain other types of rules, substituting for the APA, the [FFDCA’s] lack of any specific procedures for the rules in question suggested that no review should be available.”<sup>90</sup>

The Supreme Court rejected this argument. It stated that the APA “embodies [a] . . . presumption of judicial review.”<sup>91</sup> Consequently, the Court held that the government has the burden of overcoming this presumption by demonstrating a “persuasive reason to believe” that Congress intended to cut off review.<sup>92</sup> According to the Court, the government must prove such intent

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82. 5 U.S.C. § 701(a)(1).

83. *Id.*

84. See WILLIAM F. FUNK & RICHARD H. SEAMON, ADMINISTRATIVE LAW 236–39 (5th ed. 2016) (describing the standard for statutory preclusion of judicial review).

85. *Id.* at 237.

86. 387 U.S. 136 (1967).

87. FUNK & SEAMON, *supra* note 84, at 236–37.

88. *Id.* at 237.

89. *Id.*

90. *Id.*

91. *Abbott Labs.*, 387 U.S. at 140.

92. *Id.*

by “clear and convincing evidence.”<sup>93</sup> The Court held that the government failed to meet this standard because it was insufficient to argue that specific procedures for judicial review existed in certain scenarios but not in others.<sup>94</sup>

The standards of *Abbott Laboratories*—the “‘presumption of judicial review’ and the need for ‘clear and convincing evidence’ to rebut that presumption—have been much repeated, but subsequent case law has lowered the barrier to findings of a preclusion of review.”<sup>95</sup> For example, in *Block v. Community Nutrition Institute*,<sup>96</sup> the Court pulled back from its statements requiring “clear and convincing evidence,” saying that the phraseology “is not a rigid evidentiary test but a useful reminder to courts that, where substantial doubt about the congressional intent exists, the general presumption favoring judicial review of administrative action is controlling.”<sup>97</sup> However, if “congressional intent to preclude judicial review is fairly discernible in the legislative scheme,” this suffices to establish preclusion.<sup>98</sup>

Despite the Court’s lessening of *Abbott Labs*’ embrace of judicial review, there remains a strong presumption against a statute totally precluding a person from obtaining judicial review of agency action.<sup>99</sup> And while this presumption may be overcome by less than clear and convincing evidence, the burden is still on the government to persuade a court that Congress intended to preclude review.<sup>100</sup>

This burden of proof, despite being a requirement of administrative law and not a constitutional requirement, has significant constitutional underpinnings. The link between the constitutional system of separated powers and the presumption of judicial review has been thoroughly described by leading administrative law scholars.<sup>101</sup> They have explained that the separation of powers doctrine “reserves a special role for an independent judiciary,” under

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93. *Id.* at 141.

94. *Id.*; FUNK & SEAMON, *supra* note 84, at 237.

95. FUNK & SEAMON, *supra* note 84, at 237.

96. 467 U.S. 340 (1984).

97. *Id.* at 351.

98. *Id.*

99. *See* FUNK & SEAMON, *supra* note 84, at 237.

100. *See id.*

101. *See* STEPHEN G. BREYER ET AL., ADMINISTRATIVE LAW AND REGULATORY POLICY 33–34 (4th ed. 1999) (describing the nexus between the Madisonian system of checks and balances and administrative law, and explaining how each statutory provision foreclosing review of executive action seems to raise its own unique set of issues, which makes it difficult to comprehensively resolve the constitutionality of statutory preclusion provisions as a whole); Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, 97 HARV. L. REV. 778, 785–89 (1984).

which judges must review regulations to ensure “executive officers’ obedience to legislative commands.”<sup>102</sup>

For example, in enacting the CRA and requiring agencies to report issuance of rules to the Senate, House of Representatives, and the GAO, Congress has imposed a legislative command on the Executive that could narrow the scope (albeit ambiguously) of Executive authority by prohibiting agencies from reissuing any rules that are substantially the same as a vetoed rule.<sup>103</sup> Imposing such a legislative boundary on the Executive is meaningless and futile, however, without an independent judiciary existing to interpret and enforce it.

The Supreme Court affirmed this understanding of the role of the judiciary in *Chadha* by articulating the underlying premise of the doctrine of separation of powers.<sup>104</sup> Specifically, the Court emphasized that “the Executive’s . . . administrative activity cannot reach beyond the limits of the statute that created it,” and that “the courts, when a case or controversy arises, can always ascertain whether the will of Congress has been obeyed, and can enforce adherence to statutory standards.”<sup>105</sup>

Preserving the judiciary’s ability to undertake this interpretation and enforcement role by asserting judicial review of claims arising under the CRA is consistent with the principles of separation of powers. Asserting judicial review preserves the Judicial Branch’s role, which is to interpret legislative commands and enforce executive compliance with them.<sup>106</sup> By abolishing this independent judicial check on the Executive, our tripartite system of government would effectively become a bipartite one with respect to the critical role of legislative oversight over executive authority that the CRA provides.<sup>107</sup>

It is unpersuasive to claim that Congress itself, “through its investigatory and legislative capacities,” could be the one to police and ensure that the

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102. Note, *supra* note 101, at 785.

103. See Finkel & Sullivan, *supra* note 3, at 752 (noting that “a resolution repealing a rule under the CRA limits an agency’s delegated authority by prohibiting it from promulgating a rule that is substantially similar”); see also Cohen & Strauss, *supra* note 17, at 104 (stating how a veto under the CRA “withdraws from agencies a range of substantive authority.”).

104. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983); Note, *supra* note 101, at 785–86.

105. *Chadha*, 462 U.S. at 953 n.16 (emphasizing that “[e]xecutive action under legislatively delegated authority . . . is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review”).

106. See *id.* (explaining why having judicial review is necessary for enforcing legislative boundaries on executive action).

107. See Note, *supra* note 101, at 785–86.

Executive complies with Congress's prior joint resolutions of disapproval.<sup>108</sup> In reality, Congress often has enough on its plate and has difficulty reaching agreement to take action as it is. This is compounded by the fact that Congress lacks any major political incentive to enforce the CRA. As Justice Kagan has noted, agencies exist in the Executive Branch and are at least nominally under presidential influence and control, which means that "Congress rarely is held accountable for agency decisions."<sup>109</sup> Specifically, if agencies secretly impose burdensome regulations without complying with the CRA, regulated entities that are upset will most likely not "take their anger out on Congress."<sup>110</sup> Rather, "[t]hey will blame the agencies, which are naturally at fault, and perhaps complain to the Office of Information and Regulatory Affairs . . . or other executive actors."<sup>111</sup> This results in a general "lack of interest" by Congress in enforcing the CRA.<sup>112</sup>

In addition, "the partisan and constituency interests of individual members of Congress usually prevent them from acting collectively to preserve congressional power—or, what is almost the same thing, to deny authority to the other branches of government."<sup>113</sup> For example, some members of Congress, despite serving in the political party that opposes the agency's rule, will be pleased that the agencies are evading congressional oversight—or at least they will not object to the rule—if they personally agree with, or benefit from, the agencies' policy decision.<sup>114</sup> And although many members of Congress will not agree with the substantive outcome of the rule, they will often have more pressing legislative concerns on their agenda which will require them to prioritize how they use their limited political capital.<sup>115</sup> And perhaps others in Congress will prefer to maintain the status quo and not want to risk incurring political backlash by attacking rules that the public supports, even if the rules are costly or burdensome.<sup>116</sup> "The director of regulatory studies at the libertarian Cato Institute suggested that many members of Congress

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108. *Id.* at 787 n.51.

109. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2347 (2001).

110. Croston, *supra* note 59, at 910.

111. *Id.*

112. Cindy Skrzycki, *Will Congress Wake Up to Its Rule-Blocking Weapon?*, WASH. POST (Feb. 13, 1998) [https://www.washingtonpost.com/archive/business/1998/02/13/will-congress-wake-up-to-its-rule-blocking-weapon/e4411cfb-5436-4531-8b93-902bcb42bc39/?utm\\_term=.3d7893dc1a48](https://www.washingtonpost.com/archive/business/1998/02/13/will-congress-wake-up-to-its-rule-blocking-weapon/e4411cfb-5436-4531-8b93-902bcb42bc39/?utm_term=.3d7893dc1a48) (quoting Robert Coakley, former House Small Business Committee staff member).

113. Kagan, *supra* note 109, at 2314.

114. Croston, *supra* note 59, at 910.

115. *See id.*

116. *Id.*

‘did not want to be perceived as being nasty’ in opposing certain rules.”<sup>117</sup> As a result, Congress has a structural disincentive to enforce the CRA.

In sum, Congress cannot, or at least does not, do much to force agencies to submit their rules in compliance with the CRA. As a result, without judicial enforcement, considerable executive non-compliance can, and does, occur.<sup>118</sup> Once the sixty legislative-day period has run, Congress is powerless to check the agency. Thus, it is necessary for the courts to step in.<sup>119</sup> In *Chadha*, the Court, in articulating its holding, explicitly assumed that separation of powers contemplates the availability of judicial review as well as congressional review.<sup>120</sup> Without judicial review, the “structure of checks and balances would give way to the operation” of largely unharnessed executive authority.<sup>121</sup> As a result, the principles of separation of powers provide strong support for the presumption of judicial review. This holds particularly true in the context of a private challenge alleging non-compliance with the CRA.<sup>122</sup> Accordingly, absent clear language in an agency’s enabling statute

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117. *Id.*

118. In fact, the Congressional Research Service circulated a report addressing how often federal agencies comply with the CRA. The report discovered that agencies failed to submit over 1000 substantive final rules to the Comptroller General between 1998 and 2008. CURTIS W. COPELAND, CONG. RESEARCH SERV., CONGRESSIONAL REVIEW ACT: RULES NOT SUBMITTED TO GAO AND CONGRESS (2009); *see also* Note, *supra* note 101, at 787 n.51 (arguing that “without case-by-case judicial review, considerable executive noncompliance [with legislative directives] might occur during the period before Congress act[s]”).

119. *See* Note, *supra* note 101, at 787 (arguing that judiciary’s ability to review agency action is a necessary corollary of the legislative “procedural and substantive limits placed on the authority of the executive”).

120. *See* *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (“Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.”).

121. Note, *supra* note 101, at 788.

122. Additional hurdles to obtaining judicial review may arise under enabling statutes that contain filing deadlines governing the time within which an agency’s rule may be challenged. For example, § 101(d) of the Federal Mine Health and Safety Act (Mine Act) allows people only sixty days to challenge the validity of a mandatory health and safety standard, and the clock starts ticking once the standard is promulgated. 30 U.S.C. § 811(d) (2012). Section 101(d) also states that “[t]he procedures in this subsection shall be the exclusive means of challenging the validity of a mandatory health or safety standard.” *Id.*; *see* *Consolidation Coal Co. v. Donovan*, 656 F.2d 910, 916 (3d Cir. 1981) (finding that the litigant was “barred from levying objections in court” against a Mine Act standard because the litigant had failed to “avail itself of the 60 day period . . . [for] seeking judicial review”). This kind of statutory deadline, when applicable, may impact a litigant’s ability to challenge a rule under the CRA.

Unlike the Mine Act, however, “most statutes that expressly foreclose judicial review of

expressly precluding judicial review or sufficiently persuasive evidence showing that Congress intended to cut off review, the courts should assert review over challenges to rules under the CRA.<sup>123</sup>

Allowing for judicial review under the CRA opens the door for regulated entities in administrative proceedings to appeal agencies' enforcement of rules to the federal courts after Congress has declined to veto the rules itself.<sup>124</sup> Alternatively,

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regulations after a stated period contain an express exemption for petitions that are based on matters that arise *after* the end of that period.” Ronald M. Levin, *Statutory Time Limits on Judicial Review of Rules: Verkuil Revisited*, 32 CARDOZO L. REV. 2203, 2214 (2011) (emphasis added). For example, although § 307(b)(1) of the Clean Air Act requires anyone adversely affected by a rule to file a petition for review challenging the rule “within sixty days,” it allows petitions to proceed if they are “based solely on grounds arising after [the] . . . sixtieth day.” 42 U.S.C. § 7607(b)(2) (2012). If such grounds arise, the sixty-day period begins anew, effectively giving the litigant a second chance to challenge the regulation. *Id.* It may be worth addressing in future research how the courts may apply these exemptions for late-filed claims arising solely after the filing deadline to regulated entities' challenges to rules under the CRA.

123. If Congress does cut off review, it is a mistake to argue that regulated entities have a right, as a matter of procedural due process, to challenge a reissued rule in court for being substantially the same as a vetoed rule. The existence of a constitutional right may strengthen a petitioner's ability to argue that it is entitled to judicial review of agency action. *See, e.g.,* *Califano v. Goldfarb*, 430 U.S. 99, 108 (1977); *Johnson v. Robison*, 415 U.S. 361, 366–67 (1974); *see also* Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187 (2018) (arguing that precluding judicial review under the CRA violates due process under the Fifth Amendment) [hereinafter Larkin, Jr., *Reawakening*]; Paul J. Larkin, Jr., *Judicial Review Under the Congressional Review Act*, HERITAGE FOUND. (Mar. 9, 2017), <http://www.heritage.org/the-constitution/report/judicial-review-under-the-congressional-review-act> (same) [hereinafter Larkin, Jr., *Judicial Review*]. Due process, however, does not apply to a petitioner's challenge to general lawmaking—such as a rule. *See* *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (holding that a tax applicable to a class of property owners does not trigger due process); *Londoner v. Denver*, 210 U.S. 373, 385–86 (1908) (holding that a tax assessed on an individual property owner does trigger due process); Kenneth C. Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193, 199–200 (1956). When an agency imposes a generally applicable rule, “the procedural safeguard of liberty and property in general lawmaking is the political process.” FUNK & SEAMON, *supra* note 84, at 109. By contrast, due process is required only when “[a] relatively small number of persons [are] concerned, who [are] exceptionally affected, in each case upon individual grounds.” *Bi-Metallic*, 239 U.S. at 446 (holding that due process is not required when the government assesses a property tax increase on a class of people); *cf. Londoner*, 210 U.S. at 385–86 (holding that due process is required when the government imposes a tax levy on an individual homeowner for the improvement of his street). Here, a petitioner challenging a generally applicable rule under the CRA has the benefit of being part of a large class of similarly situated people affected by the rule. As such, due process protections do not apply to § 801(b)(2) challenges.

124. *See* 5 U.S.C. § 702 (2012) (granting a right of judicial review to persons “suffering

a regulated party need not wait until an agency attempts to enforce the rules in order to raise challenges; as a second option, one may go on the offensive and bring suit for declaratory judgment or injunctive relief to prevent the agency from ever enforcing the rules in the first place.<sup>125</sup>

In either of these scenarios, the regulated entities may argue that the federal courts must interpret the CRA to decide whether a reissued rule is “substantially the same” as a vetoed rule.<sup>126</sup> The courts would need to decide whether they could consider this issue.

*B. The Judiciary May Decide How to Interpret “Substantially the Same” as a Necessary Part of its Constitutional Authority to Decide Cases and Controversies Arising Under Federal Statutes*

Several commentators have raised concerns about excessive delegations of authority by Congress to the judiciary.<sup>127</sup> Some have also suggested that Congress’s creation of the vague language, “substantially the same,” constitutes such an excessive delegation.<sup>128</sup> These claims, however, rest upon the invalid premise that the non-delegation doctrine applies to the judiciary.

*1. Overview of the Non-Delegation Doctrine*

To understand why this premise is invalid, it is important to have a basic understanding of the non-delegation doctrine. The non-delegation doctrine rests on the principle that the Congress of the United States is vested with “all legislative powers” by Article One, Section 1 of the Constitution, and, as a result, Congress cannot delegate those powers to the Executive Branch of government.<sup>129</sup> This is based on the theory that one branch of government cannot abdicate its duties by authorizing another branch to exercise its own

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legal wrong because of agency action”); *id.* § 706(2)(C) (conferring to courts the authority to strike down agency action that is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”); *see also id.* § 704 (requiring that aggrieved parties exhaust their administrative remedies before challenging final agency action in federal court).

125. Finkel & Sullivan, *supra* note 3, at 733.

126. *Id.* at 733–34.

127. *See* Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Non-delegation Doctrine*, 81 S. CAL. L. REV. 405, 407–10 (2008); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2440–44 (2003) (invoking non-delegation principles to argue against the judiciary’s practice of disregarding the clear language of statutes to avoid absurd results); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 41 & n.182 (1985) (arguing that there may be limits on Congress’s ability to delegate common lawmaking power to federal courts).

128. *See* Cohen & Strauss, *supra* note 17, at 104–05; Parks, *supra* note 17, at 200–01.

129. U.S. CONST. art. I, § 1.



constitutionally authorized powers. This theory is implicit in the Constitution's structural system of separated powers and well-established case law.<sup>130</sup>

At the same time, however, the Supreme Court in *J. W. Hampton, Jr. & Co. v. United States*,<sup>131</sup> held that Congress may delegate its legislative authority to the Executive Branch as an implied power of Congress under the Constitution, as long as it provides an "intelligible principle" to guide the agencies.<sup>132</sup> If it does so, congressional delegations of legislative power are not "forbidden."<sup>133</sup>

*2. Arguments Exist to Support the Non-Delegation Doctrine's Application to Statutes Interpreted by the Judiciary.*

Whether the non-delegation doctrine applies both when agencies interpret statutes *and* when the judiciary interprets statutes is a huge issue. Professor Margaret Lemos argues that the answer is yes because judicial statutory interpretation—the creation of law by gap-filling in a statute—constitutes the same delegated exercise of a "lawmaking function" that occurs when agencies "fill in the gaps left by broad statutory delegations of power."<sup>134</sup> She points out that the courts that have upheld the non-delegation doctrine as applied to agencies have done so based on the reasoning that Congress cannot legislate every detail on its own, because if Congress were

130. See, e.g., *Whitman v. Am. Trucking Ass'n Inc.*, 531 U.S. 457, 488 n.2 (2001) (Stevens, J., concurring) (explaining the underlying separation of powers rationale of the non-delegation doctrine); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30, 551 (1935) (finding statute unconstitutional under the non-delegation doctrine).

131. 276 U.S. 394 (1928).

132. *Id.* at 409.

133. *Id.*

134. Lemos acknowledges that "courts and agencies are by no means identical." Lemos, *supra* note 127, at 408. She contends, however, that they nevertheless "share a common status as recipients of congressional delegations." *Id.* She argues that:

Just as agencies exercise a lawmaking function when they fill in the gaps left by broad delegations of power, so too do courts. And, to the extent that lawmaking by agencies triggers constitutional anxieties about the proper allocation of power among the three branches, so too should delegated lawmaking by courts.

*Id.*; see also Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036 (2006) ("When a legislature delegates . . . [authority to interpret a statute, it] must choose the institution to which it will delegate this power. Perhaps the most basic decision a legislature makes in this regard is whether to delegate primary interpretive authority to an administrative agency or to the judiciary.").

required to do so, the legislative process would be slowed down dramatically.<sup>135</sup> According to Lemos, this constitutional principle applies with equal force to justify delegations to courts.<sup>136</sup>

However, Lemos also contends that many of the reasons used to justify delegations to agencies—including agency expertise, accountability, accessibility, and flexibility—“do not extend to delegations to courts.”<sup>137</sup> For example, Lemos states that generalist judges tend to lack the specialized expertise possessed by agency staff, which in turn may hamper judges’ abilities to understand technical issues that are relevant to deciding a case.<sup>138</sup> Furthermore, due to their judicial independence, judges lack political accountability—as opposed to agency officials, who are held accountable, at least indirectly, due to their relationship with the President (e.g., through the appointment and removal processes and executive orders), as well as with the Congress (e.g., through the confirmation, budget control, and oversight processes).<sup>139</sup>

In addition, Lemos argues that agencies are designed to be accessible to public participation (e.g., through the notice-and-comment rulemaking process), whereas the courts are not as accessible, as they can only hear arguments from parties to a case, and that “rules of standing, ripeness, and mootness limit who can get in the courthouse door, and when, and why.”<sup>140</sup> Finally, judicial lawmaking tends to be more rigid than the agency rulemaking process, which can be used to adapt rules to respond to new information or changed circumstances.<sup>141</sup> For these reasons, Lemos acknowledges that the reasons for allowing delegations to courts are in some ways weaker than those for agencies—but argues that the courts should, at the very least, be pulled into the sphere of the non-delegation doctrine.<sup>142</sup>

Several other commentators have also raised concerns about excessive delegations of lawmaking authority to the courts and argued that the vague

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135. Lemos, *supra* note 127, at 428–29; *see also Am. Trucking Ass’n Inc.*, 531 U.S. at 488 n.2 (Stevens, J., concurring) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society . . . Congress simply cannot do its job absent an ability to delegate power. . . .”)).

136. Lemos, *supra* note 127, at 434–37.

137. *Id.* at 445.

138. *Id.* at 445–48.

139. *Id.* at 448–50.

140. *Id.* at 450–53.

141. *Id.* at 453–55.

142. *Id.* at 408–09.

language, substantially the same, in the CRA presents “a possible constitutional problem.”<sup>143</sup> Specifically, Daniel Cohen, Peter Strauss, and Julie Parks suggest that, if judges were to interpret “substantially the same,” this would constitute an exercise of excessively delegated authority by Congress because the courts would determine the scope of the Executive’s authority while enabling Congress to shirk its legislative duties without assuming any political accountability on the issue.<sup>144</sup> In other words, the courts would improperly traverse into the role of the legislature.<sup>145</sup>

Cohen, Strauss, and Parks point out that, under the CRA process, Congress does not draft any legislative text that is held out to public or political scrutiny while vetoing a rule.<sup>146</sup> As such, Congress does not amend the text of the agency’s enabling statute. As a consequence, judges, in interpreting “substantially the same,” are the ones left to determine the scope of the Executive’s authority, thereby effectively allowing Congress to circumvent the bicameral and presentment processes required under the Constitution.<sup>147</sup>

By contrast, if Congress were to define “substantially the same” in the statute, it would be impossible to argue that Congress is attempting to escape from its political responsibilities or abdicating its legislative duties because the statutory definition would proceed through both Houses of Congress as part of the drafting process and would be signed by the President in the political limelight.<sup>148</sup> However, as suggested by Cohen, Strauss, and Parks, such

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143. Cohen & Strauss, *supra* note 17, at 104–05; see *Congressional Review Act: Hearing before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 105th Cong. 135 (1997) [hereinafter, *Hearing on Congressional Review Act*] (statement of Peter L. Strauss, Betts Prof. of Law, Columbia University) (opining that “the form of disapproval [under the CRA] is constitutionally objectionable”).

144. See Cohen & Strauss, *supra* note 17, at 104–05; Parks, *supra* note 17, at 200 n.71, 201 nn.73–74.

145. See Cohen & Strauss, *supra* note 17, at 105; see Parks, *supra* note 17, at 200 n.71, 201 nn.73–74 (suggesting that Congress neglected to assume political accountability for defining executive authority, “leaving it up to the courts” to do so).

146. See Cohen & Strauss, *supra* note 17, at 105 (arguing that Congress has failed to explain its intent in vetoing agencies’ rules because the CRA sets out the precise language to be used in Congress’s joint resolutions of disapproval). Cohen & Strauss argue that, “[a]s a result, Congress may find it easy to tell an agency when it is wrong, but never specif[ies] how the agency could get it right.” *Id.* This “compound[s] the difficulties created by unclear initial delegations.” *Id.* Instead of taking “political responsibility for defining the agency’s authority, Congress leaves to the courts the task of working out the meaning of its Delphic ‘No!’ This is an evasion, not an assumption, of political control.” *Id.*

147. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983) (invalidating 8 U.S.C. § 1254(c)(2) (1982) after applying U.S. CONST. art. I, § 7)).

148. See Parks, *supra* note 17, at 201 (“By clearly defining ‘in substantially the same form,’

a definition cannot be judicially-created because it would constitute an excessive delegation of lawmaking authority to the courts.<sup>149</sup>

Cohen, Strauss, and Parks effectively build on the arguments articulated by Lemos and argue that the same principles underlying the non-delegation jurisprudence should apply to the CRA because Congress is avoiding political accountability—what the courts were trying to prevent from occurring in their non-delegation jurisprudence—by delegating the task of interpreting “substantially the same” to the courts.<sup>150</sup> The goal of preserving political accountability is reflected by Justices Rehnquist and Brennan, who have both previously expressed concern that Congress may abdicate its legislative duties to other branches of government while evading political accountability.<sup>151</sup> A

Congress would have avoided this dilemma and ensured that accountability to taxpayers was not diminished.”).

149. See Cohen & Strauss, *supra* note 17, at 104–05; Parks, *supra* note 17, at 200 n.71, 201 nn.73–74.

150. See Cohen & Strauss, *supra* note 17, at 104–05; Parks, *supra* note 17, at 200 n.71, 201 nn.73–74.

151. See, e.g., *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 684–86 (1980) (Rehnquist, J., concurring); *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring) (quoting *Greene v. McElroy*, 360 U.S. 474, 507 (1959) (“Without explicit action by law-makers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government are not endowed with authority to decide them.”)).

The concern of a lack of political accountability is also known as the “clarity-of responsibility” problem. Jide O. Nzelibe & Matthew C. Stephenson, *Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design*, 123 HARV. L. REV. 617, 625 (2000). As described by Jide Nzelibe and Matthew Stephenson, the “diffusion of authority among multiple government actors [and branches] makes it difficult for voters to figure out [which actor or branch] . . . to blame or reward, thereby weakening electoral incentives across the board.” *Id.* Consequently, “politicians may be excessively reluctant to undertake socially desirable policies because they will receive only a fraction of the credit.” *Id.* Further, “leading constitutional scholars and comparative political scientists, at least as far back as Woodrow Wilson,” have cited similar arguments “to claim that the American-style separation of powers hinders effective governance.” *Id.*; see also WOODROW WILSON, *CONGRESSIONAL GOVERNMENT* 281–82 (Transaction Publishers 2002) (1885) (“Each branch of the government is fitted out with a small section of responsibility, whose limited opportunities afford to the conscience of each many easy escapes. Every suspected culprit may shift the responsibility upon his fellows.”). This “clarity-of-responsibility problem may also make politicians more likely to take actions that benefit parochial interests at the expense of a majority of voters.” Nzelibe & Stephenson, *supra*, at 625–26. For instance, “Congress might delegate controversial or unpopular decisions to executive agencies, while continuing to influence these decisions behind the scenes, so as to deliver [benefits] . . . to special interest groups while blaming the agency for unpopular policies.” *Id.* at 626.

delegation to the judiciary presents more problems with political accountability than a delegation to an agency because, unlike agencies, Article III judges enjoy judicial independence in rendering their decisions.<sup>152</sup> As a result, a judge's interpretation of "substantially the same" would raise a significant constitutional concern because such a decision would affect the balance of power between the Executive and the Legislature without democratic participation.

This constitutional concern, according to Cohen, Strauss, and Parks, is compounded by the fact that Congress does not provide any explanations for why it is objecting to a vetoed rule in its joint resolutions of disapproval.<sup>153</sup> Such a lack of explanation may contribute to judges attempting to speculate or guess as to Congress's intent in vetoing a rule, without the guidance from any intelligible principle. This could result in judges rendering arbitrary decisions on how to interpret "substantially the same."<sup>154</sup> Under this argument, such an outcome would exacerbate the already-existing constitutional concern with Congress's excessive delegation of authority to the courts in the CRA.<sup>155</sup>

*3. The Arguments that Challenge the Constitutionality of § 801(b)(2) and Claim that the Non-Delegation Doctrine Applies to the Judiciary Must Ultimately Fail*

The above arguments, upon first blush, appear to form the basis for a creative and appealing constitutional challenge to the statute. There is an Achilles Heel, however, with questioning the constitutionality of "substantially the same" and claiming that the non-delegation doctrine applies to the judiciary. Namely, these arguments presuppose that the judiciary is exercising authority given to it by Congress in the first place. This presupposition, however, reflects a misunderstanding of the nature of our system of separated powers. In reality, the judiciary is exercising its *own* power. Specifically, Article III, Section Two, Clause One of the Constitution states that "[t]he judicial power shall extend to all cases, in law and equity, arising under . . . the laws of the United States."<sup>156</sup> Courts have consistently interpreted this clause to mean that, assuming a case or controversy exists, the judiciary has the inherent power to fashion substantive rules of law, including federal common law, when the Legislature has not spoken to the specific issue raised by an individualized dispute.<sup>157</sup> As such, the Judiciary is exercising its *own* power,

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152. Lemos, *supra* note 127, at 445–50.

153. Cohen & Strauss, *supra* note 17, at 105; Parks, *supra* note 17, at 201–02.

154. See Cohen & Strauss, *supra* note 17, at 105; Parks, *supra* note 17, at 201–02.

155. See Cohen & Strauss, *supra* note 17, at 105; Parks, *supra* note 17, at 201–02.

156. U.S. CONST. art. III, § 2, cl. 1.

157. See, e.g., *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (noting

which puts to rest any questions about the constitutionality of the CRA under the non-delegation doctrine.

Furthermore, the arguments of Lemos, Cohen, Strauss, and Parks, taken to their logical conclusion, would not only contradict Article III, Section Two, Clause One of the Constitution but would also invalidate the federal question statute published at 29 U.S.C. § 1331. Section 1331 states that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”<sup>158</sup> The provision has been interpreted, without question, to grant subject-matter jurisdiction to federal courts to hear civil cases when a plaintiff has alleged a violation “arising under” federal law.<sup>159</sup> For such a grant of jurisdiction to be meaningful, however, the courts must be able to resolve all necessary legal issues arising in a dispute without any limitation (assuming that a justiciable case and controversy exists and that the parties meet all relevant procedural requirements).<sup>160</sup> Any holding to the contrary would undermine and invalidate § 1331, a strange and extreme outcome.

Moreover, the validity of the courts’ inherent judicial power is reinforced by the fact that they apply the non-delegation doctrine to protect the role of the Judiciary from any intrusion by Congress. Specifically, the Supreme Court has prohibited Congress from authorizing agencies to have adjudicatory schemes that go too far in resembling those of the courts.<sup>161</sup> The Court does this to “protect the role of the independent judiciary . . . and to safeguard litigants’ rights to have claims decided before judges who are free from potential domination by other branches of government.”<sup>162</sup> This reasoning

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that “the Court has recognized the need and authority in some limited area to formulate what has come to be known as federal common law”); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 394 (1971) (demonstrating the Court’s rejection of an argument that the Fourth Amendment serves only as a limitation of federal defenses to state law claims and not as an independent limitation upon the exercise of federal power); *Nachwalter v. Christie*, 805 F.2d 956, 959 (11th Cir. 1986) (holding that “federal court[s] may create federal common law based on a federal statute’s preemption of an area . . . where the federal statute does not expressly address the issue before the court”); *see also* MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 140–41 (1995) (arguing that delegations to courts are unproblematic so long as they authorize courts to make law only in the context of a case or controversy).

158. 29 U.S.C. § 1331 (2012).

159. *See, e.g.*, *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 817 (1986) (defining the scope of the “arising under” clause); *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 28 (1983) (same).

160. *See Merrell Dow*, 478 U.S. at 817; *see also Franchise Tax*, 463 U.S. at 27–28.

161. *See Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1944–45 (2015).

162. *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848 (1986) (citing

implies that the judiciary operates under its own independent authority, separate from that provided by Congress. Accordingly, assuming that a case or controversy exists, the courts must have the inherent constitutional authority to decide how to interpret “substantially the same.”

*C. The Courts Should Interpret “Substantially the Same” Narrowly*

Many commentators have interpreted “substantially the same” broadly, believing that, once Congress vetoes a rule under the CRA, the agency is barred from ever regulating in the area of law addressed by the rule unless Congress gives the agency new authorization to do so.<sup>163</sup> As the Congressional Research Service (CRS) points out, however, inherent ambiguity exists regarding the meaning of “substantially the same” as well as what criteria should be considered in defining the term.<sup>164</sup> For example, the term can “be

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United States v. Will, 449 U.S. 200, 218 (1980)).

163. See, e.g., *Hearing on Congressional Review Act*, *supra* note 143, at 135 (statement of Professor Strauss) (claiming that the substantial similarity provision has a “doomsday effect”); see also Vernon Mogensen, *The Slow Rise and Sudden Fall of OSHA’s Ergonomics Standard*, WORKINGUSA, Sept. 2003, at 54, 72 (interpreting “substantially the same” to mean that “the agency that issued the regulation is prohibited from promulgating it again without congressional authorization”); Tom Struble, *Tom Struble: The Broadband Privacy CRA: Much Ado About...Something*, TOPEKA CAP.-J. (Apr. 19, 2017, 11:43 PM) <http://cjonline.com/opinion/columns/2017-04-19/tom-struble-broadband-privacy-cra-much-ado-about-something> (claiming that the Federal Communications Commission “cannot adopt new privacy or data security rules for [Internet Service Providers] unless Congress gives it new authority” because the CRA “prevents agencies from adopting ‘substantially similar’ rules going forward, unless Congress gives them new authorization to do so”).

164. See CAREY, DOLAN & DAVIS, *supra* note 26, at 16–17, 18 n.83. For the most part, no other statutory provisions in the U.S. Code contain any definitions of “substantially the same” that would provide any useful guidance for interpreting “substantially the same” in the CRA. The Code “contains over 270 provisions that include the terms ‘substantially similar’ or ‘substantially the same,’” but none of these provisions arise in scenarios remotely similar to the CRA. *Id.* at 17 n.81; see, e.g., 26 U.S.C. §§ 83, 168, 246 (2012); 49 U.S.C. §§ 30,141, 30,166 (2012). The one exception is the Federal Trade Commission Act (FTCA), 15 U.S.C. §§ 41–58 (2012), which prohibits the Federal Trade Commission (FTC) from issuing regulations “substantially similar” to prior rules governing children’s advertising if the rule is based on a theory that the children’s advertising constitutes an unfair trade practice. 15 U.S.C. § 57a(h). However, although this language is relevant to the CRA, “substantially similar” is undefined in the text of the FTCA and the case law does not shed any light on the issue either. As a result, this statutory provision does not lend any guidance on how courts should define “substantially the same” in the CRA.

determined by scope, penalty level, textual similarity, or administrative policy, among other factors.”<sup>165</sup>

The CRS raises several questions under these factors that illustrate the ambiguity of “substantially the same”:

If Congress objected to a specific section of language in a rule that was ultimately disapproved, would a rule that only removed that language be considered “substantially the same” as the original because the rest of the rule is identical to the original rule? If the agency reissued a rule in which it changed one standard listed in the original regulation, would that be substantially similar? If it changed the number of categories to which a standard applied would the rule still be “substantially the same”? These questions, for which no definitive answer is available, highlight the ambiguity in the meaning of “substantially the same.”<sup>166</sup>

### *1. Seven Different Proposed Interpretations of “Substantially the Same” Exist*

Finkel and Sullivan contend that at least seven different levels of stringency exist that Congress could possibly have chosen when it wrote the CRA and established the “substantially the same” test to govern the reissuance of related rules.

The first interpretation of “substantially the same” offered by Finkel and Sullivan is the least stringent for administrative agencies because it allows agencies to reissue an identical rule merely “if the agency asserts that external conditions have changed.”<sup>167</sup> An example of “external conditions” changing would be that the vote-count in Congress has changed or that the certain members have indicated a change of heart about the regulation at issue or even regulatory policy as a whole.<sup>168</sup> In such a scenario, the agency could simply “reissue a wholly identical rule” and claim that “although the regulation was . . . in ‘substantially the same form,’ the effect of the rule is now substantially different from what it would have been the first time around.”<sup>169</sup>

This approach

recognizes that the effects of regulation—or the estimates of those effects—can change over time even if the rule itself does not change. Our understanding of the science or economics behind a rule can change our understanding of its benefits or costs, or those benefits and costs themselves can change” as new technologies develop or “new hazards

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165. CAREY, DOLAN & DAVIS, *supra* note 26, at 17.

166. *Id.*

167. Finkel & Sullivan, *supra* note 3, at 734.

168. *Id.*

169. *Id.*



emerge.<sup>170</sup>

Under this scenario, the “reissued rule only becomes ‘substantially the same,’ in any sense that matters, if Congress votes to veto it again on [the same] grounds.”<sup>171</sup>

The second interpretation is slightly more restrictive for agencies, but only to a small degree. The interpretation allows for agencies to reissue an identical rule only if external conditions *actually* change, as opposed to the courts taking the agency at its word on the issue.<sup>172</sup>

Ultimately, however, these interpretations do not survive peer review. Larkin points out that these interpretations would “permit [an] agency to repromulgate the identical rule and so ignore . . . the CRA’s prohibition on reissuance of a rule that is ‘substantially similar.’”<sup>173</sup> According to Larkin, “a new rule that is identical to the one that Congress and the President disapproved is ‘substantially similar’ to the original rule under any rational interpretation of that term regardless of any change in its effect.”<sup>174</sup>

Larkin’s critique is correct because, as stated in § 801(b)(2), a rule that is vetoed under the CRA “may not be reissued in *substantially the same form*.”<sup>175</sup> This language is set apart from the following language in the same section, which states that “a new rule that is substantially the same as [a vetoed] . . . rule may not be issued.”<sup>176</sup> As stated above in the portion of the Article arguing for judicial review under the CRA,<sup>177</sup> the courts typically presume that Congress intended for separate phrases in a statute to have specific, non-superfluous meanings.<sup>178</sup> The courts should therefore preserve the independent meaning of the word “form” by prohibiting agencies from reissuing rules identical to those already vetoed.<sup>179</sup>

By contrast, Finkel and Sullivan’s third interpretation has merit because it requires agencies to change their reissued rules from their prior rules. Namely, “the reissued rule must be altered so as to have significantly greater benefits and/or significantly lower costs than the original rule.”<sup>180</sup> This is the interpretation for which Finkel and Sullivan generally advocate in their

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170. *Id.*

171. *Id.* at 735.

172. *Id.* at 734–35.

173. Larkin, Jr., *Reawakening*, *supra* note 123, at 42 n.178.

174. *Id.*

175. 5 U.S.C. § 801(b)(2) (2012) (emphasis added).

176. *Id.*

177. *See supra* Part II.A.2.

178. *See, e.g.*, *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).

179. *See* Larkin, Jr., *Reawakening*, *supra* note 123, at 42 n.178.

180. Finkel & Sullivan, *supra* note 3, at 735.

scholarship.

Under this interpretation, “the notion of ‘similar form’ would not be judged via a word-by-word comparison of the two versions of the rule.”<sup>181</sup> Rather, the issue would be determined “by a common-sense comparison of the stringency and impact of the rule.”<sup>182</sup> In practical terms, “two versions of a regulation that have vastly different impacts on society might contain 99.99% or more of their individual words in common and thus be *almost* identical in ‘form’ if that word was used in its most ordinary sense.”<sup>183</sup> For example, “an OSHA rule requiring controls on a toxic substance in the workplace . . . might contain thousands of words mandating engineering controls, exposure monitoring, record-keeping, training, issuance of personal protective equipment, and other elements, all triggered when the concentration of the contaminant exceeded some numerical limit.”<sup>184</sup> If OSHA reissued a vetoed toxic substance rule “with one single word changed (the number setting the limit), the costs and burdens could drop precipitously.”<sup>185</sup> Finkel and Sullivan persuasively explain that it would be “bizarre to constrain the agency from attempting to satisfy congressional concerns by fundamentally changing the substance and import of a vetoed rule merely because doing so might affect only a small fraction of the individual words in the regulatory text.”<sup>186</sup>

Their fourth interpretation, by contrast, posits that the agency must not only change the overall costs and benefits of the rule, but “fix all of the specific problems Congress identified when it vetoed the rule.”<sup>187</sup> This interpretation would recognize that “despite the paramount importance of costs, benefits, and stringency, Congress may have reacted primarily to specific aspects of the regulation.”<sup>188</sup> Finkel and Sullivan argue, however, that “the fact that Congress chose not to accompany statements of disapproval with any language explaining the consensus of what the objections were may make it inadvisable to require the agency to fix problems that were never formally defined and that may not even have been seen as problems by more than a few vocal representatives.”<sup>189</sup>

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181. *Id.*

182. *Id.*; *see also id.* at 740–41 (explaining why Congress “intended that the currency for judging [substantial] similarity” should be based on costs and benefits instead of other criteria).

183. *Id.* at 735 (emphasis added).

184. *Id.*

185. *Id.*

186. *Id.* at 735–36.

187. *Id.* at 736.

188. *Id.*

189. *Id.*

The fifth interpretation goes one step further—but in questionably vague form. Here, the courts would interpret “‘substantially the same form’ in an expansive way befitting the colloquial use of the word form as more than, or even perpendicular to, substance.”<sup>190</sup> Specifically, in addition to “changing the costs and benefits and fixing specific problems, the agency must do more to show it has ‘learned its lesson.’”<sup>191</sup> This would be based on the rationale that “the original rule deserved a veto because of how it was issued, not just because of what was issued, and the agency needs to change its attitude, not just its output.”<sup>192</sup> In other words, “the CRA was created as a mechanism to assert the reality of congressional power, . . . [so] merely fixing the regulatory text may not be sufficient to avoid repeating the same purported mistakes that doomed the rule upon its first issuance.”<sup>193</sup> In concrete terms, however, it remains unclear what standard the courts would fashion to ensure that agencies “learn their lesson.”<sup>194</sup> This raises questions about the interpretation’s workability and lends uncertainty to its practical impact, which undercuts its validity.

Equally invalid is Finkel and Sullivan’s sixth interpretation, which states that “the agency must devise a wholly different regulatory approach if it wishes to regulate in an area Congress has cautioned it about.”<sup>195</sup> This interpretation would supply additional meaning to the term “form.”<sup>196</sup> If the vetoed rule was, for instance, a “specification standard, the agency would have to reissue it as a performance standard in order to devise something that was not in ‘substantially the same form.’”<sup>197</sup> In addition, “substantially the same form” could be read even more restrictively by dividing the term “*form*” into the overarching dichotomy between command-and-control and voluntary (or market-based) designs: if Congress nixed a ‘you must’ standard, the agency would have to devise a ‘you may’ alternative to avoid triggering a ‘substantially similar’ determination.”<sup>198</sup> However, I believe this goes too far.

Finally, the seventh and most stringent interpretation states that an agency

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190. *Id.*

191. *Id.*

192. *Id.* (arguing that the “interpretation comports with Senator Enzi’s view of why the CRA was written, as he expressed during the ergonomics floor debate: ‘I assume that some agency jerked the Congress around, and Congress believed it was time to jerk them back to reality. Not one of you voted against the CRA’”); *see* 147 CONG. REC. 2821 (2001) (statement of Sen. Enzi).

193. Finkel & Sullivan, *supra* note 3, at 736.

194. *Id.*

195. *Id.*

196. *Id.* at 736–37.

197. *Id.* at 737.

198. *Id.*

“simply cannot attempt to regulate in any way in an area where Congress has disapproved of a specific regulation.”<sup>199</sup> Such a “daunting interpretation would take its cue from a particular reading of the clause that follows the ‘same form’ prohibition: ‘unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.’”<sup>200</sup> Regardless, the validity of this interpretation is undermined by the fact that enabling statutes like the Dodd-Frank Act require agencies to promulgate rules in certain areas of law. The existence of such statutory mandates illustrates that Congress did not intend to preclude agencies from reissuing rules merely because Congress has vetoed a prior rule issued by the agency—at least in scenarios where the agency has a preexisting obligation to issue rules.<sup>201</sup>

*2. The Interpretation Stating that a Reissued Rule Need Only be Altered so as to Have Significantly Greater Benefits or Significantly Lower Costs than the Original Rule, if not Both, to not be “Substantially the Same” is a Generally Valid Approach*

Finkel and Sullivan persuasively argue that the courts should adopt their third interpretation of “substantially the same.” They argue that, “so long as the rule as reissued makes enough changes to alter the cost-benefit ratio in a significant and favorable way . . . , the purposes of the CRA will be served, and the new rule should not be barred.”<sup>202</sup>

Finkel and Sullivan present three compelling reasons in support of this interpretation. First, they argue that the legislative history of the CRA indicates that cost-benefit analysis and risk assessment were the “intended emphases” of the statute because “Congress wanted more efficient regulations,” and “requiring an agency to go back and rewrite rules that failed a cost-benefit test served Congress’s need” for regulatory accountability.<sup>203</sup>

Second, Finkel and Sullivan argue that “the constraint that the text of any joint resolution of disapproval must be all-or-nothing—all non-offending portions of the vetoed rule must fall along with the offending ones—argues

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199. *Id.*

200. *Id.*

201. *See id.* at 744 (“[T]he very fact that Congress . . . anticipated occasional instances where similar or even identical rules could be reissued means, logically, that it clearly expected different rules to be reissued, making the interpretation of ‘substantially the same’ as barring all further activity in a given problem area quite far-fetched.”).

202. *Id.* at 740.

203. *Id.*; *see* 142 CONG. REC. 8197 (1996) (joint statement of Sens. Nickles, Reid & Stevens) (“Congress may find a rule to be too burdensome, excessive, inappropriate or duplicative”).

for a limited interpretation” because a “far-reaching interpretation of ‘substantially the same’ would limit an agency’s authority in ways Congress did not intend in exercising the veto.”<sup>204</sup> Finally, Finkel and Sullivan point out that “it seems implausible (or at least unwise) that Congress would intend to significantly alter an agency’s delegated authority via the speedy and less-than-deliberative process it created to effect the CRA.”<sup>205</sup> I believe that these arguments are reasonable and persuasive and that Finkel and Sullivan’s narrow “cost-benefit ratio” interpretation of “substantially the same” is a valid approach.

Despite these arguments, circumstances arguably exist in which applying the cost-benefit ratio test is inappropriate. Such circumstances include cases where an agency issues a rule that imposes no monetary costs or costs that are *de minimis*. In such a scenario, it defies logic for the courts to ask whether the agencies’ reissued rule alters the cost-benefit analysis, given that the original rule had been cost-free. As the argument goes, Congress did not veto rules because of concerns with cost so the courts should not be concerned about cost either.

This argument can be illustrated by the following hypothetical scenario involving a rule that arguably imposes no compliance costs. Specifically, suppose that a rule exists that prohibits educational institutions that receive federal funding from preventing transgender students from accessing restroom facilities consistent with their gender identity. Such a prohibition was expressed in a non-binding guidance document issued jointly by the Department of Justice and the Department of Education (ED) under Title IX of the Education Amendments of 1972 during the Obama Administration.<sup>206</sup> The

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204. Finkel & Sullivan, *supra* note 3, at 740; *see* 142 CONG. REC. 8197 (stating that the CRA “will help to redress” the “delicate balance between the appropriate roles of the Congress in enacting laws, and the Executive Branch in implementing those laws” by “reclaiming for Congress *some* of its policymaking authority, *without at the same time requiring Congress to become a super regulatory agency*”) (emphasis added).

205. Finkel & Sullivan, *supra* note 3, at 741 (making a “behavioral analogy,” stating that “a parent who wants her teenager to bring home the right kind of date will clearly achieve that goal more efficiently, and with less backlash, by rejecting a specific suitor [perhaps with specific detail about how to avoid a repeat embarrassment]” as opposed to “grounding her or forbidding her from ever dating again.” Likewise, a Congress that wants to ensure that agencies issue the right kinds of rules in the future will likely avoid “repudiat[ing] whole categories of agency activity” without any guidance or explanation).

206. *See* U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER (2016); *see also* 20 U.S.C. §§ 1681–1688 (2012) (providing statutory authority for the guidance letter); 34 C.F.R. § 106 (2016) (providing regulatory authority for the guidance letter); 28 C.F.R. § 54 (2016) (same).

guidance has since been repealed under the Trump Administration.<sup>207</sup> Assume, however, that rather than issuing non-binding guidance on the matter, the ED had issued a binding rule. Suppose that Congress had subsequently vetoed the rule under the CRA and then the agency had reissued the rule, claiming that it was substantially different from the prior version of the rule. A court would need to determine whether the reissued rule is substantially the same as the old rule and ask whether a cost-benefit ratio test is the appropriate way to figure this out.

The answer is “yes.” A cost-benefit ratio test is the appropriate way to figure this out. Arguably, a cost-benefit ratio test would make no sense here because a rule prohibiting transgender discrimination would impose minimal, if any, compliance costs on schools—as the schools would likely need to spend little, if any, money in allowing transgender students to use the restroom facilities of their choice. However, most, if not all, regulations carry hidden economic costs and benefits.<sup>208</sup> For example, critics of the rule may argue that allowing transgender students to use the bathroom of either gender may make some students feel uncomfortable and even cause some parents to withdraw students from the schools (perhaps enrolling them elsewhere, like a privately-funded school), which would decrease enrollment at the public school, thus constituting a hidden cost of the regulation. By contrast, advocates of the rule may argue that an anti-discrimination rule protecting transgender students would carry hidden benefits, such as the fostering of tolerance, empathy, acceptance and well-being among students with different backgrounds, which would encourage diversity in individuals’ relationships, translating into economic development for communities.<sup>209</sup> As a result, it is clear that both hidden benefits and costs exist with a transgender bathroom access rule. This example suggests that costs and benefits are likely imposed by most—if not all—regulations. As such, Finkel and Sullivan’s cost-benefit ratio approach seems proper in the vast majority of cases.

The validity of the cost-benefit ratio approach is further reinforced by the

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207. See U.S. DEP’T OF JUSTICE & U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER (2017) (stating that “the prohibitions on discrimination ‘on the basis of sex’ in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity”).

208. See, e.g., William Dunkelberg, *The Hidden Costs of Regulations*, FORBES (July 12, 2016), <https://www.forbes.com/sites/williamdunkelberg/2016/07/12/the-cost-of-regulations/#4f3055eb6c81> (arguing that “‘hidden’ costs are estimated to be nine times the observed cost of compliance” for business regulations).

209. See, e.g., Nathan Eagle, Michael Macy & Rob Claxton, *Network Diversity and Economic Development*, 328 SCI. 1029, 1029–31 (2010) (finding a strong correlation between the diversity of people’s relationships and the economic development of the people’s communities).

fact that agencies are required to consider the costs associated with a rule whenever doing so is arguably permissible under the agency's enabling statute.<sup>210</sup> In *Michigan v. EPA*,<sup>211</sup> for example, the Supreme Court held that the Environmental Protection Agency (EPA) impermissibly failed to consider costs when it decided to regulate hazardous air pollutants emitted by power plants, despite the fact that the Clean Air Act (CAA) only directed the agency to consider whether regulation was "appropriate and necessary."<sup>212</sup> Despite the fact that the statute did not explicitly require the EPA to consider costs, the Court found that the context of the term "appropriate and necessary" in the CAA required the agency to do so.<sup>213</sup>

Specifically, the Court found that § 7412(n)(1) of the CAA required the EPA to conduct three studies, including one that reflects concerns about cost.<sup>214</sup> The Court noted that the EPA agreed that the term "appropriate and necessary" must be interpreted in light of all three studies.<sup>215</sup> As such, the Court held that the EPA must consider costs when deciding whether a rule is appropriate and necessary.<sup>216</sup>

Although the Court stated that "[t]here are undoubtedly settings in which the phrase 'appropriate and necessary' does not encompass cost,"<sup>217</sup> many commentators have viewed the decision as requiring agencies to consider costs whenever the statute arguably permits it, and federal courts have likewise increasingly come to "view as per se irrational agency action that ignores the economic considerations" associated with a rule.<sup>218</sup> These decisions support the reasonableness of Finkel and Sullivan's cost-benefit ratio approach

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210. See *Michigan v. EPA*, 135 S. Ct. 2699, 2707–12 (2015).

211. *Id.* at 2699.

212. *Id.* at 2707–12.

213. *Id.* at 2707.

214. *Id.* at 2707–08.

215. *Id.* at 2708.

216. *Id.* at 2711–12.

217. *Id.* at 2707.

218. Reeve Bull & Jerry Ellig, *Judicial Review of Regulatory Impact Analysis: Why Not the Best?*, 69 ADMIN L. REV. 725, 728 (2017) (discussing *Michigan*); see *Michigan*, 135 S. Ct. at 2716–17 (Kagan, J., dissenting) ("Cost is almost always a relevant—and usually, a highly important—factor in regulation. Unless Congress provides otherwise, an agency acts unreasonably in establishing 'a standard-setting process that ignore[s] economic considerations.'") (citations omitted); *Metlife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 240 (D.D.C. 2016) ("In the end, cost must be balanced against benefit because '[n]o regulation is "appropriate" if it does significantly more harm than good.'") (citations omitted); see also Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 587 n.82 (2015) ("[*Michigan v. EPA*] show[s] strong support for requiring some [cost-benefit analysis] . . . in agency decision making whenever arguably permissible.").

in most cases.

There are rare circumstances, however, where it would be unreasonable to follow the cost-benefit ratio approach in determining whether a reissued rule is substantially the same as a prior rule. These circumstances exist when two conditions are present: (1) an agency is expressly precluded in its enabling statute from considering costs,<sup>219</sup> and (2) the statute requires the agency to reissue the rule if struck down.<sup>220</sup>

An example of a scenario where an agency was statutorily precluded from considering costs arose in *Whitman v. American Trucking Ass'ns*.<sup>221</sup> In that case, the Supreme Court held that the CAA barred the EPA from considering implementation costs in setting National Ambient Air Quality Standards (NAAQS), which dictate the allowable quantities of air pollutants that may exist in the ambient air.<sup>222</sup> In such a scenario, the courts should refrain from considering costs in deciding whether a reissued rule is substantially the same as a vetoed rule because the agency is unable to consider costs when issuing such a rule in the first place.

Not being able to examine costs raises the issue of what remaining options are available to a court in interpreting “substantially the same.” It is clear, upon considering the range of plausible interpretations of “substantially the same,” that a very non-stringent interpretation must be adopted. Finkel and Sullivan’s fourth interpretation—that the agency must “fix all of the specific problems Congress identified when it vetoed the rule”—does not make sense because, as noted above, Congress does not provide any guidance or basis for why it objects to a rule to enable the courts to identify the specific problems identified by Congress.<sup>223</sup> Also, it would not make sense to interpret “substantially the same” stringently to preclude the agency from ever regulating in the area of law again because the agency would still be required to reissue the rule under its enabling statute. Further, it would not make sense to require the agency to follow a wholly new regulatory approach—issuing a voluntary or market-based standard instead of a “command-and-control” regulation—because the enabling statutes in such circumstances generally require issuance of a specific form of a rule—such as the CAA requiring the EPA to set NAAQS, which are traditional, command-and-control requirements.<sup>224</sup> The only remaining viable option for interpreting “substantially

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219. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 467–71 (2001).

220. See, e.g., Dodd-Frank Act, 15 U.S.C. § 78m(q)(2)(A) (2012) (imposing a mandatory duty on agencies to promulgate Securities and Exchange Commission disclosure rules).

221. 531 U.S. 457 (2001).

222. See *id.* at 468–71.

223. Finkel & Sullivan, *supra* note 3, at 736.

224. See Roger K. Raufer & Stephen L. Feldman, ACID RAIN AND EMISSIONS TRADING:



the same” is to allow the agencies to reissue a rule if the agency makes some sort of change in the rule while asserting, or perhaps proving, that external conditions, such as the vote count in Congress regarding the rule, have changed.<sup>225</sup> In doing so, the agency would want to tout any increased intangible benefits of the reissued rule but would not need to argue that it has decreased the rule’s economic costs.

Overall, *Michigan* suggests that, in most statutes, agencies are able—if not required—to consider costs. As such, Finkel and Sullivan’s cost-benefit ratio test appears to be a valid approach in most cases.

*D. The Courts Should Decline to Grant Chevron Deference to Agency Interpretations of “Substantially the Same”*

*1. Overview of the Chevron Doctrine*

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>226</sup> has a “familiar two-step analytical process for deciding whether to uphold an agency’s interpretation of a statute.”<sup>227</sup> The first question courts consider is “whether Congress has directly spoken to the precise question at issue.”<sup>228</sup> If Congress has clearly and unambiguously spoken to the issue at hand, “that is the end of the matter.”<sup>229</sup> However, if Congress has not spoken to “the precise question at issue,” the agency’s interpretation of the statutory provision will stand if it is “reasonable.”<sup>230</sup>

For the second step of *Chevron*, “the reviewing courts will defer to the agency’s interpretation, even if it believes that a different policy choice is better.”<sup>231</sup> “The courts are far more deferential to agencies in this second step.”<sup>232</sup> In fact, according to an empirical study Orin Kerr conducted between 1995 and 1996, “agencies prevail at step one forty-two percent of the time and at step two eighty-nine percent of the time.”<sup>233</sup> In addition, Schroeder and Glicksman found that the EPA lost 58% of the time at step

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IMPLEMENTING A MARKET CONTROL TO POLLUTION CONTROL 17 (1987) (describing the National Ambient Air Quality Standards as reflecting a “command/control philosophy”).

225. Finkel & Sullivan, *supra* note 3, at 734–35.

226. 467 U.S. 837, 842 (1984).

227. *Id.* at 842; Cole, *supra* note 75, at 280.

228. *Chevron*, 467 U.S. at 842.

229. *Id.* at 842–43.

230. *Id.* at 843.

231. Cole, *supra* note 75, at 280–81.

232. *Id.* at 281.

233. *Id.*

one of *Chevron* while prevailing under *Chevron* step two 92.6% of the time.<sup>234</sup>

The Supreme Court has justified this increased level of deference to agencies at step two of *Chevron* for several reasons:

[A]gency personnel are experts in their field; judges are not. . . . Congress entrusts agencies to implement the law in a particular area because of this expertise. For example, scientists and analysts working for the [FDA] are more knowledgeable about food safety and drug effectiveness than are judges. Because [agency experts] are specialists in their field, they are in a better position to implement effective public policy.<sup>235</sup>

As such, “agencies typically understand better than courts do the impact of competing statutory interpretations on underlying statutory policies.”<sup>236</sup>

In addition, “deferring to agency experts follows the intent of Congress because the *Chevron* court ruled that when Congress leaves open regulatory gaps in a statute, it intends to enable the agencies with the expertise the discretion to fill the gaps, rather than have the courts do so.”<sup>237</sup> The Supreme Court recognized that “Congress simply cannot legislate every detail in a comprehensive regulatory scheme.”<sup>238</sup> Rather, agencies must be able to fill and resolve the inevitable “gaps and ambiguities” in statutes.<sup>239</sup> The Supreme Court “presumed that by leaving open these gaps and ambiguities, Congress impliedly delegated to the agency the authority to resolve them.”<sup>240</sup> Further, “even though Congress knew that an agency might follow its own political agenda rather than that of Congress, it still desired for agency experts to make the policy decisions in implementing statutes.”<sup>241</sup>

Third, the President of the United States and his administrative officials “have a political constituency to which they are accountable.”<sup>242</sup> Federal judges, by contrast, do not have a constituency and therefore “have a duty to respect legitimate policy choices made by those who do.”<sup>243</sup> “Thus, in creating its two-step deference framework, the Court based its decision on

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234. Christopher H. Schroeder & Robert L. Glicksman, *Chevron, State Farm, and the EPA in the Courts of Appeals During the 1990s*, 31 ENVTL. L. REP. 10,371, 10,377 (2001).

235. See LINDA D. JELLUM, *MASTERING STATUTORY INTERPRETATION* 215–16 (2008).

236. Cole, *supra* note 75, at 281.

237. *Id.*

238. JELLUM, *supra* note 235, at 216.

239. *Id.*

240. *Id.*

241. Cole, *supra* note 75, at 281–82.

242. JELLUM, *supra* note 235, at 216.

243. *Id.* (quoting *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984)).

three concepts: agency expertise, implied congressional delegation, and democratic theory.”<sup>244</sup>

2. *Arguments Exist to Support Chevron’s Application to Agency Interpretations of § 801(b)(2) of the Congressional Review Act*

To support the claim that agency interpretations of “substantially the same” are entitled to *Chevron* deference, Finkel and Sullivan rely on the Supreme Court’s holding in *Chevron* that a court must defer to an agency’s reasonable interpretation of a statutory ambiguity that concerns the scope of the agency’s own authority unless the organic statute is itself clear and contrary.<sup>245</sup> An agency’s authority is limited by a resolution repealing a rule under the CRA because it prohibits the agency from promulgating a rule that is substantially the same.<sup>246</sup> As such, Finkel and Sullivan argue that the *Chevron* doctrine should apply here.

Finkel and Sullivan contend that “the CRA proscription against an agency reissuing a vetoed rule ‘in substantially the same form’ is an ambiguous limitation to an agency’s delegated authority.”<sup>247</sup> As a result, “it cannot provide any evidence that Congress has ‘directly spoken to the precise question at issue’—namely, what form of regulation would constitute a ‘substantially similar’ reissuance of the rejected rule.”<sup>248</sup> They acknowledge that a court might, “in the absence of clear, enacted statutory language, look to legislative history [or the signing statements of the joint resolutions of disapproval] to determine whether Congress has ‘spoken to’ the issue” of whether a reissued rule is “substantially the same.”<sup>249</sup> They also maintain, however, that examining legislative history here “without any textual hook to hang it on” is “unworkable as a judicial doctrine” because individual members of Congress make “too many disparate (and perhaps disingenuous) arguments on the floor” when debating on the rationale for a veto under the CRA.<sup>250</sup> *Chevron* step one, then, according to Finkel and Sullivan, “cannot end the inquiry,” and the courts must “proceed to step two,” in which “a court should give substantial deference to an agency in determining whether, for purposes

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244. *Id.*

245. Finkel & Sullivan, *supra* note 3, at 752; *see also* *City of Arlington v. FCC*, 133 S. Ct. 1863, 1870–75 (2013) (deferring to agency’s interpretation regarding the scope of its own statutory jurisdiction).

246. *See* Finkel & Sullivan, *supra* note 3, at 752.

247. *Id.*

248. *Id.*

249. *Id.* at 752–53.

250. *Id.* at 753.

of the CRA, a rule is substantially different from the vetoed rule.”<sup>251</sup>

*3. Chevron Does Not Apply to the Congressional Review Act Because the Statute is Not Agency-Specific, so Deferring Here Would Create a Lack of Uniformity on an Issue of Great Economic and Political Magnitude that is Outside Any Agencies’ Expertise, Without Any Meaningful Judicial Input*

Despite the appeal of Finkel and Sullivan’s argument, it falls short. This is because the CRA is not an agency-specific statute and therefore *Chevron* deference is inappropriate. Courts have clearly held that *Chevron* deference is inappropriate when an agency offering an interpretation of a statute is not administering the statute.<sup>252</sup> To “administer” a statute, agencies typically must adjudicate or promulgate rules pursuant to their delegated statutory authority using their regulatory expertise.<sup>253</sup>

By contrast, a statute may not be administered when a number of agencies interpret it.<sup>254</sup> For instance, “the Freedom of Information Act [(FOIA)] requires all agencies to provide government records to members of the public upon request, subject to a number of exceptions.”<sup>255</sup> Nearly “every agency has regulations interpreting how it must comply with FOIA, but none of these regulations should receive *Chevron* deference.”<sup>256</sup> There is a reason for this. Namely, “as a practical matter, two agencies might well interpret the statute differently, and if courts deferred to both agency’s interpretations, it could mean that the same statute may have two different meanings depending on the agency involved.”<sup>257</sup> Likewise, if the courts deferred to every agency’s interpretation of “substantially the same” in the CRA, it could mean

251. *Id.*

252. *See, e.g.,* Kelley v. EPA, 25 F.3d 1088, 1091–92 (D.C. Cir. 1994). As stated in *Adams Fruit Co. v. Barrett*, “[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority.” 494 U.S. 638, 649 (1990) (citing *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)).

253. FUNK & SEAMON, *supra* note 84, at 284.

254. *See id.* (explaining why agencies interpreting the Freedom of Information Act (FOIA) do not receive *Chevron* deference).

255. *Id.*; *see* 5 U.S.C. § 552 (2012) (providing statutory framework).

256. FUNK & SEAMON, *supra* note 84, at 284 (explaining that agencies interpreting FOIA do not receive *Chevron* deference because of the lack of uniformity that would ensue and the fact that the agencies lack the relevant subject-matter expertise necessary to receive deference); *see also* Collins v. Nat’l Transp. Safety Bd., 351 F.3d 1246, 1252–53 (D.C. Cir. 2003) (declining to grant deference to agency interpretations of FOIA); *Inst. for Wildlife Prot. v. U.S. Fish & Wildlife Serv.*, 290 F. Supp. 2d 1226, 1230 (D. Or. 2003) (same); JAMES T. O’REILLY, FEDERAL INFORMATION DISCLOSURE: THE FREEDOM OF INFORMATION ACT IN COURT 554–55 (2017) (“Deference is not given to individual agency interpretations of FOIA.”).

257. FUNK & SEAMON, *supra* note 84, at 284.

that the CRA may have different meanings depending on the agency involved.

Such an outcome would undermine one of the benefits of *Chevron*, which is the encouragement and facilitation of national uniformity in the interpretation of federal statutes.<sup>258</sup> “That is, an administering agency’s reasonable interpretation is generally deferred to by courts across the nation, whereas if courts were to resolve ambiguities themselves, there would likely be different results in different circuits, requiring Supreme Court review.”<sup>259</sup> A similar lack of uniformity may ensue if the courts defer to different agencies’ interpretations of the CRA.

A lack of uniformity ensuing in such circumstances is not an inconceivable, or even unlikely, outcome. Although one could argue that federal agencies would likely all have the same interest in protecting their jurisdiction, this cannot simply be assumed in a vacuum. Rather, some agency officials might have political or ideologically-driven agendas that could motivate them to narrow the scope of government reach and argue at litigation for a more stringent interpretation of “substantially the same.”

This could occur, for instance, in the context of litigation involving agencies—such as the EPA—whose missions fundamentally conflict with the current President’s policy and political agenda. It is well-documented, for example, that the EPA’s current Administrator, who serves at the pleasure of the President, has made decisions that conflict with the mission of the agency.<sup>260</sup> It is quite possible that this type of decisionmaking could extend to litigation arising under the CRA. This illustrates that ideological motivations could quite possibly result in different agencies offering different interpretations of “substantially the same,” which, if adopted by the courts, would result in different courts interpreting the CRA differently, thereby subverting one of the primary benefits of *Chevron*—nationwide legal uniformity. As a result, the courts should decide de novo how to interpret § 801(b)(2) of the CRA.

It is unpersuasive to claim that *Chevron* should apply simply because a similar lack of uniformity may be created from the courts deciding CRA cases de novo. Although it is true that de novo review could result in different

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258. See *Kelley v. EPA*, 25 F.3d 1088, 1091 (D.C. Cir. 1994).

259. FUNK & SEAMON, *supra* note 84, at 284.

260. See, e.g., Oliver Milman, *EPA: Air Pollution Rule Should Be Delayed—Despite Its Effect On Children*, GUARDIAN (June 14, 2017), <https://amp-theguardian-com.cdn.ampproject.org/c/s/amp.the-guardian.com/us-news/2017/jun/14/epa-pollution-rule-delay-children> (explaining how the current Environmental Protection Agency (EPA) Administrator has made a string of decisions to either halt or scrap pollution rules despite acknowledging that postponing the rules might have “disproportionate” effects on young people).

interpretations in different circuits, this would occur as a result of judges rendering principled decisions without having to blindly rubber-stamp arguments made by agencies.<sup>261</sup> At the very least, this constitutes a less arbitrary and more independent method of decisionmaking than a deference-based approach.<sup>262</sup>

*Chevron* deference is also inappropriate here because an agency's interpretation of "substantially the same" would require considerations that exceed the scope of the agency's own area of expertise.<sup>263</sup> The CRA is a generally-applicable statute, which means that any interpretation of "substantially the same" would affect *all* agencies that issue rules.<sup>264</sup> This would require a court to take into account considerations that go beyond the scope of any individual agency's familiarity.

This reasoning is compounded by the fact that agencies may often make decisions in a manner influenced by their own specific subject matter expertise and agency missions.<sup>265</sup> Further, their positions may often be motivated by their own unique institutional interests. As a result, it would be inappropriate and unfair for those agencies to be able to make the courts defer to them on matters that affect other agencies. Thus, the Supreme Court's reasoning in *Chevron* for deferring to agency personnel who are "experts in [their own] field"<sup>266</sup> and better equipped to understand technical and complex issues arising within their own specialized areas of law does not apply here.

Finally, the Supreme Court's decisions in *King v. Burwell*<sup>267</sup> and *FDA v. Brown & Williamson Tobacco Corp.*<sup>268</sup> dictate that the courts should hold that Congress is unlikely to delegate to an agency the authority to resolve the pol-

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261. See *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 962, 965–66 (1983) (Powell, J., concurring) (emphasizing the critical need for an independent judiciary).

262. *Id.*

263. See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (stating that agencies are "especially unlikely" to be entitled to deference on issues outside of their expertise).

264. See generally CAREY, DOLAN & DAVIS, *supra* note 26 (explaining how the CRA works).

265. As an example, the Internal Revenue Service defines its agency's mission as "Provid[ing] America's taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all," and "help[ing] the large majority of compliant taxpayers with the tax law, while ensuring that the minority who are unwilling to comply pay their fair share." *The Agency, its Mission and Statutory Authority*, IRS, <https://www.irs.gov/about-irs/the-agency-its-mission-and-statutory-authority> (last updated Aug. 6, 2017).

266. *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

267. 135 S. Ct. 2480 (2015).

268. 529 U.S. 120 (2000).

icy question of how to interpret “substantially the same” because such a question carries significant economic and political magnitude.<sup>269</sup> In *Brown & Williamson Tobacco Corp.*, the Court concluded that under *Chevron* Congress clearly intended to exclude tobacco products from regulation under the FFDCA.<sup>270</sup> In doing so, the Court emphasized that it “must be guided to a degree by common sense as to the manner in which Congress is likely to delegate [to an agency] a policy question of such economic and political magnitude.”<sup>271</sup> Further, upon analyzing the legislative history and text of the statute, the Court held that Congress was unlikely to delegate to the FDA the authority to regulate tobacco products.<sup>272</sup>

The Court reaffirmed this holding more recently in *Burwell* by refusing to defer to the Internal Revenue Service’s interpretation of the Affordable Care Act (ACA).<sup>273</sup> Specifically, the Court held that the issue of whether tax credits were available for insurance purchased on federally-established exchanges was “a question of deep ‘economic and political significance,’” and that if Congress had “wished to assign that question to an agency, it would have done so expressly.”<sup>274</sup>

These decisions can be characterized as standing for the proposition that when a legal issue in question is of profound political or social importance, it is less likely that Congress would have delegated its resolution to an agency absent an express statement of delegation.<sup>275</sup> Such a proposition applies with equal force to the idea of an agency resolving issues under the CRA. As in *Burwell* and *Brown & Williamson Tobacco Corp.*, the issue of how to interpret “substantially the same” is one of substantial economic and political importance because it affects the balance of power between the Legislative and Executive branches of the Federal government. Given the profound magnitude of this issue, it is less likely that Congress would have delegated its resolution to an agency absent an express statement of delegation. Such a statement, of course, does not exist in the CRA.<sup>276</sup> As a result, the courts should not grant *Chevron* deference to agencies’ interpretations of “substantially the

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269. See *id.* at 133; *Burwell*, 135 S. Ct. at 2488–89.

270. See generally *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133.

271. *Id.*

272. *Id.* at 160–61.

273. See *Burwell*, 135 S. Ct. at 2488–89.

274. *Id.* at 2489.

275. See, e.g., Cass. R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 240–42 (2006) (arguing that *Brown & Williamson Tobacco Corp.* suggests that the courts will decline to grant *Chevron* deference to agencies on issues of major political or social importance); FUNK & SEAMON, *supra* note 84, at 289 (same).

276. See generally 5 U.S.C. §§ 801–808 (2012).

same” under the statute.<sup>277</sup>

*E. The Courts Should Apply the Arbitrary and Capricious Standard of Review to Agencies’ Determinations About Whether a Rule is “Substantially the Same”*

Despite not granting *Chevron* deference to agencies on how to interpret “substantially the same,” courts should defer under the arbitrary and capricious standard of review to agencies’ determinations about the differences in the costs and benefits between their reissued and original rules.<sup>278</sup> The deference granted would be rule-specific and it would occur within the confines of the courts’ cost-benefit ratio interpretation of “substantially the same.”<sup>279</sup> Under this approach, the courts would defer to the agencies’ determinations that their reissued rules substantially increase benefits or lower costs, or both, so long as the agencies’ determinations are reasonable and supported by the record. The deference granted here would be limited to the agencies’ cost-benefit analyses as opposed to the agencies’ interpretations of the statute. This would avoid arbitrarily undermining the uniform application of the CRA.

*1. Overview of the Arbitrary and Capricious Standard to Agency Cost-Benefit Analysis*

Section 706(2)(a) of the APA states that a “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>280</sup> Also known as “hard look” review,<sup>281</sup> the arbitrary and capricious standard requires that agencies “fully explain their actions,

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277. Recall that Congress has introduced legislation that would repeal *Chevron* deference, thereby rendering the entire issue of *Chevron* in this Article moot. See *supra* note 46 (discussing Regulatory Accountability Act, H.R. 76, 115th (Jan. 3, 2017)). The likelihood of a *Chevron* repeal, however, is reduced by the fact that the Senate version of the bill does not repeal *Chevron*. Furthermore, the Senate and House bills would need to be reconciled before the final bill can arrive on the President’s desk. *Id.* It is also worth asking whether the President would sign the legislation, given that repealing *Chevron* and *Auer* would make it harder for him to advance his policies.

278. 5 U.S.C. § 706(2)(a) (2012) (setting forth the “arbitrary and capricious” standard of review); Cecot & Viscusi, *supra* note 218, at 591 (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (describing arbitrary and capricious review as deferential).

279. See *supra* Part II.C.2 (arguing for validity of the cost-benefit ratio test).

280. 5 U.S.C. § 706(2)(a).

281. *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851–52 (D.C. Cir. 1970).



taking into account all relevant factors, and responding to all material comments.”<sup>282</sup> This test is “generally considered to be deferential,” and is “especially so when a court evaluates the adequacy of an agency’s cost-benefit analysis.”<sup>283</sup>

“The Supreme Court has consistently reminded courts that the scope of review is ‘narrow’ and ‘a court is not to substitute its judgment for that of the agency.’”<sup>284</sup> “In addition, when an agency makes ‘predictions, within its area of special expertise, at the frontiers of science,’ the reviewing court should ‘generally be at its most deferential.’”<sup>285</sup>

In fact, a “cost-benefit analysis is the kind of analysis that often requires an agency to make many predictions based on available scientific and technical evidence—such as, for example, predictions about the emission-reduction benefits associated with a particular air-pollution-control technology or predictions about the cost of implementing a particular workplace-safety regulation.”<sup>286</sup> When examined from this perspective, “Supreme Court precedent can be read to require courts to be particularly hands off when it comes to evaluating the substance of agency cost-benefit analysis.”<sup>287</sup> As such, the courts have “explicitly reasoned that agency determinations based on the weighing of expected benefits and costs are best left to agency expertise.”<sup>288</sup>

With that said, “the arbitrary or capricious test is not without some bite, even in the context of evaluating an agency’s [cost-benefit analysis].”<sup>289</sup> For example, in *Motor Vehicle Manufacturers Ass’n of the United States v. State Farm Mutual Automobile Insurance Co.*,<sup>290</sup> the Supreme Court held that:

[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered

282. William S. Jordan, III, *Ossification Revisited: Does Arbitrary and Capricious Review Significantly Interfere with Agency Ability to Achieve Regulatory Goals Through Informal Rulemaking?*, 94 NW. U. L. REV. 393, 397 (2000).

283. Cecot & Viscusi, *supra* note 218, at 590.

284. *Id.* (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

285. *Id.* (citing *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

286. *Id.* (citing *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1351 (D.C. Cir. 1985) (“The agency was to identify the costs and benefits of alternative standards, measure them, and select the standard which displays the greatest net benefit. This is more easily said than done, since . . . the process was as much one of prediction as of analysis.”)).

287. *Id.*

288. *Id.*

289. *Id.*

290. 463 U.S. 29 (1983).

an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>291</sup>

The cases illustrate how the Court “succinctly predicted—or influenced the development of—the current style of [cost-benefit analysis] policing by reviewing courts.”<sup>292</sup> As a result, the courts “primarily examine whether all statutory factors and other important aspects of the issue were considered in the cost-benefit analysis and whether the cost-benefit analysis is well founded in available scientific evidence.”<sup>293</sup>

Under this approach, courts evaluate whether the cost-benefit analysis is reasonable.<sup>294</sup> In doing so, courts typically ask three questions. The first question asks whether the scope of the cost-benefit analysis is inadequate, “often because it ignores an important—or statutorily mandated—aspect of the problem.”<sup>295</sup> The second question concerns whether the cost-benefit analyses’ “methodology or assumptions go against scientific evidence or reason.”<sup>296</sup> The third question asks whether the agency has disclosed the cost-benefit analysis’ assumptions or methodology to interested parties.<sup>297</sup> These are all questions that courts consider in assessing the reasonableness of a cost-benefit analysis.<sup>298</sup>

However, courts will generally not reverse an agency’s cost-benefit analysis “‘simply because there are uncertainties, analytic imperfections, or even mistakes in the pieces of the picture petitioners have chosen to bring to [the court’s] attention,’ but rather ‘when there is such an absence of overall rational support as to warrant the description ‘arbitrary or capricious.’”<sup>299</sup> If the courts find a “defect in the analysis, [they] . . . look to the seriousness of the flaw and the likelihood that correcting the error will change the agency’s ultimate decision.”<sup>300</sup> Courts also evaluate the “persuasiveness” of the cost-benefit analysis “as part of the evidence before the agency to determine whether the agency’s chosen regulatory action was reasonable in light of this evidence.”<sup>301</sup>

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291. *Id.* at 43.

292. *Cecot & Viscusi*, *supra* note 218, at 591.

293. *Id.*

294. *See City of Portland v. EPA*, 507 F.3d 706, 712–13 (D.C. Cir. 2007) (noting that the court “will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses”).

295. *Cecot & Viscusi*, *supra* note 218, at 592.

296. *Id.*

297. *Id.*

298. *Id.* at 576–77.

299. *Id.* at 591 (citing *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1370 (D.C. Cir. 1985)).

300. *Id.*

301. *Id.* at 591 n.111 (citing *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1040

2. *For Pragmatic Reasons, the Courts Should Extend the Deferential Arbitrary and Capricious Standard to Agencies' Conclusions Regarding the Difference in Costs and Benefits Between their Reissued and Original Rules, Despite Concerns that Doing So May Undermine the Congressional Review Act's Goal of Agency Accountability*

The courts should expand the scope of the deferential arbitrary or capricious test to agencies' cost-benefit analyses in reviewing whether a reissued rule is substantially the same as a prior rule vetoed under the CRA.<sup>302</sup> In doing so, however, the courts must impose an additional requirement on the agencies that is less deferential. The courts must look at the final dollar figures of both rules and determine whether there is a substantial reduction in costs or increase in benefits from the new rule. Furthermore, such a reduction or increase must be fairly traceable to the agency's change in the rule. To determine traceability, the courts must determine whether a connection exists between the change made in the new rule and the purported reduction in costs or increase in benefits.<sup>303</sup>

For example, the courts should consider evidence that a new EPA air pollutant emissions limitation rule is not substantially the same as a prior, vetoed version of the rule. Specifically, the EPA may assert that, unlike the prior rule, the new rule reduces the scope of the CAA's regulatory requirements, thereby covering fewer factories and power plants and imposing fewer costs on society. In such a scenario, the courts would need to defer to the agency's analysis and conclusions on the issue, provided that the agency's analysis and conclusions are reasonable and supported by the record.

Although this approach is ultimately deferential, it still has some bite. As a result, it does not undermine the *agency accountability* purpose of the CRA.<sup>304</sup>

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(D.C. Cir. 2012) (“[W]hen an agency decides to rely on a cost-benefit analysis as part of its rulemaking, a serious flaw undermining that analysis can render the rule unreasonable.”); see *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007) (“In the narrow context of this case . . . remanding this rule to the Agency based on flaws in its cost-benefit analysis would be pointless. Even were EPA to redress its alleged errors, the final rule would remain unchanged, making this the epitome of harmless error.”).

302. Granting *Auer* deference would not be an appropriate approach in this scenario. See *Auer v. Robbins*, 519 U.S. 452 (1997). *Auer* deference only applies when a *regulatory provision* is ambiguous. *Id.* at 452; see also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). Under a cost-benefit ratio test, however, the language of a rule is not at issue. Instead, the issue is an agency's cost-benefit analysis. As such, *Auer* does not apply.

303. See Finkel & Sullivan, *supra* note 3, at 735 (offering the cost-benefit ratio test).

304. See, e.g., 142 CONG. REC. 8200 (1996) (joint statement of Sens. Nickles, Reid & Stevens) (articulating intent to hold agencies accountable by stating that “Congress is enacting the congressional review chapter, in large part, as an exercise of its oversight and legislative responsibility . . . over all agencies and entities within its legislative jurisdiction”).

Some might argue that, by deferring to agencies' cost-benefit analyses in the context of the CRA challenge, the courts are, in effect, rubber-stamping the agencies' determinations, without providing any meaningful oversight, which runs counter to a primary goal of the CRA to oversee agencies.<sup>305</sup> However, as mentioned above, the courts still must undertake meaningful hard look review of agencies' cost-benefit analyses by evaluating their scope, methodologies, assumptions and transparency under *State Farm*.<sup>306</sup> This is consistent with the nature of the meaningful oversight under the CRA that Congress desired.<sup>307</sup>

Further, pragmatic considerations may require the courts to ultimately defer to agencies on specific matters of costs and benefits that fall squarely within the agencies' special expertise. Article III courts are courts of general jurisdiction, and for all practical purposes, judges may feel uncomfortable second-guessing agency experts, particularly in areas that are highly technical or specialized in nature.<sup>308</sup> As a result, the idea of deferring to an agency's cost-benefit analysis is reasonable upon realizing that no realistic alternatives to this approach appear to exist.<sup>309</sup>

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305. *See id.*

306. *See* *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

307. *See, e.g.*, 142 CONG. REC. 8200.

308. *See, e.g.*, *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012) (“[W]e review such a cost-benefit analysis deferentially.”); *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 563 (D.C. Cir. 2002) (per curiam) (“[I]n view of the complex nature of economic analysis typical in the regulation promulgation process, [the petitioners'] burden to show error is high.”); *Ctr. for Auto Safety v. Peck*, 751 F.2d 1336, 1342 (D.C. Cir. 1985) (“This is especially true when the agency is called upon to weigh the costs and benefits of alternative policies, since [s]uch cost-benefit analyses epitomize the types of decisions that are most appropriately entrusted to the expertise of an agency . . . .”) (internal quotes omitted) (citation omitted).

309. Applying the arbitrary and capricious standard raises an interesting procedural issue that could arise in future litigation. The issue is whether the agency must do an adequate cost-benefit analysis in its regulatory impact analysis or preamble ahead of time if it wants to argue that it has changed the cost-benefit ratio of the new rule—or whether the agency may develop the record on the “cost-benefit” issue upon remand? In other words, how should courts deal with the agency when it fails to adequately address the issue of costs and benefits up front? *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 657–58 (requiring circuit court to remand case to agency under the arbitrary and capricious test).

This issue is further complicated by the fact that some petitioners are required to bring their legal challenges to agency actions in the district courts—which often do their own fact-finding—while others must bring their challenges in the circuit courts, where fact-finding is prohibited. *See, e.g.*, 49 U.S.C. § 46,110(a) (2012) (providing for circuit court review for challenges by decertified airline mechanics); *cf.* *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993) (remanding cases to district court to resolve necessary factual issues); *Nat.*

## CONCLUSION

Congress and the President, in vetoing a rule that they object to under the CRA, may not forever bar the issuing agency from regulating in the area of law addressed by the rule. The courts should prevent this outcome from occurring by asserting judicial review and using their inherent judicial power to narrowly construe “substantially the same.” Specifically, the courts should require agencies to do nothing more than alter the cost-benefit analysis of a reissued rule to avoid finding the rule to be substantially the same as a vetoed rule. The courts should adopt this approach *de novo*, and refrain from granting *Chevron* deference to agencies’ interpretations of substantially the same. At the same time, however, the courts should grant deference to agencies’ determinations regarding the difference in costs and benefits between the vetoed and reissued rules under the arbitrary and capricious standard of review. This overall approach reflects a proper understanding of the scope of legislative, executive, and judicial authority under our system of separated powers.

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Res. Def. Council, Inc. v. Train, 519 F.2d 287, 291 (D.C. Cir. 1975); Joseph Mead & Nicholas Fromherz, *Choosing a Court to Review the Executive*, 67 ADMIN. L. REV. 1, 3–4 (2015) (discussing Pinnacle Armor, Inc. v. United States, No. 1:07-CV-01655 LJO DLB, 2012 WL 2994111, at \*5 (E.D. Cal. 2012) (requiring decertified navy instructors or body armor manufacturers to seek district court review)). Furthermore, a remand may undermine the CRA’s purpose of holding the agencies accountable for their regulations by delaying the of court’s disposition of the merits of the validity of the rule.

Such a delay could be avoided, however, if the courts were to stay enforcement of the agencies’ rules pending the outcome of the litigation. The ability of the courts to issue a stay, however, depends on how they apply the doctrine of preliminary injunctive relief. *See, e.g.*, Va. Petroleum Jobbers Ass’n v. Fed. Power Comm’n, 259 F.2d 921 (D.C. Cir. 1958) (applying the doctrine). The outcome depends in part on the likelihood of success on the merits by the moving party. *Id.* It is unclear how this factor would apply to a scenario where an administrative record is deficient for determining costs and benefits of a reissued rule under the CRA. A court may find it premature to decide the likelihood of success on the merits at this phase of the litigation because the agencies would still have the opportunity to further develop the record before the courts can render a final judgment on the merits of the rule. As a result, the courts may decline to grant a stay of enforcement of a rule that is challenged under the CRA. Such an outcome, however, may conflict with the CRA’s purpose of holding agencies accountable for their regulations.

Another problem with remanding the case to an agency on the issue of costs is that it may give an agency an unfair second bite at the apple to prove that its rule is not substantially the same. How many times should agencies be able to argue that their rules are different? When should the courts say, “enough is enough, you have failed to prove your case and need to be held accountable?”

These are all subsidiary issues that fall outside the scope of this Article. They require further research.