

REAWAKENING THE CONGRESSIONAL REVIEW ACT

PAUL J. LARKIN, JR.*

| | |
|--|-----|
| INTRODUCTION | 188 |
| I. THE PROVENANCE OF THE CONGRESSIONAL REVIEW ACT: THE LIFE AND DEATH OF THE LEGISLATIVE VETO | 193 |
| II. CONGRESS'S RESPONSE TO THE DEMISE OF THE LEGISLATIVE VETO: THE CONGRESSIONAL REVIEW ACT OF 1996..... | 197 |
| III. THE REACH OF THE CONGRESSIONAL REVIEW ACT..... | 204 |
| A. The Lateral Breadth of the CRA: What Is a "Rule"?. | 204 |
| B. The Vertical Reach of the CRA: When Does the Congressional Review Period Commence? | 214 |
| IV. JUDICIAL REVIEW UNDER THE CRA | 217 |
| V. OPPOSING VIEWS OF THE SCOPE OF THE CONGRESSIONAL REVIEW ACT..... | 232 |
| A. A Broad Reading of the CRA Is Unreasonable | 232 |
| B. A Broad Reading of the CRA Is Reasonable..... | 235 |
| 1. The Text of the CRA | 236 |
| 2. The Effective Date of the CRA | 237 |
| 3. The Number of Rules Subject to CRA Review | 237 |
| 4. The Burden on Agencies..... | 239 |
| 5. The Relevance of Appropriations Bills..... | 239 |

* Senior Legal Research Fellow, The Heritage Foundation; M.P.P. George Washington University, 2010; J.D., Stanford Law School, 1980; B.A., Washington & Lee University, 1977. The views expressed in this Article are the author's own and should not be construed as representing any official position of The Heritage Foundation. I want to thank Daren Bakst, James Gattuso, Todd Gaziano, Greg Maggs, John G. Malcolm, and John-Michael Seibler for excellent comments on an earlier version of this Article. Any errors are mine.

| | |
|--|-----|
| 6. The Absence of a “Statute of Limitations” on Congress’s Review | 241 |
| 7. Prior Infrequent Use of the CRA | 243 |
| 8. Gamesmanship..... | 244 |
| 9. Agency Nullification | 246 |
| 10. Remedial Legislation..... | 247 |
| VI. THE LONG-TERM USEFULNESS OF THE CONGRESSIONAL REVIEW ACT..... | 248 |
| VII. CONCLUSION..... | 252 |

INTRODUCTION

A longstanding criticism of the administrative state has been that it imposes unduly burdensome costs on the American economy through the issuance of a blizzard of unnecessary rules that stifle investment and reduce employment.¹ That criti-

1. One estimate is that the rules generated by the Obama Administration in 2015 alone imposed more than \$22 billion in annual costs. See Adam J. White, *Republican Remedies for the Administrative State*, in UNLEASHING OPPORTUNITY, PART II: POLICY REFORMS FOR AN ACCOUNTABLE ADMINISTRATIVE STATE 11 (Yuval Levin & Emily MacLean eds., 2017). That sum, however, is just part of the expense imposed by that administration’s regulatory policies. See, e.g., JAMES L. GATTUSO & DIANE KATZ, HERITAGE FOUND., RED TAPE RISING 2016: OBAMA REGS TOP \$100 BILLION ANNUALLY, BACKGROUNDER, at 1 (2016), <http://www.heritage.org/research/reports/2016/05/red-tape-rising-2016-obama-regs-top-100-billion-annually> [<https://perma.cc/CP5C-524H>] (“The addition of 43 new major rules [in 2015] increased annual regulatory costs by more than \$22 billion, bringing the total annual costs of Obama Administration rules to an astonishing \$100 billion-plus in just seven years.”); Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), <https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html> [<https://nyti.ms/2jAytGL>] (“The Obama administration in its first seven years finalized 560 major regulations—those classified by the Congressional Budget Office as having particularly significant economic or social impacts. That was nearly 50 percent more than the George W. Bush administration during the comparable period, according to data kept by the regulatory studies center at George Washington University And it has imposed billions of dollars in new costs on businesses and consumers.”); James Gattuso & Diane Katz, *20,642 New Regulations Added in the Obama Presidency*, DAILY SIGNAL (May 23, 2016), <http://dailysignal.com/2016/05/23/20642-new-regulations-added-in-the-obama-presidency/> [<https://perma.cc/FJ5M-8WWM8>] (“More than \$22 billion per year in new regulatory costs were imposed on Americans last year, pushing the total burden for the Obama years to exceed \$100 billion annually. That’s a dollar for every star in the galaxy, or one for every second in 32 years.”); Kimberley A. Strassel, *Obama’s Midnight Regulation Express*, WALL ST. J. (Dec. 22, 2016), <http://www.wsj.com/articles/obamas-midnight-regulation-express-1482451192>

cism has been advanced regardless of which political party occupies the White House.² During the presidential campaign and initial period of his administration, President Donald Trump made clear that he intends to address that problem. In fact, he and senior members of his administration have vowed to remake the administrative state as we currently know it.³

In a series of executive orders, the President directed senior agency officials to aggressively review the effects that excessive federal agency regulations have had on economic growth, to eliminate unnecessary rules, to ensure that agencies do not act in an *ultra vires* manner, to respect the values of federalism, and to always measure and be guided by the costs and benefits of

[<https://perma.cc/KW8Y-XEKN>] (“According to a Politico story of nearly a year ago, the administration had some 4,000 regulations in the works for Mr. Obama’s last year. They included smaller rules on workplace hazards, gun sellers, nutrition labels and energy efficiency, as well as giant regulations (costing billions) on retirement advice and overtime pay. Since the election Mr. Obama has broken with all precedent by issuing rules that would be astonishing at any moment and are downright obnoxious at this point.”); Justin Sykes, *Nearly 4,000 EPA Regulations Issued Under President Obama*, AMS. FOR TAX REFORM (July 6, 2016, 2:25 PM), <https://www.atr.org/nearly-4000-epa-regulations-issued-under-president-obama> [<https://perma.cc/275K-JJ5K>] (“Since President Obama assumed office in 2009, the EPA has published over 3,900 rules, averaging almost 500 annually, and amounting to over 33,000 new pages in the Federal Register The compliance costs associated with EPA regulations under Obama number in the hundreds of billions and have grown by more than \$50 billion in annual costs since Obama took office. Such high costs, especially those related to the energy sector, ripple throughout the economy, impacting GDP, killing thousands of jobs, and increasing the cost of consumer goods.”).

2. The problem is bipartisan in nature. See Christopher DeMuth, *The Regulatory State*, NAT’L AFF., Summer 2012, at 70, 70 (“[T]he apparent partisan divide over regulations is illusory During the half-century before President Obama’s election, the greatest growth in regulation came under Presidents Richard Nixon and George W. Bush.”). In 2016, the George Mason University Mercatus Center found that regulations adopted since 1980 have cost the nation roughly \$4 trillion in lost GDP. See Bentley Coffey et al., *The Cumulative Cost of Regulations 8* (April 2016) (unpublished working paper) (on file with Mercatus Ctr.) (“Had regulations been held constant at levels observed in 1980, our model predicts that the economy would be nearly 25 percent larger. In other words, the growth of regulation since 1980 cost the United States roughly \$4 trillion in GDP (nearly \$13,000 per person) in 2012 alone.”).

3. See Michael C. Bender & Rebecca Ballhaus, *Trump Strategist Steve Bannon: ‘Every Day Is Going to Be a Fight,’* WALL ST. J. (Feb. 23, 2017), <https://www.wsj.com/articles/trump-strategist-steve-bannon-every-day-is-going-to-be-a-fight-1487881616> [<https://perma.cc/BLU4-6JAM>] (stating that Steve Bannon, who was at that time the chief strategist to President Trump, said that the President will “push for deregulation, which Mr. Bannon referred to as ‘deconstruction of the administrative state’”).

any rules an agency considers.⁴ As an additional step in his regulatory reform program, President Trump signed fifteen congressional joint resolutions designed to nullify agency rules promulgated during the last year of former President Barack Obama's administration.⁵ Of particular concern were the so-called "midnight rules," ones that were issued in final form between the November 2016 election and the January 2017 inauguration.⁶ Congress passed those joint resolutions under a lit-

4. Some of the President's executive orders address broad regulatory issues. See Exec. Order No. 13,777, 82 Fed. Reg. 12,285 (Feb. 24, 2017) (directing agencies to establish Regulatory Reform Task Forces to determine what agency rules should be repealed, replaced, or modified); Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Jan. 30, 2017) (limiting the costs of new regulations for the remainder of the fiscal year, creating a budget process for new regulations in the next fiscal year, and requiring agencies to eliminate two rules for every new one adopted); Exec. Order No. 13,766, 82 Fed. Reg. 8657 (Jan. 24, 2017) (developing a process for identifying high priority infrastructure projects and creating expedited environmental reviews and approvals for such projects). Other ones focus on particular regulatory problems. See, e.g., Exec. Order No. 13,778, 82 Fed. Reg. 12,497 (Feb. 28, 2017) ("Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the 'Waters of the United States' Rule").

5. See, e.g., Lisa Beilfuss, *Ruled Out: 13 Obama Regulations Rolled Back Under Congressional Review Act*, WALL ST. J.: WASH. WIRE (May 4, 2017, 10:46 AM), <https://blogs.wsj.com/washwire/2017/05/04/ruled-out-13-obama-regulations-rolled-back-under-congressional-review-act> [<https://perma.cc/6E6C-94B6>] (listing and summarizing the rules) (published before the signing of H.R.J. Res. 66, 115th Cong. (2017)); *Congressional Review Act Tracker 2017*, GEORGE WASH. UNIV. REGULATORY STUDIES CNTR. (Nov. 1, 2017), <https://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/CRA%20Tracker%2011-01-2017.pdf> [<https://perma.cc/NYY7-73XP>].

6. First coined during the end of the Carter administration, the term "midnight rules" refers to the issuance of new rules in the waning period of an outgoing administration that will be followed by a change of political party. The phenomenon—also known as the "Cinderella Constraint," because government officials turn back into ordinary citizens at noon on January 20—has been a common occurrence for decades and is problematic for several reasons: the outgoing President cannot be held politically accountable, there is insufficient time for an agency to review comments, and it creates a burden for the incoming administration. See, e.g., H.R. REP. NO. 114-782, pt. 1, at 2-4 (2016) (report on The Midnight Rules Relief Act, H.R. 5982, 114th Cong. (2016)); MAEVE P. CAREY, CONG. RES. SERV., R42612, MIDNIGHT RULEMAKING 2 (2012); Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947 (2003); Jason M. Loring & Liam R. Roth, *After Midnight: The Durability of The "Midnight" Regulations Passed By The Two Previous Outgoing Administrations*, 40 WAKE FOREST L. REV. 1441 (2005); Patrick A. McLaughlin, *The Consequences of Midnight Regulations and Other Surges in Regulatory Activity*, 147 PUB. CHOICE 395 (2011); Susan E. Dudley, *Reversing Midnight Regulations*, REGULATION, Spring 2001, at 9, <https://object.cato.org/sites/cato.org/files/serials/files/regulation/2001/4/dudley.pdf> [<https://perma.cc/7MF2-HFVC>]; Jay Cochran, III, *The Cinderella Constraint: Why Regulations Increase Significantly During Post-*

tle-known and, until recently, even less often used statute known as the Congressional Review Act of 1996 (CRA).⁷

The CRA is Congress's most recent effort to trim the excesses of the modern administrative state. The Act does so by creating a fast-track procedure that enables Congress to set aside any new rule it finds unwise before the rule can go into effect. The Act directs federal agencies to submit to Congress and the Comptroller General a copy of every new rule so that the latter can examine it and the former can schedule a vote on a joint resolution to disapprove it without delay. The expedited process allows the Senate and House of Representatives to quickly pass a joint resolution of disapproval that is presented to the President for his signature or veto. If the President signs the resolution or Congress overrides his veto, the rule becomes null and void, thereby (hopefully) preventing whatever harm that Congress believed that the rule would inflict. Because the process created by the Act differs from the one that Congress ordinarily uses to consider legislation, the CRA raises a number of novel legal issues. This article will address the ones that are most important today.⁸

Election Quarters 1–6 (Mercatus Cntr. Working Paper, 2001), https://www.mercatus.org/system/files/The_Cinderella_Constraint%281%29.pdf [<https://perma.cc/V93A-9CFZ>].

7. The CRA was enacted as Title II, Subtitle E, of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 871 (1996) (codified at 5 U.S.C. §§ 801–08 (2012)).

8. For commentary on the CRA, see, for example, STAFF OF H. COMM. ON THE JUDICIARY, SUBCOMM. ON COMMERCIAL & ADMIN. L., 109TH CONG., INTERIM REPORT ON THE ADMINISTRATIVE LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY 87–96 (Comm. Print 2006) [hereinafter INTERIM REPORT]; CURTIS W. COPELAND & RICHARD S. BETH, CONG. RES. SERV., RL34633, CONGRESSIONAL REVIEW ACT: DISAPPROVAL OF RULES IN A SUBSEQUENT SESSION OF CONGRESS (2008); CURTIS W. COPELAND, CONG. RES. SERV., R40997, CONGRESSIONAL REVIEW ACT: RULES NOT SUBMITTED TO GAO AND CONGRESS, (2009); MORTON ROSENBERG, CONG. RES. SERV., RL30116, CONGRESSIONAL REVIEW OF AGENCY RULEMAKING: AN UPDATE AND ASSESSMENT OF THE CONGRESSIONAL REVIEW ACT AFTER A DECADE (2008) [hereinafter ROSENBERG, CONGRESSIONAL REVIEW UPDATE]; RYAN D. WALTERS, TEX. PUB. POL'Y FOUND., THE UNDERVALUATION OF THE CONGRESSIONAL REVIEW ACT (2017); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 83–84 (2006); Jerry Brito & Veronique de Rugy, *Midnight Regulations and Regulatory Review*, 61 ADMIN. L. REV. 163, 189–90 (2009); Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677 (2004); Daniel Cohen & Peter L. Strauss, *Congressional Review of Agency Regulations*, 49 ADMIN. L. REV. 95 (1997); Michael J. Cole, *Interpreting the Congressional Review Act: Why the Courts Should Assert Judicial Review, Narrowly Construe "Substantially the Same," and Decline to Defer to Agencies Under Chevron*, 70 ADMIN. L.

Part I summarizes the background to the CRA and why Congress adopted that law. Part II then explains how the CRA works and what effect it has on agency rulemaking. Part III reviews the length and breadth of the CRA by discussing the meaning of the critical term “rule” and the retroactive reach of the Act. Part IV analyzes the Act’s judicial review provision. That part maintains that Congress has precluded judicial review of any action taken by Congress or the President under the CRA, but not of an *agency’s* compliance with that law. In fact, Part IV concludes that Congress could *not* preclude review of such a claim without violating the Fifth Amendment Due Process Clause.⁹ Part V offers—and responds to—the argument that the CRA is unlikely to allow Congress to do much more than eliminate rules that agencies adopt in the twilight of an outgoing administration. The article concludes in Part VI by saying that the CRA should be helpful in corralling agency ex-

REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009317 [<https://perma.cc/ZY4D-4GL5>]; Sean D. Croston, *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 (2010); 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 (2011); Morton Rosenberg, *Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform*, 51 ADMIN. L. REV. 1051 (1999) [hereinafter Rosenberg, *Whatever Happened*]; Julie A. Parks, Comment, *Lessons in Politics: Initial Use of the Congressional Review Act*, 55 ADMIN. L. REV. 187 (2003); Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162 (2009); Daren Bakst & James L. Gattuso, *The Stars Align for the Congressional Review Act*, HERITAGE FOUND. (Dec. 16, 2016), <http://thf-reports.s3.amazonaws.com/2016/IB4640.pdf> [<https://perma.cc/EG45-M79E>]; Sam Batkins & Adam J. White, *Should We Fear ‘Zombie’ Regulations?*, REGULATION, Summer 2017, at 16; Alex Guillen, *GOP onslaught on Obama’s ‘midnight rules’ comes to an end*, POLITICO (May 7, 2017, 7:10 AM), <http://www.politico.com/story/2017/05/07/obama-regulations-gop-midnight-rules-238051> [<https://perma.cc/PR2J-TTWN>]; Brian Mannix, *Midnight Mulligan: The Congressional Review Act Rides Again!*, LAW & LIBERTY (Nov. 17, 2016), <http://www.libertylawsite.org/2016/11/17/midnight-mulligan-the-congressional-review-act-rides-again/> [<https://perma.cc/S6X4-4M6S>]; Philip A. Wallach & Nicholas W. Zeppos, *How powerful is the Congressional Review Act?*, BROOKINGS INST. (Apr. 24, 2017); Sarah Westwood, *White House faces rough road to deregulation as its favorite tool, the Congressional Review Act, expires*, WASH. EXAMINER (May 8, 2015, 12:01 AM), <http://www.washingtonexaminer.com/white-house-faces-rough-road-to-deregulation-as-its-favorite-tool-the-congressional-review-act-expires/article/2622125> [<https://perma.cc/PP7J-JPLL>].

9. U.S. CONST. amend. V (“No person shall be . . . deprived of life, liberty, or property without due process of law . . .”).

cesses, but new legislation could achieve that result more effectively and efficiently.

I. THE PROVENANCE OF THE CONGRESSIONAL REVIEW ACT:
THE LIFE AND DEATH OF THE LEGISLATIVE VETO

Regulatory agencies are a necessity in contemporary America. For legal, structural, and political reasons, neither Congress nor the federal courts can decide which people should be charged with a crime, which compounds are hazardous waste, which pharmaceuticals are safe and effective, which weapons systems are most reliable, which grant applicants should be funded, or which individuals are disabled. Executive branch officials are necessary to make those calls. For many people, however, agencies are a necessary evil. There is the risk that they may make a hash out of a particular assignment or pursue their own form of “empire building” by expanding their jurisdiction beyond what Congress authorized. Further, the public has little to say about what agencies do, which people should fill those departments, and who should be dismissed.

Congress has that authority, along with a box of tools at its disposal to supervise an agency. Congress must establish agencies and approve their budgets.¹⁰ Members therefore have the opportunity to set or revise an agency’s priorities, secure promises from senior agency officials about its work during the upcoming fiscal year, and publicly embarrass at budget or oversight hearings agency officials whose organization has engendered public hostility.¹¹ Every member can also introduce legislation that would clip an agency’s wings, and an important member’s minatory presence can deter an agency from going on a frolic and detour. Also, members have almost unlimited access to various media outlets, which are more than happy to report how “troubled” a member is at the goings-on in a particular agency and how the agency has abused its authority in one fashion or another. The Senate also has a weapon

10. See U.S. CONST. art. I, § 8, cl. 18 (the Necessary and Proper Clause); *id.* § 9, cl. 7 (the Appropriations Clause); *id.* art. II, § 2, cl. 1 (contemplating the creation of “executive Departments”).

11. See, e.g., CURTIS W. COPELAND, CONG. RES. SERV., RL34354, CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS (2008).

that the House of Representatives lacks: confirmation hearings.¹² Senators can obtain concessions from officials as a condition of receiving their votes for the position to which officials aspire. Every member and every committee also has staff that can negotiate with an agency's personnel over the direction it has taken or will take, and staff members who are dissatisfied with an agency's response are in a position to persuade their boss that an agency has "gone rogue." If the congressional staff are not familiar with a particular example of agency overreach, there are numerous private businesses, organizations, and individuals that are more than willing to let the staff know what is going on in the fourth branch.

Nonetheless, during the New Deal Congress came up with an additional means of restraining agencies: the legislative veto. Borrowing from the presidential veto, a legislative veto would allow both chambers—and, sometimes, just one—to nullify a specific agency action that a majority found unauthorized or unwise.¹³ The rationale for the legislative veto was in part a version of "the greater includes the lesser" argument. The argument was that Congress should be free to reserve a legislative veto because Congress need not create a particular agency or empower one to adopt rules. Part of the justification was practical. Delegation is risky because of the difficulty of ensuring that agency officials adhere to Congress's mandates—what economists call a "principal-agent problem"—so Congress felt a need to nullify unwise agency actions before they became effective. The Supreme Court had also refused to limit the type or amount of authority that Congress could delegate

12. See U.S. CONST. art. II, § 2, cl. 1 (The Appointments Clause requires the "Advice and Consent" of the Senate for some "Officers of the United States.").

13. See Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1370 (1977); Note, *supra* note 8, at 2164 ("The problem of congressional control of the administrative state is not new. As early as the 1930s, members of Congress worried that wide delegations of administrative authority would leave the unelected bureaucracy politically unaccountable. Yet they also realized that Congress could not pass enough specific legislation to regulate the increasingly complex world. The legislative veto was seen as a partial solution to this dilemma. Congress would grant broad rulemaking authority to administrative agencies, but would reserve the ability to disapprove regulations that Congress disfavored. No single statute created an across-the-board legislative veto. Instead, over the course of sixty years, Congress enacted more than 200 federal statutes with individual legislative vetoes." (footnotes omitted)).

to agencies, so the legislative veto served as a means of compensating for the absence of any cap on what agencies could be allowed to do.¹⁴ The legislative veto seemed perfect for the job.

14. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1252–53 (1994). The Supreme Court has taken a hands-off approach to delegation issues. The Court has decided some degree of delegation is essential to manage today's society and that Congress is in a better position than the courts to decide what and how much authority that should be. See, e.g., *Opp Cotton Mills, Inc. v. Adm'r of the Wage & Hour Div. of the Dep't of Labor*, 312 U.S. 126, 145 (1941) ("In an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy in fixing, for example, a tariff rate, a railroad rate or the rate of wages to be applied in particular industries by a minimum wage law. The Constitution, viewed as a continuously operative charter of government, is not to be interpreted as demanding the impossible or the impracticable. The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."). As long as Congress has identified some remotely usable "intelligible principle to which the person or body authorized to [act] is directed to conform," *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), even one as vacuous as "excessive profits," see *Lichter v. United States*, 334 U.S. 742 (1948), the Court has upheld the delegation of even large-scale rulemaking authority. See, e.g., *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457 (2001) (upholding delegation to set ambient air quality standards "allowing an adequate margin of safety"); *Mistretta v. United States*, 488 U.S. 361 (1989) (upholding delegation of authority to promulgate sentencing guidelines); *Am. Power & Light Co. v. SEC*, 329 U.S. 90 (1946) (upholding delegation of authority to Securities and Exchange Commission to prevent unfair or inequitable distribution of voting power among security holders); *Yakus v. United States*, 321 U.S. 414 (1944) (upholding delegation to Price Administrator to fix "fair and equitable" commodity prices); *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944) (upholding delegation to Federal Power Commission to determine "just and reasonable" rates); *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943) (upholding delegation to Federal Communications Commission to regulate broadcast licensing "as public interest, convenience, or necessity" require). For opposing views on whether this state of affairs injures the public, benefits it, or is unavoidable regardless of its pluses and minuses, see, for example, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 133–34 (1980); THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 125–26 (2d ed. 2009); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1995); Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003); Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399 (2000); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969); David M. Driesen, *Loose Canons: Statutory Construction and the New Nondelegation Doctrine*, 64 U. PITT. L. REV. 1 (2002); Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87 (2010); Douglas H. Gins-

Congress certainly thought so. It took full advantage of that option, adding legislative veto provisions to hundreds of different statutes.¹⁵

The legislative veto, however, was controversial. Presidents saw it as an infringement on their executive authority.¹⁶ When used to overturn an agency adjudication, the legislative veto could also be criticized as an effort by Congress to play the role of an Article III court.¹⁷ The constitutionality of that practice finally reached the Supreme Court in 1983, and, unfortunately for Congress, the legislative veto did not survive. The Supreme Court ruled in *INS v. Chadha*¹⁸ that Article I defines the process by which Congress may legislate, that Article I requires bicameral passage of legislation and presentment of that legislation to the President for his signature (or veto, followed by a possible congressional override), and that Congress cannot end-run the Article I procedure through a legislative veto, however practical that option might be.¹⁹ The result was drastic: the numerous legislative veto provisions that Congress had added to legislation—whether the one- or two-chamber variety—were now unenforceable.²⁰

burg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251 (2010); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985); Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223 (1985); Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303 (1999); Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359 (2017).

15. See *INS v. Chadha*, 462 U.S. 919, 959–60 (1983) (Powell, J., concurring in the judgment); *id.* at 1003–13 (White, J., dissenting) (collecting statutes containing a legislative veto); Note, *supra* note 8, at 2164.

16. See *Chadha*, 462 U.S. at 976 & nn.12–14 (White, J., dissenting) (collecting authorities arguing pro and con on the constitutionality of the legislative veto).

17. See *id.* at 960–67 (Powell, J., concurring in the judgment).

18. 462 U.S. 919 (1983).

19. See *id.* at 944–59.

20. See *id.*; see also *U. S. Senate v. FTC*, 463 U.S. 1216 (1983) (relying on *Chadha* to affirm a lower court holding that a two-House veto is unconstitutional); *Process Gas Grp. v. Consumer Energy Council*, 463 U.S. 1216 (1983) (same, one-House veto).

II. CONGRESS'S RESPONSE TO THE DEMISE OF THE LEGISLATIVE VETO: THE CONGRESSIONAL REVIEW ACT OF 1996

The CRA was Congress's attempt to devise a lawmaking procedure that would approximate a legislative veto as closely as *Chadha* would allow.²¹ The CRA falls between the quick-acting legislative veto and the deliberative process that Congress ordinarily uses to enact legislation. Like a legislative veto,

21. The CRA was negotiated and added to a larger bill. *See supra* note 7. It was not the subject of pre-enactment congressional hearings, a Senate or House of Representative committee report, or extensive floor debate. Accordingly, the only CRA "legislative history" consists of a post-enactment joint statement by its sponsors. There are also a few allied documents created by the Congressional Research Service and congressional staff reflecting on the CRA and Congress's intent. *See* 142 CONG. REC. 8196 (1996) (Joint Statement of Senators Nickles, Reid, and Stevens); *id.* at 6922, 6929 (Joint Explanatory Statement of House and Senate Sponsors); *id.* at 6907 (Statement of Rep. David McIntosh); ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 37. Some commentators find worthwhile the statements of the CRA's sponsors. *See, e.g.,* Batkins & White, *supra* note 8, at 17. The difficulties in divining the intent of a collegial body are well known. *See, e.g.,* United States v. O'Brien, 391 U.S. 367, 383–84 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it"). Decades ago, the Supreme Court went from pillar to post on the question whether legislative history is useful or even relevant to statutory interpretation. *Compare, e.g.,* Grove City Coll. v. Bell, 465 U.S. 555, 566–67 (1984) (relying on post-enactment remarks of a bill's sponsors), *with, e.g.,* Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980) (finding post-enactment legislative history to be entitled to little weight). More recent decisions demonstrate that the Court believes it should have very little, if any, weight. *See* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002) (affirming that statutory interpretation begins and ends with the text of a statute if the text is clear). If and to the extent that those materials are relevant to determine the intent of a collegial body, they would support the broad interpretation of the CRA offered in this article. *See* INTERIM REPORT, *supra* note 8, at 87–88 ("The framers of the Congressional review provision intentionally adopted the broadest possible definition of the term 'rule' when they incorporated section 551(4) of the APA. As indicated previously, the legislative history of section 551(4) and the case law interpreting it make it clear that it was meant to encompass all substantive rulemaking documents—such as policy statements, guidance, manuals, circulars, memoranda, bulletins and the like—which as a legal or practical matter an agency wishes to make binding on the affected public The committees are concerned that some agencies have attempted to circumvent notice-and-comment requirements by trying to give legal effect to general statements of policy, 'guidelines,' and agency policy and procedure manuals. 'The committees admonish the agencies that the APA's broad definition of 'rule' was adopted by the authors of this legislation to discourage circumvention of the requirements of chapter 8.'" (quoting 142 Cong. Rec. E571, at E578; 142 Cong. Rec. S3683, at S3687 (Joint Explanatory Statement of House and Senate Sponsors))).

the Act enables Congress to expeditiously nullify administrative rules that it finds unauthorized, unnecessary, or unwise before they can go into effect. Unlike a legislative veto, the CRA requires both houses of Congress to pass the identical joint resolution and the President to sign it (or Congress to override his veto) for a rule to be nullified. The CRA therefore satisfies the requirements of Article I described in *Chadha* while trying to preserve at least some of the expedition that the legislative veto afforded.²²

The CRA has certain unique features that set it apart from the traditional Article I legislative process. Before a rule can take effect, the rule-issuing agency must submit to each house of Congress and the Comptroller General²³ a “report” containing the rule, a summary of its provisions, any cost-benefit analysis the agency conducted, and information regarding whether the agency complied with certain other federal laws.²⁴ Once the

22. One organization has challenged the constitutionality of the CRA on the ground that the act unconstitutionally permits Congress and the President to nullify a statutorily authorized agency rule without revising the underlying act of Congress. See, e.g., Batkins & White, *supra* note 8, at 20–21 (discussing a lawsuit filed by the Center for Biological Diversity challenging CRA nullification of an Interior Department rule). That argument is fatally flawed in two respects. One is that, under *Chadha*, Article I requires only bicameral passage of a bill, presentment to the President, and his signature for the bill to become a law. 462 U.S. at 946–52. Congress and the President can collaborate to repeal a regulation without amending the underlying statute even if the CRA had never existed. The other flaw is that passage of a joint resolution of disapproval under the CRA *does* modify the underlying statute. See *infra* notes 191–94 and accompanying text.

23. The Comptroller General is the Director of the Government Accountability Office (GAO), previously known as the Government Accounting Office. Created by the Budget and Accounting Act of 1921, Ch. 18, § 312, 42 Stat. 20 (1921) (codified as amended in scattered sections of 31 U.S.C.), the GAO provides investigative, evaluative, and auditing services for Congress. See KAREN L. MANOS, GOVERNMENT CONTRACT COSTS & PRICING § 86:11 (2nd ed. 2017); see also GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (2004).

24. 5 U.S.C. § 801(a)(1)(A) (2012) (“Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—(i) a copy of the rule; (ii) a concise general statement relating to the rule, including whether it is a major rule; and (iii) the proposed effective date of the rule.”); *id.* § 801(a)(1)(B) (“On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—(i) a complete copy of the cost-benefit analysis of the rule, if any; (ii) the agency’s actions relevant to sections 603, 604, 605, 607, and 609; (iii) the agency’s actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and (iv) any other relevant information or requirements under any other Act and any relevant Executive orders.”). The Secre-

report is filed, each chamber must forward it to the chairman and ranking member of the relevant committee with jurisdiction over the rule.²⁵

Submission of the report starts three different clocks. One gives the Comptroller General fifteen days to comment on a “major rule,”²⁶ which the Act defines as a rule that will have a material effect on the economy.²⁷ The Comptroller General must include in his analysis whether the agency has performed a cost-benefit analysis and has complied with several other particular statutes.²⁸ The second, and more important, clock oper-

tary of the Senate and the House Parliamentarian receive agency rules for Congress. COPELAND, *supra* note 8, at 10. The GAO places submitted rules into a database on its website. MAEVE P. CAREY ET AL., CONG. RES. SERV., F43992, THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS 11, app. at 23–24 (2016), <https://fas.org/sgp/crs/misc/R43992.pdf> [<https://perma.cc/NNW6-HK3Q>] (listing opinions).

25. 5 U.S.C. § 801(a)(1)(C) (“Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.”).

26. *Id.* § 801(a)(2)(A) (“The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency’s compliance with procedural steps required by paragraph (1)(B).”); *id.* § 801(a)(2)(B) (“Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General’s report under subparagraph (A).”).

27. 5 U.S.C. § 804 (“For purposes of this chapter . . . (2) The term ‘major rule’ means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.”).

28. Among the laws that the Comptroller General considers when preparing his report are the following: the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified at 2 U.S.C. §§ 1501–07 (2012)); the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified at 5 U.S.C. ch. 5 (2012)); the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified as amended at 5 U.S.C. ch. 6 (2012)); the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified at 44 U.S.C. §§ 3501–21 (2012)); and Executive Order No. 12,866, 58 Fed. Reg. 51,735 (1993) (requiring a cost-benefit analysis of every proposed rule). See *Congressional Review Act: Hearing Before the Subcomm. on Commer-*

ates for the sixty-day period that Congress may use to nullify the rule. The CRA lengthens the sixty-day period if it is interrupted by a congressional adjournment to prevent agencies from running out the clock by submitting rules at the tail end of a session.²⁹ The third clock concerns when a rule may go into effect. Ordinarily, a rule cannot take effect for at least thirty days after the *Federal Register* publishes it in final form.³⁰ The CRA increases that period to sixty days in the case of a “major” rule to afford Congress additional time to decide whether to nullify it.³¹ The President can advance the effective date if he

cial & Admin. Law of the H. Comm. on the Judiciary, 105th Cong. 37–38 (1997) (statement of Robert P. Murphy, General Counsel, GAO) (so noting). Given the brief period available for its analysis, the GAO uses a checklist to conduct “a paper review of the processes employed in the rulemaking under applicable statutory and regulatory mandates.” *Id.* at 2; see also ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 3, 18. In response to requests from a member of Congress, the GAO has also issued opinions analyzing whether a particular agency memorandum or pronouncement is a “rule” for CRA purposes. See *10th Anniversary of the Congressional Review Act: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 109th Cong. 12–13 (2006) (statement of J. Christopher Mihm, Managing Dir., Strategic Issues, GAO); Susan A. Poling, U.S. Gov’t Accountability Office, Opinion Letter on GAO’s Role and Responsibilities Under the Congressional Review Act, at 7 n.36 (May 29, 2014); CAREY, *supra* note 24, at 11–12, app. at 23–24 (listing opinions).

29. 5 U.S.C. § 801(d)(1) (“In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—(A) in the case of the Senate, 60 session days, or (B) in the case of the House of Representatives, 60 legislative days, before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress.”); *id.* § 801(d)(2)(A) (“In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—(i) such rule were published in the Federal Register (as a rule that shall take effect) on—(I) in the case of the Senate, the 15th session day, or (II) in the case of the House of Representatives, the 15th legislative day, after the succeeding session of Congress first convenes; and (ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.”). The extension of the congressional review period does not excuse an agency from compliance with the submission requirement. *Id.* § 801(d)(2)(B) (“Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a report shall be submitted to Congress before a rule can take effect.”).

30. 5 U.S.C. § 553(d). A rule can postpone the effective date for a longer period, and an agency can accelerate that date for “good cause.” *Id.* § 553(d)(1)–(3).

31. 5 U.S.C. § 802(b)(2) (“For purposes of this section, the term ‘submission or publication date’ means the later of the date on which—(A) the Congress receives the report submitted under section 801(a)(1); or (B) the rule is published in the Federal Register, if so published.”). It could be argued that Congress should be free to bundle together and review multiple rules simultaneously and pass one

makes certain findings attesting to the need to avoid delay.³² The President's acceleration of the effective date for a rule, however, does not prevent Congress from disapproving it.³³

The filing of the rule with Congress is a critical event for CRA purposes.³⁴ To expedite Congress's action,³⁵ the CRA cre-

joint resolution nullifying all of them. That approach makes sense as a matter of policy and efficiency, but the text of the CRA seems to contemplate that Congress must limit a joint resolution to one particular rule. *See id.* § 802(a) (defining "joint resolution"); *id.* § 802(b)(2)(B) (referring to "the rule" (emphasis added)); *see also* CAREY, *supra* note 24, at 4; ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 22–23. If an agency were to submit more than one rule in a single "report," however, the answer could be different. Plus, Article I does not regulate the number of joint resolutions that can be contained in any one bill. *See INS v. Chadha*, 462 U.S. 919, 946–52 (1983) (describing the Article I lawmaking process). Accordingly, if a joint resolution listed each rule in a separate paragraph, each such reference, for purposes of Section 802, would be to "the rule." That would enable Congress to include multiple rules within one joint resolution. Of course, packaging more than one agency rule in one joint resolution could materially change political support for the resolution.

32. 5 U.S.C. § 801(c)(1) ("Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress."); *id.* § 801(c)(2) ("Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—(A) necessary because of an imminent threat to health or safety or other emergency; (B) necessary for the enforcement of criminal laws; (C) necessary for national security; or (D) issued pursuant to any statute implementing an international trade agreement."); *id.* § 801(d)(3) ("A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).").

33. 5 U.S.C. § 801(c)(3) ("An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section."); *id.* § 801(f) ("Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.").

34. The GAO General Counsel has concluded that the sixty-day period does not begin to run until both houses of Congress have received the agency's report. ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 3 n.5.

35. 5 U.S.C. § 802(a) ("For purposes of this section, the term 'joint resolution' means only a joint resolution introduced in the period beginning on the date on which the report referred to in section 801(a)(1)(A) is received by Congress and ending 60 days thereafter (excluding days either House of Congress is adjourned for more than 3 days during a session of Congress), the matter after the resolving clause of which is as follows: 'That Congress disapproves the rule submitted by the _____ relating to _____, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in.); *id.* § 802(b)(1) ("A joint resolution described in subsection (a) shall be referred to the committees in each House of Congress with jurisdiction."); *id.* § 802(c) ("In the Senate, if the committee to

ates a fast-track procedure that guarantees a vote before the sixty-day review period has expired.³⁶ The biggest concern was the Senate parliamentary practices, so the CRA directly addresses and eliminates them as a roadblock to a vote. If the relevant Senate committee does not vote on the rule within twenty legislative days, thirty Senators can bring a joint resolution of disapproval to the floor.³⁷ There, the resolution can be brought up for debate at any time. Debate is limited to a maximum of ten hours split evenly between supporters and opponents, stopping a filibuster; the resolution is not subject to amendment, a point of order, or a motion to postpone consideration; and there are no appeals to the full Senate from a ruling by the chair on points of procedure.³⁸ A House-passed joint

which is referred a joint resolution described in subsection (a) has not reported such joint resolution (or an identical joint resolution) at the end of 20 calendar days after the submission or publication date defined under subsection (b)(2), such committee may be discharged from further consideration of such joint resolution upon a petition supported in writing by 30 Members of the Senate, and such joint resolution shall be placed on the calendar.”).

36. See Note, *supra* note 8, at 2176–77 (“Though the executive may not be much more concerned about disapproval resolutions than about ordinary legislation, disapproval resolutions do benefit from a streamlined legislative process unavailable to ordinary legislation. Like all fast-track legislative procedures, the CRA is designed to ensure that political minorities are not able to use congressional procedure to hijack policy. That this feature of the CRA was seen as necessary provides useful evidence in contemporary debates about the legislative and regulatory processes.” (footnote omitted)).

37. 5 U.S.C. § 802(d)(1) (“In the Senate, when the committee to which a joint resolution is referred has reported, or when a committee is discharged (under subsection (c)) from further consideration of a joint resolution described in subsection (a), it is at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) for a motion to proceed to the consideration of the joint resolution, and all points of order against the joint resolution (and against consideration of the joint resolution) are waived. The motion is not subject to amendment, or to a motion to postpone, or to a motion to proceed to the consideration of other business. A motion to reconsider the vote by which the motion is agreed to or disagreed to shall not be in order. If a motion to proceed to the consideration of the joint resolution is agreed to, the joint resolution shall remain the unfinished business of the Senate until disposed of.”).

38. *Id.* § 802(d)(2) (“In the Senate, debate on the joint resolution, and on all debatable motions and appeals in connection therewith, shall be limited to not more than 10 hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion further to limit debate is in order and not debatable. An amendment to, or a motion to postpone, or a motion to proceed to the consideration of other business, or a motion to recommit the joint resolution is not in order.”); *id.* § 802(d)(3) (“In the Senate, immediately following the conclusion of the debate on a joint resolution described in subsection (a), and a single quorum call at the conclusion of the debate if requested in accordance with the

resolution is immediately referred to the full Senate.³⁹ That process keeps the Senate from stalling.⁴⁰

If both chambers have adopted the joint resolution, the CRA procedure reverts to the traditional Article I process. If either the Senate or the House of Representatives votes on and fails to pass a joint resolution of disapproval, the agency rule remains in place.⁴¹ By contrast, if a joint resolution passes both chambers, it goes to the President for his signature or veto. If the President signs the joint resolution, or the Congress overrides

rules of the Senate, the vote on final passage of the joint resolution shall occur.”); *id.* § 802(d)(4) (“Appeals from the decisions of the Chair relating to the application of the rules of the Senate to the procedure relating to a joint resolution described in subsection (a) shall be decided without debate.”).

39. 5 U.S.C. § 802(f) (“If, before the passage by one House of a joint resolution of that House described in subsection (a), that House receives from the other House a joint resolution described in subsection (a), then the following procedures shall apply: (1) The joint resolution of the other House shall not be referred to a committee. (2) With respect to a joint resolution described in subsection (a) of the House receiving the joint resolution—(A) the procedure in that House shall be the same as if no joint resolution had been received from the other House; but (B) the vote on final passage shall be on the joint resolution of the other House.”).

40. The vote is on the rule in its entirety, not on a portion of it. *See CAREY, supra* note 24, at 4; ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 24 (“An up or down vote on the entire rule would appear to have been the intent of the framers of the review provision.”); Rosenberg, *Whatever Happened, supra* note 8, at 1066 (“The language and structure of the provision, and the supporting explanation of the legislative history, contemplates a speedy, definitive and limited process. It is not unlike the legislative processes created for congressional actions dealing with military base closings, international trade agreements, and presidential reorganization plans, among others. Each deals with complex, politically-sensitive decisions that allowed only an up or down vote by Congress on the entire package presented. It was understood that piecemeal consideration would delay and perhaps obstruct legislative resolution of the issues before it. For similar reasons, the statutory structure and legislative history of the review provision strongly indicates that Congress intended the process to focus on submitted rules as a whole, and not to allow veto of individual parts.” (footnotes omitted)).

41. Congress’s failure to disapprove a rule does *not* constitute approval of it. The CRA has a provision to that effect. *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.”). Plus, as a constitutional matter, a unicameral or bicameral failure to pass a joint resolution of disapproval *cannot* be treated as approval. *Chadha* made clear that congressional approval of the rule would require bicameral passage of a joint resolution (or some other bill), presentment to the President, and his signature (or bicameral passage of a veto override resolution). *See INS v. Chadha*, 462 U.S. 919, 944–59 (1983).

his veto, the rule is invalidated.⁴² To prevent the agency from engaging in shenanigans—by reissuing the same rule under a different name or with only trivial or cosmetic revisions—the CRA prohibits the agency from promulgating a new rule that is “substantially the same” as the one invalidated absent an intervening act of Congress.⁴³

III. THE REACH OF THE CONGRESSIONAL REVIEW ACT

A. *The Lateral Breadth of the CRA: What Is a “Rule”?*

Oliver Wendell Holmes characterized a rule as “the skin of a living policy.”⁴⁴ The meaning of that term is critical for the CRA because it is the base on which the entire statute rests. The CRA, however, did not invent that term. The Administrative Procedure Act (APA) first defined it fifty years earlier. The APA defines a rule (in part) as “the 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.”⁴⁵

The APA divides rules into two categories.⁴⁶ *Legislative* or *substantive rules* create legally enforceable rights and duties.⁴⁷

42. 5 U.S.C. § 802(b)(1) (“A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.”).

43. *Id.* § 802(b)(2) (“A rule that does not take effect (or does not continue) under paragraph (1) 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.”).

44. CORNELIUS M. KERWIN & SCOTT R. FURLONG, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 2–3 (4th ed. 2011). The reason is that, “[i]ncreasingly, rulemaking defines the substance of public programs. It determines, to a very large extent, the specific legal obligations we bear as a society. Rulemaking gives precise form to the benefits we enjoy under a wide range of statutes. In the process, it fixes the actual costs we incur in meeting the ambitious objectives of many public programs.” *Id.* at 2.

45. The full definition of a “rule” in the APA is found at 5 U.S.C. § 551(4) (2012) (“[R]ule’ means the 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 therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing . . .”).

46. 5 U.S.C. § 553(b), (d).

Interpretative rules come in various forms, such as guidance documents, manuals, opinions letters, so-called “Dear Colleague” letters, and the like.⁴⁸ In theory, interpretive rules merely construe statutes, legislative rules, agency practices, or other interpretative rules and do not have the same legal effect as legislative rules.⁴⁹ The Supreme Court, however, largely eliminated that distinction. In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,⁵⁰ the Court held that federal courts must accept an agency’s reasonable interpretation of an ambiguous statute even if the court would have read the law differently.⁵¹ As a practical matter, in many cases interpretive

47. See *Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977) (An authorized and properly issued rule has “the force and effect of law.” (quoting TOM C. CLARK, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (1947)); see also, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 & n.18 (1979).

48. See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidelines, Manuals, and the Like— Should Federal Agencies Use Them To Bind the Public?*, 41 DUKE L.J. 1311, 1320 (1992) (“[R]ules” include “legislative rules, interpretive rules, opinion letters, policy statements, policies, program policy letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidelines, staff instructions, manuals, questions-and-answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, testimony before Congress, and many others”); Rosenberg, *Whatever Happened*, supra note 8, at 1054. Distinguishing between legislative and interpretive rules can be difficult, and even the correct approach to that undertaking is a controversial issue. Compare John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004) (arguing that the label “legislative rules” should only be applied to rules that underwent the APA notice-and-comment process, with all other agency pronouncements properly deemed interpretive), with Richard J. Pierce, Jr., *Distinguishing Legislative Rules from Interpretive Rules*, 52 ADMIN. L. REV. 547 (2000) (discussing the other tests used to make that distinction); see also *Perez v. Mort. Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015) (noting but declining to decide the issue). The answer to that question, however, has no effect on the meaning of the underlying term “rule.”

49. See, e.g., RICHARD J. PIERCE, JR., ET AL., *ADMINISTRATIVE LAW AND PROCESS* § 6.4.7a, at 292 (6th ed. 2014); *id.* § 6.4.5, at 273.

50. 467 U.S. 837 (1984).

51. *Id.* at 865–66. A similar but even more deferential principle applies when an agency construes one of its rules. In that case, the administrative interpretation “becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.” *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 414 (1945). The Court has applied that standard in diverse settings—for example, when the agency acted in a formal or informal proceeding, when it interpreted a rule in the context of litigation, when its later interpretation appeared to conflict with a different one, when the “agency” was a nontraditional regulatory agency, and even when the agency advanced its interpretation in a legal brief. See, e.g., *Talk America, Inc. v. Michigan Bell Tel. Co.*, 564 U.S. 50, 59 (2011); *Long Island Care at Home, Ltd. v.*

rules can have the same effect as legislative ones because of their *in terrorem* effect on regulated parties.⁵² The result is that “[a]lthough legislative and nonlegislative rules are conceptual-

Coke, 551 U.S. 158, 170–71 (2007); *Stinson v. United States*, 508 U.S. 36, 44–45 (1993) (U.S. Sentencing Commission); *Udall v. Tallman*, 380 U.S. 1, 16–17 (1965) (oil and gas leases). The Supreme Court reaffirmed *Seminole Rock* in *Auer v. Robbins*, 519 U.S. 452, 461 (1997), although some justices later expressed misgivings about that rule. See *Mort. Bankers Ass’n*, 135 S. Ct. at 1210 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1212–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment). There is a strong case that the *Seminole Rock* rule is mistaken and should be overruled. See *id.* at 1211–13 (Scalia, J., concurring in the judgment); *id.* at 1213–25 (Thomas, J., concurring in the judgment); *Decker v. Nw. Env’tl. Cntr.*, 133 S. Ct. 1326, 1339–42 (2013) (Scalia, J., concurring in part and dissenting in part); John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996). Justice Scalia expressed a willingness to reconsider *Seminole Rock* before his death. It is uncertain whether a majority of the Court is willing to do so. Interestingly though, the newest member of the Court, Justice Neil Gorsuch, wrote while a court of appeals judge that he would overrule *Chevron*. See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring). As a matter of policy, the best defense of *Auer* deference is the same one offered to support *Chevron*. See Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. 297, 306, 308 (2017). Accordingly, if *Chevron* falls, *Auer* will follow.

52. See *Mort. Bankers Ass’n*, 135 S. Ct. at 1211–12 (Scalia, J., concurring in the judgment) (“By supplementing the APA with judge-made doctrines of deference, we have revolutionized the import of interpretive rules’ exemption from notice-and-comment rulemaking. Agencies may now use these rules not just to advise the public, but also to bind them. After all, if an interpretive rule gets deference, the people are bound to obey it on pain of sanction, no less surely than they are bound to obey substantive rules, which are accorded similar deference. Interpretive rules that command deference *do* have the force of law.”); see also K.C. JOHNSON & STUART TAYLOR, JR., *THE CAMPUS RAPE FRENZY: THE ATTACK ON DUE PROCESS AT AMERICA’S UNIVERSITIES* (2017) (discussing the effect that a 2011 “Dear Colleague” letter published by the Department of Education Office of Civil Rights had on colleges); Anthony, *supra* note 48, at 1328–29; Randolph J. May, *Ruling Without Real Rules—Or How To Influence Private Conduct Without Really Binding*, 53 ADMIN. L. REV. 1303 (2001). Not every agency opinion receives *Chevron* deference. See, e.g., *Christian v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (ruling that agency opinion letters are not entitled to receive *Chevron* deference); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257 (1991) (same, EEOC opinions). Unless Congress expressly empowered an agency to fill a statutory gap, an agency’s administration of a statutory scheme is entitled only to whatever persuasive value its opinion contains under the standard enunciated in *Seminole Rock* and *Auer*. See *United States v. Mead Corp.*, 533 U.S. 218, 227–34 (2001); *Pierce*, *supra* note 48. In many instances, however, that may tip the scale in the government’s favor, and in no instance does a private party receive any degree of deference for its reading of the law.

ly distinct and although their legal effect is profoundly different, the real-world consequences are usually identical.”⁵³

The Justice Department⁵⁴ and the federal courts have made clear that the term “rule” must be construed broadly.⁵⁵ As one lower federal court put it, “The APA defines the term ‘rule’

53. Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 34 DUKE L.J. 381, 384 (1985). For that reason, Attorney General Jeff Sessions recently prohibited Justice Department lawyers from issuing “guidance documents that purport to create rights or obligations binding on persons or entities outside the Executive Branch (including state, local, and tribal governments).” Memorandum from Attorney General Jeff Sessions to All Components Regarding Prohibition on Improper Guidance Documents 1–2 (Nov. 16, 2017), <https://www.justice.gov/opa/press-release/file/1012271/download> [<https://perma.cc/34J9-Y39P>].

54. See TOM C. CLARK, U.S. DEP’T OF JUSTICE, ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 13 (1947) (“The definition of rule is not limited to substantive rules, but embraces interpretive, organizational and procedural rules as well.”).

55. See *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 892 (1990) (“[T]he individual actions of the BLM identified in the six affidavits can be regarded as rules of general applicability . . . announcing, with respect to vast expanses of territory that they cover, the agency’s intent to grant requisite permission for certain activities, to decline to interfere with other activities, and to take other particular action if requested.”); *Chem. Serv., Inc. v. Env’tl. Monitoring Sys. Lab.*, 12 F.3d 1256, 1267 (3d Cir. 1993) (“The MOU would appear to fit within the definition of a rule because EPA has entered into a statement of general applicability and future effect designed to implement the [Federal Technology Transfer Act of 1986, Pub. Law No. 99-502, 100 Stat. 1785]”); *Caudill v. Blue Cross & Blue Shield of N.C.*, 999 F.2d 74, 76 (4th Cir. 1993) (agency medical benefit determinations); *Poling*, *supra* note 28, at 8 (noting that GAO had concluded that an HHS memorandum discussing the government’s ability to waive work requirements under the Temporary Assistance for Needy Families Program was a CRA rule); COPELAND, *supra* note 8, at 11–14 (listing eleven different agency documents deemed rules, such as procurements requirements for the National School Lunch Program, a designation of critical habitat by the Fish & Wildlife Service, an EEOC document discussing health benefits for retirees, a document issued by the Office of Thrift Supervision addressing “Permissible Activities of Savings and Loan Holding Companies,” and a document issued by the Bureau of Land Management regarding the issuance of oil and gas leases in Alaska); ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 2–3 (stating, based on a review of federal court decisions, that a “rule” includes “interpretive and substantive rules, guidelines, formal and informal statements, policy proclamations, employee manuals and memoranda of understanding, among other types of actions”); *id.* at 26–27 (noting that the GAO had deemed the following to be “rules under the CRA”: a letter issued by the Centers for Medicare and Medicaid Services to state officials concerning the State Children’s Health Insurance Program, a Department of Interior Trinity River “Record of Decision,” the Farm Credit Administration’s national charter initiative, the EPA’s “Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits,” the Tongass National Forest Land and Resources Management Plan, and a Secretary of Agriculture memorandum concerning the Emergency Salvage Timber Sale Program).

broadly enough to include virtually every statement an agency may make”⁵⁶ The analysis of two commentators is quite instructive:

[T]he APA definition, interestingly, does not refer to subject matter other than ‘law’ and ‘policy.’ In this respect, the definition could not be written more broadly. No area of public policy is excluded Rules covered a large range of topics in 1946; in the early twenty-first century the scope is virtually limitless The definition clearly established an expansive relationship between rules, law, and public policy. The terms *implement*, *interpret*, and *prescribe* describe the fullest range of influence that a rule could have.⁵⁷

The CRA incorporates the APA’s definition of a “rule” so that term should have the same meaning for both laws (with a few specified exceptions).⁵⁸ As the result, by using the “broadest possible definition of the term ‘rule,’” Congress ensured that no agency action would escape its consideration.⁵⁹

56. *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983) (citation omitted).

57. KERWIN & FURLONG, *supra* note 44, at 4–5.

58. The exceptions are for the case-specific application of law or policy; personnel rules; rules of internal agency organization, practice, or procedure; and rules concerning monetary policy by the Board of Governors of the Federal Reserve System or the Federal Open Market Committee. 5 U.S.C. § 804(3)(A)–(C) (2012); *id.* § 807. The CRA also exempts from a “major” rule—but not from a “rule”—any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that act.” *Id.* § 804(2).

59. See LUBBERS, *supra* note 8, at 164; Rosenberg, *Whatever Happened*, *supra* note 8, at 1066–67 (“The framers of the congressional review provision intentionally adopted the broadest possible definition of the term “rule” when it incorporated the APA’s definition. As indicated previously, the legislative history of section 551(4) of the APA and the case law interpreting it clarifies it was meant to encompass all substantive rulemaking documents—such as policy statements, guidances, manuals, circulars, memoranda, bulletins and the like—which as a legal or practical matter an agency wishes to make binding on the affected public.” (footnote omitted)); see also CAREY, *supra* note 24, at 6 (“Notably, the CRA adopts the broadest definition of ‘rule’ contained in the APA, which is broader than the category of rules subject to notice and comment rulemaking. Thus, some agency actions that are not subject to notice and comment rulemaking under the APA, and thus may not be published in the *Federal Register*, may still be considered a rule under the CRA.” (footnote omitted)); Cohen & Strauss, *supra* note 8, at 102 (“Even though major rules are, in some respects, singled out for more intensive analytical requirements and have their effective date delayed for some period of time, even policy statements, interpretative rules, and technical manuals face congressional review.”).

That conclusion makes eminent sense given the purpose of the CRA. Before *Chadha*, Congress could use a legislative veto to nullify rules before they went into effect, and it exercised that option liberally by including more than two hundred legislative veto provisions in regulatory schemes. Denied by *Chadha* of the ability to use that tool, Congress borrowed from the APA the broadly interpreted term “rule” to capture every possible agency document that could affect the public, the economy, or the nation. That term establishes the base for the entire CRA, so it must be read broadly to support the superstructure created by the rest of that law. In fact, only by construing the term “rule” in as broad a manner as the English language allows can that term play the role that Congress intended.

That conclusion also makes eminent sense as a matter of administrative law. Agencies often use interpretive rules to state a position on the meaning of governing statutes and regulations.⁶⁰ The practice can be helpful because it enables an agency to clear up an ambiguity in the governing law while avoiding the delay occasioned by the APA notice-and-comment process. But the practice is also a controversial one. Agencies need not submit interpretive rules through the notice-and-comment process,⁶¹ so the first opportunity a private party has for judicial review can occur in an agency enforcement action. In that scenario, however, the controversy is biased in the agency’s favor. *Chevron* and other Supreme Court decisions place a thumb on the government’s side of the scale when it comes to the meaning of federal law, with the agency winning when it has the better of the argument *and* when courts find themselves in equipoise. That outcome is an oddity. Historically, courts have had the final say on the meaning of the law.⁶² Now, administra-

60. Perhaps to avoid the rigors of formal or informal rulemaking, perhaps to avoid giving private parties an immediate opportunity for judicial review, which would be available were an agency to adopt a legislative rule. *See, e.g.,* *Perez v. Mort. Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015); *KERWIN & FURLONG, supra* note 44, at 23; *Anthony, supra* note 48, at 1324.

61. *See, e.g.,* 5 U.S.C. § 553(b)(3)(A) (unless another statute directs otherwise, the APA notice-and-comment requirement “does not apply” to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”); *Mort. Bankers Ass’n*, 135 S. Ct. at 1204.

62. *See* *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

tive agencies sometimes have that power.⁶³ However large that category of cases may be, the government benefits from the Supreme Court's decision to give agencies decision-making power. In light of what Congress sought to achieve in the CRA, Congress would have wanted to be able to review any agency opinion of the law whose effect would be bolstered by *Chevron* or other case law before that opinion went into effect.

The views of the Government Accountability Office (GAO) as to the meaning of the CRA are also important in this regard. Congress gave the Comptroller General the responsibility to analyze every major rule to learn whether the agency has complied with a variety of laws other than the CRA.⁶⁴ That tasking has significance for purposes of the proper interpretation of the CRA. Perhaps the rationale that the Supreme Court used to justify the rule of administrative law adopted in *Chevron*—namely, courts must accept Congress's decision to delegate law-interpreting authority to an agency—does not apply to the CRA because Congress reserved for itself the authority to decide what is and is not a "rule." But *Chevron* is not the only relevant Supreme Court decision. In *Skidmore v. Swift & Co.*,⁶⁵ Justice Robert Jackson concluded that "the rulings, interpretations and opinions" of a statute offered by an agency entrusted with the responsibility for making it work are entitled to respect.⁶⁶

63. See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) ("If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (footnotes omitted).

64. See Poling, *supra* note 27, at 1, 3 (identifying laws that the Comptroller General considers when preparing his report).

65. 323 U.S. 134 (1944).

66. *Id.* at 139–40 ("There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular

They “constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,”⁶⁷ with the exact amount of guidance contingent on “the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking the power to control.”⁶⁸ Just as a court would treat as scholarly guidance the opinion of John Henry Wigmore on a point of evidence or that of Arthur Corbin on an issue of contract law, so too should the courts accept a persuasive GAO opinion on the meaning of a CRA “rule.”⁶⁹ As relevant here, the GAO’s interpretation of the CRA can provide valuable guidance to its meaning.

The GAO has adopted a broad interpretation of a “rule” as encompassing any document in which an agency creates, modifies, or describes the law.⁷⁰ The GAO also reads the CRA broadly as applying to all new rules, whether or not they are “major” rules and regardless of whether they are legislative or interpretive rules.⁷¹ It has further said that an unsubmitted rule

case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator’s policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.”).

67. *Id.* at 140.

68. *Id.*

69. See Paul J. Larkin, Jr., *The World After Chevron*, HERITAGE FOUND. (Sept. 8, 2016), <http://www.heritage.org/courts/report/the-world-after-chevron> [<https://perma.cc/33SU-RBML>].

70. *Chevron* is relevant for another reason too. *Chevron* was decided in 1984, twelve years before the CRA became law, and it gives law-interpreting authority to agencies in a potentially large number of cases. *Chevron* directs courts to place a thumb (maybe the entire hand) on the government’s side of the scale. A private party may find it quite difficult to persuade a court to adopt its interpretation of a statute. Under those circumstances, Congress may well have wanted to review an agency’s rule, in whatever form it took, before anyone was at risk of facing a losing battle in court.

71. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-268T, CONGRESSIONAL REVIEW ACT 1–3 (2007) (Statement of Gary Kepplinger, General Counsel); *10th Anniversary of the Congressional Review Act*, *supra* note 28, at 9–10, 12; *Congressional Review Act*, *supra* note 28, at 37–38 (stating that agencies must submit all new rules to Congress, but the GAO is required to analyze only major rules); Poling, *supra*

has no legal effect.⁷² Those conclusions are fully consistent with the CRA's text and purpose.

The GAO recently reiterated those conclusions in response to a congressional inquiry. Senator Pat Toomey asked the GAO for its opinion on whether a 2013 guidance document issued jointly by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation—a document known as the final Interagency Guidance on Leveraged Lending⁷³—was a “rule” for purposes of the CRA and therefore should have been submitted to Congress as that Act requires. “Leveraged lending” generally refers to the extension of large loans to corporate borrowers for the purpose of engaging in mergers and acquisitions, recapitalization, buyouts, and expansion.⁷⁴ The Interagency Guidance document addressed a host of subjects, such as “underwriting standards, valuation standards, the risk rating of leveraged loans, and problem credit management.”⁷⁵ The document also spoke to the types of actions and considerations that might prompt the three agencies to take an administrative action against a bank.⁷⁶ The agencies argued that the document was not a “rule” because it merely set forth general factors that they would consider when deciding, in the exercise of their discretion, whether to take an action against a bank. The GAO agreed with the agencies that the document was a policy statement, not a dictate affecting a bank's rights or obligations, but also concluded that a general statement of agency policy

note 28, at 9 (concluding that the CRA requires GAO to analyze final rules, not proposed ones). The Congressional Research Service has reached the same conclusion. See RICHARD S. BETH, CONG. RES. SERV., DISAPPROVAL OF REGULATIONS BY CONGRESS: PROCEDURE UNDER THE CONGRESSIONAL REVIEW ACT (2001); ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 2–3.

72. See COPELAND, *supra* note 8, at 7 (“GAO has said on numerous occasions that covered final rules cannot take effect until the rules are submitted to it and to both Houses of Congress . . .”).

73. 78 Fed. Reg. 17,766, 17,770–76 (Mar. 22, 2013).

74. Letter from Susan A. Poling, GAO General Counsel, to Senator Pat Toomey, Pub. B-329272, Office of the Comptroller of the Currency, Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation—Applicability of the Congressional Review Act to Interagency Guidance on Leveraged Lending 2 (Oct. 19, 2017), <https://www.gao.gov/assets/690/687879.pdf> [<https://perma.cc/ZG86-4Q9U>].

75. *Id.*

76. *Id.* at 3.

nonetheless is a rule for CRA purposes.⁷⁷ Relying on the text of the CRA, its legislative history, the GAO's prior decisions, and academic commentary, the GAO concluded that the Interagency Guidance was a rule because it "is a general statement of policy designed to assist financial institutions in providing leveraged lending to creditworthy borrowers in a sound manner."⁷⁸ The GAO also expressly rejected the agencies' argument that only a document establishing legally binding standards affecting the rights or obligations of third parties such as banks is a rule. Those factors are evidence that a document is a CRA rule, but they are not necessary for a document to meet the statutory definition.⁷⁹

The GAO's decision in that matter is quite important.⁸⁰ It makes quite clear that the GAO believes that agency guidance documents are "rules" under the CRA even if they only describe the type of factors that an agency will take into account when deciding whether and how to exercise its enforcement discretion. The three banking agencies involved in that matter also are not the only ones that issue guidance documents. It is likely that most, if not all, agencies that can initiate some type of enforcement proceeding have their own version of the Interagency Guidance that the GAO decided should have been submitted to Congress. Given the GAO's conclusion in that matter, all of those numerous agency guidance documents would be subject to the CRA's submission requirement. The upshot is that there might be "hundreds or even thousands of sub-regulatory statements" that should have been submitted to Congress, but were not.⁸¹ Moreover, because the CRA requires that a rule be submitted to Congress "before it can take ef-

77. *Id.* at 4–7.

78. *Id.* at 7.

79. *Id.*

80. See Editorial, *Toomey's 'Guidance' Repeal Guide*, WALL ST. J. (Oct. 29, 2017), <https://www.wsj.com/articles/toomeys-guidance-repeal-guide-1509312087> [<https://perma.cc/YBJ4-AJ8A>]; Susan E. Dudley, *Don't Write Off the Congressional Review Act Yet*, Y. J. REG.: NOTICE & COMMENT (Nov. 6, 2017), <http://yalejreg.com/nc/dont-write-off-the-congressional-review-act-yet-by-susan-e-dudley/> [<https://perma.cc/P92B-XRRA>].

81. Susan E. Dudley, *New Implications of the Congressional Review Act*, GEO. WASH. U. REGULATORY STUD. CNTR. (Nov. 8, 2017), <https://regulatorystudies.columbian.gwu.edu/new-implications-congressional-review-act> [<https://perma.cc/LJR4-DMUR>]; see also Dudley, *supra* note 80.

fect,”⁸² the GAO also noted, unsubmitted agency guidance documents cannot serve as a legal basis for taking agency action.

Does the CRA apply to rules promulgated by so-called independent agencies?⁸³ The answer is yes. The text of the CRA does not distinguish between independent agencies and executive branch agencies, the ones traditionally under the direct and close supervision of the President. There is also no good reason to exempt independent agencies from congressional review. Congress’s decision to create an independent agency shows only that Congress wanted to reduce *executive* control of the organization by restricting the President’s authority to remove senior *officials*.⁸⁴ It does not mean that Congress exempted the agency from Congress’s ability to use the CRA to oversee and nullify an agency’s *rules*. Independent agencies can abuse their regulatory authority no less than executive branch agencies, so Congress would have wanted to review their rules too. Finally, Congress, President Trump, and the GAO have also concluded that the CRA applies to executive and independent agencies alike.⁸⁵

B. *The Vertical Reach of the CRA:*

When Does the Congressional Review Period Commence?

The CRA does not create a time for an agency to file a rule with Congress and the Comptroller General, but it does spur the agency to act quickly because it provides that a rule cannot

82. *Id.* at 1.

83. For a list of independent agencies, see 44 U.S.C. § 3502(5) (2012).

84. See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 623–32 (1935).

85. The House and Senate both passed H.J. Res. 111, 115th Cong. (2017), which sought to invalidate a rule governing arbitration agreements promulgated by the Consumer Financial Protection Board, an independent agency, and President Trump signed the bill into law on November 1, 2017. See Yuka Hayashiu, *Trump Signs Bill Scrapping Rule That Made It Easier to Sue Banks*, WALL ST. J. (Nov. 1, 2017), <https://www.wsj.com/articles/trump-signs-bill-scrapping-rule-that-made-it-easier-to-sue-banks-1509569795> [<https://perma.cc/XR58-ULJ9>]; see also *Congressional Review Act Tracker 2017*, *supra* note 5. The GAO had previously taken the position that the CRA applies to rules issued by independent agencies. See *10th Anniversary of the Congressional Review Act*, *supra* note 28, at 10 (“With certain exceptions, CRA applies to most rules issued by federal agencies, including the independent regulatory agencies.” (footnote omitted)); Poling, *supra* note 28, at 1 (“Congressional review is assisted by CRA’s requirement that all federal agencies, including independent regulatory agencies, submit each rule to both Houses of Congress and to GAO before it can take effect.”).

take effect until it has been submitted. By contrast, the CRA does define the time period available to Congress to review a rule.⁸⁶ According to the text of the Act, the clock does not commence until “the *later* of the date on which” the *Federal Register* publishes the rule or on which “Congress receives the report” required by the Act.⁸⁷ Accordingly, any and every regulation, policy statement, and the like that has not yet been properly submitted to Congress for its review remains open for invalidation even today⁸⁸—even ones that were published in the *Federal Register*.

The text of the CRA makes that clear. The time to introduce a joint resolution of disapproval does not commence until the *later* of the date of *Federal Register* publication or the date that Congress receives the report. It would be silly to conclude that the legislative review period *precedes* the date that Congress can introduce a resolution of disapproval. Moreover, the period of expedited review in the Senate—a key feature of the CRA because it prevents a filibuster—is measured from the “submission or publication date,” which “means the later of the date on which” Congress “receives the report” or it is “published.” It would also be witless to conclude that the Senate’s expedited procedure ends before Congress receives the rule. Accordingly, publication alone does not trigger the review period. To start the clock the rule must also be presented to Congress and the Comptroller General.⁸⁹

Why is that critical? Why must an agency not only publish a rule in the *Federal Register* but also submit a published rule to Congress? There are several reasons. First, Congress wanted to put the burden of notification on the agency rather than on its members, their staff, or the GAO. Congress could have made publication in the *Federal Register* the triggering date and relied on one of those three groups to follow the *Federal Register* regularly to see when every new agency rule is published. But that would have placed an additional demand on parties Congress likely thought already carried a heavy burden.

86. See 5 U.S.C. § 802(a) (2012).

87. 5 U.S.C. § 802(b)(2) (2012) (emphasis added).

88. As explained below, the question whether Congress or the courts have the final say on compliance with the CRA has a handful of sub-issues associated with it.

89. See ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 2 (“A covered rule cannot take effect if the report is not submitted.”).

Second, Congress directed each agency to give the Comptroller General a copy of every rule so that the GAO could analyze “major” rules and report that analysis to each chamber. One element of that analysis is whether the agency had complied with several other federal laws and had performed a cost-benefit analysis. Congress considered the Comptroller General’s analysis important and might have wanted to avoid the risk that it would not have that opinion if publication in the *Federal Register* alone triggered the review period. Atop that, the CRA directs agencies to “cooperate with the Comptroller General by providing information relevant to the Comptroller General’s report” to Congress. The Comptroller General might find an agency report incomplete, which would hamper its ability to analyze the rule for Congress. Using the *Federal Register* publication date as the triggering event could hinder the Comptroller General’s ability to complete its analysis within the fifteen-day period set by the CRA.

Third, reliance on *Federal Register* publication could create logistical difficulties at the end of a Congress, when members not re-elected to the next session (and their staff) would be leaving Capitol Hill for other pursuits. Given the prevalence of agencies’ issuance of “midnight rules,”⁹⁰ Congress wanted to be able to restart the review clock in the new session without relying on departing members to act before leaving office.

Fourth, a final agency rule would burden or benefit different private parties, so Congress may have believed that the burden of notification should rest on the party responsible for changing the status quo. Accordingly, the CRA submission requirement is an eminently sensible one.⁹¹

* * * * *

Where does that leave us? A broad construction of the term “rule” and a strict construction of the “submission” requirement are consistent with the text and purpose of the CRA. Congress decided that it needed another tool to review the

90. See *supra* note 6.

91. The recent GAO decision noted above is important in this regard, too. See *supra* text accompanying notes 73–82. The GAO’s October 19, 2017, decision discussed above involved a guidance document issued in 2013. The GAO’s decision that the document should have been submitted to Congress under the CRA demonstrates that the agency believes that the Act reaches back well before the period during which “midnight regulations” are ordinarily promulgated.

work of agencies in addition to the budget process, oversight hearings, and nominations. Congress initially settled on the legislative veto as the tool it would use, but the Supreme Court scotched that notion in *Chadha*. Congress then turned to the CRA to reach the same goal that a legislative veto would have served, but in a way that avoided the roadblock imposed by the Supreme Court. Congress could not perform its oversight function if an agency could publish a rule and wait for the congressional review period to expire before submitting it to Congress. Only reading the CRA as discussed above prevents an agency from running out the clock on agency documents with an important effect.

IV. JUDICIAL REVIEW UNDER THE CRA

The APA supplies private parties with a cause of action to challenge an agency rule on the ground that it is arbitrary and capricious or exceeds the agency's statutory authority.⁹² But Congress can preclude review under the APA through a different statute,⁹³ and sometimes Congress does that, either by creating a different review procedure or by simply foreclosing APA review.⁹⁴ A provision of the CRA appears to have just that effect. Section 805 of Title 5 provides as follows: "No determination, finding, action, or omission under this chapter shall be subject to judicial review."⁹⁵ On its face, Section 805 appears quite clearly to preclude all judicial review under the APA or

92. See 5 U.S.C. § 702 (2012).

93. See *id.* § 701(a) ("This chapter applies, according to the provisions thereof, except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.").

94. See, e.g., *Elgin v. Dep't of Treasury*, 567 U.S. 1, 5 (2012) (ruling that the judicial review provisions of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 1101–1105 (2012), are exclusive); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 202 (1994) (ruling that the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §§ 801–966 (2012), prevents a district court from exercising subject-matter jurisdiction over a pre-enforcement challenge to the act); *Lincoln v. Vigil*, 508 U.S. 182, 184 (1993) (ruling that the decision of the Indian Health Service to discontinue a particular program was "committed to agency discretion by law" and therefore not subject to judicial review under the APA, 5 U.S.C. § 701(a)(2)); *Air Courier Conf. of Am. v. Am. Postal Workers Union, AFL-CIO*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring in the judgment) (concluding that the text of a section of the Postal Reorganization Act, 39 U.S.C. § 410(a) (2012), forecloses judicial review under the APA of certain actions taken by the U.S. Postal Service).

95. 5 U.S.C. § 805.

any other law. The question posed by that provision, therefore, is quite simple: what does that Section 805 mean? The answer, however, is more complicated.

The Supreme Court has never discussed Section 805, but a handful of lower federal courts have done so. There is no consensus over its proper interpretation. A majority of courts, including the D.C. and Tenth Circuit Courts of Appeals, have decided that the text of Section 805 is straightforward and bars them from reviewing the merits of a claim that an agency did not submit a rule to Congress.⁹⁶ Those courts, however, have not scrutinized Section 805 in any depth. They have essentially limited their analysis to a reading of Section 805's text in isolation from the other provisions and purpose of the CRA. By contrast, a few other lower courts, including the Second Circuit by implication,⁹⁷ have disagreed with the majority.⁹⁸ They have held that the text of Section 805 does not demand the odd, counterintuitive result that agencies may violate the CRA with

96. See *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 229 (D.C. Cir. 2009) ("That latter provision denies courts the power to void rules on the basis of agency noncompliance with the Act. The language of § 805 is unequivocal . . ."); *Via Christi Reg'l Med. Ctr., Inc. v. Leavitt*, 509 F.3d 1259, 1271 n.11 (10th Cir. 2007) ("The Congressional Review Act specifically precludes judicial review of an agency's compliance with its terms."); *United States v. Carlson*, No. 12-305, 2013 WL 5125434, at *14–15 (D. Minn. Sept. 12, 2013), *aff'd* 810 F.3d 544 (8th Cir. 2016); *New York v. Am. Elec. Power Serv. Corp.*, Nos. 2:04 CV 1098, 2:05 CV 360, 2006 WL 1331543, at *13–14 (S.D. Ohio Mar. 21, 2006); *In re Operation of the Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1173 (D. Minn. 2004) (ruling that agency's determination under CRA that a rule is not a "major rule" is not subject to judicial review); *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), *aff'd* 201 F.3d 551 (5th Cir. 2000); *cf.* *United States v. Ameren Mo.*, No. 4:11 CV 77 RWS, 2012 WL 2821928, at *3–4 (E.D. Mo. July 10, 2012) (ruling that Section 805 bars judicial review of EPA's alleged noncompliance with the CRA but also ruling that it was unclear whether the CRA applied).

97. See *Nat. Res. Def. Council v. Abraham*, 355 F.3d 179, 201–02 (2d Cir. 2004) (considering CRA compliance claim without discussing Section 805).

98. See *United States v. Reece*, 956 F. Supp. 2d 736, 743–44 (W.D. La. 2013) (ruling that Section 805 does not bar review of a CRA noncompliance claim); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197, 1234–35 (E.D. Cal. 2003) (rejecting a CRA noncompliance claim on the merits); *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692-C-M/S, 2002 WL 31427523, at *4–5 (S.D. Ind. Oct. 24, 2002); *cf.* *United States v. Nasir*, No. 5:12-CR-102-JMH, 2013 WL 5373691 (E.D. Ky. Sept. 25, 2013) (declining to decide whether Section 805 bars review of the claim that the DEA did not comply with the CRA when listing a controlled substance on the ground that the DEA complied with the CRA).

impunity, thereby completely frustrating the Act's purpose.⁹⁹ To them, Section 805 forecloses judicial review of *Congress's* actions once an agency has complied with the CRA without also precluding review of the question whether *the rule-issuing agency* has complied with the CRA by submitting a report containing the rule to Congress. Those courts have the better view of the statute.

Section 805 is quite clear in one respect. It states that no "determination, finding, action, or omission under this chapter" is subject to review by a court. The CRA does not define those terms,¹⁰⁰ so under the traditional rules of statutory interpretation, they should be given their ordinary dictionary meaning.¹⁰¹ Given those terms, Section 805 is exceptionally broad, possibly as broad as the English language would allow. The text reaches every "action . . . or omission under this chapter"—which would appear to embrace anything that Congress could do or could fail to do—as well as every "determination" or "finding," apparently in an effort to reach whatever else Congress might do that was not an "action" or "omission." Accordingly, Section 805 would appear to reach every decision or step—

99. See *S. Ind. Gas & Elec.*, 2002 WL 31427523 at *5 (If Section 805 precludes judicial review of an agency's failure to comply with the CRA, "agencies could evade the strictures of the CRA by simply not reporting new rules, and courts would be barred from reviewing their lack of compliance. This result would be at odds with the purpose of the CRA, which was to provide a check on administrative agencies' power to set policies and essentially legislate without Congressional oversight. The CRA has no enforcement mechanism, and to read it to preclude a court from reviewing whether an agency rule is in effect that should have been reported would render the statute ineffectual. Moreover, the language of the statute precludes judicial review of a 'determination, finding, action, or omission under this chapter' Agencies do not make findings and determinations under this chapter. Congress, on the other hand, is required to make a number of findings and determinations under the CRA. Therefore, it is logical to interpret the judicial preclusion language as barring review of the determinations, findings, actions, or omissions made by Congress after a rule is submitted by an agency, but not extending the bar of judicial scrutiny to questions of whether or not an agency rule is in effect that should have been reported to Congress in the first place.").

100. The CRA defines only three terms: "Federal agency," "major rule," and "rule." 5 U.S.C. § 804.

101. See *Green v. Brennan*, 136 S. Ct. 1769, 1791 (2016) ("When a word or phrase is left undefined . . . we consider its 'ordinary meaning.'" (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179 (1995))); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 69 (1st ed. 2012) ("The ordinary-meaning rule is the most fundamental semantic rule of interpretation. It governs constitutions, statutes, rules, and private instruments." (footnote omitted)).

including deciding or doing nothing at all—that could be associated with the CRA. No decision or judgment, no action of any kind, no failure to act, no omission—nothing that could be done under the CRA would be eligible for judicial review. Accordingly, Section 805 seems quite straightforward regarding *what* is not subject to judicial review.

Where the Act is unclear, however, is *whose* “determination, finding, action, or omission under this chapter” is not subject to judicial review? There are a limited number of possibilities because there are only a few parties who could take (or fail to take) a relevant action “under this chapter.”

The CRA refers to a few entities with tertiary roles in this process: the chairman and ranking member of the congressional committee with jurisdiction over the rule’s subject matter, each chamber of Congress, the Comptroller General, and the Administrator of the Office of Regulatory Affairs at the Office of Management and Budget. None of them, however, plays a major role in the operation of the CRA. The chairman and ranking member of the relevant committees serve only as recipients and conduits of the reports submitted by the rule-issuing agency.¹⁰² Neither chamber of Congress acting alone can pass legislation.¹⁰³ The Comptroller General must provide Congress with a report analyzing the one submitted by the agency,¹⁰⁴ but he cannot take any action to advance or delay Congress’s review, and he cannot vote on the passage of a disapproval resolution.¹⁰⁵ Accordingly, for purposes of the CRA only the rule-issuing agency, Congress, and the President play an important role, which means that only one or more of those parties is the likely focus of the judicial-review preclusion, CRA Section 805. Whom would Congress have wanted to immunize from judicial review?

102. 5 U.S.C. § 801(a)(1)(C).

103. U.S. CONST. art. I, § 7, cl. 2; *see also* *INS v. Chadha*, 462 U.S. 919, 948–51 (1983).

104. 5 U.S.C. § 801(2)(A).

105. Only senators and representatives may vote on a bill, U.S. CONST. art. I, § 7, cl. 2, and the people of their states or districts choose them, *id.* § 2, cl. 1; *id.* amend. XVII. By contrast, the President appoints the Comptroller General, 31 U.S.C. § 703(a)(1) (2012), and no sitting member of the Senate or House of Representatives can simultaneously serve as the Comptroller General, U.S. CONST. art. I, § 6, cl. 2 (the Disqualification Clause).

Start with Congress. It is eminently clear that Congress did not want any of its actions to be subject to judicial review. Congress expressly exempted itself from judicial review when it adopted the APA in 1946,¹⁰⁶ and the CRA carried forward the same exemption.¹⁰⁷ Another way to put it is that Congress expressly exempted itself from review when it passed the APA, and Congress did not add itself back into the APA judicial review process when it adopted the CRA. Of course, Congress's work product—"Law[s]"¹⁰⁸—are subject to judicial review,¹⁰⁹ but not a "determination, finding, action, or omission under this chapter" or anything else that Congress (or any of its members) may do.¹¹⁰

Now move to the President. Congress did not expressly exempt the President from review under the APA by excepting him from the definition of an "agency," but the Supreme Court has made up the difference. The Court held in *Franklin v. Massachusetts*,¹¹¹ four years before the CRA became law, that the term "agency" does not include the President.¹¹² What is true

106. See 5 U.S.C. § 804 ("For purposes of this chapter—(1) The term 'Federal agency' means any agency as that term is defined in section 551(1)."); *id.* § 551 ("For the purpose of this subchapter—(1) 'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress . . .").

107. 5 U.S.C. § 804(1) (providing that the term "Federal agency" under the CRA has the same meaning that that APA uses for "any agency").

108. U.S. CONST. art. I, § 7, cl. 2.

109. And have been ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

110. 5 U.S.C. § 805.

111. 505 U.S. 788 (1992).

112. *Id.* at 800–01 ("The APA defines 'agency' as 'each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—(A) the Congress; (B) the courts of the United States; (C) the governments of the territories or possessions of the United States; (D) the government of the District of Columbia.' 5 U.S.C. §§ 701(b)(1), 551(1). The President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion. As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements. Although the President's actions may still be reviewed for constitutionality, we hold that they are not reviewable for abuse of discretion under the APA." (citations omitted)); *cf.* *Mississippi v.*

about Congress is also true about the President: the APA does not subject the President's actions to judicial review, and the CRA does not add him back in.

Who is left? Only the rule-issuing agency. Did Congress intend the CRA to immunize the agency's action from judicial review? No. Congress sought to *curb* agency action through the CRA, not immunize it. Remember, before *Chadha*, Congress and the President were not subject to review under the APA. By contrast, an agency *was* subject to review under the APA for its unlawful actions before *Chadha*.¹¹³ The CRA also did not seek to change that arrangement; its goal was to *increase* Congress's oversight power, not *weaken* the judicial review power of *the courts*. Why would Congress have wanted to eliminate the historic role that courts have played in halting illegal agency actions? There is no persuasive reason for believing that Congress did. The CRA gave Congress fast-track authority so it could review an agency rule before it went into effect. Immunizing agencies from judicial review is unnecessary to make the CRA work or to achieve the CRA's purpose and would have been an irrational response to Congress's concern with agency overreaching. The bottom line is this: the best reading of Section 805 is that it precludes judicial review of any decisions or actions taken *by Congress (including the Comptroller General, who works for Congress) or the President* but does *not* foreclose judicial review of an agency's compliance with the Act.¹¹⁴

Johnson, 71 U.S. (4 Wall.) 475 (1866) (denying leave to file a bill seeking to enjoin the President from implementing an act of Congress).

113. An injured party can seek relief (other than money damages) if the agency has exceeded its statutory authority or acted in an arbitrary and capricious or unconstitutional manner. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party."); *id.* § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."); *id.* § 706(1)–(2).

114. ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 6 ("The legislative history of this provision [5 U.S.C. § 805] indicates that this preclusion of judicial review would not apply to a court challenge to a failure of an agency to report a rule."); Rosenberg, *Whatever Happened*, *supra* note 8, at 1057. As one Congressional Research Service scholar has concluded:

Atop that is another consideration. The Supreme Court has made it clear that it will not construe an act of Congress as foreclosing all judicial review of a constitutional claim unless the text of the relevant statute is pellucid in that regard.¹¹⁵ That is critical here. Unlike the President, a federal agency has no inherent authority; it possesses only whatever power Congress has granted it.¹¹⁶ Accordingly, as explained in detail below, an agency cannot infringe on someone's "life, liberty, or property" unless it can identify some statutory "law" that justifies its action.¹¹⁷ The Due Process Clause is relevant here because it prevents an agency from acting in an *ultra vires* manner.¹¹⁸

[T]he statutory scheme appears geared toward congressional review of all covered rules at some time; and a reading of the statute that allows for easy avoidance would seem to defeat that purpose. Interpreting the judicial review preclusion provision to prevent court scrutiny of the validity of administrative enforcement of covered but non-submitted rules appears to be neither a natural nor warranted reading of the provision. Section 805 speaks to "determination[s], finding[s], actions[s], or omission[s] *under this chapter*," a plain reference to the range of actions authorized or required as part of the review process. Thus Congress arguably did not intend . . . to subject to judicial scrutiny, its own internal procedures, the validity of Presidential determinations that rules should become effective immediately for specified reasons, the propriety of OIRA determinations whether rules are major or not, or whether the Comptroller General properly performed his reporting function. These are matters that Congress can remedy by itself.

ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 31.

115. See *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975); *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974).

116. See *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power upon it.").

117. U.S. CONST. amend. V.

118. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) ("The third clause in which the Solicitor General finds seizure powers is that 'he shall take Care that the Laws be faithfully executed' That authority must be matched against words of the Fifth Amendment that 'No person shall be . . . deprived of life, liberty, or property, without due process of law' One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther. These signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." (footnote omitted)). Of course, not every claim that an executive official acted beyond his statutory authority raises a due process claim. See *Dalton v. Specter*, 511 U.S. 462, 476 (1994) (noting the "well established" distinction between "claims that an official exceed-

The Due Process Clause is a lineal descendant of Magna Carta, and its best-known feature is Article 39.¹¹⁹ Article 39 provided that “[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.”¹²⁰ Article 39 “was a plain, popular statement of the most elementary rights.”¹²¹ It sought to restore the customary rights of Englishmen and prevent the Crown from arbitrarily detaining and punishing someone not first adjudged guilty of a crime—a common occurrence under King John.¹²² As one scholar

ed his statutory authority” and “claims that he acted in violation of the Constitution”). What makes the CRA different is that it deprives an unsubmitted rule of any legal force and effect. 5 U.S.C. § 801(a)(1)(A) (2012) (“Before a rule can take effect . . .”); *id.* § 801(b)(1) (“A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.”); *id.* § 801(f) (“Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.”); *infra* Part V.B. That feature of the CRA makes the issue more like the one in *Youngstown*, which involved the lack of any statutory authority, *Youngstown*, 343 U.S. at 585 (“[W]e do not understand the Government to rely on statutory authorization for this seizure.”) than like the one in *Dalton*, which involved the claim that the President acted *in excess of his statutory authority*, *Dalton*, 511 U.S. at 476.

119. See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855) (“The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50,) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, ‘but by the judgment of his peers, or the law of the land.’ The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the River Ohio, used the same words.”). For a discussion of the history and purposes of Magna Carta, see, for example, DAVID CARPENTER, *MAGNA CARTA* (2015); ARTHUR L. GOODHART, “LAW OF THE LAND” (1966); J.C. HOLT, *MAGNA CARTA* (2d ed. 1992); A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968); THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 22–26 (5th ed. 1956); *MAGNA CARTA MEMORATION ESSAYS* (Henry Elliott Malden ed., 1917); WILLIAM SHARP MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN WITH AN HISTORICAL INTRODUCTION* (2d ed. 1914); R.H. Helmholz, *Magna Carta and the ius commune*, 66 U. CHI. L. REV. 297 (1999); Paul J. Larkin, Jr., *The Lost Due Process Doctrines*, 66 CATH. U. L. REV. 293, 327–50 (2016); C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27 (1914).

120. HOLT, *supra* note 119, at 461.

121. Charles E. Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”* 4 HARV. L. REV. 365, 373 (1891).

122. MCKECHNIE, *supra* note 119, at 377 & n.1.

noted a century ago, “The main point in this [provision], the chief grievance to be redressed, was the King’s practice of attacking his barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his *curia*.”¹²³ The guarantee that the Crown could administer punishment only in accordance with “the law of the land” meant, as Coke put it, that “no man [could] be taken or imprisoned, but *per legem terrae*, that is, by the common law, statute law, or custome of England.”¹²⁴ Expressed in today’s language, Article 39 protected “life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, *not* all individual rights), and property.”¹²⁵

Article 39 of Magna Carta became a foundational part of American constitutional law in the eighteenth century.¹²⁶ Familiar with the legal theories of Sir Edward Coke,¹²⁷ the Found-

123. McIlwain, *supra* note 119, at 41.

124. 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 45 (William S. Hein & Co. 1986) (1642).

125. Shattuck, *supra* note 121, at 373 (footnote omitted). In the fourteenth century, Parliament revised Magna Carta by changing the phrase “*per legem terrae*” or “the law of the land” to “due Process of the Law.” 28 Edw. 3, c. 3, reprinted in 1 STATUTES OF THE REALM 345 (William S. Hein & Co. 1993) (1810); see also McIlwain, *supra* note 119, at 49. That revision, however, did not alter its meaning, effect, or significance. See *Davidson v. New Orleans*, 96 U.S. 97, 101 (1878) (“The equivalent of the phrase ‘due process of law,’ according to Lord Coke, is found in the words ‘law of the land,’ in the Great Charter, in connection with the writ of *habeas corpus*, the trial by jury, and other guarantees of the rights of the subject against the oppression of the crown.”); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875) (“Due process of law is process due according to the law of the land.”); see also *Daniels v. Williams*, 474 U.S. 327, 331 (1986); *Hovey v. Elliott*, 167 U.S. 409, 415–17 (1897); RALPH V. TURNER, MAGNA CARTA 3 (2003); Max Radin, *The Myth of Magna Carta*, 60 HARV. L. REV. 1060, 1063–68, 1075, 1090–91 (1947).

126. See *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2426 (2015) (“The colonists brought the principles of Magna Carta with them to the New World . . .”); Larkin, *supra* note 119, at 340–42.

127. See, e.g., *Kerry v. Din*, 135 S. Ct. 2128, 2133 (2015) (plurality opinion) (“Edward Coke[’s] . . . Institutes ‘were read in the American Colonies by virtually every student of law . . .’”) (quoting *Klopper v. North Carolina*, 386 U.S. 213, 225 (1967)); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 614 (2009) (“Because most of the American colonies were initially chartered and settled during the early seventeenth century, when Coke’s career as a judge and member of Parliament was at its height, Coke exerted a strong influence on colonial law. A large number of seventeenth-century American lawyers studied law in England, where Coke’s *Reports* and *Institutes* were a staple of legal educa-

ers saw Article 39 as exemplifying the tenet of English constitutionalism that the Crown and Parliament were obligated to respect the “natural and customary rights recognized at common law.”¹²⁸ The Framers’ generation used the phrase “the law of the land” or “due process of law” in numerous important political documents, such as the Virginia Resolutions of 1769, the Declaration and Resolves of the First Continental Congress of 1774, the Declaration of Independence, later-enacted state constitutions, and ultimately the Fifth Amendment.¹²⁹ They did not see any material difference in meaning between the two phrases.¹³⁰

Like its ancestor term in Magna Carta “the law of the land,” the concept of “due process of law” binds the government to act according to law.¹³¹ Most contemporary discussion of the Due Process Clause focuses on the debate over the issue of whether the clause should be limited to a procedural guarantee of fundamentally fair proceedings or should also embrace a substantive component, one that forbids arbitrary legislation.¹³² What tends to be overlooked in that debate, however, is that the clause guarantees “due process of *law*.” That last word is an important one. The ancestor of the clause, Article 39 of Magna Carta, obligated the government to act pursuant to “the law of the land,” rather than the whims of the Crown. The barons had suffered under the latter for too long and rebelled precisely to force King John to comply with the common law before he

tion, just as they were in the American colonies until the publication of Blackstone’s *Commentaries* in 1765.” (footnote omitted)).

128. Gedicks, *supra* note 127, at 619.

129. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2633 & n.3 (2015) (Thomas, J., dissenting); *Kerry v. Din*, 135 S. Ct. 2128, 2132 (2015) (plurality opinion); *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855); HOWARD, *supra* note 108, at xi, 15–16, 19, 211–15 (listing colonial charters); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1789, at 547 (4th ed. 1873); Gedicks, *supra* note 127, at 622–23; H.D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1, 22 (1917).

130. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986); Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911); Larkin, *supra* note 119, at 342.

131. See JOHN PHILLIP REID, THE RULE OF LAW: THE JURISPRUDENCE OF LIBERTY IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES 93 (2004) (“Rule-of-law belonged to the seventeenth and eighteenth centuries. It was . . . the cornerstone of the jurisprudence of liberty in the years when liberty was struggling to survive.”).

132. See Larkin, *supra* note 119, at 294–303.

could deprive anyone of his life, liberty, or property. The Founding Generation carried that principle forward into the Due Process Clause of the Fifth Amendment.

The upshot of that history is this: an agency has no authority to act except what it receives from Congress; the government must be authorized by law to infringe on someone's life, liberty, or property; and a statute that has the intent and effect of permitting an agency to evade those limitations—that is, a law that exempts the government from complying with the rule of law—is not a law but a license to act lawlessly. Due process demands that there be some already-existing law for the government to infringe on someone's life, liberty, or property; the government cannot make it up as it goes along. Otherwise, the government's actions would not be authorized by, and would be at odds with, the "due process of law" (or, as it would have been said in 1215, "the law of the land").¹³³

That conclusion considerably raises the stakes as far as the preclusion of judicial review is concerned. Since 1953, when Harvard Law School Professor Henry Hart first discussed in depth Congress's power over the jurisdiction of the federal courts,¹³⁴ constitutional law scholars have vigorously debated whether Congress can preclude judicial review of a private party's claim that a government official has violated the Constitution.¹³⁵ Congress can channel the resolution of all legal claims

133. See John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997) ("In their procedural aspect, the Due Process Clauses are understood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law. Judges and executive officers may not simply make up some method of proceeding and sentence someone to prison on that basis. This requirement that deprivation follow the rule of law is so fundamental that it is often forgotten, but there is good reason to believe that some version of it is the historical root meaning of due process." (footnote omitted)); McIlwain, *supra* note 119, at 30.

134. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1402 (1953).

135. See, e.g., Paul M. Bator et al., *Hart and Wechsler's The Federal Courts and the Federal System* 366–428 (3d ed. 1988) (discussing issue and collecting authorities); 1 Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801*, at 204–50 (P. Freund gen. ed. 1971); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895 (1984); Leonard G. Ratner, *Congressional Power Over the Appellate Jurisdiction of the Supreme Court*, 109 U. Pa. L. Rev. 157 (1960); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. Pa.

into a particular scheme when it offers an opportunity for review by an Article III court at the end of the process.¹³⁶ It is an entirely different matter, however, to interpret a statute as foreclosing *any* judicial review of a constitutional claim, particularly when the defendant has had no prior opportunity to raise that claim in an Article III court and it is offered as a defense in a government enforcement action. The Supreme Court has been exceedingly reluctant to construe an act of Congress to deny a party any opportunity to assert a constitutional claim. Reading a law in that manner would pose extraordinarily difficult constitutional issues because it would amount to an attempt by Congress to legislate around the nation's fundamental law by zoning out federal constitutional claims.¹³⁷

The CRA does not require an answer to the question that Professor Hart broached more than 60 years ago. There is a presumption that the APA affords a private party the right to obtain judicial review of a claim that an agency has not complied with another law.¹³⁸ To be sure, the CRA modifies that presumption with respect to any "determination, finding, action, or omission." But Section 805 has that effect only insofar as one or more of those actions are done "under this chapter." An agency does not promulgate any rules "under" the CRA; rather it promulgates rules by relying on the substantive law-

L. Rev. 45 (1975); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 *Nw. U.L. Rev.* 143 (1982); Lawrence Gene Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 *Harv. L. Rev.* 17 (1981); Symposium, *Congressional Limits on Federal Court Jurisdiction*, 27 *Vill. L. Rev.* 893 (1982) (contributions by Martin Redish, Leonard Ratner, Charles Rice, Max Baucus & Kenneth Kay, James McClellan, and Paul Bator); Albert Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 *Ariz. L. Rev.* 229 (1973); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 *Harv. L. Rev.* 49 (1923).

136. See, e.g., *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (both discussed *supra* at note 94); cf. *Younger v. Harris*, 401 U.S. 37, 53 (1971) (ruling that federal courts cannot generally interfere with an ongoing state criminal prosecution even when a defendant raises a constitutional claim).

137. See *Webster v. Doe*, 486 U.S. 592, 603 (1988); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986); *Weinberger v. Salfi*, 422 U.S. 749 (1975); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974).

138. See, e.g., *Sackett v. EPA*, 566 U.S. 120, 130 (2012).

making authority that Congress granted the agency elsewhere in an implementing statute.¹³⁹

It is one thing to read a statute as precluding judicial review under the APA of an agency's decision to deny government benefits when there is an alternative scheme available to challenge the agency's action. There would be no reason to address those issues in the case of the CRA because it is implausible that, in a statute designed to rein in administrative agencies, Congress sought to bar the federal courts from serving their historic function as neutral and impartial arbiters of federal constitutional challenges to agency actions. Proof of that conclusion can be seen in the severability components of Section 806(b). It provides that "[i]f any provision of this chapter or the application of any provision of this chapter to any person or circumstance, is held invalid, the application of such provision to other persons or circumstances, and the remainder of this chapter, shall not be affected thereby."¹⁴⁰ That subsection reveals that Congress contemplated that there would be *some* judicial review of *some* issue involving the CRA. Otherwise, it would make little sense to include a provision addressing the situation in which a court decided that the text or application of the Act is "invalid." Section 806(b) shows that Congress did not intend to foreclose the federal courts from adjudicating constitutional claims that could arise in connection with the CRA.

There are two arguments to the contrary. The first one is that, as numerous lower federal courts have concluded, the text of the CRA is straightforward and forecloses judicial review of any claim involving the CRA. As explained above, however, the text of the CRA forecloses only judicial review of actions by Congress and the President, not the agency whose rule is at issue. The second argument is that the Act was designed to be a

139. See *United States v. S. Ind. Gas & Elec. Co.*, No. IP99-1692-C-M/S., 2002 WL 31427523, at *5 (S. D. Ind. Oct. 24, 2002) ("Agencies do not make findings and determinations under this chapter; Congress, on the other hand, is required to make a number of findings and determinations under the CRA. Therefore, it is logical to interpret the judicial preclusion language as barring review of the determinations, findings, actions, or omissions made by Congress after a rule is submitted by an agency, but not extending the bar of judicial scrutiny to questions of whether or not an agency rule is in effect that should have been reported to Congress in the first place.").

140. 5 U.S.C. § 806(b) (2012).

political tool for Congress and the President to use to eliminate rules that they find unwise, not a vehicle for litigation over the political choice they make. But the CRA was (and is) unnecessary to empower the political branches to engage in political wheeling and dealing. Private parties do not sit at the table in that game. They need the courts to protect them against what Congress and the President have dealt them.

Can a party decide not to wait to be sued or criminally charged before raising the claim that an agency has not complied with the CRA? The answer to that question is yes, but the analysis is a little trickier. The APA provides an injured party with a cause of action to sue an agency if it has acted in an unlawful, *ultra vires*, or arbitrary and capricious manner. Judicial review is available under the APA to an injured party, only for “final agency action for which there is no other adequate remedy in a court.”¹⁴¹ Is the ability to raise an agency’s CRA non-compliance as a defense in a government enforcement action an “adequate” substitute for APA review? At first blush the answer might appear to be yes because a defendant has another remedy: a defense in an enforcement proceeding. In fact, the *Younger v. Harris*¹⁴² doctrine requires the federal courts to abstain from deciding a constitutional issue that could be presented in an ongoing criminal or civil proceeding.¹⁴³ Moreover, it could be argued that the government’s action is not “final” until it files a criminal or civil charge against someone because only then has the government’s position crystallized. Nonetheless, a person should be able to bring a pre-enforcement action under the APA to challenge an agency’s noncompliance with the CRA. Both the finality and inadequacy elements are readily satisfied in that setting.

As far as finality goes, the Supreme Court has taken what it calls a “pragmatic” approach¹⁴⁴ and has concluded that an agency action is “final” if two conditions are true: (1) the action represented the consummation of the agency’s decisionmaking process and (2) it determines a party’s rights or obligations, or

141. *Id.* § 704.

142. 401 U.S. 37 (1971).

143. *See id.* at 37, 56 (criminal prosecution); *see also* *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 592–94, 604, 607 (1975) (applying *Younger* to a state-initiated civil action).

144. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967).

identifies important legal consequences for a violation.¹⁴⁵ Those conditions clearly obtain in the case of the CRA. An agency must submit a new rule to Congress for review for it to take effect, and the agency's failure to do so gives a private party the right to raise the agency's noncompliance as a defense. As for the "adequacy" of an alternative legal remedy, that term does not foreclose pre-enforcement review as a matter of law. The Supreme Court has not read the term "adequate remedy in a court" to deny a party the opportunity to bring a pre-enforcement legal challenge when that party faces serious legal consequences from a potentially unlawful rule. The reason is that private parties cannot file an enforcement action, yet they stand at risk of accumulating penalties for allegedly ongoing violations of a disputed governmental action.

The Supreme Court's recent decisions in *Sackett v. EPA*¹⁴⁶ and *U.S. Army Corps of Engineers v. Hawkes*¹⁴⁷ are illuminating in this regard. *Sackett* involved the issue of whether a private party could seek judicial review of an EPA compliance order finding that their property was a "wetland" and was therefore subject to the permitting requirements of the Clean Water Act.¹⁴⁸ The Court noted that the Sacketts could defend against an enforcement action on the ground that their property was not a wetland, but held nonetheless that the opportunity to present that claim as a defense did not afford them with an "adequate remedy in a court," for APA purposes.¹⁴⁹ The reason was that "the Sacketts cannot initiate that process, and each day they wait for the agency to drop the hammer, they accrue, by the Government's telling, an additional \$75,000 in potential liability."¹⁵⁰ The Court recognized that there was another "possible route to judicial review—applying to the Corps of Engineers for a permit and then filing suit under the APA if a permit is denied," but found that option inadequate because "[t]he remedy for denial of action that might be sought from one agency does not

145. See *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

146. 566 U.S. 120 (2012).

147. 136 S. Ct. 1807 (2016).

148. The Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act), Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. § 1251–1387 (2012)).

149. *Sackett*, 566 U.S. at 127–28.

150. *Id.* at 127.

ordinarily provide an ‘adequate remedy’ for action already taken by another agency.”¹⁵¹ *Hawkes* involved an effort by a peat mining company and its owners to challenge a determination by the U.S. Army Corps of Engineers that the land they sought to use for mining was a wetland subject to the Clean Water Act permitting requirements.¹⁵² The Court held that the Corps’ actions were final because a determination that the mining area was not a wetland would have created a “safe harbor” for the mining company, which would have bound the government in any enforcement action.¹⁵³ The Court also squarely rejected the government’s argument that the ability to raise a claim as a defense in an enforcement action is an adequate alternative remedy. “As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of ‘serious criminal and civil penalties.’”¹⁵⁴ *Sackett* and *Hawkes* both involved the Clean Water Act, but each decision rested on the APA, not the Clean Water Act. Accordingly, depending on the consequences for violating an agency rule, a party may be able to seek relief under the APA for a claim that an agency has violated the CRA without waiting to be administratively cited, civilly sued, or criminally charged.

V. OPPOSING VIEWS OF THE SCOPE OF THE CONGRESSIONAL REVIEW ACT

There are several responses to the interpretation set forth above. While reasonable, they are unpersuasive. The next subsections will summarize those arguments and then identify the flaws in them.

A. *A Broad Reading of the CRA Is Unreasonable*

The threshold argument is that the above interpretation is unreasonable.¹⁵⁵ Indeed, the above argument has no limiting

151. *Id.*

152. *Hawkes*, 136 S. Ct. at 1812–13.

153. *Id.* at 1814.

154. *Id.* at 1815 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 153(1967)).

155. See Prof. Lisa Heinzerling, Address at the Federalist Society Fifth Annual Executive Branch Review Conference (May 17, 2017), <http://www.fed-soc.org/multimedia/detail/is-the-modern-congress-doing-more-harm-than-good-event-audiovideo> [<https://perma.cc/WT6W-QLHD>]; Prof. David C. Vladeck, Ad-

principle. The logical conclusion of the interpretation offered above is that Congress could invalidate today any rule adopted since the CRA went into effect in 1996, or perhaps even since the APA became law fifty years earlier. That interpretation, so the argument would go, is not what Congress had in mind. It would permit Congress to reach back *twenty-one years* to nullify rules that have become part of the framework of our law. That result would create chaos in administrative law, because no one would know which rules are and are not in effect today, and impair every agency's ability to carry out its mandates, because its rules could always be nullified at some future point. It would also eviscerate society's legitimate, settled expectations, because every change in administration could erase all that came before.

Atop those considerations is another one, a variant of the "Be careful what you ask for" admonition. Reading the term "rule" as broadly as its text allows would sweep in a mountain of documents that Congress never intended to be subject to the CRA.¹⁵⁶ As one scholar has noted, agency documents come in "a myriad of formats" with "a myriad of labels," such as "legislative rules, interpretive rules, opinion letters, policy statements, policies, program policy letters, Dear Colleague letters, regulatory guidance letters, rule interpretations, guidances, guidelines, staff instructions, manuals, questions-and-answers, bulletins, advisory circulars, models, enforcement policies, action levels, press releases, testimony before Congress, and many others."¹⁵⁷ Congress wanted to be able to review agency rules, but it did not want to rent warehouses to store them until the sixty-day CRA review period has passed. Congress never

dress at the Federalist Society Fifth Annual Executive Branch Review Conference (May 17, 2017), <http://www.fed-soc.org/multimedia/detail/what-is-congress-doing-to-reassert-its-power-over-agencies-event-audiovideo> [https://perma.cc/WT6W-QLHD]. Some would say that "unreasonable" is a bit too mild a criticism. See Jonathan Miller, *The New War on Old Rules: A Strategy for Gutting 20 Years of Regulations*, CONG. QUARTERLY, May 19, 2017, at 19 ("[Professor Richard J.] Pierce thinks the result will be predictable: 'I think the courts are going to string them up by their balls,' he says. 'I don't think that's going to work.'").

156. Between April 1996 and July 2012, agencies submitted more than 60,000 final rules to Congress. Morton Rosenberg, Report Prepared for the Administrative Conference of the United States: The Critical Need for Effective Congressional Review of Agency Rules: Background and Considerations for Incremental Reform 3 (2012).

157. Anthony, *supra* note 48, at 1320.

intended that an agency submit every document it generates for its review; it wanted agencies to submit only those documents that could bind the public by creating positive law. To-do manuals and the like do not perform that function. Forcing agencies to send them to Congress on pain of later nullification would force agencies to spend inordinate amounts of time inundating Congress with tons of needless paper that no staffer, to say nothing of a member, will want to review, read, or care about one whit. No rule of statutory interpretation values busywork above common sense, and the broad reading of the CRA discussed above does just that.

Proof that the above interpretation of the CRA is unreasonable, the argument goes, lies in two facts. One is that Congress has rarely invoked the CRA in the two decades since its enactment, and on the occasions that it has, Congress has never once sought to nullify a rule issued years ago. Between 1996 and 2011, agencies submitted more than 57,000 rules to Congress. Yet, until this year Congress passed only seventy-two joint resolutions of disapproval, only one became a law, and it involved a then-recently promulgated rule.¹⁵⁸ That happened early in 2001. A majority-Republican Congress passed a joint resolution of disapproval to invalidate an ergonomics regulation promulgated during the waning days of President Bill Clinton's Administration,¹⁵⁹ and President George W. Bush signed that joint resolution into law.¹⁶⁰ The rarity with which Congress has taken up the CRA to nullify a rule is powerful evidence that neither the Congress that adopted that law nor any of the Congresses since then thought that the CRA could be applied in a broad manner.

The other fact is that, over the last two decades, Congress has likely funded agency programs and activities created or implemented under rules issued long ago but never sent to Congress for CRA review. That action is important, the argument

158. See CAREY, *supra* note 24, at 5; Christopher M. Davis & Richard S. Beth, *Agency Final Rules Submitted on or After June 13, 2016, May Be Subject to Disapproval by the 115th Congress*, CONG. RES. SERV. INSIGHT (Dec. 15, 2016), <https://fas.org/sgp/crs/misc/IN10437.pdf> [<https://perma.cc/6NAQ-HDCD>].

159. See Ergonomics Program, 65 Fed. Reg. 68,261 (proposed Nov. 14, 2000) (to be codified at 29 C.F.R. pt. 1910).

160. See Ergonomics Rule Disapproval, Pub. L. No. 107-5, 115 Stat. 7 (2001); BAKST & GATTUSO, *supra* note 8, at 2-3; Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2318 n.287 (2001).

goes, because federal agencies may spend only funds that Congress has appropriated for an authorized purpose.¹⁶¹ By appropriating funds for an agency to enforce an unsubmitted rule, Congress has implicitly made the decision to exempt the rule from the CRA or to overlook the agency's noncompliance. In either case, the passage of time since the rule was adopted signals Congress's acceptance, however reluctant, of the rule's legitimacy, and that resignation is tantamount as a practical matter to Congress's refusal to undo the rule under the CRA.

A broad interpretation of the CRA would reward members of Congress for political gamesmanship. The public is generally unfamiliar with the operation of the CRA and likely would believe that Congress has amended the underlying statute rather than simply disapprove one particular rule. A broad reading of the Act would permit Congress to take advantage of the public's unfamiliarity with the ordinary legislative process, the one established by the CRA, and the limited effect of a joint resolution of disapproval to disguise its action. It would be ironic and unreasonable, the argument goes, to read the CRA—a statute designed to hold government agencies accountable for their rules—in a manner that permits Congress to avoid accountability itself by obscuring the effect of a joint resolution of disapproval.

Finally, it is unnecessary to give the CRA a broad interpretation to ensure that Congress can nullify an agency rule it finds unwise. Congress can always pass a law erasing a rule simply by following the same procedures that predated the CRA. *Chadha* did not restrict how Congress can pass legislation. It only required Congress to go through the constitutionally mandated process for doing so.

B. A Broad Reading of the CRA Is Reasonable

This section offers ten counter-arguments to the view that a broad reading of the statute is unreasonable. These arguments

161. The Appropriations Clause of Article I and the Antideficiency Act prohibit any federal official from spending funds except as provided by an act of Congress. See U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Accounts of the Receipts and Expenditures of all public Money shall be published from time to time."); Antideficiency Act (Act of Mar. 3, 1905), ch. 1484, § 4, 33 Stat. 1214, 1257 (codified as amended at 31 U.S.C. §§ 1341–51 (2012)).

in favor of a broad reading are drawn from, among other things, the CRA's text, purpose, and practical use.

1. *The Text of the CRA*

The argument that a broad reading is unreasonable is not faithful to the text of the statute. Look to the opening words of the CRA. It provides that a rule must be submitted to Congress "[b]efore the rule can take effect." It is impossible to read that provision as allowing a rule to become effective before it has been submitted to Congress.¹⁶² The verb "can" is also noteworthy in this regard. The Oxford English Dictionary defines the primary meaning of "can" as "be able to."¹⁶³ In the context of a law, to "be able to" refers to authority, not timing. To "be able to" do X means one has the power to do X, not that one will do it before anything else. If the opening line of the CRA were concerned only with timing, Congress would have used the phrase "takes effect" or "will go into effect." Those terms would better indicate that Congress merely wanted to receive a copy of the rule before the APA's thirty-day period or the CRA's sixty-day period expired. Finally, the GAO and OMB have concluded that a rule must be submitted to go into effect.¹⁶⁴ As one scholar has noted:

The very first sentence of the Congressional Review Act . . . states that, "Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General" several items. These items include a copy of the rule, a concise statement explaining whether it is a "major" rule under the CRA, the proposed effective date of the rule, and any regula-

162. Representative Dave McIntosh, the House sponsor of the CRA, certainly read the law that way. See 142 CONG. REC. 6907 (1996) ("Under Section 801(a), covered rules, with very few exceptions, may not go into effect until the relevant agency submits a copy of the rule and an accompanying report to both Houses of Congress.").

163. 2 THE OXFORD ENGLISH DICTIONARY 817 (2d ed. 1989).

164. See *Federal Rulemaking and the Regulatory Process: Hearing Before the Subcomm. on Commercial & Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 92 (2010) (statement of Curtis W. Copeland, Cong. Res. Serv.) (quoting OMB Memorandum M-99-13, Mar. 30, 1999, to agencies: "In order for a rule to take effect, you must submit a report to each House of Congress and GAO . . ."); CAREY, *supra* note 24, at 11 ("The CRA does not specify when an agency must submit a rule. However, a rule cannot become effective until after it is submitted." (footnote omitted)); COPELAND, *supra* note 8, at 7 (quoted *supra* note 72).

tory analyses required by law. There is nothing particularly mysterious or complicated about this mandate.¹⁶⁵

2. *The Effective Date of the CRA*

The CRA does not apply to agency rules issued before the Act became law in 1996. The Supreme Court has made it clear that an act of Congress does not apply retroactively unless its text so dictates,¹⁶⁶ and the text of the CRA does not state that it applies retroactively. There is also no reason to construe the Act in that manner to avoid rendering the law a nullity. The CRA functions perfectly well with only a prospective effect. Accordingly, any argument that Congress can nullify rules issued between 1946 and 1996 is very wide of the mark. Only the latter date matters.

There is nothing irrational about construing the CRA to reach back to 1996. The CRA imposed a new duty on agencies that became effective when the Act became law. If the agencies did not comply with that new requirement, they have acted unlawfully. Nullifying a rule that the agency did not submit to Congress serves the public by eliminating a rule that is not law and should not have been applied against the public, while also serving the didactic function of making clear to agencies that compliance is necessary because the Act has teeth. Congress intended that agencies comply with the CRA, and only by reading it to enable Congress, even as late as today, to nullify an unsubmitted rule can Congress ensure that the agencies know that it meant business when it passed that statute.

3. *The Number of Rules Subject to CRA Review*

It is difficult to know the exact number of post-1996 rules still subject to review by Congress. Private parties have offered different opinions on the subject,¹⁶⁷ and the government (unsur-

165. Croston, *supra* note 8, at 908 (footnotes omitted).

166. *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 265–80 (1994); Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 842–44 (1990) (Scalia, J., concurring); Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988) (“Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.”).

167. *See, e.g.*, CURTIS COPELAND, CONGRESSIONAL REVIEW ACT: MANY RECENT FINAL RULES WERE NOT SUBMITTED TO GAO AND CONGRESS 2 (2014) (estimating that twelve percent of agency rules published in the *Federal Register* from 1997

prisingly) has not made public the number of instances in which it failed to comply with the CRA (although it is possible that such an inquiry is underway). Nonetheless, it is doubtful that every post-1996 rule is subject to CRA review today. The CRA directs agencies to submit any new rule to Congress as part of a report that the Comptroller General is to review for the Senate and House of Representatives. Agencies are likely to comply when issuing a new legislative rule, because it would create new rights and duties. It is in the case of interpretative rules that agencies may have fallen short. Nonetheless, in any case where the agency has submitted a report in a timely manner, the CRA review period has already expired (or, in the case of a recently issued rule, is still open but only for sixty legislative days). If the agency did not comply with the CRA in a particular case, the congressional review period remains open for that rule.

That result should hardly be deemed troublesome even if there are a large number of rules that were not submitted. The GAO reported that between 1999 and 2009, agencies had failed to submit more than 1,000 rules to Congress.¹⁶⁸ Congress has also directed OMB to provide Congress with guidance on how it construes the CRA, and has issued compliance directives to the agencies.¹⁶⁹ Agencies cannot say that they were not warned. Moreover, only if an agency acted unlawfully by failing to give Congress the opportunity to nullify a rule can Congress review that rule today. Far from being problematic, that outcome is desirable. Any problem created by the size of the corpus of still-reviewable rules would arise only if there is a large number of instances in which agencies did not follow the law. Yet, exempting from CRA review rules that should have been, but were not, submitted would reward agencies for recalcitrance or disobedience on a large scale. It makes little sense to decide

through 2011 were not submitted to Congress); Wallach & Zeppos, *supra* note 8, at 3 (finding a ceiling of “348 significant rules with apparent reporting deficiencies”); *id.* app. 3 (listing rules); James Valvo, *Hundreds of Important Rules Vulnerable To Repeal Under the Congressional Review Act*, CAUSE ACTION INST. (Mar. 29, 2017), <http://causeofaction.org/economically-significant-rules-vulnerable-to-repeal-under-congressional-review-act/> [<https://perma.cc/3NLJ-5S7H>].

168. See COPELAND, *supra* note 167, at 15; ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 26.

169. See COPELAND, *supra* note 167, at 6; ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 28 (citing a provision in the FY1999 OMB appropriation).

that an agency should be forgiven, not for one minor slip-up, but for being a career offender.

4. *The Burden on Agencies*

There is no merit to the argument that a broad reading of the CRA imposes a needless burden on agencies of preparing and submitting written reports that no one will read. Agencies submit their rules (and the reports containing them) electronically to the GAO, and by hard copy to Congress.¹⁷⁰ Sending electronic copies of rules to Congress when they are sent to the Government Printing Office for publication in the *Federal Register* scarcely burdens anyone. If Congress wants hard copies, that is Congress's choice.

5. *The Relevance of Appropriations Bills*

While it is true that Congress can alter or repeal a substantive law through an appropriations bill,¹⁷¹ there is a strong presumption against construing an appropriations bill in that manner, and both chambers have rules to keep appropriations bills separate from substantive legislation.¹⁷² That separate treatment implements the principle that “the process through which the activities of government are chosen should be distinct from the process through which those activities are funded.”¹⁷³ That is why a substantive law remains valid until it is repealed (or held unconstitutional), while an appropriations law lasts only for whatever portion of a fiscal year the bill covers.¹⁷⁴

170. See COPELAND, *supra* note 167, at 56 n.130; E-mail from Susan E. Dudley, Dir., George Wash. Univ. Regulatory Studies Ctr., to author (June 1, 2017) (on file with author). GAO lists received rules on its website. See *Congressional Review Act*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://www.gao.gov/legal/congressional-review-act/overview> [<https://perma.cc/UQ7M-23XS>] (last visited Oct. 18, 2017).

171. See *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 440 (1992) (“Congress . . . may amend substantive law in an appropriations statute, as long as it does so clearly.”); *United States v. Will*, 449 U.S. 200, 222 (1980) (citing *United States v. Dickerson*, 310 U.S. 554, 555 (1940)).

172. See H.R. Res. 5, 115th Cong. Rules XXI(2)(b)–(c), XXII(5)(b)(2) (2017); S. Res. 285, 113th Cong. Rule XVI.2 (2013).

173. James V. Saturno, Cong. Res. Serv., R41634, *Limitations in Appropriations Measures: An Overview of Procedural Issues 1* (2016).

174. See *id.*; see also 31 U.S.C. § 1301(c) (2012); 1 U.S. GOV'T ACCOUNTABILITY OFFICE, *PRINCIPLES OF APPROPRIATIONS LAW 2–34* (3d ed. Jan. 2004) (“Since an appropriation act is made for a particular fiscal year, the starting presumption is

Congress votes on appropriations bills under the assumption that the money to be disbursed will be spent only for authorized purposes. As the Supreme Court explained in *Tennessee Valley Authority v. Hill*,¹⁷⁵ Congress does not examine the status of agency rules when it grants an agency funds to implement them. Congress assumes that those rules were promulgated in accordance with the governing law, which includes the relevant authorizing statute, the APA, the CRA, and any other applicable law.¹⁷⁶ Indeed, given the vast number of rules that agencies adopt annually, it would be unreasonable for Congress to operate under any other presumption. That presumption is important in this context because an agency rule that is yet to be submitted to Congress has not gone into effect even if the agency published the rule in the *Federal Register*. As explained below, the CRA does not start the congressional review period until the date that the rule is published in the *Federal Register* or the date that a report containing the rule is submitted to Congress, whichever is later.¹⁷⁷ Accordingly, an unsubmitted rule is not “in effect” yet. The proper course is for the agency to refrain from spending any funds devoted to its implementation until the agency satisfies the requirements under the CRA. Only then would the appropriations be authorized for use or disbursement.

that everything contained in the act is effective only for the fiscal year covered.”); see also *id.* at 1–31, 2–13.

175. 437 U.S. 153 (1978).

176. *Id.* at 190–91 (“The doctrine disfavoring repeals by implication ‘applies with full vigor when . . . the subsequent legislation is an *appropriations* measure.’ This is perhaps an understatement since it would be more accurate to say that the policy applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act. We recognize that both substantive enactments and appropriations measures are “Acts of Congress,” but the latter have the limited and specific purpose of providing funds for authorized programs. When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure. Not only would this lead to the absurd result of requiring Members to review exhaustively the background of every authorization before voting on an appropriation, but it would flout the very rules the Congress carefully adopted to avoid this need.” (alteration in original) (citations omitted) (quoting *Comm. for Nuclear Responsibility v. Seaborg*, 463 F.2d 783, 785 (1971)).

177. 5 U.S.C. § 801(a)(3)(A) (2012).

6. *The Absence of a “Statute of Limitations”
on Congress’s Review*

It must be noted that what the CRA does *not* say is also significant. It pointedly does *not* adopt a statute of limitations that would deny Congress the opportunity to review a rule that was published in the *Federal Register* but has not yet been submitted. Statutes of limitations did not exist under common law,¹⁷⁸ but they do exist today. Congress uses them to limit the ability of either the government or a private party to bring a case before a court in order to decide whether the defendant committed a civil wrong or a crime.¹⁷⁹ Congress does not always include a statute of limitations in a law creating a private right, and when that occurs, the federal courts will often look into the relevant state law.¹⁸⁰ But that approach is not a sensible one in this context.

The CRA does not create private rights that can be enforced in federal court. It grants *Congress* an *institutional* right that, as explained above, is *not* subject to judicial review. Congress also specified *when* it may exercise that oversight opportunity—sixty legislative days *after* a rule is submitted to Congress—as well as precisely when that period begins to run—*when* the rule is so submitted. Looking elsewhere to find a limit on Congress’s review authority would frustrate the all-inclusive purpose of the CRA. Finally, because no private party has the authority that Article I of the Constitution guarantees to

178. CHARLES DOYLE, CONG. RES. SERV., STATUTES OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW, CRS 7-5700, at 1 (Oct. 1, 2012), <https://fas.org/sgp/crs/misc/RL31253.pdf> [<https://perma.cc/59RV-P4V6>].

179. *See* 18 U.S.C. § 3282 (2012) (“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or information is instituted within five years next after such offense shall have been committed.”); 28 U.S.C. § 2462 (2012) (requiring that “action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise” be brought within 5 years from the date when the claim first accrued).

180. *See* *Wilson v. Garcia*, 471 U.S. 261, 266–67 (1985) (“The Reconstruction Civil Rights Acts do not contain a specific statute of limitations governing [42 U.S.C.] § 1983 actions—a void which is commonplace in federal statutory law.’ . . . When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so.” (quoting *Bd. of Regents v. Tomanio*, 446 U.S. 478, 483 (1980)).

Congress—"All legislative Powers"¹⁸¹—trying to identify a limitations period by resorting to private law would involve an entirely unguided reach into a grab-bag of possibilities wholly unrelated to the problem Congress addressed in the CRA. Indeed, the CRA expressly states that the President's decision to advance the effect date of a rule does not affect Congress's ability to review and nullify it.¹⁸²

Further, the CRA does not leave open any room for application of the equitable doctrine of laches to bar Congress's review today of an unsubmitted rule. Laches is a defense developed by the English equity courts to bar a claim for non-damages relief sought by someone who had, as the saying goes, "sat on his rights." The doctrine is principally applicable to "claims of an equitable cast" for which Congress has defined no statute of limitations.¹⁸³ In the case of the CRA, to be sure, there is no statute of limitations to exclude late-filed claims, so it could be argued that the doctrine of laches should be applied to Congress's inaction on unsubmitted post-1996 rules. That argument, however, is mistaken. Put aside the fact that laches is applied by courts, not legislatures. The CRA *has* a statute of limitations of sorts—the sixty-day period Congress has to review a submitted rule. But, as explained below, that period does *not* commence until the *later* of two dates: the date when the *Federal Register* publishes the rule *or* the date that the rule-issuing agency submits it to Congress. In the case of the latter, it is important to note that only submission of the rule triggers the review period clock, not publication or even Congress's knowledge of the rule's existence. For that reason, it makes no sense to say that the review period can expire for a never-submitted rule. If that were true, no agency would ever bother to submit its rules to Congress since doing so could only lead to an adverse result. It must be remembered that the CRA review period comes into play for old rules only if it is the *agency—not* Congress—that sat on its *obligations—not rights*. Accordingly, the doctrine cannot bar Congress from now

181. U.S. Const. art. I, § 1.

182. See 5 U.S.C. § 801(c) (quoted *supra* note 32).

183. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1973 (2014).

considering a rule never previously submitted in compliance with the CRA, however long that period might be.¹⁸⁴

7. *Prior Infrequent Use of the CRA*

The past, infrequent use of the CRA is hardly surprising, and certainly does not suggest that the Act must be read narrowly. This is true for several reasons. Every executive agency must submit proposed rules to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB) for review.¹⁸⁵ If the agency and OMB disagree on the merits of a particular rule that is proposed, the President or his designee can referee the dispute.¹⁸⁶ Under the CRA, the President can veto a joint resolution of disapproval, and he is not likely to scuttle a rule that he or OMB has already approved. Accordingly, the optimal time for Congress to invoke the Act is during the early days of a new administration headed by a President who replaces one from the opposing party and who belongs to the same party as the majority of the incoming members of both houses of Congress.¹⁸⁷ That unique confluence of factors has happened at most only three times since the CRA became law: when George W. Bush became President in 2001, when Barack Obama became President in 2009, and when Donald Trump became President in 2017. Yet neither of those

184. *Cf. id.* at 1974 (“[W]e adhere to the position that, in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief.”).

185. *See* Exec. Order No. 12,291, 3 C.F.R. 127, 128 (1982); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 21, 2011); DeMuth, *supra* note 2, at 73–74.

186. *See* Christopher DeMuth, *OIRA at Thirty*, 63 ADMIN. L. REV. 101, 102 (2011); DeMuth, *supra* note 2, at 73–74.

187. *See* CAREY, *supra* note 24, at 5; Brito & Rugy, *supra* note 8, at 190; Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1002 (2001); *see also* Croston, *supra* note 8, at 910 (“[T]here are structural problems inherent in any model of congressional enforcement. First, because the agencies are in the Executive Branch and at least nominally under the President’s control, ‘Congress rarely is held accountable for agency decisions.’ If regulated entities are upset because agencies are passing secretive, burdensome rules without complying with the CRA, they will probably not take out their anger on Congress. They will blame the agencies, which are naturally at fault, and perhaps complain to the Office of Information and Regulatory Affairs (OIRA) or other executive actors. The general result is a congressional ‘lack of interest’ in CRA enforcement. 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.’” (footnotes omitted)).

first two Presidents was leery of using the administrative state to advance his policy goals. President Bush did sign one joint resolution of disapproval early in his administration, but that pertained to an ergonomics rule issued by the Occupational Safety and Health Administration under unique circumstances.¹⁸⁸ President Bush used the regulatory process to advance his interests in homeland security.¹⁸⁹ As for President Obama, he aggressively used the rulemaking process to advance his policies, particularly during his last six years in office, when he no longer had a Democratic majority in Congress.¹⁹⁰ Only now, with the election of President Trump, is there a President who seems committed to reducing the size and power of the administrative state. The past infrequent use of the CRA is therefore irrelevant.

8. Gamesmanship

The argument about gamesmanship is mistaken for two reasons. The first one is that a joint resolution of disapproval *does* amend the underlying statute or regulation. *Chevron* held that courts must accept an agency's interpretation of an ambiguous statute. By nullifying a rule under the CRA, Congress's joint resolution nullifies not only the *outcome* that the rule directs, but also whatever *construction* the agency gave to the relevant statute. It must be remembered that Section 802 requires a joint resolution to identify the specific rule to be nullified.¹⁹¹ In so doing, Section 802 effectively incorporates that rule into the

188. See ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 15 ("In sum, the veto of the ergonomics standards could be seen as the product of an unusual, confluence of factors and events: control of both Houses of Congress and the presidency by the same party, the longstanding opposition by these political actors, as well as by broad components of the industry to be regulated, to the ergonomics standards, and the willingness and encouragement of a President seeking to undo a contentious, end-of-term rule from a previous Administration.").

189. See KERWIN & FURLONG, *supra* note 44, at 43.

190. See David E. Bernstein, *Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law* (2015); Kerwin & Furlong, *supra* note 44, at xii (writing in 2010 that "[i]f there is any consensus on anything, it is that regulation will be a centerpiece of the Obama program.").

191. 5 U.S.C. § 802(a) (2012) (providing that the "joint resolution" includes the following: "the matter after the resolving clause of which is as follows: 'That Congress disapproves the rule submitted by the _____ relating to _____, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in).").

resolution. Congress's decision to nullify the rule therefore also nullifies whatever statutory interpretation the agency adopted under *Chevron*. As two scholars have noted:

[T]he enactment of a resolution of disapproval alters the agency's statutory mandate in an unusual way. The congressional review statute is explicit that if any rule is disapproved, the agency may not re-issue the same or a substantially similar rule unless the agency has been provided specific statutory authority enacted after the date of the joint resolution disapproving the original rule. Of course Congress may amend statutes. Under this procedure, however, a simple and unelaborated "No!" withdraws from agencies a range of substantive authority that cannot be determined without subsequent litigation.¹⁹²

The other important effect stems from the CRA's express anti-circumvention provision. The Act provides that, in the absence of an intervening federal legislation, the agency cannot readopt a nullified rule and cannot issue a new one that is "substantially the same" as the one Congress eliminated. The effect is to create a "buffer zone" around the now-erased rule to disable an agency from engaging in mischief by reissuing a new rule with a different title, a different effective date or penalty, a slightly different substance or tone, or some other cosmetic change in a thinly disguised effort to escape nullification. To create that buffer zone, a joint resolution must necessarily amend the underlying statute. In fact, given *Chadha*, new legislation with that effect is the only way that Congress could amend the original law. Accordingly, a joint resolution does have the effect of amending the underlying statute and so does not mislead the public.¹⁹³

Consider this hypothetical. Congress passes legislation providing that "X is mandatory"; the relevant agency issues a

192. Cohen & Strauss, *supra* note 8, at 104.

193. As a matter of politics, trying to force members of Congress to be held accountable for their legislative acts is like trying to grab quicksilver. Congress is the major leagues of politics. People do not get elected to the Senate or House of Representatives without having the ability to avoid or shed accountability when necessary. Reading the CRA or any other statute to keep members from disguising their rationales for legislative behavior is a fool's endeavor. That is why the courts avoid inquiries into a legislator's motives. *See United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("Inquiries into congressional motives or purposes are a hazardous matter.").

rule (whether legislative or interpretive—the difference does not matter) saying that “X means X₁, X₂, and X₃”; Congress passes a joint resolution disapproving that rule; and the President signs the resolution into law. The resolution has the effect of deeming X₁, X₂, and X₃ to be erroneous interpretations of X. That is, Congress by law has now revised the meaning of X to exclude X₁, X₂, and X₃ as possible interpretations. Put another way, the effect of disapproval is the same as if Congress had passed a statute providing that “X is mandatory, but X₁, X₂, and X₃ are not X.” In fact, the resolution has an even broader effect. Because the agency cannot issue a new rule that is “substantially the same” as the one Congress eliminated, X₄ and (perhaps) X₅ have also been deemed null and void to create a buffer zone around X₁, X₂, and X₃ for substantially similar rules.¹⁹⁴

9. Agency Nullification

The alternative, narrow view of the CRA noted above enables an agency to stiff arm Congress by refusing to submit a rule for Congress’s review and waiting for the sixty-day review period to expire. That result would render the CRA a nullity, which is obviously not the role that Congress intended for the CRA. That result is also at odds with the text of the statute for the reasons given above. Congress has furthermore gone out of its way to address a scenario that might occur at the end of a

194. Commentators have offered their views on the meaning of the CRA term “substantially similar.” Fleshing out the meaning of “substantially similar” is beyond the scope of this article, but a few points in response to their theories are in order. There is no merit to several possible interpretations of “substantially” similar, such as the following: (1) an agency can reissue the identical rule if the “external conditions” have changed, or if it just believes that to be true; (2) an agency can issue a new rule if the original cost-benefit analysis for the disapproved rule has materially changed; and (3) an agency can issue a new rule if the original cost-benefit analysis has materially changed and the agency has fixed the specific problems that Congress identified when it disapproved the rule. See Finkel & Sullivan, *supra* note 8, at 734–37. Options 1 and 2 would permit the agency to re-promulgate the identical rule and so ignores the CRA’s prohibition on reissuance of a rule that is “substantially similar.” 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. Option 3 adds the requirement that the agency “fix” the “problems” mentioned by members of Congress during debate over a CRA joint resolution and so is subject to all of the same criticisms that can be made against relying on the isolated remarks of legislators to determine a statute’s intent.

term of Congress by providing a detailed mechanism for calculating the number of days that the new Congress would have to review a rule submitted with fewer than sixty legislative days remaining in the prior Congress. These provisions demonstrate that Congress did not want to lose the opportunity to review a rule simply because the agency submitted it late in a particular Congress. It therefore makes no sense to read the CRA as allowing the rule-issuing agency to ignore the Act by not submitting a rule at all.

10. Remedial Legislation

The argument that the CRA is not remedial is either irrelevant or wrong, depending on one's view of the value of the Senate filibuster. Yes, Congress did not need the CRA to enact legislation; Article I empowered Congress to do just that. But the Senate rules allow any Senator to prevent a bill from coming to a vote by filibustering, which means that, in a polarized political climate, a supermajority is generally necessary for the Senate to pass, or even debate, any bill. The CRA, however, ensures that the Senate can vote on a joint resolution by eliminating the filibuster and ruling out of bounds any other procedural mechanism with the same effect. Some parties would dislike that result because it would enhance Congress's ability to overturn agency rules; they see the CRA as anything but remedial. Other parties would prefer to see the Senate vote on a joint resolution; they see the elimination of the filibuster as worthwhile. Neither opinion matters. To ease the process and increase the speed at which a legislation is passed, Congress decided to eliminate a practice that is not required by Article I or *Chadha*. That is Congress's prerogative, and its decision controls regardless of what others might think.¹⁹⁵

195. See U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the rules of its Proceedings . . ."); *Nixon v. United States*, 506 U.S. 224, 250 (1993) (White, J., concurring in the judgment) (concluding that each chamber's authority to establish its procedures authorizes the Senate to use a committee to hear evidence and report to the full Senate in impeachment cases).

VI. THE LONG-TERM USEFULNESS OF THE CONGRESSIONAL
REVIEW ACT

The CRA is a workable substitute for a legislative veto. It satisfies the Bicameralism and Presentment requirements that the Supreme Court found critical in *Chadha* while still giving Congress an opportunity to eliminate rules before they can inflict damage on the economy, a business, or an individual. The Act achieves these goals by staying the effectiveness of a rule until Congress has had an opportunity to consider it, by establishing a fast-track review process so that Congress can act quickly, and by presenting a joint resolution of disapproval to the President for his signature or veto. Of course, the CRA process does not offer Congress the same authority and convenience that it enjoyed with a legislative veto. But no statute could do so as long as *Chadha* remains good law. Congress cannot return to the days when one house could invalidate an agency rule without the concurrence of the other house and the President, and thus the CRA is a reasonable alternative.

Congress and President Trump have used the CRA to nullify rules submitted to Congress on or after June 13, 2016. The above theory would enable them to reach back even further and undo any rule promulgated after the CRA was signed into law that was never submitted to Congress. Whether the Trump Administration exercises that authority is a matter of politics and will, not law. The administration might decide that it does not have a majority in each house of Congress to reach back and eliminate unsubmitted rules. Or the administration might decide to negotiate away that authority with Congress in exchange for particular legislation or, in the case of the Senate, more intense effort to expedite the process of confirming the President's nominees for positions in his administration or on the bench. Or the administration might not have the political courage to withstand the criticism that will follow upon its decision to invalidate unsubmitted rules in areas, such as the environment or land use, where the administration's opponents will fight tooth and nail to sustain rules that they persuaded agencies to adopt under President Trump's predecessors. Only time will tell.

But there is an additional issue to consider: Does the CRA matter *prospectively*? After all, Congress can follow the same

Article I process used to pass every other type of legislation. The President can also repeal existing legislative rules by going through the same APA notice-and-comment process that an agency used to promulgate them. As far as interpretative rules go, the President does not even need to do that much. Agency interpretative rules are exempt from the notice-and-comment process, so he or the chief agency officer can simply revise or repeal whatever guidance manual, opinion letter, or equivalent document the agency issued previously. So, if Congress and the President can repeal any existing legislative or interpretative rule without regard to the CRA, what difference does that statute make going forward? Why is it important?

President Trump could use executive orders to rescind or modify rules or policies adopted during the Obama Administration, but the repeal or revision of a regulation that has gone into effect must undergo the same APA notice-and-comment period that an agency must follow when initially adopting a rule.¹⁹⁶ The notice-and-comment process and the ensuing litigation, which will inevitably follow as the night follows the day, could put off for years the final resolution of the validity of a rule that neither Congress nor the President believes improves life for the American public. Moreover, if Congress were to pass and President Trump were to sign into law a joint disapproval resolution, the agency would be barred from readopting the rule absent an intervening change in federal statutory law. Atop that, the Trump Administration might conclude that aggressive use of the CRA establishes a precedent that future administrations, not committed to regulatory reform, would find difficult to distinguish or evade, thereby al-

196. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“The [APA] makes no distinction . . . between initial agency action and subsequent agency action undoing or revising that action.”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (ruling that an agency must comply with the APA when rescinding a rule). The APA established a multi-step procedure for “notice-and-comment rulemaking.” To start, the agency must issue a “[g]eneral notice” of proposed rulemaking, which is ordinarily done by publication in the Federal Register. Next, the agency must give interested parties the opportunity to offer written submissions regarding the proposed rule, with the agency obliged to consider and respond to significant comments. When promulgating its final rule, the agency must include “a concise general statement” of the rule’s basis and purpose. See *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1203 (2015); see also *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

lowing the administration to make its mark on administrative law. President Trump and Congress therefore might find that the CRA provides the best vehicle by which to eliminate what they see as unjustified economic burdens, partly because, in addition to eliminating the regulation, it would keep a regulatory agency from going astray from whatever statute Congress enacted.¹⁹⁷

Nullification of a rule under the CRA has a more significant effect than would be the case if the President or agency simply withdrew it. Once a rule is nullified, the agency cannot promulgate a rule that is “substantially the same” unless the agency can point to an intervening federal law as authority for the rule.¹⁹⁸ An obvious purpose of that provision is to prevent an agency from issuing a new rule with merely a different caption, justification, need, or explanation, or one that makes only cosmetic or substantively trivial revisions to the original one. How different a rule must be to satisfy that requirement is uncertain. Congress did not explain what that difference must be or even how to go about answering that question. Some new rules—for example, one that encourages a party to act in a certain way rather than legally directing or effectively coercing him to do so—should satisfy the substantial difference requirement. Rules like those use a very different mechanism to achieve a result—moral suasion instead of coercion. On the other hand, rules that merely minimize the effect of the original rule—for example, one that reduces the penalty for noncompliance—likely would be found “substantially the same.” Those rules carry forward the command-and-control approach to regulation that agencies are fond of using while simply making non-compliance less painful (perhaps only slightly).

But the question remains whether the CRA is a useful and important tool for correcting an errant agency. Some commentators believe that the CRA has failed to check administrative

197. See Kimberly Strassel, *A GOP Regulatory Game Changer*, WALL ST. J. (Jan. 27, 2017), <http://www.wsj.com/articles/a-gop-regulatory-game-changer-1485478085> [https://perma.cc/P9WY-QC9H]; see also Michael Barone, *Two really audacious proposals for Trump and the Republicans*, WASH. EXAMINER (Jan. 30, 2017, 9:37 AM), <http://www.washingtonexaminer.com/two-really-audacious-proposals-for-trump-and-the-republicans/article/2613333> [https://perma.cc/W8DT-NSJ9].

198. 5 U.S.C. § 802(b)(2) (2012) (quoted *supra* note 31).

excess.¹⁹⁹ Certain members of Congress have introduced bills to make the CRA more useful. For example, allowing Congress to bundle more than one rule into a joint resolution of disapproval rather than consider them one at a time or establishing a fast-track procedure for the House of Representatives.²⁰⁰ These revisions would certainly make the CRA review process more efficient, but they would not answer the question whether the CRA, however revised, can function in nearly as effective a manner as a legislative veto.

Ultimately, the answer is no. The CRA cannot work as effectively as a legislative veto in restraining the regulatory state. The reason is a simple one: the politics of the CRA process work in the President's favor. The President appoints the OIRA Administrator, and the latter is responsible for reviewing proposed agency rules. Absent some extraordinary, intervening political occurrence the President is not likely to sign any joint resolution of approval that would scuttle a rule his administration has adopted. Once the initial break-in period of his administration has become history and his own appointees are up and running, the President will largely be able to keep Congress from interfering in his regulatory policy. At that point, unless there is a supermajority in Congress to overturn a presidential veto, Congress will return to the regulatory sidelines. Only new legislation would get Congress back into the game.

That would happen, for example, if Congress were to enact a bill known as the Regulations from the Executive in Need of Scrutiny Act, or the REINS Act for short.²⁰¹ The REINS Act

199. See Rosenberg, *Whatever Happened*, *supra* note 8, at 1083 ("The CRA is not working. Part of the problem may be traced to identifiable structural and interpretive flaws. Part may also be attributable to a lack of political will to confront and deal with complex and sensitive policy issues that major rulemakings often present. Avoidance is the easier path when a court is available to bail you out or an agency is handy to blame. But a good part of the problem appears to lie in the failure of the Congress to understand and appreciate the nature of the stakes involved and the dangers inherent in failing to act decisively to resolve them.").

200. See The Midnight Rules Relief Act, S. 34, 115th Cong. (2017); The Midnight Rules Relief Act, H.R. 31, 115th Cong. (2017); H.R. REP. NO. 114-782, pt. 1 (2016) (report on a predecessor bill, The Midnight Rules Relief Act, H.R. 5982, 114th Cong. (2016)); ROSENBERG, CONGRESSIONAL REVIEW UPDATE, *supra* note 8, at 18, 21.

201. S. 21, 115th Cong. (2017); Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 26, 115th Cong. (2017); see also Jonathan Adler, *Placing "REINS" on Regulation: Assessing the Proposed REINS Act*, 16 N.Y.U. J. LEGIS. & PUB.

would flip the CRA (and the legislative veto) on its head. It would require an agency to submit to Congress any rule that would have an effect on the economy greater than \$100 million. At that point, the legislative process would treat the rule like any other bill. The rule would not become law unless and until both chambers approved a joint resolution of approval and the President signed it into law. The difference between the proposed REINS Act and the CRA works entirely to Congress's advantage. Inaction now would defeat the rule. Accordingly, the REINS Act would put Congress in an even better position than the one it occupied before *Chadha* struck down the legislative veto.

VII. CONCLUSION

Congress adopted the CRA to have the opportunity to quickly review agency rules before they could go into effect. Congress intended that the term "rule" include every type of document that an agency could prepare that could have an adverse effect on the economy or the public. Congress intended that the CRA would apply to every rule promulgated after President Bill Clinton signed the act into law, and it also intended to limit judicial review to only those actions or inactions attributable to the rule-issuing agency. An agency that has submitted to Congress whatever rules it has adopted since 1996 may continue to rely on them in whatever enforcement action the agency may threaten or bring. Only rules that have not been submitted to Congress are now subject to CRA review and repeal. But that was the dual purpose of the act: to review rules before their troublesome effects could be felt and to ensure that agencies would comply with the act's requirements by preventing unsubmitted rules from becoming law unless and until they passed Congress's review. Whether that interpretation of the CRA is deemed to be broad, narrow, or just right is of no importance. The text and purposes of the statute demand that rules never submitted to Congress be deemed not yet in effect, whatever form they have taken and whenever they were issued. Agencies cannot, by acting unlawfully, run out a clock that never started.

POL'Y 1 (2013). The House passed its bill in January 2017. The Senate is yet to act on Senate Bill 21.