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Unlocking the Potential of the Congressional Review Act

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The Congressional Review Act (CRA),¹ which creates special fast-track procedures that Congress can use to disapprove agency rules, has traditionally been understood as a negative instrument that the President and Congress may use to “cancel” regulations adopted during the prior administration. But the CRA has substantially greater unrealized potential. By coordinating their actions, the administration and supportive congressional majorities can take advantage of the CRA’s fast-track procedures to clarify or alter an agency’s statutory authority—without the possibility of filibuster. In other words, the CRA can be used not only to *reject* an agency’s proposed interpretation of its statutory authority, but to *endorse* that interpretation.

This unconventional use of the CRA would entail a coordinated two-step procedure: First, the agency would promulgate a rule construing the relevant statute to have the *opposite* of the meaning the agency actually wants to adopt. For example, the Environmental Protection Agency (EPA) might issue a rule interpreting the Clean Air Act (CAA) as *not* permitting the regulation of greenhouse gases (GHGs) from power plants under Section 111 of the CAA.² Next, Congress and the President would use the CRA to disapprove that agency rule—for example, by enacting a joint resolution disapproving the EPA’s declaration that it lacks authority to regulate GHGs under Section 111. This disapproval would establish, via a formal exercise of legislative power, that the statute has the meaning the agency rule rejected. *Disapproving* the statement that the EPA *may not* regulate GHGs under Section 111 is equivalent—as a matter of law, language, and logic—to *approving* the statement that the EPA *may* regulate GHGs under Section 111. This is what the agency and the White House wanted in the first place: The agency

¹ 5 U.S.C. §§ 801–08.

² 42 U.S.C. § 7411.

promulgated the original rule solely to allow Congress to use the CRA’s fast-track procedures to disapprove it in order to clarify statutory meaning.

This double-negative maneuver may initially seem contrived and counter-intuitive. And indeed, this use of the CRA would be a departure from prevailing assumptions about how that statute is supposed to operate. This procedure would nevertheless be a lawful way for the executive and legislative branches to clarify, or even to change, statutory law by majority vote. In that sense, the proposed use of the CRA has a kinship with the ways the budget reconciliation process has been used to advance substantive policy, even though that was not the original intent or understanding of the Congressional Budget Act. In response to the unprecedented obstructionism enabled by the abuse of the filibuster—which itself amounts to an unanticipated exploitation of a procedural loophole—members of Congress and the administration interested in advancing substantive policy can, and indeed should, explore ways to make use of existing procedural mechanisms. The CRA offers one such mechanism.

This Issue Brief develops and explains this approach. After Part I provides an overview of the CRA, Part II elaborates further on how the CRA could be used to clarify or alter agencies’ statutory authority by simple majority vote, without the possibility of filibuster. Part III raises and answers important questions about the legality, practicality, and broader implications of this mechanism.

I. The Congressional Review Act

The CRA, which was enacted in 1996,³ requires that agencies submit their rules, together with some additional information, to both Houses of Congress and the Comptroller General.⁴ This submission (or the publication of the rule in the *Federal Register*, whichever is later) triggers the beginning of a sixty-legislative-day period during which members of the House and Senate may introduce a joint resolution that disapproves the agency’s rule.⁵ The CRA specifies that such a resolution must state, after the resolving clause, “That Congress disapproves the rule submitted

³ Pub. L. No. 104-121, §§ 801–08, 110 Stat. 847, 868–74 (1996).

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

⁵ 5 U.S.C. §§ 802(a), b)(1)–(2). In some cases, when the agency has not submitted its rule to Congress or published it in the *Federal Register*, but the Government Accountability Office (GAO) issues an opinion to the effect that the CRA applies to the rule in question, Congress is willing to treat the GAO opinion as triggering the start of the sixty-legislative-day clock. See MAEVE P. CAREY, CONG. RESEARCH SERV., R45248, THE CONGRESSIONAL REVIEW ACT: DETERMINING WHICH “RULES” MUST BE SUBMITTED TO CONGRESS 25 (2019).

by the ___ relating to ___, and such rule shall have no force or effect,” with “[t]he blank spaces being appropriately filled in.”⁶

Although a disapproval resolution is initially referred to the appropriate committee,⁷ the CRA provides that in the Senate, if the committee with jurisdiction has not acted on a proposed resolution within twenty calendar days, a group of thirty Senators may file a discharge petition to bypass the committee.⁸ Once a disapproval resolution is on the Senate calendar, a motion to consider the resolution must be taken up,⁹ and is subject only to limited debate followed by an up-or-down vote.¹⁰ In other words, there is no possibility of amendment or filibuster.¹¹ Furthermore, if one chamber passes a CRA resolution, then the other chamber must immediately take up the resolution without referring it to committee.¹²

A joint resolution of disapproval passed by Congress is presented to the President. If the President signs the resolution, or if Congress overrides a presidential veto, then the resolution becomes a Public Law of the United States, recorded in the Statutes at Large. The CRA makes clear that a disapproved agency rule “shall not take effect (or continue).”¹³ Furthermore, the CRA prohibits agencies from issuing a new rule that is “substantially the same as” a disapproved rule, unless the new rule is “specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.”¹⁴

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

Securing fast-track legislative endorsement of an agency’s preferred statutory interpretation would be straightforward if the CRA provided for fast-track enactment of joint resolutions of *approval*. It does not. But because the product of two negatives is a positive as a matter of language and logic, the CRA can be used to accomplish much the same thing.

To return to the example from the introduction, suppose the EPA wants to clarify that it may regulate GHGs under Section 111 of the CAA. Suppose further that majorities in both the House and the Senate would support this view, but there are not enough votes in the Senate to overcome

⁶ 5 U.S.C. § 802(a).

⁷ 5 U.S.C. § 802(b)(1).

⁸ 5 U.S.C. § 802(c).

⁹ 5 U.S.C. § 802(d)(1).

¹⁰ 5 U.S.C. §§ 802(d)(2)–(3).

¹¹ The CRA does not contain parallel provisions for the House, but the House leadership has sufficient control over the process that typically a joint CRA resolution is considered under a closed special rule that permits no amendments. See MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RESEARCH. SERV., R43992, [THE CONGRESSIONAL REVIEW ACT: FREQUENTLY ASKED QUESTIONS](#) 15 (2021).

¹² 5 U.S.C. § 802(f).

¹³ 5 U.S.C. § 801(b)(1).

¹⁴ 5 U.S.C. § 801(b)(2).

a filibuster. In this situation, the EPA, its congressional allies, and the President could establish that the agency has the authority to regulate GHGs under Section 111 through the following coordinated two-step procedure:

First, the EPA would issue an interpretive rule stating the position that is the *opposite* of what it actually wants to adopt. (As discussed further below, the agency would use an interpretive rule rather than a legislative rule because an interpretive rule can be issued, and if necessary revoked, without time-consuming notice-and-comment procedures and because the sole purpose of the rule is to interpret the statute.) That rule might declare, “The EPA lacks the statutory authority to regulate GHGs under Section 111 of the CAA.” To clarify what the agency is doing and why, the agency should preface this interpretive rule with a preamble that explains that the agency is promulgating this interpretation in order to give Congress the opportunity to disapprove it via a CRA resolution, and that the agency will not make any policy changes based on the rule before the expiration of the sixty-legislative-day period during which Congress may take up a CRA resolution.

Second, Congress would use the CRA’s fast-track procedures to pass a joint resolution disapproving the EPA’s interpretive rule. That resolution would declare “[t]hat Congress disapproves the rule submitted by the EPA relating to the agency’s erroneous statement that the agency may not regulate GHGs under Section 111 of the Clean Air Act, and such rule shall have no force or effect.” The President would then sign the resolution into law.

This CRA resolution establishes that the EPA *does* have the statutory authority to regulate GHGs under Section 111. After all, Congress and the President, acting through an exercise of Article I legislative power, expressly *disapproved* an interpretation of the CAA that would *prohibit* such regulation. In general, disapproving the statement “X is *not* permitted” is equivalent (linguistically and legally) to approving the statement “X *is* permitted.” Thus, by passing the disapproval resolution, Congress has, by formal legislative action, declared that the CAA *permits* (that is, does not prohibit) the regulation of GHGs under Section 111. Doing so alleviates the concern that a court might interpret the original text of the CAA differently. Importantly, the argument here is not merely that one can *infer* from Congress’s disapproval of the agency’s interpretive rule that Congress must actually favor the opposite of that interpretation. Rather, the disapproval resolution *formally adopts* that latter view as binding statutory law.¹⁵

In the above example, the CRA double-negative procedure establishes that a certain agency action is *permitted*. But the procedure can also be used to establish that an agency action is *prohibited*,

¹⁵ See *Ctr. for Biological Diversity v. Bernhardt*, 946 F.3d 553, 562 (9th Cir. 2019) (holding that “because the [CRA] Joint Resolution passed both houses of Congress and was signed by the President into law[,] ... the Joint Resolution is enforceable *as a change to substantive law*, even though it did not state that it constituted an amendment to the [relevant statutes].”) (emphasis added). Importantly, as noted above, joint resolutions are recorded in the Statutes at Large, and the Statutes at Large takes precedence over the U.S. Code when the two conflict. See 1 U.S.C. § 112.

required, or not required. Depending on what the agency, the White House, and congressional majorities want to accomplish, they can frame the to-be-disapproved agency rule in different ways:

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

Critically, in all these scenarios, the agency's rule has no independent importance, and is never intended to go into effect. The only purpose of the rule is to provide Congress the opportunity to pass legislation using the CRA's fast-track process. Once Congress enacts that disapproval resolution, then the resolution, not the rule, becomes the operative legal instrument.

The CRA double-negative mechanism is extremely flexible. Indeed, as long as a given proposition can be articulated in an interpretive rule and framed in double-negative terms, this technique could be used to resolve a wide variety of interpretive questions, in fields as disparate as environmental protection, immigration, public health, labor, and voting rights. It could also be used to respond swiftly to an adverse judicial ruling which adopts an interpretation that the administration and a majority of Congress wish to reverse.

III. Questions and Answers

The non-traditional use of the CRA outlined above naturally invites numerous questions, and perhaps a healthy degree of skepticism. In this section, we raise and address what we anticipate will be among the most common practical, legal, and political concerns.

Doesn't rulemaking take too long for this to be a viable approach?

No. It is true that the notice-and-comment process for enacting *legislative* rules can take months or years to complete. But an agency can promulgate an *interpretive* rule (a rule that announces an interpretation of an existing statute or regulation, rather than creating new legal duties) without going through this lengthy process.¹⁶

¹⁶ See 5 U.S.C. § 553(b)(A).

If Congress fails to pass a disapproval resolution, does this mean the agency will be stuck with an unfavorable legal interpretation?

No. Interpretive rules can be withdrawn just as quickly and easily as they can be issued.¹⁷ So, if for some reason Congress does not enact the disapproval resolution, the agency can simply withdraw the rule. Also, the agency can include a proviso in the rule’s preamble clarifying that the rule will not take effect immediately, thereby giving the agency more breathing room if something goes awry.

One might worry that even if the interpretive rule is withdrawn, courts might treat Congress’s failure to disapprove the rule as evidence that Congress agrees with the view contained in that rule. But the CRA explicitly states that no court should draw any inference from Congress’s failure to enact a resolution disapproving of an agency rule.¹⁸

Does the CRA apply to interpretive rules?

Yes. The CRA’s definition of “rule” covers not only legislative rules, but also interpretive rules and general statements of policy (so-called “non-legislative rules”).¹⁹ This reading is confirmed by the legislative history of the CRA,²⁰ rulings from the Government Accountability Office,²¹ Office of Management and Budget guidance,²² and Congress’s past practice.²³

Wouldn’t it be unlawful for an agency to promulgate a rule it believes to be incorrect? And if so, wouldn’t this stop Congress from using the CRA to disapprove the rule?

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

¹⁸ 5 U.S.C. § 801(g).

¹⁹ 5 U.S.C. § 804(3) (incorporating the definition, with only certain exceptions not relevant here, found in 5 U.S.C. § 551(4), which defines a “rule” as including “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy”).

²⁰ *See* 142 CONG. REC. S3684, S3687 (daily ed.) (Apr. 18, 1996) (joint statement of Sens. Nickles, Reid and Stevens); 142 CONG. REC. E571, E578 (daily ed.) (Apr. 19, 1996) (statement of Rep. Hyde).

²¹ *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFF., GAO B-329129, BUREAU OF CONSUMER FINANCIAL PROTECTION: APPLICABILITY OF THE CONGRESSIONAL REVIEW ACT TO BULLETIN ON INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT 1 (2017); U.S. GOV’T ACCT. OFF., GAO B-287557, OPINION ON WHETHER TRINITY RIVER RECORD OF DECISION IS A RULE (2001) ; U.S. GOV’T ACCOUNTABILITY OFF., GAO B-316048, APPLICABILITY OF THE CONGRESSIONAL REVIEW ACT TO LETTER ON STATE CHILDREN’S HEALTH INSURANCE PROGRAM (2008).

²² *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, NO. M-19-14, [GUIDANCE ON COMPLIANCE WITH THE CONGRESSIONAL REVIEW ACT 3](#) (Apr. 11, 2019).

²³ *See* S.J. Res. 57, Pub. L. No. 115-172, 132 Stat. 1290 (2018) (overturning CONSUMER FIN. PROT. BUREAU BULL., 2013-02, INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT (2013)). *See also* S.J.Res.44, 110th Cong. (2008) (proposed resolution to disapprove a policy statement issued by the Secretary of Health and Human Services).

No and no. It is true that the CRA double-negative procedure involves an agency promulgating an interpretation that the agency believes to be wrong. But doing so is not “arbitrary [and] capricious.”²⁴ The agency is not engaging in any subterfuge or obfuscation. Rather, the agency is presenting Congress with an opportunity to express an authoritative view on the meaning of the law. No statutory law or judicial decisions prohibit an agency from proposing an interpretation in the negative, if doing so serves the eminently rational objective of facilitating expedited congressional review. And the agency would state explicitly in the rule’s preamble its reasons for issuing this rule, so there is no issue of dishonesty or pretext.

Moreover, nothing in the CRA precludes Congress from using fast-track procedures to disapprove a rule that may be legally invalid. By the statute’s plain terms, if an agency reports a rule to Congress pursuant to the CRA’s provisions, then Congress can use fast-track procedures to disapprove that rule. In fact, several agency rules that have been targeted by CRA resolutions have been challenged as unlawful,²⁵ and some of those regulations have later been invalidated.²⁶ But the alleged illegality of the rules has never been considered, or even referenced, when deciding whether a disapproval resolution is eligible for the CRA’s fast-track procedures.²⁷ In short, the validity of the original agency rule is irrelevant to the legitimacy of using the CRA to disapprove that rule, and to the legal effect of the resulting resolution.

²⁴ 5 U.S.C. § 706(2)(A).

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

²⁶ *See, e.g., S.J.Res. 53* (116th Congress) (2019) (CRA resolution to disapprove Trump Administration rule, codified at 82 Fed. Reg. 32520 (July 8, 2019), that repealed the Clean Power Plan and replaced it with weaker emissions standards); 142 CONG. REC. S5858–69 (daily ed.) (Oct. 17, 2019) (Proposed CRA joint resolution defeated 53–41 in a floor vote); *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 930 (D.C. Cir. 2021) (subsequently invalidating the Trump Administration rule on grounds that it was arbitrary and capricious and inconsistent with the Clean Air Act). Although it would have been obvious at the time that this rule would be challenged as unlawful, there is no indication that anyone even suggested that the rule’s possible legal invalidity precluded Congress from considering and voting on the CRA disapproval resolution.

²⁷ Importantly, the principal responsibility for resolving questions whether a disapproval resolution is eligible for CRA fast-track procedures would fall not to the courts, but to the House and Senate parliamentarians. The procedural advice of the parliamentarians is virtually always treated by congressional leadership as controlling, even though Congress is not formally bound to follow it. *See, e.g.,* VALERIE HEITSHUSEN, CONG. RESEARCH. SERV., RS20544, [THE OFFICE OF THE PARLIAMENTARIAN IN THE HOUSE AND SENATE 1](#) (2018). The courts are unlikely to rule on these issues in part because the enrolled bill doctrine bars courts from invalidating a statute on the grounds that proper legislative procedures were not followed in its passage, *see Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892), and in part because the CRA bars judicial review, *see* 5 U.S.C. § 805.

Does a CRA disapproval resolution really amount to a rejection of the substance of the interpretation announced in that rule?

Yes (though the question has not yet been tested). The viability of the CRA double-negative procedure advanced in this Issue Brief turns on the idea that a joint resolution rejecting an agency’s legal interpretation is equivalent to endorsing its opposite—for example, that a resolution disapproving a rule that interprets a statute to prohibit regulation X is equivalent to approving the interpretation that the statute permits regulation X. This understanding is consistent with logic and conventional legal principles, as well as the views of commentators from across the ideological spectrum.²⁸ Indeed, when an agency declares a certain policy is required by statute, and Congress disapproves that assertion through formal legislative action, the natural conclusion is that the law does not require that policy, and on some occasions congressional committee reports have made this understanding explicit.²⁹

That said, we acknowledge another possible view. One might claim that although a disapproval resolution nullifies the agency rule, the resolution does not reject the *substance* of the interpretation announced in the rule and has no effect on how a court should interpret the scope of the agency’s statutory authority. On this view, although the CRA would bar an agency from reissuing a disapproved interpretive rule *in the form of a rule*,³⁰ the agency could (and perhaps must) continue to adhere to the legal view articulated in the rejected rule.

²⁸ See, e.g., Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL’Y 187, 246 (2018) (explaining that if an agency issues an interpretive rule saying “that ‘[Statute X] means X₁, X₂, and X₃[,]’ [and] Congress passes a joint resolution disapproving that rule [which the President signs, this] resolution has the effect of deeming X₁, X₂, and X₃ to be erroneous interpretations of X[; t]hat is, Congress by law has now revised the meaning of X to exclude X₁, X₂, and X₃, as possible interpretations”); Anita S. Krishnakumar, *Longstanding Agency Interpretations*, 83 FORDHAM L. REV. 1823, 1847 (2015) (asserting that the CRA provides Congress with a mechanism to “disapprove [statutory] interpretations that it does not like,” and that a disapproval resolution “express[es] disagreement with an agency interpretation contained in a rule”); Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 WAKE FOREST L. REV. 745, 770 (1996) (observing that a CRA disapproval resolution “necessarily entail[s] a judgment that the agency’s action was or ought to be outside its legal authority”); see also MAEVE P. CAREY & VALERIE C. BRANNON, CONG. RESEARCH. SERV., IF11096, *THE CONGRESSIONAL REVIEW ACT: DEFINING A “RULE” AND OVERTURNING A RULE AN AGENCY DID NOT SUBMIT TO CONGRESS 2* (2019) (noting that although the impact of a CRA disapproval resolution on rules that lack the force of law is not entirely clear, “congressional action to overturn such an agency action may communicate that Congress believes the agency has exceeded the intended scope of its authority or otherwise chosen an action that conflicts with congressional intent or preferences”).

²⁹ See H.R. REP. NO. 117–64 (2021), at 3 (House committee report on CRA resolution emphasizing that the resolution, if passed, would “specifically reject[]” the EPA’s assertions regarding the meaning of the CAA); *id.* at 8 (declaring that “[p]assage of the resolution of disapproval indicates Congress’s intent to make clear that” the agency erred in its assertions regarding the meaning of the CAA).

³⁰ See 5 U.S.C. § 801(b)(2) (barring an agency from reissuing a disapproved rule “in substantially the same form” and from issuing a “new rule that is substantially the same” as the disapproved rule).

While it is hard to predict how a court would resolve this issue, there are strong legal arguments against the view that a disapproval resolution has no bearing on the substantive meaning of the relevant statutory law. First, this view is less consistent with what Members of Congress likely understand themselves to be doing when they vote to disapprove an agency's interpretive rule. Intuitively, a Member of Congress who votes to disapprove an agency's assertion regarding the meaning of the law likely understands her vote to indicate that she believes the agency's legal assertion is incorrect.³¹ Second and perhaps more significantly, treating a disapproval resolution as leaving the meaning of the substantive law unchanged but prohibiting the agency from announcing that interpretation in the form of a rule would create a range of anomalous, implausible results. For instance, this understanding would mean that an agency could rely on the interpretation contained in a disapproved rule to justify orders in individual adjudications, and could advance that interpretation in litigation, but the agency would be prohibited from giving the public advance notice of the agency's legal views. (Any such advance declaration would count as a prohibited reissuance of a disapproved interpretive rule.) Furthermore, if a court treats a CRA disapproval resolution as nullifying an agency's interpretive rule but as having no implications for the legal correctness of the interpretation stated in that rule, the court could end up interpreting the statute in a way that requires the agency to adopt a rule that the CRA prohibits the agency from adopting.³² In a similar vein, various statutes require agencies to explain their legal reasoning, including their statutory interpretations. For example, agencies often must articulate their understanding of statutory requirements when explaining the rationale for their regulations.³³ Agencies must also publish general policies and legal interpretations that have a significant effect on the public.³⁴ If a CRA

³¹ See, e.g. H.R. REP. NO. 117-64 (2021) at 3, 8 (House committee report on CRA resolution disapproving the Trump EPA's methane rule, which clearly indicates that the disapproval resolution constitutes a substantive rejection of the EPA's interpretation of the Clean Air Act).

³² A court probably could not require the agency do something that the agency is legally barred from doing, see, e.g., *Am. Hosp. Ass'n v. Price*, 867 F.3d 160, 167–68 (D.C. Cir. 2017), but this only underscores the dilemma: If the CRA resolution does not affect the substantive law—that is, if the resolution does not bind the court—then the court must uphold an agency rule that the court concludes is unlawful.

³³ See 5 U.S.C. § 553(c) (requiring that agencies incorporate into any final legislative rules adopted a statement of a rule's basis and purpose); see also Jerry Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 24–25 (2001) (observing that the APA has been interpreted to require that a final agency rule incorporate a statement that includes, among other things, a “comprehensive articulation of the ... statutory authority that justifies” the rule); Kevin M. Stack, *Interpreting Regulations*, 111 *MICH. L. REV.* 355, 380 (2012) (emphasizing that “the statement of basis and purpose is one part of the agency's product in the rulemaking proceeding”).

³⁴ See 5 U.S.C. § 552(a)(1)(D) (requiring agencies to publish in the *Federal Register* “interpretations of general applicability formulated and adopted by the agency”); *id.* § 552(a)(2)(B) (requiring agencies to make available to the public in electronic form other “interpretations adopted by the agency” that are not published in the *Federal Register*); see also JAMES T. O'REILLY, *ADMINISTRATIVE RULEMAKING* § 3.61 (2021 ed.) (discussing scope of agencies' obligation to publish their statutory interpretations as interpretive rules).

disapproval resolution only bars an agency from reissuing an interpretation *in rule form*, but does not reject the substance of that interpretation, compliance with these obligations becomes impossible.

In short, treating a resolution that disapproves an agency's interpretive rule as having no implications for the substantive correctness of the interpretation contained in that rule creates an untenable situation in which the agency remains legally obligated to adhere to a certain interpretation of the statute, but the agency is legally prohibited from stating that interpretation in an agency rule. The most straightforward way out of this dilemma is simply to treat a CRA disapproval resolution as rejecting not just the form but the substance of a rule.

Is there a way for Congress to make clearer that a disapproval resolution rejects the substance of the interpretation or policy contained in the agency rule?

Possibly. Although a CRA resolution disapproving an agency's interpretive rule is best understood as a legislative determination that the interpretation stated in that rule is erroneous, a skeptical court might be tempted to construe the effect of the disapproval resolution more narrowly. Supporters of the CRA double-negative procedure might therefore explore additional ways to signal that the disapproval resolution is intended to reject the substantive interpretation contained in the disapproved rule. Three such techniques are worth considering.

First, Congress might incorporate into the disapproval resolution language indicating that the legal interpretation announced in the agency's rule is erroneous. For example, the disapproval resolution could state that "Congress disapproves the rule submitted by [agency] relating to the agency's *erroneous* statement that [X], and such rule shall have no force or effect." There is a good legal argument that including such evaluative language is permissible. The CRA's mandatory template says only that the blank space that contains the description of the agency rule must be filled in "appropriately."³⁵ Language clarifying Congress's intent as to the resolution's impact would seem "appropriate[]" in the ordinary sense of that term,³⁶ especially given that this language would eliminate a potential ambiguity that the courts would otherwise have to resolve. Moreover, the CRA's generic limitation to "appropriate" content contrasts with other statutes where Congress has used more specific and restrictive language regarding what may be included in a fast-tracked resolution.³⁷ Nevertheless, including such evaluative language in a CRA resolution would be a departure from past practice, and the Senate parliamentarian might reject it.

Second, supporters of the disapproval resolution could seek to include a preamble that explains that the resolution rejects the substance of the agency's interpretation—something like, "*Whereas*

³⁵ 5 U.S.C. § 802(a).

³⁶ See, *Appropriate*, MERRIAM-WEBSTER'S UNABRIDGED DICTIONARY (defining "appropriate" as "correct or suitable for some purpose").

³⁷ Compare 5 U.S.C. § 802(a) with 2 U.S.C. §§ 641(a)(1)–(4), (d)(1)–(2), (g) (detailing restrictions on the use of the budget reconciliation process).

the agency’s rule incorrectly states that X is not the law...”. Whether a CRA resolution may include a preamble is unclear. On occasion Members of Congress have introduced CRA resolutions containing preambles,³⁸ but this has not been the usual practice, and to date none of the CRA resolutions that received a floor vote has included a preamble. The view that a CRA resolution may include a preamble is strengthened by the fact that although other statutes that create special fast-track Senate procedures explicitly prohibit preambles,³⁹ there is no such restriction in the CRA. Nevertheless, the parliamentarian might determine that a preamble is not entitled to fast-track CRA procedures.

Third, the resolution’s sponsors could include explicit statements in the committee report and floor debates clarifying the resolution’s meaning. There is precedent for doing so.⁴⁰ Such a statement might say that “a resolution that ‘disapproves’ an agency’s interpretive rule is intended and understood by this Congress as a disapproval of the interpretation stated in that rule and is a formal legislative determination that this interpretation is inconsistent with the law.” The statement might also stipulate that “a vote in favor of this resolution, which disapproves of the agency declaration that such-and-such policy is *prohibited*, will have the effect of a legislative determination that this policy is *permitted*.” It is true that some federal judges, including some on the Supreme Court, are skeptical of legislative history. Nevertheless, most judges will still look to legislative history to resolve textual ambiguities, so explicit statements along these lines might help persuade an uncertain court that the text of the CRA resolution is best read as rejecting the substance of the interpretation, not just the articulation of that interpretation in the form of an agency rule.

Can this procedure be used when a court has already invalidated an agency decision as not authorized by statute?

Yes, as long as the court’s ruling was based on statutory interpretation. A CRA disapproval resolution can override a court decision to the same extent that Congress can override a court decision by amending the underlying statute. To use the CRA to override a court’s ruling that an agency policy is not authorized by statute, the agency would first promulgate an interpretive

³⁸ See, e.g., H.J.Res. 178 (104th Congress) (1996); S.J.Res. 25 (105th Congress) (1997); S.J.Res. 22 (110th Congress) (2007).

³⁹ See, e.g., National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 2908(a)(1), 104 Stat. 1485, 1816–17 (1990) (codified at 10 U.S.C. § 2687 note) (providing that, in order to be eligible for fast-track consideration, a joint resolution blocking the closure or realignment of a military installation must not contain a preamble); 12 U.S.C. § 5612(d)(4)(B) (provision of the Dodd-Frank Act mandating that, to be eligible for fast track consideration, a joint resolution to increase the maximum guarantee amount for emergency loans may not contain a preamble); 2 U.S.C. §§ 907a(a)(2)(B), 907c(e)(3) (provisions of the Balanced Budget and Emergency Deficit Control Act mandating that a fast-track joint resolutions under certain provisions of that act shall not contain any preamble).

⁴⁰ See H.R. REP. NO. 117–64 (2021) at 3, 8; see also CAREY & DAVIS, *supra* note 11, at 14.

rule restating the court's interpretation of the statute. Congress would then use the CRA to enact a resolution disapproving that interpretation. Once that occurred, the agency would no longer be bound by the court's ruling on the meaning of the statute, because Congress would have *changed* the meaning of the statute to exclude the court's reading.

Because a CRA resolution could not undo a court decision that rested on constitutional grounds, this procedure could not be used to undo a court decision that held an agency action to be unconstitutional, unless the determination of unconstitutionality was premised on the lack of express statutory authorization for, or appropriate statutory constraints on, the agency's action.

Can this procedure be employed to override a court decision while an appeal is pending?

Yes, though the logistics may be more complex. The CRA can be used to override a lower court decision while an appeal of that decision is still pending, but in this case there is a complication: The CRA double-negative procedure requires the agency to promulgate an interpretive rule that endorses the court's decision, while the U.S. government's appeal would argue the court's decision was incorrect. The administration would prefer not to simultaneously endorse and challenge the court's legal conclusion. Fortunately, there are several ways to avoid this problem. First, the agency's interpretive rule can be phrased in conditional terms. ("Unless the lower court's ruling is overturned on appeal, the agency will interpret the statute to have the meaning that the court ascribed to it.") Second, the agency can issue a policy statement regarding its future course of action that does not explicitly refer to the court's legal interpretation. Third, the administration and Congress can move expeditiously to execute the CRA double-negative procedure before the U.S. government files its opening brief in the appeal; that brief can then reference the CRA resolution as a reason to overturn the original ruling, as Congress would have effectively amended the statute in the interim.

Would Senators committed to retaining the filibuster be willing to use this mechanism?

Quite possibly. A reasonable concern about the political viability of the CRA double-negative procedure is that Senators who support the filibuster might be reluctant to embrace a mechanism that would expand the range of legislative initiatives that are exempt from the filibuster. But one of the attractive features of this proposal, from a political perspective, is that it does *not* involve eliminating or further restricting the filibuster. Instead, the procedure rests upon existing legislation that *already* creates an exemption to the filibuster, and channels more decisions through that process. In that sense, the CRA procedure suggested here is not meaningfully different in kind from the more familiar use of the budget reconciliation process, which the Senate's staunchest filibuster defenders on both sides of the aisle view as legitimate.

Isn't this proposed use of the CRA contrary to the original understanding of how the CRA is supposed to operate?

Perhaps, but this doesn't matter. The CRA double-negative procedure may not be what the CRA's drafters had in mind. But as a legal matter, this is irrelevant: Many statutes are used in ways that their original drafters did not anticipate. As previously noted, the budget reconciliation process is a prime example. Indeed, the CRA itself has *already* been used in unanticipated ways.⁴¹ The dysfunction of the modern Congress amply justifies exploring unconventional methods for overcoming obstructionism—especially since the most significant obstructionist device, the filibuster, is itself the product of an unanticipated exploitation of gaps and loopholes in Senate rules.

Couldn't the CRA procedure be deployed to stymie or roll back a progressive policy agenda, in exactly the same way it could be used to advance a progressive policy agenda?

Yes. As is true of other mechanisms for limiting or circumventing the filibuster, this procedure bolsters the ability of congressional majorities and the White House to enact legislation by curbing the ability of a Senate minority to block legislation. When the Democratic Party controls the White House and both chambers of Congress, the CRA double-negative procedure could facilitate a progressive policy agenda. But under periods of unified Republican government, the same technique could be used to advance a conservative policy agenda. Whether the use of this procedure will tend to favor progressive or conservative policies in the long run depends on whether the filibuster tends to stymie progressive legislative priorities more or less often than it stymies conservative legislative priorities.

If this approach were accepted as valid, couldn't this be used for just about anything? What's the limiting principle?

The procedure has broad potential applications, but practical and political constraints would limit its use. Because a CRA disapproval resolution has the same effect as an ordinary statute, and because most legal propositions can be stated in double-negative terms, the two-step procedure described in this Issue Brief could be used to change, rather than merely clarify, statutory law. After all, if an agency proposed an interpretation that contravened the existing statutory text, and Congress subsequently endorsed that interpretation through a formal exercise of legislative power, then Congress effectively would have amended the statute to permit the agency's proposed interpretation.

That said, the more complex the legal proposition to be established, and the more that proposition seems like a change to statutory law rather than a clarification of an existing

⁴¹ In particular, the CRA was used to reject a guidance document that was adopted years earlier, but had never been properly reported. See S.J. Res. 57, Pub. L. No. 115-172, 132 Stat. 1290 (2018) (overturning CONSUMER FIN. PROT. BUREAU BULL., 2013-02, [INDIRECT AUTO LENDING AND COMPLIANCE WITH THE EQUAL CREDIT OPPORTUNITY ACT](#) (2013)). The use of the CRA to invalidate older agency rules that had not been formally submitted to Congress was "widely dismissed" at first, but that this "new and innovative" use of the CRA was subsequently accepted. See Sam Batkins, *Congress Strikes Back: The Institutionalization of the Congressional Review Act*, 45 MITCHELL HAMLINE L. REV. 351, 353 (2019).

ambiguity, the more practically and politically difficult it will be to negotiate and coordinate the CRA double-negative procedure. This procedure is only viable if the White House and party leaders can assemble the requisite majorities in both chambers of Congress. Furthermore, because the CRA bypasses the ordinary legislative process—which includes lengthy committee consideration, debates over proposed amendments, and reconciliation of House and Senate bills, among other steps—the White House and congressional leaders would need to negotiate the final form of the legislative change entirely ahead of time. Therefore, even if the CRA double-negative procedure were embraced as legitimate, it would probably be used relatively sparingly, primarily in cases where there is an obvious statutory ambiguity, strong congressional majorities favor of a given resolution of that ambiguity, and both the agency rule and the disapproval resolution can be framed in straightforward terms. Still, there are many cases where using this tool could make a substantial difference, enabling progress on a legislative and regulatory policy agenda that would otherwise be obstructed.

IV. Conclusion

Thanks to gridlock and minority obstructionism, Congress often does too little to resolve many of the most pressing policy issues facing the country. As Congress has receded from the scene, the executive and judicial branches have assumed a greater role in setting public policy, frequently in the context of disputes over the interpretation of old statutes that were drafted and enacted with very different problems in mind. Scholars and activists have proposed a variety of mechanisms that might enable Congress to act more swiftly and decisively to clarify or update statutes, or respond to judicial decisions. The CRA permits Congress to do just that.

The CRA's fast-track procedures are available for any joint resolution that can be framed as disapproving an agency rule—including an agency rule that consists solely of a declaration of what a particular statutory provision means and whose sole purpose is to enable Congress to express its disapproval. Crucially, although the CRA only applies to resolutions of disapproval, any statement of disapproval can be converted into a statement of approval by using a double-negative construction. Once one appreciates this fact, it becomes clear that the CRA could be deployed far more broadly, enabling congressional majorities to avoid the filibuster and other procedural bottlenecks that too often paralyze the legislative process.

The Congress that enacted the CRA may not have intended or anticipated this possibility, but in this respect the CRA is not much different from the budget reconciliation process or other fast-track mechanisms that Congress has used to advance legislation. And given how bad congressional dysfunction has gotten, exploring nontraditional alternatives to the ordinary legislative process is not merely justified—it is essential to the health of our democracy

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