Transition Critical: What Can and Should Be Done with the Congressional Review Act in the Post-Trump Era?

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My decision to write about the Congressional Review Act (CRA) in the fall of 2020 launched the beginning of an academic journey marked by several unexpected twists and turns.

I originally chose to write about the CRA because, like many political theorists at the time, I was curious whether a Democrat-controlled Congress and presidency might utilize the CRA to rescind Trump-era agency rules (just as the Republican-led 115th Congress did for Obama-era regulations in 2017). But while I was intrigued by the possibility of using the CRA to strengthen environmental protections in the short term, I was terrified by the long-term implications of reinstating what is essentially a legislative veto.

Unsure how to feel about the CRA, I decided to research the origin of the law and to try to parse out what separated the successful uses of the Act from the failures. This Note expands upon that early research to contextualize the law within American history and evolving political ideologies. It also explores how the federal courts system has responded to agency-created law, focusing in particular on a recent Ninth Circuit case, Center for Biological Diversity v. Bernhardt. *By examining the origins of the CRA and how the Act affects the structure of our three-pronged federal government, this Note concludes that the CRA is ultimately harmful and should substantially amended or, better yet, repealed. Now that the 2020 election and transition period is behind us, Congress must seriously consider the future of the CRA.*

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[*] JD, University of California, Berkeley School of Law, Class of 2021. I imagine writing legal scholarship is always challenging, but writing amidst a global pandemic and contentious election season was particularly difficult. I am therefore thankful for my advisors, Professor Holly Doremus and Robbie Newell, who helped me to tune out the noise and focus on what I wanted to write about and why. I am also grateful to the student members of *Ecology Law Quarterly*, who, in addition to their outstanding editorial work, have supported me throughout my entire law school experience. Thank you.

INTRODUCTION

When I began the process of writing this Note, I had never heard of the Congressional Review Act (CRA): a law that allows Congress to repeal agency rules by issuing joint resolutions.[1] Though I had followed the Trump administration's rolling back of environmental protections with an almost unhealthy attentiveness,[2] I did not fully understand the tools that Congress used

1. 5 U.S.C. §§ 801–08.

2. Two of my favorite sources include the Columbia Law School Sabin Center for Climate Change Law's *Climate Deregulation Tracker*, SABIN CTR. FOR CLIMATE CHANGE L., COLUM. L. SCH., COLUM. U. EARTH INST., https://climate.law.columbia.edu/climate-deregulation-tracker (last visited Dec. 10, 2020); the New York Times' List of Environmental Rollbacks, Nadja Popovich et al., *The Trump*

to accomplish these ends. In my defense, the legal and political worlds were also taken aback by how important the CRA proved to be.[3] The rise of the CRA was the congressional power grab that somehow, incredibly, no one saw coming.[4]

Prior to 2017, Congress had only successfully used the CRA to overturn an agency rule once.[5] But in 2017 and 2018, the Republican-dominated 115th Congress used the legislation to overturn a whopping *fourteen* agency-issued rules.[6] In the aftermath, various interest groups on the political Left began to strategize about how the Democrats could use the CRA if the party won the presidency and enough congressional seats in the 2020 election.[7] Wonks theorized that a Biden presidency and a Democrat-controlled Congress might be able to reverse some of the Trump administration's more egregious environmental rollbacks just as quickly as the Trump administration stripped Obama-era regulations.[8] The speculation around this possibility only intensified in the wake of the ruling in *Center for Biological Diversity v. Bernhardt*, in which

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Administration Is Reversing More than 100 Environmental Rules. Here's the Full List, N.Y. TIMES (Nov. 10, 2020), https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html; and University of California, Berkeley Law's Center for Law, Energy & the Environment's *Reversing Environmental Rollbacks*, CTR. FOR L., ENERGY, & THE ENV'T, UNIV. OF CAL. BERKELEY SCH. OF L., https://www.law.berkeley.edu/research/clee/rollback-tracker/ (last visited Aug. 5, 2021) (which both compiles information about the rollbacks and provides up-to-date information about the Biden administration's response).

3. Because the CRA had only been used successfully one time in over twenty years, a common narrative in the popular press was to downplay the potential power of the legislation. *See, e.g.*, David Roberts, *The Republicans' Hollow Threat The EPA and the Congressional Review Act*, GRIST (Jan. 11, 2011), https://grist.org/article/2011-01-10-republicans-hollow-threat-epa-and-congressional-review-act/ (referring to the CRA as "Republicans' hollow threat" or "the dog that never barks"). Legal scholars also allude to the dormancy of the legislation before 2017. *See* Bethany A. Noll & Richard L. Revesz, *Regulation in Transition*, 104 MINN. L. REV. 1, 2 (2019) (referring to the CRA as an "obscure rollback tool[]" and a "previously low-profile strateg[y]"); Paul J. Larkin, Jr., *Reawakening the Congressional Review Act*, 41 HARV. J.L. & PUB. POL'Y 187, 190–91 (2018) (referring to the CRA as "a little-known and, until recently, even less often used statute"); Dan Farber, *Should a New Congress Use a Deeply Flawed Law to Cancel Trump's Regulations?*, LEGAL PLANET (Sept. 23, 2020), https://legal-planet.org/2020/09/23/should-a-new-congress-use-a-deeply-flawed-law-to-repeal-trump-agency-rules/ (referring to the CRA as "a part of Newt Gingrich's 'Contract With America' [that] slumbered for many years in obscurity").

4. Or perhaps, it would be more accurate to say that those who were aware of the law didn't take it seriously. *See* Roberts; Noll & Revesz; Larkin; and Farber, *supra* note 3.

5. *See* Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2000) (to be codified at 29 C.F.R. pt. 1910); S.J. Res. 6, 107th Cong. (2001) (rejecting the final Ergonomics Program Rule).

6. *See* H.J. Res. 41, 115th Cong. (2017); H.J. Res. 38, 115th Cong. (2017); H.J. Res. 40, 115th Cong. (2017); H.J. Res. 37, 115th Cong. (2017); H.J. Res. 44, 115th Cong. (2017); H.J. Res. 57, 115th Cong. (2017); H.J. Res. 58, 115th Cong. (2017); H.J. Res. 42, 115th Cong. (2017); H.J. Res. 69, 115th Cong. (2017); H.J. Res. 83, 115th Cong. (2017); S.J. Res. 34, 115th Cong. (2017); H.J. Res. 43, 115th Cong. (2017); H.J. Res. 67, 115th Cong. (2017); H.J. Res. 66, 115th Cong. (2017); H.J. Res. 111, 115th Cong. (2017); S.J. Res. 57, 115th Cong. (2018). These resolutions and the rules they repealed are discussed in more detail *infra* Subpart II.B and in the Appendix.

7. *See, e.g.*, James Goodwin, *The Congressional Review Act Could Be Put to Positive Short-Term Use, but It Should Still Be Repealed*, CTR. FOR PROGRESSIVE REFORM (Aug. 20, 2020), http://progressivereform.org/cpr-blog/congressional-review-act-could-be-put-positive-short-term-use-it-should-still-be-repealed/; Farber, *supra* note 3.

8. *See* Goodwin, *supra* note 7.

the Ninth Circuit confirmed that Congress could use a CRA-issued joint resolution to repeal one of the Department of the Interior's rules.[9] The court also ruled that as a matter of first impression, the text of the CRA precluded the judiciary from reviewing statutory claims in these types of cases.[10] In other words, as the law stands right now, Congress's use of the CRA is unlikely to be questioned or challenged by federal courts.[11]

Writing this Note required an uncomfortable amount of guess-work. I wrote the majority of it while anxiously awaiting the results of the 2020 election. But in some ways, the uncertainty became a strength of the piece: because I did not know which party might get the chance to use the CRA, I considered what might happen in a variety of scenarios. By focusing on how the CRA would affect our overall system of government, my biases were somewhat tempered, and I could not approach the analysis thinking only of how the CRA could benefit one party's goals.

In the fall of 2020, the prospect of a Democrat-wielded CRA felt remote at best. The American people had just selected Joe Biden as their President Elect; Democrats maintained a shaky hold on the House, and, unless Democrats could flip both seats in Georgia,[12] Republicans would control the Senate.[13] Without a Senate majority, Democrats would not have been able to use the CRA to the same scope or effect as Republicans did in 2017—this is a piece of legislation that thrives in conditions of one-party dominance.[14] Against all odds, Jon Ossoff and Raphael Warnock became Georgia's first Democratic senators.[15] Thus, the Democratic Party entered the presidential transition period with the majority it needed to utilize the CRA. And it did. At the tail-end of the statute's timing window, Congress succeeded in using the CRA not just once but three times: issuing joint resolutions that repealed rules originally promulgated by the Equal

9. Ctr. for Biological Diversity v. Bernhardt, 946 F.3d 553, 564 (9th Cir. 2019).

10. *Id.* The Ninth Circuit sidestepped the issue of whether or not judicial preclusion would apply to constitutional claims, concluding that "[Center for Biological Diversity's] constitutional claims do not allege a plausible basis for relief." *Id.* at 556.

11. At least in the Ninth Circuit's jurisdiction (the West and Mountain West) and/or until the U.S. Supreme Court holds otherwise.

12. Because both Democratic challengers won the Georgia runoff, the balance of power in the Senate is split between the two major parties at an even fifty-fifty. (This number includes the two Independent senators who caucus with the Democrats.) In the event of a tie, Vice President Kamala Harris, as president of the Senate, would cast the deciding vote.

13. *See Senate Results*, CNN POLITICS, https://www.cnn.com/election/2020/results/senate (last visited June 6, 2021).

14. This is because the CRA requires both chambers of Congress to pass a joint resolution, and unless there is a two-thirds majority vote in each chamber, the joint resolution is then sent to the president's desk for potential veto. Unless one party controls the House, the Senate, and the presidency, a joint resolution is likely to fail. The conditions necessary to CRA success are detailed throughout the Note, but for a quick overview of this effect in action, see the attached Appendix, *infra*.

15. *See* Kendall Karson, Meg Cunningham, & Quinn Scanlan, *Against the Odds, Georgia Democrats Make History with Senate Runoffs*, ABC News (Jan. 6, 2021), https://abcnews.go.com/Politics/odds-georgia-democrats-make-history-senate-runoffs/story?id=75095109; *see also* CNN POLITICS, *supra* note 13.

Employment Opportunity Commission,[16] the Environmental Protection Agency,[17] and the Office of the Comptroller of Currency.[18]

I cannot say I blame the Democrats for using the CRA, or for using it to a more limited degree than their conservative counterparts. But now that the presidential transition period is behind us and Democrats will not have a meaningful opportunity to use the CRA again until at least 2028,[19] it is time for Congress to seriously consider the future of this law. In this Note, I trace the history of the CRA and its relationship to both political parties as well as to our judicial system. I conclude that the CRA is ultimately more harmful than helpful, and should be substantially altered or repealed. The Note proceeds as follows.

Part I will explain what the CRA is, how it works, and why it matters. This Part will situate the Act within the broader context of administrative law, including ongoing debates about the role of the administrative state and the balance of power between the branches of federal government. It will also trace the CRA's origins through legislative history and explore how this history dictates the scope and use of the CRA: namely, that this statute was designed by and for conservatives.

Part II will look at Congress's past attempts to revoke agency rules using the Congressional Review Act. This Part will look to the historical record of past joint resolutions of disapproval and will analyze what separated the successes from the failures. Particular attention will be paid to the fourteen successful joint resolutions enacted in 2017, including the rule at issue in a recent Ninth Circuit case: *Center for Biological Diversity v. Bernhardt*.[20]

Part III will draw on the material presented in Parts I and II to explore the future of the Congressional Review Act. This Part will identify three potential avenues Congress could pursue. If inclined, Congress could (1) keep the CRA as is (and either use it or disregard it but leave it on the books), (2) amend certain concerning aspects of the CRA or (3) repeal the statute altogether. This Part will also discuss the normative value judgments and tradeoffs inherent to the CRA and weigh these considerations against other governance options.

Though the CRA is unlikely to ever be as powerful as it was during its heyday in 2017, its very existence contributes to the erosion of our government institutions—institutions that were left badly bruised by the unprecedented rejection of political norms that ultimately culminated in an attempted coup of the U.S. Capitol during the waning hours of the Trump presidency.[21] The CRA

16. S.J. Res. 13, 117th Cong. (2021).

17. S.J. Res. 14, 117th Cong. (2021).

18. S.J. Res. 15, 117th Cong. (2021).

19. This 2028 scenario assumes a Republican administration holds power from 2024–2028 and then Democrats retake the presidency.

20. Ctr. for Biological Diversity v. Bernhardt, 946 F.3d 553, 558 (9th Cir. 2019).

21. *See Capitol Insurrection Updates Shockwaves after a Pro-Trump Mob Stormed the U.S. Capitol Complex*, NPR, https://www.npr.org/sections/insurrection-at-the-capitol (last visited Apr. 11, 2021).

was marketed as a check on the power of the administrative state,[22] but in reality, it enables minoritarian rule: congressional leadership has used this Act to box the public out of the rulemaking process, and there is no reason to believe it would hesitate to do so again. Despite what its original creators may have promised,[23] the CRA is not an instrument of the people. Rather it was, is, and will always be a partisan tool congressional leadership uses to further its own aims. Democrats' use of the CRA should remain limited to these three instances which amount to a partial counteraction of the excesses of a truly unprecedented presidency.[24] Now that we understand the true potential of the CRA's power, we should protect our democracy by urging our members of Congress to end this chapter of our history by repealing the CRA for good.

I. WHAT IS THE CONGRESSIONAL REVIEW ACT AND WHY DOES IT MATTER?

A. What Is the Congressional Review Act? — Examining the Statute

The CRA, or the Small Business Regulatory Enforcement Fairness Act, is a subsection of the Contract with America Advancement Act.[25] The designers of the CRA created it as an alternative to the congressional veto: the purpose of the Act is to curtail the power of the administrative state by providing an avenue for Congress to repeal substantive federal agency rules.[26] The CRA requires that an agency wishing to finalize a rule submit a report to Congress before said rule can

22. *See Congressional Review Act*, BALLOTPEDIA, https://ballotpedia.org/Congressional Review _Act (last visited Mar. 13, 2021) ("Republicans claimed that the reforms contained in the *Contract* would 'be the end of government that is too big, too intrusive, and too easy with the public's money.'" (quoting the text of the Contract)).

23. Or at least heavily implied in the Contract, which was marketed as a way to hold the federal government accountable to the American public by "restor[ing] the bonds of trust between the people and their elected representatives." *Republican Contract with America*, U.S. HOUSE OF REPRESENTATIVES (Apr. 27, 1999), https://web.archive.org/web/19990427174200/http://www.house.gov/house/Contract/CONTRACT.html.

24. In fact, the Trump presidency was so unprecedented, that many journalists adopted a new term, "unpresidented," which Trump himself accidentally coined in a tweet while he was president elect. Adam Gabbatt, *Unpresidented' Donald Trump Invents the Guardian's Word of the Year*, GUARDIAN (Dec. 19, 2016, 11:49 AM EST), https://www.theguardian.com/us-news/2016/dec/19/unpresidented-trump-word-definition.

25. Contract with America Advancement Act, Pub. L. No. 104–121 (1996) (codified at 5 U.S.C. §§ 801–808).

26. After the Court's ruling in *INS v. Chadha*, which struck down the legislative veto, political leaders were looking for a constitutionally valid alternative to the original legislative veto. *See* PETER W. LOW, JOHN C. JEFFRIES, JR. & CURTIS A. BRADLEY, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 389 (9th ed. 2018) ("The Court in Chadha held that congressional power to override executive action by resolution undermined the President's constitutionally mandated opportunity to veto legislation with which the executive disagrees. If Congress wishes to overrule an executive action, the Court said, it must enact new law, which triggers the President's veto opportunity."); Larkin, *supra* note 3, at 197 ("The CRA was Congress's attempt to devise a lawmaking procedure that would approximate a legislative veto as closely as *Chadha* would allow."); *see generally* INS v. Chadha, 462 U.S. 919 (1983).

take effect.[27] After submitting the report, the comptroller general has fifteen days to comment on whether or not the proposed rule is "major,"[28] and after the comptroller makes their decision, Congress then has sixty legislative days[29] to nullify the rule.[30] In order to rescind the rule, Congress must pass an identical "joint resolution of disapproval" by majority vote in each chamber.[31] If the joint resolution fails at any step of the way, the new rule becomes binding.[32] However, if the joint resolution passes through both houses, it is brought to the president's desk and he or she has the option to veto. If the president does not veto Congress's joint resolution, then the resolution takes effect, which means the new agency rule has been rejected.[33] Congress's rejection of a rule ensures that the pre-existing agency rule[34] remains in place *and* that a rule that is "substantially the same" as the one just rejected cannot be proposed in the future.[35]

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27. 5 U.S.C. § 801(a)(1)(A) ("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.").

28. *Id.* (defining a major rule as a rule that "has resulted in or is likely to result in (A) an annual effect on the economy of $1,000,000,000 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").

29. This sixty-day timer restarts when Congress goes out of session. That provision is quite significant, as it also applies when the federal government shuts down entirely. So, for example, if an agency submits a rule to Congress on April 1, and on April 29 the government shuts down for thirty days, Congress will have an additional sixty days to review the agency rule when it returns on June 30. 5 U.S.C. § 801(d)(1).

30. 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.").

31. *Id.* § 802(a) ("That Congress disapproves the rule submitted by the ____ [agency name] relating to ____ [subject of the rule], and such rule shall have no force or effect.").

32. At least, until the agency seeks to replace it with another version, at which point the whole process starts anew.

33. *See* 5 U.S.C. § 801(a)(3)(B)(C) ("(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date — (i) on which either House of Congress votes and fails to override the veto of the President; or (ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or (C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).").

34. Or relevant law—sometimes an agency's proposed rule adds new federal regulation to an area where there was no regulation previously, as was the case for the rule at issue in *Center for Biological Diversity v. Bernhardt*. In this case, the Department of the Interior sought to apply a new rule about hunting restrictions in an area that previously had been regulated under Alaska state law. *See* Ctr. for Biological Diversity v. Bernhardt, 946 F.3d 553, 564 (9th Cir. 2019).

35. 5 U.S.C. § 805(b)(2).

The CRA also contains a jurisdiction-stripping provision, which reads, in its entirety: "No determination, finding, action, or omission under this chapter shall be subject to judicial review."[36] Because the Supreme Court has never directly ruled on the constitutionality of jurisdiction-stripping statutes, this area of the law is still largely unsettled.[37] Scholars have thus been particularly interested in how courts have treated plaintiffs who challenged the constitutionality of the CRA.[38] However, the Supreme Court has dealt with this uncertainty by assuming that even if statutory claims are barred, Congress cannot bar constitutional claims via statute without explicitly writing that intention into the text of the statute itself.[39] As we will further examine in the later portions of this Note,[40] this was the approach Ninth Circuit Justice Sandra Ikuta employed when reviewing the statutory and constitutional claims brought by the plaintiff-appellant in *Bernhardt*.[41]

Generally, the Administrative Procedure Act requires that all federal agencies follow an open process for issuing regulations.[42] This process includes publishing a statement of rulemaking authority in the Federal Register for all

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36. *Id.* § 805.

37. Whether and to what degree Congress can control the federal courts is an area of the law rife with legal scholarship. *See* Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1010 (1965) (arguing that deciding how federal judicial power should be exercised was left to Congress and jurisdiction stripping should therefore be permissible); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953) (making a similar argument to that of Wechsler); Ryan D. Doerfler & Samuel Moyn, *Reform the Court, but Don't Pack It*, ATLANTIC (Aug. 8, 2020) (making a modern, progressive argument in favor of aggressive jurisdiction stripping); *but see* Lawrence G. Sager, *What Is a Nice Court Like You Doing in a Democracy Like This?*, 36 STAN. L. REV. 1087 (1984) (arguing that Congress needs the federal courts to carry out its programs and that allowing jurisdiction stripping would therefore be impractical).

38. *See, e.g.*, Sarah Douglas, Tugaw Ranches, LLC v. U.S. Department of the Interior *New Scrutiny of the Congressional Review Act in a Changing Political Landscape*, 44 HARV. ENV'T L. REV. 299 (2020).

39. And, so far, no Congress has done this. *See* LOW, JEFFRIES, & BRADLEY, *supra* note 26, at 499 (explaining that there had been no Supreme Court rulings on the constitutionality of jurisdiction-stripping measures and that "[o]n the rare occasions when jurisdiction-stripping measures have been enacted, moreover, the Court's primary strategy has been to construe the jurisdictional limitation in a way that avoids the most difficult constitutional questions.").

40. *Infra* Subpart II.C.

41. Ctr. for Biological Diversity v. Bernhardt, 946 F.3d 553, 564 (9th Cir. 2019).

42. 5 U.S.C. §§ 551, 553(b)(c)(d)(e) ("(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved . . . (c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection. (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date . . . (e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.").

proposed and final rules.[43] Agencies involve the public throughout the rulemaking process.[44] To move forward with a final rule, the agency must conclude that its proposed rule will accomplish the goals it identifies.[45] In order to reach this conclusion, the agency must ground its findings in some sort of analysis—unsubstantiated claims are not sufficient.[46] It must also consider alternate solutions (including solutions that would be less expensive).[47] In the final rule, the agency must include a preamble (which includes the rule summary, effective date, and supplementary information).[48] The agency must state its basis and purpose for the rule, as well as legal authority for enacting the rule in the first place.[49] This traditional rulemaking process is both time and resource intensive. It is not uncommon for agencies to spend several months or even years working on a single rule.[50]

Crucially, the same rulemaking process and the requirement to explain agency rationale applies to rescinding agency rules.[51] Unlike its congressional counterpart, the executive branch (acting through its federal agencies) cannot wave a magic wand and make an existing rule disappear.[52] Thus, the CRA's power lies in its ability to bypass much of this process through an expedited fast-track procedure.[53] Critics argue that this fast-tracking power makes the CRA dangerous; bypassing the traditional rescinding procedure minimizes the involvement of the public and allows Congress to erase years of agency effort with a single sentence.[54]

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43. 5 U.S.C. § 553(b).

44. *Id.* §§ 551–59; *see also A Guide to the Rulemaking Process*, OFF. FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited June 6, 2021). For example, some agencies may publish an "Advance Notice of Proposed Rulemaking" in the Federal Register or hold public hearings to solicit public comments about the proposed rule.

45. 5 U.S.C. §§ 551–59; see *also A Guide to the Rulemaking Process*, *supra* note 44.

46. *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977) (finding that an agency promulgating a rule must identify the major policies implicated by said rule and the agency's rationale for reacting to the implicated issues).

47. 5 U.S.C. §§ 551–59; *see also A Guide to the Rulemaking Process*, *supra* note 44.

48. 5 U.S.C. §§ 551–59.

49. *Id.*

50. See, for example, the Department of Labor ergonomics rule, which the agency initiated under H.W. Bush but did not finalize until the final years of the Clinton presidency. Ergonomics Program, 29 C.F.R. § 1910 (2000).

51. For example, in one of the most famous cases in administrative law, *Motor Vehicle Manufacturers Ass'n of the United States, Inc. v. State Farm Mutual Auto. Insurance Co.*, the Court found that an incoming administration's rule rescinding a pre-existing agency rule related to seatbelts was arbitrary and capricious because the agency did not explain its rationale or the evidence supporting its decision. 463 U.S. 29 (1983).

52. *See id.*

53. Larkin, *supra* note 3, at 202.

54. *See* Laura Barron-Lopez & Arthur Delaney, *Republicans Are Using an Arcane Tool to Handcuff Federal Agencies*, HUFFPOST (Feb. 19, 2017), https://www.huffpost.com/entry/republicans-cra-federal-agencies n 58a7776ae4b045cd34c1a44c (quoting Sen. Ben Cardin, Democrat of Maryland, saying "[w]hat the Senate did with the CRA . . . is outrageous"); Thomas O. McGarity, *The Congressional Review Act A Damage Assessment*, AM. PROSPECT (Feb. 6, 2018), https://prospect.org/article/congressional-review-act-damage-assessment.

B. Where Did the CRA Come From? — A Legislative History

The CRA origin story begins with the Contract with America ("the Contract"). The Contract was a legislative agenda promulgated by the Republican Party during the congressional midterm elections of 1994.[55] Prior to those elections, Republicans had not held a majority in the House for over forty years.[56] The creators of the Contract, Speaker of the House Newt Gingrich and House Majority Leader Dick Armey, used language from President Reagan's 1985 State of the Union Address and ideas from the Heritage Foundation[57] to cobble together a plan for party success.[58] Never before had lawmakers set out with such specificity what they planned to do if elected to Congress.[59] Republicans needed the support of the American people, and they came ready to make a deal.

On September 27, 1994, the Contract made its public debut: 367 Republican candidates for congressional office signed the Contract on the steps of the U.S. Capitol.[60] Their pledge: "If we break this Contract, throw us out."[61] The Contract described itself as an "agenda for national renewal, a written commitment with no fine print."[62] Its architects presented it as an antidote to the current government, which the Contract described as "too big, too intrusive, and too easy

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55. *Republican Contract with America*, *supra* note 23.

56. *Id.*

57. A conservative thinktank. The Heritage Foundation describes itself as "an organization whose mission is to formulate and promote conservative public policies based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense.", *About Heritage*, HERITAGE FOUND., https://www.heritage.org/about-heritage/mission (last visited Aug. 5, 2021).

58. *Republican Contract with America*, *supra* note 23.

59. Specifically, the Republicans promised that if they became the majority party, they would institute the following reforms on the first day of the new Congress:

> FIRST, require all laws that apply to the rest of the country also apply equally to the Congress; SECOND, select a major, independent auditing firm to conduct a comprehensive audit of Congress for waste, fraud or abuse; THIRD, cut the number of House committees, and cut committee staff by one-third; FOURTH, limit the terms of all committee chairs; FIFTH, ban the casting of proxy votes in committee; SIXTH, require committee meetings to be open to the public; SEVENTH, require a three-fifths majority vote to pass a tax increase; EIGHTH, guarantee an honest accounting of our Federal Budget by implementing zero base-line budgeting.

Republicans further promised that they would bring ten bills—The Fiscal Responsibility Act, The Taking Back Our Streets Act, The Personal Responsibility Act, The Family Reinforcement Act, The American Dream Restoration Act, The National Security Restoration Act, The Senior Citizens Fairness Act, The Job Creation and Wage Enhancement Act, the Common Sense Legal Reform Act, and The Citizen Legislature Act—to the floor for debate within the first 100 days of the new congressional session. *Republican Contract with America*, *supra* note 23; *see also* Jeffrey Gayner, *The Contract with America Implementing New Ideas in the U.S.,* HERITAGE FOUND. (Oct. 12, 1995), https://www.heritage.org/political-process/report/the-contract-america-implementing-new-ideas-the-us.

60. *Republican Contract with America*, *supra* note 23.

61. *Id.*

62. *Id.*

with the public's money."[63] This new approach worked: Republicans flipped both the House and the Senate to hold the majority for the first time in decades, though Democrats still controlled the presidency.[64] As promised, one of the first acts of the new Republican Congress was to codify the Contract into law.[65] Of course, not every element of the Contract made it through the legislative process unscathed—President Clinton had veto power and was unafraid to use it.[66] Nevertheless, in 1996, Republicans followed up the Contract with yet another strikingly similar contract: the Contract with American Advancement Act.[67]

Nestled into this legislation under subsection E is the CRA.[68] The CRA was designed to reinstate a modified, less potent version of the legislative veto, which Congress had used frequently until it was struck down by the Supreme Court as unconstitutional in 1983.[69]

Surprisingly,[70] the CRA was not an element of the original Contract targeted by the President Clinton's office for veto.[71] Secondary sources are largely silent as to why this is. But it is worth engaging in a bit of speculation, because putting ourselves in President Clinton's shoes may help illuminate the upcoming discussion about how Democratic lawmakers should handle this law moving forward.

One possible explanation for President Clinton's decision not to veto the CRA is that the Act maintained the existence of the presidential veto.[72] Perhaps the CRA did not appear threatening so long as the president could continue to use his veto power to strike down any objectionable joint resolutions. Clinton would also likely have considered that, should his departure from the White House coincide with a Republican-led Congress and Republican president, the presidential veto would do nothing to protect his own legacy—an ideologically aligned legislative and executive branch could repeal any agency rules his administration levied within the past sixty legislative days.[73] But perhaps this was not a pressing concern. After all, incoming administrations have made a

63. *Id.*

64. Gayner, *supra* note 59.

65. Contract with America Advancement Act, Pub. L. No. 104–121 (1996) (codified at 5 U.S.C. §§ 801–808).

66. *Id.*

67. *Id.*

68. *Id.*

69. *See* I.N.S. v. Chadha, 462 U.S. 919 (1983); *see also* LOW, JEFFRIES & BRADLEY, *supra* note 26, at 389.

70. At least, in retrospect.

71. *See* 5 U.S.C. §§ 801 et. seq.; *see also* Mitchell A. Sollenberger, *President Clinton's Vetos*, CRS REPORT FOR CONGRESS (Apr. 7, 2004), https://www.everycrsreport.com/files/20040407_98-147_fd13db32bb34e6acdaf459b81562f52922484a92.pdf (documenting all of the bills President Clinton vetoed during his time in office, from which the Congressional Review Act is notably absent).

72. 5 U.S.C. § 801(a)(3)(B).

73. And this is ultimately exactly what happened. *See* S.J. Res. 6, 107th Cong. (2001).

practice of trying to undo the outgoing administration's policies for decades[74] and have been largely unsuccessful.[75]

As for the long-term implications for his party, if Clinton considered them at all, there are a couple rationales explaining why Clinton may have allowed the proposed legislation to stand. One was popularity of the Contract. The Contract's agenda obviously resonated with the American people, as it enabled Republicans to flip enough seats to gain control of both chambers of Congress. Additionally, as mentioned above, the CRA passed on bipartisan vote: the House voted to pass the Act 328 to 91: 201 Republicans and 127 Democrats voted *yea*; approximately thirty Republicans and sixty Democrats voted *nay*.[76] The optics of vetoing a bipartisan bill that gave elected representatives the power to check what many Americans apparently viewed as a bloated, bureaucratic state would not have done the Clinton administration any political favors. This factor is especially powerful considering 1996 was a presidential election year, which would have made the president especially receptive to public opinion as he fought to win a second term.

It is unlikely President Clinton spent much time thinking about how this relatively obscure law would affect future Democrat-led Congresses or future Democratic presidents. Perhaps the president thought this administrative shortcut would be a positive development in American politics. It is possible that he thought the Democrats could use the CRA to their advantage in the future. It could also be that the president had mixed feelings about the power and scope of the CRA. In the interim, nothing about the CRA seemed poised to threaten the status quo. This assessment turned out to be more or less true for most of the statute's lifetime: there was only one successful use of the CRA prior to 2017.[77]

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74. *See, e.g.*, James Carney & John F. Dickerson, *How Bush Plans to Roll Back Clinton*, TIME (Jan. 21, 2001), http://content.time.com/time/nation/article/0,8599,96140,00.html (detailing plans to reverse guidance and make regulatory changes); Ceci Connolly & R. Jeffrey Smith, *Obama Positioned to Quickly Reverse Bush Actions*, WASH. POST (Nov. 9, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/11/08/AR2008110801856.html?nav=E8.

75. The failure to undo an outgoing administration's policies is due to two basic factors: (1) the incoming administration has limited time to execute its goals and often prioritizes other things, see Noll & Revesz, *supra* note 3, and (2) the outgoing administration can choose to set up roadblocks that would frustrate a new administration's attempts to enact reform. *See Presidential Transitions Issues Involving Outgoing and Incoming Administrations*, CONG. RSCH. SERV. (May 17, 2017), https://www.everycrsreport.com/files/20170517_RL34722_3957bb7a66e65555270ff10e75b21813f89c7f6b.pdf ("[I]f the sitting president (or his party) lost the election, he has every reason to hurry through last-minute public policies, doing whatever possible to tie his successor's hands.").

76. 142 CONG. REC. H2986 (daily ed. Mar. 28, 1996). The Senate passed the Act unanimously. 142 CONG. REC. S2316 (daily ed. Mar. 19, 1996).

77. *See* Ergonomics Program, 65 Fed. Reg. 68,262 (Nov. 14, 2000) (to be codified at 29 C.F.R. pt. 1910).

C. Why Does the Congressional Review Act Matter? Contextualizing the Statute within the Broader Administrative Law and Federal Court Schema

In order to understand the powerful implications of the CRA, we need to understand not just how the statute works, but also how it fits into the broader framework of administrative law and the federal courts system. A basic summary of how our government institutions and federal agencies operate is the quickest means to this end.

As the sophisticated legal reader already knows, the American government is broken into three branches: legislative, executive, and judicial.[78] Though these branches sometimes overlap, our nation's founders assigned each branch its own core tasks. In the most simplistic form: the legislative branch creates the laws, the executive branch carries out the law, and the judicial branch reviews the creation and enactment of these laws (to ensure that neither branch violates superior laws).[79]

This system of government has always been (and likely always will be) a subject of hotly contested and ongoing debate.[80] Though most students of political science and the law probably associate this field of study with questions about how power should be allocated between the federal government and the states, even in these early discussions about the scope and structure of American government, lawmakers raised concerns about the power of the executive.[81] In the early twentieth century, however, a new debate began to emerge.[82] This new debate centered around the growing phenomenon of executive agencies[83]: entities that were created by Congress via statute to carry out certain objectives, but that, once created, fell under the purview of the executive branch. This network of agencies came to be termed the "administrative state," and many felt that it was becoming too powerful.[84]

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78. *Branches of the U.S. Government*, USA.GOV, https://www.usa.gov/branches-of-government (last visited Dec. 14, 2020).

79. Most notably, Article VI of U.S. Constitution guarantees this must be the supreme law of the land. *See* Marbury v. Madison, 5 U.S. 137 (1803).

80. Eugene Boyd, *American Federalism, 1776 to 1997 Significant Events* (Jan. 6, 1997), https://usa.usembassy.de/etexts/gov/federal.htm ("During the pre-federalism period, the country waged a war for independence and established a confederation form of government that created a league of sovereign states. Deficiencies in the Articles of Confederation prompted its repeal and the ratification of a new Constitution creating a federal system of government comprised of a national government and states. Almost immediately upon its adoption, issues concerning state sovereignty and the supremacy of federal authority were hotly debated and ultimately led to the Civil War.").

81. *See, e.g.*, *Congress's Authority to Influence and Control Executive Branch Agencies*, CONG. RSCH. SERV. (May 12, 2021), https://fas.org/sgp/crs/misc/R45442.pdf.

82. This debate became especially preeminent during and after the Great Depression, which the Note details more fully below. *See infra* Subpart I.D.

83. *See supra* note 80 and accompanying text.

84. Additionally, many scholars, especially conservatives, still feel this way today. *See, e.g.* Larkin, *supra* note 3, at 188 ("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.").

Both scholars and judges continue to disagree over whether Congress (the legislative branch) should be able to delegate some of its power to federal agencies (the executive branch), and, if so, how broad these delegations should be.[85] Those who believe Congress is constitutionally permitted to—and should—delegate some, perhaps broad swaths, of its legislative power to government agencies ascribe to *delegation theory*. Those who believe the opposite, that Congress is constitutionally prohibited from delegating some of its legislative power to government agencies (or, if delegation is permitted at all, that it should be extremely limited) ascribe to *nondelegation theory*. At the time of writing, the Supreme Court has warily accepted delegation theory as the law of the land.[86] However, the Court has also not ruled out the possibility of returning to nondelegation theory or further restricting the instances where Congress may delegate.[87]

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85. At the risk of dangerously simplifying an extensive body of scholarship, for the purposes of this Note, all arguments about congressional delegation can be sorted into one of three categories: (1) textualist arguments about the meaning of the Constitution itself, (2) structural arguments about the limits the Constitution sets on each branch's powers, and (3) arguments over whether we should adopt a formalist (adhering strictly to the text of the Constitution) or functionalist (adhering less strictly to the Constitution in favor of prudential concerns) view toward the workings of government.

86. 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'ns, 531 U.S. 457, 472 (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); *see also* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1252–53 (1994); Larkin, *supra* note 3, at 195 ("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.").

87. Many scholars have posited that this possibility is increasingly likely, given the new conservative composition of the Court. *See* Mistretta v. United States, 488 U.S. 361, 416–17 (1989) (Scalia, J., dissenting) ("Precisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation . . . . [I]t is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be."); Gundy v. United States, 139 S. Ct. 2116, 2133–35, *reh'g denied*, 140 S. Ct. 579 (2019) (Gorsuch, J., dissenting) (quoting John Locke, "[t]he legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others" as influencing the thinking of the Founders and explaining "[i]f Congress could pass off its legislative power to the executive branch, the [v]esting [c]lauses, and indeed the entire structure of the Constitution, would make no sense. Without the involvement of representatives from across the country or the demands of bicameralism and presentment, legislation would risk becoming nothing more than the will of the current President.") (citations omitted). Note that Justice Amy Coney Barrett has said that Justice Scalia's judicial philosophy is the same as her

The history surrounding congressional delegation is instructive because it helps us to understand how Democratic and Republican ideologies conceptualize agency power and the role of the administrative state. It also helps to explain why the Democrats are unlikely to benefit as much from the CRA as Republicans. One of the Supreme Court's first attempts to suss out the correct balance between executive and legislative power occurred in 1928, in *J.W. Hampton, Junior and Company v. United States* (*J.W. Hampton*).[88] In that case, Chief Justice Taft,[89] writing for the majority, held that Congress may delegate certain tasks to the president, so long it legislates "intelligible principles" for the president to follow.[90] This holding introduced what became known as the intelligible principle doctrine. The theory behind this doctrine is appealing: by requiring that Congress set a substantive constraint on presidential power, the Court walked the line between satisfying democratic accountability and rule of law considerations. In practice, however, the intelligible principle test proved difficult to implement and was not as constraining on the executive as proponents of nondelegation had hoped.[91] Fans of the intelligible principle theory will note it was subject to some particularly unfortunate timing: a year after the Supreme Court ruled on *J.W. Hampton*, the Great Depression ravaged the nation. The sudden economic spiral led to a clamoring for government intervention, followed by an unprecedented federal response that would change the trajectory of the administrative state, and American political thought, forever.

D. The Rise of the Executive and the Modern Democratic Party: The New Deal Era

Those of us living through the current historical moment might be heartened to remember that the early 1930s could give even 2020 a run for its (lack of) money.[92] Amidst this backdrop, Democratic challenger Franklin Delano Roosevelt won the presidency, sailing to victory over sitting Republican

own and that Justice Gorsuch is still a sitting member of the Supreme Court. *See* Marcia Coyle, *His Judicial Philosophy Is Mine' Amy Barrett Touts Scalia in Remarks from Rose Garden*, NAT'L L.J. (Sept. 26, 2020), https://www.law.com/nationallawjournal/2020/09/26/his-judicial-philosophy-is-mine-amy-barrett-touts-scalia-in-remarks-from-rose-garden/?slreturn=20210213172836.

88. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

89. *Id.* It is worth noting the unique (indeed, singular) position Chief Justice Taft was in at the time of writing, as the only person in American history to have served as both President of the United States and Chief Justice of the Supreme Court. THE WHITE HOUSE, *Presidents William Howard Taft, The 27th President of the United States* https://www.whitehouse.gov/about-the-white-house/presidents/william-howard-taft/ (last visited Aug. 5, 2021).

90. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

91. *See supra* note 87 and accompanying text.

92. After the stock market crash of 1929, the United States plummeted into the Great Depression: by 1933, stocks were only worth 20 percent of their value, nearly half of the nation's banks were shuttered, and a staggering fifteen million people (or 30 percent of the workforce) filed for unemployment. *Stock Market Crash of 1929*, HISTORY.COM (Apr. 27, 2021), https://www.history.com/topics/great-depression/1929-stock-market-crash.

President Herbert Hoover in 1932.[93] Roosevelt ran on a platform of government intervention that must have resonated with the American people, as he won the presidential election by truly historic margins.[94] In his first one hundred days in office, Roosevelt implemented a slew of new government programs aimed at jump-starting the American economy through job creation and increased financial regulation. This dramatic shift toward using the power of the federal government to address societal needs became a defining feature of the Democratic Party.[95]

President Roosevelt pushed executive power to new limits—specifically, he careened into the guardrails set by the Supreme Court in *J.W. Hampton.*[96] Examples of Roosevelt's expansion of presidential power spanned from the creation of the largest public-works program in history under the Tennessee Valley Authority to the forced internment of Japanese Americans during World War II.[97] Congress was not especially pleased to see its power so aggressively eclipsed by the executive. It responded by introducing some of the first jurisdiction-stripping statutes that attempted to limit executive power via legislative veto.[98] Yet even with these legislative veto provisions, the executive

93. FDR's victory came at truly historic margins: he won the popular vote in every state outside the Northeast (only six states—Maine, New Hampshire, Vermont, Connecticut, Pennsylvania, and Delaware—went for Hoover), the largest percentage of the popular vote ever secured by a Democratic candidate at the time. *1932 Statistics*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/elections/1932 (last visited June 6, 2021).

94. His was a sort of inverse of the pledge against government excess that similarly captured the hearts and minds of American voters during the introduction of the Contract in the mid-nineties.

95. We can see Roosevelt's influence in the work of his progressive successors, including John F. Kennedy and Lyndon Johnson, and can trace that influence all the way through to the most recent Democratic presidents, Barack Obama and Joe Biden. *See, e.g.*, 42 U.S.C. 21 (the Kennedy and Johnson administrations' push for civil rights legislation, culminating in the Civil Rights Act of 1964), 42 U.S.C. 18001 (the Obama administrations' embrace of large government programs such as the Affordable Care Act). Also note the willingness to use executive agencies to further sweeping government programs, such as the Obama-era Environmental Protection Agency's promulgation of the Clean Power Plan. *FACTSHEET Overview of the Clean Power Plan*, EPA https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html (last visited Aug. 5, 2021).

96. Many students of American history may remember that President Roosevelt was often at odds with the federal judiciary: in his Judicial Procedures Reform Bill of 1937 he famously threatened to pack the courts by adding a new Justice to the Supreme Court bench (up to a maximum of six) for every member of the Court that did not voluntarily retire after age seventy. *See FDR's "Court-Packing" Plan*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/fdrs-court-packing-plan (last visited June 6, 2021).

97. James T. Paterson, *The Rise of Presidential Power Before World War II*, 40 L. & CONTEMPORARY PROBLEMS 39, https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3481&context=lcp (last visited August 12, 2021).

98. *See* Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369, 1370 (1977); Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162, 2164 (2009) ("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.

branch had still become too powerful in the eyes of the judiciary. In 1935, the Court struck down two instances of Congress delegating power to the executive. In *Panama Refining Co. v. Ryan* and *ALA Schechter Poultry Corp. v. United States*, the Court ruled that Congress impermissibly transferred its power without meaningful limits and that these actions could not be reconciled with the precedent set by *J.W. Hampton*.[99] These two cases remain the only cases to date where the Court has ruled a congressional transfer of power to a federal agency unconstitutional.

So why did the holdings in *Panama Refining* and *Schechter* fail to usher in an era of widespread nondelegation? Once again, proponents of nondelegation theory could argue that delegation theory won out not because it was superior, but because of unfortunate timing. Though American political theory imagines the judiciary as separate and insulated from political concerns, one would be hard-pressed to argue that the courts never allow the atmosphere of the times affect their decisions.[100] For example, as the United States entered World War II,[101] the Court became more willing to allow expansive uses of the executive power under the intelligible principle test.[102] Proponents of delegation theory will argue that the nation's willingness (and, perhaps, need) to embrace a strong executive during the Great Depression and World War II highlights a central component of the theory: that a functioning government is critical.[103] They might go as far as to say that this need has become even more pressing as the legislative branch descends further and further into hyper-partisan gridlock without end in sight.[104] Then again, those who ascribe to the nondelegation philosophy laid out in various dissenting opinions written by Justices Scalia and Gorsuch might respond that this 'ends justify the means' approach is doomed to end in institutional collapse.[105] Warnings of democracy's downfall took on a Chicken Little-like quality after the Cold War, but recent events, most conspicuously the

Instead, over the course of sixty years, Congress enacted more than 200 federal statutes with individual legislative vetoes.").

99. Pan. Refin. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

100. In fact, the Court itself has admitted this is not the case. Chief Justice Marshall stated, "We must never forget that it is a constitution we are expounding . . . intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *The Court and Constitutional Interpretation*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/constitutional.aspx (last visited June 6, 2021).

101. And thus, a powerful commander in chief became more desirable.

102. *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944).

103. *See* United States v. Lopez, 514 U.S. 549, 573 (1995) (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937), in which Justice Kennedy writes that the New Deal Era cemented "the Court's definitive commitment to the practical conception of the commerce power . . . [and the rejection of] mathematical or rigid formulas . . . [in favor of a] practical conception of commercial regulation").

104. *See, e.g.*, Noll & Revesz, *supra* note 3 (arguing that the need for presidential governance will become more pronounced as legislative victories become fewer and further between).

105. *See supra* note 87 and accompanying text.

siege on the U.S. Capitol by right-wing extremists on January 6, 2021,[106] make clear just how fragile our institutions can be.

There is already extensive scholarship dedicated to exploring whether or not Congress can limit federal judicial review via statutory provisions—few topics of legal scholarship have attracted more attention.[107] Given that this field is already, as one scholar put it, "choking on redundancy,"[108] this Note will not delve too deeply into the topic. However, a basic understanding of the ongoing debate is useful, as it will help to contextualize the power of the CRA[109] and the Ninth Circuit's ruling in *Center for Biological Diversity v. Bernhardt*.

All judicial authority stems from the U.S. Constitution, and Sections One and Two of Article III explain the outermost limits of this authority.[110] There have been dozens of proposals throughout the years to include 'jurisdiction-stripping provisions,' as they are often called, in federal legislation.[111] Scholars debate the extent to which this is permissible.[112] A certain amount of jurisdiction stripping has been accepted since the very early years of the judiciary.[113] Similarly, there are constitutional limits placed on Supreme Court jurisdiction that narrow the world of possibilities presented under Article III.[114]

Most jurisdiction-stripping statutes do not make it out of Congress. The Supreme Court has always assumed those rare, surviving statutes do not extend to constitutional matters.[115] Traditionally, the courts are quite deferential to federal agencies, finding that their rules are generally permissible so long as the agency is not acting a manner thought to be "arbitrary" or "capricious."[116] Courts

106. *See* NPR *supra* note 21.

107. *See* the scholarly debate cited *supra* note 36; *see also* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895, 897 n.9 (1984).

108. Gunther, *supra* note 107.

109. Especially as it pertains to environmental regulations during administrative transitions.

110. U.S. CONST. art III, §§ 1–2. Additionally, art. I, § 8 cl. 9 gives Congress the power "[t]o constitute Tribunals inferior to the supreme Court."

111. *The Mysteries of the Congressional Review Act*, *supra* note 98, at 2164 ("[O]ver the course of sixty years, Congress enacted more than 200 federal statutes with individual legislative vetoes.").

112. *See* the scholarly debate cited *supra* note 36; Gunther, *supra* note 107.

113. For example, in the Federal Judiciary Act of 1789, the nation's first judiciary act, Congress created an amount in controversy requirement, which limited federal courts from hearing cases where the disputed amount in question totaled less than 500 dollars, even if the case concerned plaintiffs from diverse states. *Transcript of the Federal Judiciary Act (1789)*, OURDOCUMENTS.GOV, https://www.ourdocuments.gov/doc.php?flash=false&doc=12&page=transcript (last visited Jan. 27, 2022). The amount in controversy requirement was later raised to $75,000. 28 U.S.C. § 1332.

114. For example, Congress and the courts have all interpreted Article III as requiring that there must be a federal law at issue in order for the Supreme Court to hear a case. *See Jurisdiction Federal Question*, FED. JUD. CTR., https://www.fjc.gov/history/courts/jurisdiction-federal-question (last visited June 6, 2021).

115. And, so far, no Congress has done this. *See* LOW, JEFFRIES & BRADLEY, *supra* note 26, at 499 (explaining that there had been no Supreme Court rulings on the constitutionality on jurisdiction-stripping measures and that "[o]n the rare occasions when jurisdiction stripping measure have been enacted, moreover, the Court's primary strategy has been to construe the jurisdictional limitation in a way that avoids the most difficult constitutional questions").

116. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984).

have also rebuked Congress for attempting to overrule agency decisions.[117] All of this makes a provision that shields congressional action from judicial review significant, and potentially troubling.

II. HOW HAS THE CONGRESSIONAL REVIEW ACT BEEN USED SO FAR?

A. One-Hit Wonder: The Early Years

Until 2017, Congress had succeeded in using the CRA to revoke an agency rule only once.[118] The year was 2001, the targeted agency was the Department of Labor (DOL), and the doomed rule concerned ergonomics.[119] After completing the necessary rulemaking processes, the DOL finalized a rule designed to prevent musculoskeletal disorders through better ergonomic conditions for workers.[120] Put more simply, this was rule aimed at reducing chronic injury in the workplace. Though the workforce-wide shift to home offices in the wake of the COVID-19 pandemic reinforced the importance of ergonomics for many of us, Congress was not convinced that the benefits of this rule outweighed substantial costs and issued a joint resolution to strike it down under the CRA.[121] Interestingly, though the DOL's rule was finalized during the lame-duck period of the Clinton presidency, the agency had been working on an ergonomics program for at least ten years and had begun the process under Republican President H.W. Bush.[122] The fact that Congress was able to scuttle

117. *See* I.N.S. v. Chadha, 462 U.S. 919 (1983).

118. S.J. Res. 6, 107th Cong. (2001).

119. *Id.*

120. Ergonomics Program, 29 C.F.R. § 1910 (2000). The agency reported:

> The final standard would affect approximately 6.1 million employers and 102 million employees in general industry workplaces, and employers in these workplaces would be required over the ten years following the promulgation of the standard to control approximately 18 million jobs with the potential to cause or contribute to covered [musculoskeletal disorders]. [Occupational Safety and Health Administration] estimates that the final standard would prevent about 4.6 million work-related [musculoskeletal disorders] over the next 10 years, have annual benefits of approximately $9.1 billion, and impose annual compliance costs of $4.5 billion on employers.

The Joint Resolution read, in entirety:

> Providing for congressional disapproval of the rule submitted by the Department of Labor under chapter 8 of title 5, United States Code, relating to ergonomics . . . . Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That Congress disapproves the rule submitted by the Department of Labor relating to ergonomics (published at 65 Fed. Reg. 68,261 (2000)), and such rule shall have no force or effect.

Id.

121. *Id.*

122. Of course, this history did not prevent Senate Republicans from characterizing the rule as "'a regulation crammed through in the last couple of days of the Clinton administration' as a 'major gift to organized labor.'" *See* Adam M. Finkel & Jason W. Sullivan, *A Cost-Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act Can OSHA Ever Utter the E-Word (Ergonomics) Again?*, 63 ADMIN. L. REV. 707, 726 (2011).

it so quickly by dismissing it as a last minute "midnight regulation" points to a central concern about using the CRA: it can be used to cancel rules that are based off of years of research and public input with a two-line proclamation and no substantive debate.[123] The DOL has not issued another rule relating to ergonomics in the last twenty years, though there is no way to tell if this is because the agency feels precluded by the "substantially the same" provision of the CRA or if it simply thinks that this is no longer good policy.[124] Merits of the failed ergonomic program aside, the cancellation of the rule did not accrue much attention—Washington remained largely unshaken.[125] The CRA would not reemerge as a powerful administrative rule for another sixteen years.

B. If at First You Don't Succeed . . . : The Lost Years

Many summaries of the CRA depict it as an obscure piece of legislation that had been cast aside, unused and forgotten, for nearly twenty years until the Trump administration rediscovered it and put it to use.[126] But while the "slumbering in obscurity"[127] narrative implies that conservative aides spent hours in the Library of Congress poring over old tomes until they emerged triumphant having discovered the CRA, it would be more accurate to say Congress never forgot about the CRA; rather, it lacked the necessary conditions to put it to use.[128] Between 2001 and 2017, Congress invoked the CRA over seventy times,[129] but it was never successful.

One major takeaway we can see from the failed resolutions is that these necessary conditions alluded to above really are *necessary.* In a bygone era, members of Congress may have been willing to cross the aisle on certain issues,[130] but that practice is virtually nonexistent today.[131] To use the CRA, the majority party needs control of *both* chambers of Congress *and* the presidency. Failure to meet any one of these conditions substantially reduces the likelihood of CRA success.

As one scholar has pointed out, the "unique confluence of factors [needed to use the CRA] has happened at most only three times since the CRA became law: when George W. Bush became President in 2001, when Barack Obama

123. Again, contrast the agency report with the joint resolution, *supra* note 118.

124. Finkel & Sullivan, *supra* note 122, at 726.

125. At least, in comparison with the flurry of think pieces and activity surrounding the reemergence of the CRA in 2017.

126. *See* scholarly debate outlined *supra* note 3.

127. Farber, *supra* note 3.

128. Larkin, *supra* note 3, at 243.

129. *See* Appendix.

130. And we see this trend in the data, especially in older joint resolutions.

131. *See* Michael Dimock & Richard Wike, *America is Exceptional in the Nature of Its Political Divide*, PEW RSCH. CTR. (Nov. 13, 2020), https://www.pewresearch.org/fact-tank/2020/11/13/america-is-exceptional-in-the-nature-of-its-political-divide/; *Political Polarization*, PEW RSCH. CTR., https://www.pewresearch.org/topic/politics-policy/political-parties-polarization/political-polarization/ (last visited June 6, 2021) (listing relevant fact tank articles on political polarization).

became president in 2009, and when Donald Trump became president in 2017."[132] However, while this framing makes the "confluence of events" seem exceedingly rare, another way to look at this data is to acknowledge that since the CRA's passage, every president (with the exception of President Trump, who was succeeded by President Biden) has served two terms, and at the end of that eight-year period, the balance of power has shifted to such a degree as to create the factors necessary to use the CRA *every time*.[133]

There are three main ways a joint resolution can fail: (1) when both chambers of Congress pass the joint resolution, but the president vetoes; (2) when the joint resolution passes in one chamber but fails in the other; and (3) when the joint resolution fails to pass either chamber. Until 2017, Congress utilized the CRA seventy-four times and only succeeded once.[134] Since 2017, Congress has bumped its success record to seventeen (fourteen joint resolutions issued under the 115th Congress and three under the 117th). But even with these successful utilizations of the CRA, the 115th Congress still put up a losing record: though it managed to pass fourteen joint resolutions, one resolution failed, and another eighteen targeted rules escaped the process altogether.[135] This Note contains an Appendix detailing every attempted use of the CRA. By summarizing these uses in the Subparts below, I identify trends that help to explain the difference between the resolutions' successes and failures and use these trends to support the overall argument that the CRA is not an effective or desirable form of governance.

1. Failure to Repeal Due to Presidential Veto

One of the biggest takeaways from reviewing the history of this legislation is that a Congress hoping to utilize the CRA needs to make sure it has the president on its side. Between 2015 and 2016, President Obama vetoed five joint resolutions issued by Congress under the CRA.[136] Four of these five resolutions originated in the Senate, not the House. Though some proponents of the CRA may argue that it democratizes Congress because it allows any member to propose a resolution, in reality, the data indicates that party leadership (for example, in 2017, the leadership of Senate Majority Leader Mitch McConnell) still maintains a tight grasp on which resolutions are introduced.[137] In this way,

132. *Id.*

133. Sahil Kapur, *Bypassing McConnell Democrats Push Biden to Aggressively Use Executive Power,* NBC NEWS (Nov. 21, 2020), https://www.nbcnews.com/politics/white-house/bypassing-mcconnell-democrats-push-biden-aggressively-use-executive-power-n1248457.

134. *See* 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; Larkin, *supra* note 3, at 252.

135. Noll & Revesz, *supra* note 3, at 20.

136. It is worth noting that nearly half of the total vetoes President Obama used while in office were expended striking down these joint resolutions. *See Barack Obama Vetoed Legislation*, BALLOTPEDIA, https://ballotpedia.org/Barack_Obama:_Vetoed_legislation (last visited Dec. 10, 2020).

137. *See* Appendix.

the resolutions track with normal legislative bills, and, similarly, can easily die on a president's desk. It is also interesting, though not surprising, that none of the Senate's attempts to override the presidential veto worked. This strengthens the conclusion that the CRA is mostly a numbers game: everything depends on the majority party's margin of power.

Presumably, Republican leadership was aware that President Obama would veto their resolutions. But forcing him to do so served a dual purpose: (1) it allowed Republicans to go 'on record' as being vehemently against a given policy or agency rule and (2) it put President Obama on the record as 'blocking' the will of the majority. This is a strategy that we see both parties embrace when it comes to utilizing the CRA. Though the makeup of the Senate is not a great indicator of the will of the people,[138] it is undoubtedly politically advantageous to frame disputes around various rules as the democratically elected representatives of the American people against a tyrannical executive. The flurry of resolutions attempting to dismantle the Obama administration's Clean Power Plan underscores this point.[139]

2. Passed by Only One Chamber of Congress

The fate of resolutions that did not make it to the president's desk indicates two trends: (1) both parties are willing to use the CRA to attempt to record their disapproval on the record despite realizing the resolution itself is unlikely to pass and (2) in situations where party margins are thin, one or two maverick politicians can make all the difference.

In 2003 and 2005, the House, the Senate, and the presidency were all controlled by the Republican Party. Given these conditions, Democratic lawmakers likely thought that a joint resolution disapproving an administrative rule was guaranteed to fail. Nevertheless, in 2005, Democrats introduced Senate Joint Resolution 4 (S.J. Res. 4), which aimed to repeal a Department of Agriculture (USDA) rule regarding "risk zones for the introduction of bovine spongiform encephalopathy" (more commonly known as mad cow disease).[140] The USDA's proposed rule allowed for the import of cattle from Canada. However, the Senators who supported the joint resolution argued that the USDA's rule failed to ensure that these imported cows were free from mad cow

138. A subject that could (and already has) filled several law review articles, but suffice it to say it was designed to check the populism of the House. *See Origins and Development*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Origins_Development.htm#:~:text=The%20framers%20of%20the%20Constitution,power%20to%20the%20national%20government (last visited June 6, 2021).

139. S.J. Res. 22–24, 115th Cong. (2016).

140. S.J. Res. 4, 109th Cong. (2005).

disease.[141] Surprisingly,[142] this joint resolution passed the Senate on a bipartisan vote: twelve Republicans joined their Democratic colleagues to vote *yea*.[143]

At first glance, it might seem as though the outcome of S.J. Res. 4 indicates that a minority party may be able to convince some members of the majority to join their joint resolutions. But what happened here should be considered an outlier. The twelve Republicans who supported S.J. Res. 4 all represented states with large beef industries, which would gain a competitive advantage over their market competitors if Congress succeeded in blocking the USDA's rule to allow for the import of cows from Canada. Thus, this coming together of the two parties does not reflect a spirit of bipartisanship so much as a veiled opportunity for economic protectionism. After reviewing the motivation behind the Senate Joint Resolution 4 vote, I concluded it was unlikely[144] that the 2021 Congress would find similar allies for rolling back Trump-era regulations. But I was wrong.

Perhaps there is just something about cows. The most prominent instance of a joint resolution failing to pass the Senate occurred not because the majority party lacked sufficient seats, but because members broke ranks with party leadership. In 2016, a House Resolution striking down the Department of the Interior's (DOI) rule to restrict methane pollution at mining facilities failed to pass because Republican Senators Susan Collins, Lindsey Graham, and John McCain refused to vote for it.[145] Senator McCain explained that he was concerned that the "substantially the same" provision of the CRA would block the DOI from issuing any type of methane regulation in the future.[146] Stymied from repealing the Obama-era methane regulations via congressional joint-resolution, the Trump EPA was forced to counteract the regulation the old-fashioned way: by replacing it with a new rule.[147] Ironically, this late-term Trump-era regulation was one of the few rules successfully targeted and repealed

141. 151 CONG. REC. S1961–79 (daily ed. Mar. 3, 2005).

142. At least, by today's standards, where we would not expect to see bipartisan consensus, even on extremely pressing public health issues. See, for example,. the Congressional voting record (220 Democrats voting *yea* and 211 Republicans voting *nay*) on House Res. 1319, The American Rescue Plan, which authorized the $1.9 trillion coronavirus relief package. H.R. 1319, 117th Cong. (2021); Tony Romm, *Congress Adopts $1.9 Trillion Stimulus, Securing First Major Win for Biden*, WASH. POST (Mar. 10, 2021), https://www.washingtonpost.com/us-policy/2021/03/10/house-stimulus-biden-covid-relief-checks/.

143. S.J. Res. 4, 109th Cong. (2005). Notably, four Democratic members also took the majority-Republican *nay* position.

144. Though perhaps no longer necessary, and also not impossible. One could imagine, for example, an argument for repealing Trump's deregulation around auto-emissions that could put American manufacturers at an advantage over foreign competitors. *See* Lee Drutman, *Why There Are So Few Moderate Republicans Left*, FIVETHIRTYEIGHT (Aug. 24, 2020), https://fivethirtyeight.com/features/why-there-are-so-few-moderate-republicans-left/.

145. H.R.J. Res. 36, 115th Cong. (2017); 163 CONG. REC. S2852 (daily ed. May 10, 2017).

146. Tom DiChristopher, *John McCain Just Delivered Trump a Rare Loss in His Bid to Roll Back Energy Rules*, CNBC (May 10, 2017), https://www.cnbc.com/2017/05/10/mccain-delivered-trump-a-rare-loss-in-his-bid-to-kill-energy-rules.html.

147. Coral Davenport, *Trump Eliminates Major Methane Rule, Even as Leaks Are Worsening*, N.Y. TIMES (Aug. 13, 2020), https://www.nytimes.com/2020/08/13/climate/trump-methane.html.

by the 117th Congress using the CRA. And, once again, three Republican senators joined the Democrats to aid its passage.[148] However, while these instances of bipartisanship are heartening, they are by no means the norm. The CRA remains most effective when one party has complete control of Congress and the presidency.

3. Did Not Pass Either Chamber of Congress

Four joint resolutions did not make it out of the chamber where they were introduced.[149] Again, this willingness to introduce joint resolutions that are doomed to fail from the get-go seems to indicate that some lawmakers use the CRA to make an ideological point, not to create legislative change. Notably, all four resolutions were introduced in the Senate; there is no equivalent data for resolutions that were introduced in and failed in the House.

Of these resolutions, the first, Senate Joint Resolution 20, is most instructive for our purposes. This joint resolution sought to repeal an EPA-promulgated rule that would "delist coal and oil-direct utility units from the source category list under the Clean Air Act."[150] Senate Joint Resolution 20 was introduced by Vermont Senator Patrick Leahy and was supported primarily by Democrats.[151] However, eight Republicans (and one Independent) broke ranks to vote in favor of the resolution.[152] This was significant because flipping more than a handful of Senators to vote against their party's leadership borders on the edge of impossible today.[153] Of course, it helps to remember that the Senators who voted in favor of the joint resolution here knew that even if this resolution passed both chambers, it would likely fail on presidential veto, which may have provided some political cover. But a more optimistic[154] interpretation holds that a successful utilization of the CRA is possible if the joint resolution addresses the right issue.

148. Coral Davenport, *Senate Reinstates Obama-Era Controls on Climate-Warming Methane*, N.Y. TIMES (Apr. 28, 2021), https://www.nytimes.com/2021/04/28/climate/climate-change-methane.html.

149. These joint resolutions are S.J. Res. 20, 109th Cong. (2005); S.J. Res. 30, 111th Cong. (2010); S.J. Res. 39, 111th Cong. (2010); and S.J. Res. 36, 111th Cong. (2012).

150. S.J. Res. 20, 109th Cong. (2005).

151. *Id.* This resolution was issued in 2005: a year during which Republicans controlled both chambers of Congress and the presidency.

152. *Roll Call Vote 109th Congress – 1st Session*, U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=1&vote=00225#position (last visited June 6, 2021).

153. And, notably, quite a few of these former senators no longer have their seats: Senator John McCain died in 2018 from cancer and Senator Olympia Snowe retired from the Senate in 2012, despite her immense popularity in her home state of Maine, citing the Senate's degradation into hyper-partisanship as one of the reasons for her departure. *See* Dana Bash & Paul Steinhauser, *Citing Partisanship, Maine's Snowe Says She'll Leave the Senate*, CNN POLITICS (Feb. 28, 2012), https://www.cnn.com/2012/02/28/politics/senate-snowe-retiring/index.html.

154. At least, optimistic for those who favor the CRA.

C. Congressional Review Act Power at Its Peak: The Golden Year(s)

The biggest difference between the singular, pre-2017 use of the CRA and its use during the Trump era boils down to insufficient paperwork. As mentioned above, part of the CRA's effect was to codify the requirement that every federal agency issue a report to Congress for every rule it passes. But federal agencies were not doing this.[155] Instead, agencies finalized rules without ever producing a congressional report—which meant that Congress could act as though that rule had never been finalized. One such repealed rule was the DOI rule limiting hunting on federal wildlife refuges in Alaska.[156] This rule is the basis for *Center for Biological Diversity v. Bernhardt*.

The significance of *Center for Biological Diversity v. Bernhardt* lies not in the specific importance of the repealed rule, but rather in the court's ruling regarding jurisdiction stripping. In *Bernhardt*, the Ninth Circuit ruled that as a matter of first impression, section 805 of the CRA precludes judicial review for a statutory claim stemming from a CRA-issued joint resolution of disapproval. This ruling does not so much change the pre-existing legal landscape as it does confirm the legitimacy of the jurisdiction-stripping provision of the Act.[157]

Center for Biological Diversity v. Bernhardt involves relatively simple facts. In 1994, the Alaska State Legislature authorized the Board of Game "to provide for intensive management programs to restore the abundance or productivity of identified big game prey populations as necessary to achieve human consumptive use goals."[158] In other words, this law allowed Alaskans to hunt predatory "big game" species, such as wolves and bears.

In 2016, the outgoing Obama DOI grew concerned the existing Alaska law was "in direct conflict" with the federal mandate for governing wildlife refuges.[159] DOI believed that the Alaska law was too generous to hunters in setting limits for takes of predatory species and that, consequentially, the ecosystems within wildlife refuges were becoming unbalanced. To remedy this conflict, DOI promulgated a new rule ("Refuges Rule") to supersede the Alaskan law. "The Refuges Rule prohibited Alaska's predator-control methods on

155. A Brookings report estimates that more than 10 percent of agency issued rules between 1996 and 2016 fell short of procedural reporting requirements and could therefore be vulnerable to repeal using the CRA. Phillip A. Wallach & Nicholas W. Zeppos, *How Powerful Is the Congressional Review Act?*, BROOKINGS (Apr. 4, 2017), https://www.brookings.edu/research/how-powerful-is-the-congressional-review-act/.

156. Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska, 81 Fed. Reg. 52,248-01, 52,252 (Aug. 5, 2016) (the "Refuges Rule") (codified at 50 C.F.R § 36.32(b)), repealed by 82 Fed. Reg. 52,009-01 (Nov. 9, 2017).

157. For statutory claims; the law surrounding constitutional claims is still unclear. *See* LOW, JEFFRIES, & BRADLEY, *supra* note 26, at 499 (explaining that there had been no Supreme Court rulings on the constitutionality on jurisdiction-stripping measures and that "[o]n the rare occasions when jurisdiction-stripping measures have been enacted, moreover, the Court's primary strategy has been to construe the jurisdictional limitation in a way that avoids the most difficult constitutional questions.").

158. Alaska Stat. § 16.05.255(e) (2014); Ctr. for Biological Diversity v. Bernhardt, 946 F.3d 553, 558 (9th Cir. 2019)

159. *Id.*

national wildlife refuges, along with certain methods of hunting bears and wolves. The Rule effectively prevented the Board from implementing Alaska's intensive management law on federal land."[160]

In 2017, Congress and President Trump used the CRA to repeal the Refuges Rule,[161] and the law reverted to the original legislation passed by the Alaska legislature in 1994. Plaintiff Center for Biological Diversity (CBD), an environmental group, brought a federal lawsuit against the DOI and Secretary of the Interior David Bernhardt in his professional capacity.[162] In its complaint, CBD sought to compel the Department to reinstate the Refuges Rule.[163] Defendants moved to dismiss.[164] The district court granted the government's motion to dismiss, and CBD appealed.[165]

On appeal, the Ninth Circuit upheld the district court's ruling, holding: (1) CBD's alleged injury due to the operation of the CRA's reenactment provision was speculative, and thus, the organization lacked standing to challenge the provision as violating the nondelegation doctrine; (2) the joint resolution did not violate the Take Care Clause of the Constitution; and (3) as a matter of apparent first impression, the CRA's jurisdiction-stripping provision precluded judicial review of the organization's statutory claim challenging Congress's enactment of the joint resolution.[166]

There are a few major takeaways from this case. One is that the CRA is a very powerful legislative tool when the executive and Congress are able to work in unison. Whereas traditional agency rules are subject to judicial review, here, the CRA combines elements of agency rulemaking with traditional legislation. Just as the U.S. judicial system does not consider it appropriate for courts to question laws passed by Congress unless plaintiffs allege the laws are somehow unconstitutional, here, the Ninth Circuit took a similar stance when it came to joint resolutions of disapproval issued by Congress.[167] Though many courts have yet to weigh in on this issue and there could easily be a split among the

160. 81 Fed. Reg. at 52,252; *Ctr. for Biological Diversity*, 946 F.3d at 558; Alaska Stat. § 16.05.255; ALASKA ADMIN. CODE, art. 5, §§ 92.106–92.127.

161. See H.J. Res 69, Pub. L. 115-20.

162. Several other groups and individuals—Pacific Legal Foundation, Alaska Outdoor Council, Big Game Forever, Kurt Whitehead, Joe Letarte, Safari Club International, National Rifle Association of America, Inc., and the State of Alaska Department of Law—joined as Intervenor-Defendants-Appellees. *Ctr. for Biological Diversity*, 946 F.3d 553.

163. *Id.*

164. *Id.*

165. The district court ruled that although CBD had standing to bring a constitutional challenge to the disapproval provision issued via a congressional joint resolution of the CRA, its claim ultimately failed because the provision did not violate the Constitution's requirements of bicameralism and presentment, nor did it violate the Constitution's "Take Care" Clause. Because both of CBD's constitutional claims failed, it was left with only its statutory claim against the reenactment provision (the reinstatement of the Alaska rule after the Refuges Rule was repealed). The court held that CBD did not meet the requirements for standing there, because its claim that the return to the Alaska game rule would result in increased deaths of predatory species members value was "merely speculative." *Id.* at 558.

166. *Id.*

167. *Id.*

circuits,[168] unless the Ninth Circuit reverses itself or the U.S. Supreme Court takes up this issue, the ruling in *Center for Biological Diversity v. Bernhardt* will remain the law of the land. The CRA looks like it is here to stay.[169] And, given that the Ninth Circuit incorporates large swaths of the Pacific Coast and Mountain West—regions of great importance in natural resource and land use law—the consequences of this ruling will undoubtedly matter to the environmentalists invested in the protecting these ecosystems.

III. WHAT'S NEXT FOR THE CONGRESSIONAL REVIEW ACT?

The rediscovered power of the CRA shocked the political world and brought with it a volley of pressing questions. The first question was essentially: *can Congress do that?* Because the CRA had only been successfully invoked once and a joint resolution of disapproval was never challenged in court, the legitimacy of the CRA had never really been put to the test. But, as litigants had a chance to air their grievances with the CRA in cases like *Center for Biological Diversity v. Bernhardt*, this changed. In *Bernhardt*, the district court rejected plaintiff-appellant's claims and granted the DOI's motion to dismiss. The Ninth Circuit upheld these dismissals on appeal.[170] In other words, when presented with the question of whether or not Congress could change agency-created law in this way, the judiciary answered with a definitive: *yes*.

They say hindsight is twenty-twenty, and this Note's greatest advantage in its ability to contribute to existing scholarship on the CRA is the fact that it was completed after the 2020 election and subsequent transition of power.[171] Now, for the first time ever, traditionally red states like Arizona and Georgia are represented by Democratic senators, which means there is an even fifty-fifty split in the Senate.[172] Though I was skeptical the 117th Congress would make use of the CRA, given this narrow margin of power and the other pressing issues facing the Biden administration, my prediction turned out to be incorrect.[173] The unpredictable nature of how future congresses will utilize the CRA strengthens the argument that it cannot be ignored, and that Congress should meaningfully

168. *See* Douglas, *supra* note 38 (comparing conflicting treatments of the jurisdiction-stripping provision of the CRA in lower courts).

169. Or at least, any potential demise will come from the legislature, not from the courts.

170. *Ctr. for Biological Diversity*, 946 F.3d at 558.

171. Because the CRA can only be used sixty days after the original agency rule was promulgated, the 117th Congress could only use it to repeal last-minute Trump administration rules through May of 2021. *See* 5 U.S.C. § 801(d)(1).

172. This includes Senators Angus King (I-ME) and Bernie Sanders (I-VT), Independent senators who caucus with the Democrats. *Senators Representing Third or Minor Parties*, U.S. SENATE, https://www.senate.gov/senators/SenatorsRepresentingThirdorMinorParties.htm (last visited June 6, 2021).

173. The 117th Congress actually did utilize the CRA a few times in the eleventh hour; most notably, to issue a joint resolution disapproving an EPA rule relating to emission standards for new, reconstructed and modified sources. *See Congressional Review Act | Overview and Tracking*, NAT'L CONF. OF STATE LEGISLATURES, https://www.ncsl.org/ncsl-in-dc/publications-and-resources/congressional-review-act-overview-and-tracking.aspx (last visited Jan. 31, 2022).

explore what should be done with the legislation moving forward. This Note will explore four options: (1) keeping the CRA as is, (2) modifying the CRA to narrow its scope and power, (3) repealing the law altogether, and (4) addressing goals for regulatory rollbacks through legislative and executive alternatives.

A. Congress Could Keep the Congressional Review Act as It Is

One option Congress has is to leave the CRA alone. But this is a dangerous choice. The actions of the 115th Congress have already demonstrated that Democratic Party values (including environmental protection) can be damaged through the revision of agency rules under the CRA. Similarly, the 117th Congress's limited use of the statute confirms that either party can use the statue to avoid the traditional legislative process but that the Left is more likely to prioritize other initiatives within the first one hundred days of a presidency.[174] Taken together, this information leads to the conclusion that is in the Left's best interest not to ignore the CRA. From a winner-take-all perspective, the Left will not have the same opportunities to use the legislation as the Right, because repealing outgoing agency regulations is unlikely to ever be the top priority for an incoming administration. As such, the CRA does more to hurt than to help congressional Democrats. From an apolitical, democratic institutions perspective, the CRA undermines the legislative process by reinstating a version of the legislative veto. Because the legislative veto allows for the elimination of agency rules without public input, it is inherently less democratic than the current agency rulemaking process. Therefore, it is in the public's best interest to alter or repeal the CRA.

Because the CRA presents the aforementioned dangers and very few benefits, the 117th Congress should not allow it to remain on the books as a ticking time bomb. Though it can no longer utilize the CRA to repeal the Trump administration's agency-issued rules, it can still vote to amend or repeal the CRA at any time. Though Congress understandably must balance its time between competing priorities, the devastation wrought by the 115th Congress' use of the CRA should be reason enough for the current Congress to prioritize addressing the CRA this legislative session.

B. Congress Could Modify the Congressional Review Act

Alternatively, if Congress is looking to strike a middle ground between the status quo and repeal, it could consider amending the CRA to tamp down some of the law's most alarming elements: those relating to timing, jurisdiction stripping, and substantially similar rules.

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174. Admittedly, the unique confluence of events in early 2021 (most notably efforts to combat the COVID-19 pandemic) make it an outlier, however, democratic presidents have traditionally prioritized appointing executive officers above repealing outgoing administration policies. *See* Noll & Revesz, *supra* note 3, at 21.

One of the reasons the 115th Congress was able to repeal so many rules was because federal agencies had become lax about issuing a report of each major rule to the comptroller general and Congress. While it seems unlikely that agencies would make that same mistake twice,[175] Congress could avoid the situation altogether by specifying that all joint resolutions of disapproval must be issued within sixty days of an act being published in the Federal Register or *sixty days after the closing of the public comment period*, whichever comes later. Currently, the CRA's timer begins either sixty days after publication in the Federal Register *or* when a report is submitted to Congress, whichever comes later.[176]

Alternatively, Congress could eliminate the reporting requirement altogether. Finalizing an agency rule is a long, slow process. Every agency is already required to publish a "Regulatory Plan" once a year and an "Agenda of Regulatory and Deregulatory Actions" twice a year.[177] These plans are available online and are also often published in the Federal Register.[178] After publication in the Federal Register, agencies provide between thirty to sixty days for public comment.[179] Congress does not need more information than that which the agency already provides.[180] That agencies fell out of the practice of creating separate reports for Congress without Congress's complaint for years is evidence that the reports are superfluous. Requiring a separate report is just a way to slow the agency down.

Another possibility is for Congress to amend the CRA to ensure that it can only be used during presidential transition periods. For example, the CRA could be amended to say that Congress can only issue joint resolutions of disapproval for rules finalized between November 3 and January 20 of an election year. From a practical perspective, unless American politics become *significantly* less partisan, Congress will only be able to utilize the CRA during presidential transition periods in any event, for the reasons outlined above. But formalizing these constraints on the statute would prevent Congress from reaching further back in time, past the period of midnight regulations, to undo substantial portions of an administration's legacy. Additionally, constraining the CRA applicability period to presidential transitions would protect against the squandering of

175. Consider, for example, an analogous situation: before the Supreme Court ruled that Congress had acted outside the scope of its Commerce Clause authority in *United States v. Lopez*, Congress had not paid much attention to specifying the constitutional provision authorizing each piece of legislation, but that dramatically changed in the post-*Lopez* world. 514 U.S. 549 (1995) (finding that Congress's issuance of a statute that would outlaw possession of a gun near a school was not within the scope of its Commerce Clause powers).

176. 5 U.S.C. § 802.

177. 5 U.S.C. § 553. The combination of the Regulatory Plan and the Agenda of Regulatory and Deregulatory Actions is often referred to as the "Unified Agenda." *A Guide to the Rulemaking Process*, *supra* note 44.

178. 5 U.S.C. § 553.

179. *Id.*

180. After all, it has been operating without the agency reports (relying solely on the notice and comment period and the documentation in the federal record) for the majority of the past two decades.

congressional time by ensuring that lawmakers were not issuing joint resolutions to make political statements.[181] Repealing the reporting requirement and limiting the period during which Congress can deploy the CRA would make the statute significantly less potent.

1. Congress Could Remove the Jurisdiction-Stripping Provision to Allow for Judicial Review

As mentioned above,[182] there are strong criticisms against allowing Congress to write statutes in such a way as to preclude judicial review. Many of these arguments boil down to concerns about interference with the Supreme Court's "essential purposes," and potential congressional overreach.[183] The CRA is a unique statute in some respects because its purpose is simply to repeal a proposed agency rule in favor of a preexisting rule. By definition, the preexisting agency rule would have had to go through normal rulemaking procedures as mandated by the Administrative Procedure Act, which includes a public notice and comment period.[184] Nothing would stop would-be plaintiffs from litigating this rule—only Congress's use of the joint resolution via the CRA would be barred from review.

But there is an area of the CRA that stands out in which the lack of access to the courts is real cause for concern: if a jurisdiction-stripping provision extends to constitutional claims, rather than just statutory claims. Applying jurisdiction stripping in this way would strike at the "core function" of the court system, and dangerously upset the power structure of American democracy.[185] Theoretically, this could happen if a future Congress takes the Supreme Court up on its invitation to specify that a jurisdiction-stripping provision includes constitutional claims, and the Supreme Court upholds Congress's right to do so.[186] This possibility exists if Congress specifies that the CRA jurisdiction-stripping provision extends to constitutional claims or if Congress makes that

181. See, for example, the joint resolutions described in Part II of this Note, where lawmakers introduced various joint resolutions knowing they would fail.

182. *See supra* Subpart II.B.1. (discussing 5 U.S.C. § 805, the ongoing debate surrounding the role of the federal courts and the legislature, and the application of jurisdiction stripping in *Bernhardt*).

183. Marbury v. Madison, 5 U.S. 137 (1803); *About the Supreme Court*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about#:~:text=Madison%20(1803).,in%20accordance%20with%20the%20law) (last visited June 6, 2021).

184. 5 U.S.C. § 553; *A Guide to the Rulemaking Process*, *supra* note 44.

185. *See, e.g.*, *Marbury*, 5 U.S. 137 (enshrining the principle of judicial independence); *see also* Bowsher v. Synar, 478 U.S. 714, 726–27, 733–34 (1986) (discussing the role of the judiciary and the functionalist approach to delegation); CFTC v. Schor, 478 U.S. 833, 848 (1986) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985)).

186. However, this possibility seems exceedingly remote, given that taking such a step would drastically limit the power and role of the Supreme Court in the United States' system of government.

specification about another statute and the Court holds that the same logic would apply to the CRA.[187]

2. Congress Could Eliminate the "Substantially the Same" Language

Another concern is the "substantially the same" language. This language has not yet been litigated—not because the statutory language is clear, but rather, because a situation warranting litigation has not yet arisen. The language itself is vague, and generally, absent a clarification from Congress, is the sort of language we would expect the courts to interpret. Far from preventing agency "shenanigans,"[188] this provision simply acts to frustrate the will of future administrations.[189] Because the CRA had only been successfully implemented once prior to 2017, no court has ever ruled on how similar a new rule needs to be to the rejected rule before it is considered too substantially similar. This could preclude entire areas of regulation, especially in the technical areas that could most benefit from agency expertise.[190] Notably, Senator McCain cited this concern when opting not to vote with the bulk of his party to repeal the DOI's methane-pollution rule in House Joint Resolution 36.[191]

Another reason Congress might want to repeal the 'substantially similar' language is because it currently has little to no benefit. An agency that has just had its rule repealed by Congress and vetoed by the president is unlikely to submit that same rule (or a rule that differs slightly but is enough like the rejected rule to fail the CRA process) again during the term. This would be a waste of time for everyone involved. Once power changes hands, however, if the previously rejected rule becomes politically palatable, it should not be taken off the table due to the actions of Congresses past. Having this sort of carryover provision is antithetical to the types of changes the public anticipates and often

187. This is all pretty speculative, but I think that the latter situation is even less likely than the former, because I would imagine that the Court would not want to give up its ability to engage in judicial review for large swaths of legislation and would instead only do so on a case-by-case basis. Of course, this is dependent on the ideologies of the different Justices on the Court at the time, and it is possible that a more conservative Court might want to give more power to Congress in this way.

188. Larkin, *supra* note 3, at 204.

189. Or, as two scholars colorfully put it:

> whether Congress can use this new mechanism to . . . [do] to a regulation what the Russian nobles reputedly did to Rasputin—poison it, shoot it, stab it, and throw its weighted body into a river—that is, to veto not only the instant rule it objects to, but forever bar an agency from regulating in that area. From the point of view of the agency, the question is, 'What kind of phoenix, if any, is allowed to rise from the ashes of a dead regulation?'

Finkel & Sullivan, *supra* note 122, at 709.

190. Take for example, an agency setting an acceptable level of particulate matter. Perhaps the agency wants to change the cap on a certain chemical from thirty parts per million (ppm) to five ppm. Suppose further that rule is rejected. If the agency later decides that twenty ppm is an appropriate level for the chemical, is that rule considered too alike to the rejected rule to merit consideration? And if so, does that mean we as a society are stuck with the thirty ppm limit forever? *Id.*

191. H.R.J. Res. 36, 115th Cong. (2017); 163 CONG. REC. S2852 (daily ed. May 10, 2017); DiChristopher, *supra* note 146.

wants from a new administration.[192] Rather than trust that the courts will narrowly interpret "substantially similar," Congress should just remove this section of the statute altogether.

C. Congress Could Repeal the Congressional Review Act

The strongest argument in favor of repealing the CRA starts with an honest assessment of the conditions necessary for its success. As already dutifully recounted, the CRA has historically only been successful where the one political party has controlled both chambers of Congress and the presidency. To put it more simply: it doesn't work unless the president is on board. Given that the CRA requires one-party dominance of Congress and the presidency, we should question whether or not this Act is really necessary. Under this scenario, the American people may be better off if Congress simply passed new legislation or engaged in normal rulemaking procedures. The CRA, at least in theory, exists as a quicker, more effective way of replacing an agency rule before it becomes final. But as we know from the above description of typical agency rulemaking procedures, there are several opportunities for opponents of rules to make their opinions known.[193] Those who feel that a rule goes beyond agency authority and bleeds into the realm of arbitrary and capricious conduct (or perhaps violates the Constitution) are also welcome to litigate that rule in court.

Furthermore, Senator Cory Booker[194] and Representative David Cicilline[195] have already introduced a bill in the Senate and the House to repeal the CRA. This bill, the Sunset the CRA and Restore American Protections (SCRAP) Act,[196] could realistically pass, especially in a Democrat-controlled Congress. Because the CRA degrades important administrative procedures and is, taken on the whole, a negative disruption to our system of governance, Democrats should use their current position of power to repeal it.

D. Alternatives to the Congressional Review Act

As even conservative commentators have pointed out, repealing or weakening the power of the CRA still leaves Congress with tools to check the power of administrative agencies. For example, Article I, section 8 of the Constitution guarantees Congress the power to tax and spend, which means members still control federal agencies' purse strings.[197] Determining each agency's budget gives members of Congress significant power over each

192. After all, isn't a change in the direction of the nation what the voters asked for?
193. *See* 5 U.S.C. § 553.
194. The junior senator from New Jersey and a member of the Democratic Party.
195. Representing Rhode Island's first district and a member of the Democratic Party.
196. S.1140, 115th Cong. (2017).
197. U.S. CONST., art. 1, § 8, cl. 1.

agency's regulatory agenda.[198] Additionally, Congress has the power to check up on agency leadership via intermittent budget and oversight hearings. And the Senate has an extra trick up its sleeve: confirmation hearings.[199] Government officials who aspire to lead federal agencies cannot achieve this goal without Senate approval.[200] Accordingly, it is not unusual for officials to make concessions or otherwise alter their proposed regulatory agendas to woo key swing voters.[201] It remains to be seen, however, how effective these traditional checks on agency power will be moving forward, given that President Trump has set another dangerous precedent in appointing "acting" agency heads without conferring official appointments, and thus bypassing the approval procedure in the Senate.[202]

E. Normative Considerations

Before we knew the outcome of the 2020 elections, some of the scholarly debate around whether Democrats should use the CRA boiled down to an assessment of the party's squeamishness toward breaking established political norms.[203] Over the past dozen years, Congress has become increasingly partisan and this winner-take-all approach to governance has led to the destruction of a laundry list of long-held democratic norms.[204] I will leave the debate about whether and to what degree the Biden administration should continue this trend of bucking established norms to other scholars.[205] But when it comes to the CRA,

198. *See id.* art. I, § 8, cl. 18 (the Necessary and Proper Clause), § 9, cl. 7 (the Appropriations Clause), art. II, § 2, cl. 1 (contemplating the creation of "executive Departments").

199. *See id.* art. II, § 2, cl. 1 (The Appointments Clause requires the "Advice and Consent" of the Senate for some "Officers of the United States").

200. *Id.* Note, however, that the Trump administration was able to get around the Senate approval requirement by enacting "acting" agency heads. Joel Rose, *How Trump Has Filled High-Level Jobs without Senate Confirmation Votes*, NPR (Mar. 9, 2020), https://www.npr.org/2020/03/09/813577462/how-trump-has-filled-high-level-jobs-without-senate-confirmation.

201. *See* Larkin, *supra* note 3, at 194; *see also, e.g.*, CURTIS W. COPELAND, CONG. RSCH. SERV., CRS REPORT FOR CONGRESS: CONGRESSIONAL INFLUENCE ON RULEMAKING AND REGULATION THROUGH APPROPRIATIONS RESTRICTIONS (2008).

202. Rose, *supra* note 200.

203. Various sources called on Democrats to finally play "hardball." *See, e.g.*, *David Sirota Democrats Have Power to Play Hardball, Too*, NPR (Sept. 20, 2020), https://www.npr.org/2020/09/20/915060757/david-sirota-democrats-have-power-to-play-hardball-too; Celine Castronuovo, *Ocasio-Cortez Republicans Don't Believe Democrats Have the Stones to Play Hardball'*, HILL (Oct. 27, 2020), https://thehill.com/homenews/house/522899-ocasio-cortez-republicans-dont-believe-democrats-have-the-stones-to-play; Rob Reiner, *Democrats Must Play Hardball*, BOSTON GLOBE (Sept. 21, 2020), https://www.bostonglobe.com/2020/09/21/opinion/democrats-will-play-hardball/.

204. See, for example, the Senate's refusal to confirm then-Judge (current Attorney General) Merrick Garland to the Supreme Court for 293 days, at which point the nomination expired. Ron Elving, *What Happened With Merrick Garland In 2016 And Why It Matters Now*, NPR (June 29, 2018), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now.

205. Professors Noll and Revesz do a particularly good job at laying out how they expect the practices of the Trump administration will change presidential transitions and governance moving forward. Noll & Revesz, *supra* note 3.

Democratic lawmakers should be aware that the decision to use the statute enacts a cost beyond mere respectability.[206]

It is difficult to overstate the importance of legitimacy to a functioning democracy.[207] Without buy-in from its citizens, a democracy cannot flourish and is doomed to fail. A robust distrust in the political system, which predates the Trump presidency but certainly was not diminished by its actions, has plagued the American political system for years.[208] Democrats themselves have publicly decried the CRA as insulating agency rulemaking from public input.[209] For example, Representative David Cicilline promised that when Democrats regained control of the legislature, they would "be very proud to work in a very transparent way and reverse the things that we think are contrary to the public interest. We should be prepared to do that in regular order, the normal way that the legislative process works."[210] Senator Booker echoed this sentiment:

> Abuse of the CRA has allowed congressional Republicans to fast track the repeal of a host of protections that benefit everyday Americans with little notice or public debate . . . President Trump and Republicans are misusing this legislative mechanism to reward special interests and big corporations at the expense of consumers, working families, and the environment.[211]

To speak out so publicly against the CRA only to turn around and use it again smacks of hypocrisy and would further contribute to the nation's legitimacy crisis. While Democrats might be able to justify using the CRA to roll back Trump administration regulations as resetting the playing field to pre-CRA norms, they cannot rely on that excuse any longer, now that the 2021 presidential transition has concluded. Moving forward, Democrats will face a choice:

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206. And, as mentioned before, that cost was especially apparent on January 6, 2021, as millions of Americans watched in disbelief as a discontented mob raided the Capitol building. Respectability should not be understated either, as it goes a long way toward convincing citizens of their government's legitimacy. *See* Dan Farber, *Restoring Agency Norms*, LEGAL PLANET (Dec. 12, 2020), https://legal-planet.org/2020/12/12/restoring-agency-norms/ (explaining the unique importance of restoring agency norms).

207. Accordingly, extensive scholarship and political thought has already been expended on this topic. *See, e.g.*, *Political Legitimacy*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/legitimacy/ (last visited June 6, 2021).

208. *See* Charles Lane, *Opinion America is Facing a Legitimacy Crisis*, WASH. POST (May 6, 2019), https://www.washingtonpost.com/opinions/america-is-facing-a-legitimacy-crisis/2019/05/06/2925ecd0-701b-11e9-8be0-ca575670e91c_story.html; Pippa Norris, *Can Our Democracy Survive if Most Republicans Think the Government Is Illegitimate?*, WASH. POST (Dec. 11, 2020), https://www.washingtonpost.com/outlook/trump-democratic-legitimacy-election/2020/12/11/1adfe688-3b14-11eb-9276-ae0ca72729be_story.html; John Rennie Short, *The Legitimation' Crisis in the US Why Have Americans Lost Trust in Government?*, CONVERSATION (Oct. 21, 2016), https://theconversation.com/the-legitimation-crisis-in-the-us-why-have-americans-lost-trust-in-government-67205; Yascha Mounk, *The Coming Crisis of Legitimacy*, ATLANTIC (Sept. 14, 2020), https://www.theatlantic.com/ideas/archive/2020/09/coming-crisis-legitimacy/616340/.

209. Nia Prater, *Democrats Push to Repeal Congressional Review Act,* U.S. NEWS & WORLD REP. (June 1, 2017), https://www.usnews.com/news/politics/articles/2017-06-01/democrats-push-to-repeal-congressional-review-act.

210. *Id.*

211. *Id.*

continue down this road of institutional destruction or do what they can to pick up the pieces and put the country back together again.[212]

There are also prudential arguments to be made in favor of repealing the CRA. Senate floor time is precious, and would-be users of the CRA must acknowledge that they are choosing to spend time on these joint resolutions at the expense of something else: during a presidential transition, this usually comes at the expense of presidential appointments.[213] The Obama and Trump administrations each weighed these tradeoffs and came to opposite conclusions, with the Obama administration prioritizing appointments and the Trump administration rollbacks.[214] Even if Democrats were keen to try the Trump approach to the CRA under different circumstances, this possibility feels unlikely in the midst of a global pandemic (when, presumably, other relief efforts will take priority).

CONCLUSION

By using the CRA's reporting requirement to question long-settled agency rules, the Republican-led 115th Congress and the Trump administration unlocked a powerful administrative tool. Before the 2020 election, wonks speculated that Democrats would also have the opportunity to use the CRA to similar ends. They were right, to a degree. The 117th Congress's limited use of the CRA did have a significant impact: most notably, the return to Obama-era methane regulations is a win for those of us concerned about anthropogenic climate change. However, now that the presidential transition period and the opportunity to use the CRA is firmly behind this Congress, it must decide what to do with the statute moving forward. If the Left decides to roll the dice and keep the CRA on the books in the hopes that it can use the law later, it should not pretend that this process comes without a cost. While the CRA is more of a symptom than a cause of political polarization, it still plays a role in weakening our federal institutions. Members of Congress should think very carefully about using it. Democrats would be well served by remembering their roots: the party should reject the temptation to trade in the utopian vision of Roosevelt's New Deal for the partisan gamesmanship of Newt Gingrich's Contract with America. It is time to close this chapter of administrative law for good.

212. Perhaps literally? Infrastructure may be a rare topic on which Democrats and Republicans actually agree.

213. Noll & Revesz, *supra* note 3, at 21.

214. *Id.*

APPENDIX

Table 1: Failure to Repeal Due to Presidential Veto[215]

Resolution	Congress	Year	Agency & Brief Rule Description	Fate
S.J. Res. 8	114th Congress	2015	**National Labor Relations Board**; rule relating to representation case procedure	Passed Senate 53–46 on March 4, 2015; passed House 232–186 on March 19, 2015; **vetoed by Obama on March 31, 2015**
S.J. Res. 22	114th Congress	2015–2016	**Army Corps of Engineers** and the **Environmental Protection Agency**; rule relating to the definition of "waters of the United States" under the Federal Water Pollution Control Act	Passed Senate 53–44 on November 4, 2015; passed House 253–166 on January 13, 2016; **vetoed by Obama on January 20, 2016**; motion to proceed on veto override not agreed to in Senate 52–40 on January 21, 2016
S.J. Res. 23	114th Congress	2015	**Environmental Protection Agency**; rule relating to "Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units"	Passed Senate 52–46 on November 17, 2015; passed House 235–188 on December 1, 2015; **vetoed by Obama on December 18, 2015**
S.J. Res. 24	114th Congress	2015	**Environmental Protection Agency**; rule relating to "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric	Passed Senate 52–46 on November 17, 2015; passed House 242–180 on December 1, 2015; **vetoed by Obama on December 18, 2015**

215. *See* CONGRESS.GOV (last visited August 10, 2021).

			Utility Generating Units"	
H.J. Res. 88	114th Congress	2016	**Department of Labor**; relating to the definition of the term "Fiduciary"	Passed House 234–183 on April 28, 2016; passed Senate 56–41 on May 24, 2016; **vetoed by Obama on June 8, 2016**; override vote in House failed 239–180 on June 22, 2016

Table 2: Passed by Only One Chamber of Congress[216]

Resolution	Congress	Year	Agency & Brief Rule Description	Fate
S.J. Res. 17	108th Congress	2003	**Federal Communications Commission**; rule with respect to broadcast media ownership	Passed Senate 55–40 on September 16, 2003; **not acted on by House**
S.J. Res. 4	109th Congress	2005	**Department of Agriculture**; rule relating to risk zones for introduction of bovine spongiform encephalopathy (mad cow disease)	Passed Senate 52–46 on March 3, 2005; **not acted on by House**
H.J. Res. 36	115th Congress	2017	Providing for congressional disapproval under chapter 8 of Title 5, United States Code, of the final rule of the **Bureau of Land Management** relating to "Waste Prevention, Production Subject to Royalties, and	Passed the House 221–191; failed in the Senate 49–51

216. *See* CONGRESS.GOV (last visited August 10, 2021).

			Resource Conservation"	

Table 3: Did Not Pass Either Chamber of Congress[217]

Resolution	Congress	Year	Agency & Rule Description	Fate
S.J. Res. 20	109th Congress	2005	**Environmental Protection Agency**; rule to delist coal and oil-direct utility units from the source category list under the Clean Air Act	Failed in the Senate 47–51 on September 13, 2005
S.J. Res. 30	111th Congress	2010	**National Mediation Board**; rule relating to representation election procedures	Motion to proceed not agreed to in Senate 43–56 on September 23, 2010
S.J. Res. 39	111th Congress	2010	**Department of Health and Human Services**; Rule relating to status as a grandfathered health plan under the **Patient Protection and Affordable Care Act**	Motion to proceed not agreed to in Senate 40–59 on September 29, 2010
S.J. Res. 36	111th Congress	2012	**National Labor Relations Board**; rule relating to representation election procedures	Failed in Senate 45–54 on April 24, 2012

217. *See* CONGRESS.GOV (last visited August 10, 2021).

Table 4: Successful Uses 2001 through 2018[218]

Title of Disapproved Rule	Agency	Date Repealed
Ergonomics Program	Occupational Safety and Health Administration (Department of Labor)	March 20, 2001
Disclosure of Payments by Resource Extraction Issuers	Securities and Exchange Commission	February 14, 2017
Stream Protection Rule	Department of the Interior	February 16, 2017
Implementation of the NICS Improvement Amendments Act of 2007	Social Security Administration	February 28, 2017
Federal Acquisition Regulation: Fair Pay and Safe Workplaces	Department of Defense and General Services Administration	March 27, 2017
Resource Management Planning	Bureau of Land Management (Department of the Interior)	March 27, 2017
Accountability and State Plans	Department of Education	March 27, 2017
Teacher Preparation Issues	Department of Education	March 27, 2017
Federal-State Unemployment Compensation Program; Middle Class Tax Relief and Job Creation Act of 2012 Provision on Establishing Appropriate Occupations for Drug Testing of Unemployment Compensation Applicants	Employment and Training Administration (Department of Labor)	March 31, 2017
Non-Subsistence Take of Wildlife, and Public Participation and Closure Procedures, on National Wildlife Refuges in Alaska	U.S. Fish and Wildlife Service (Department of the Interior)	April 3, 2017
Clarification of Employer's Continuing Obligation to Make and Maintain an Accurate Record of Each Recordable Injury and Illness	Occupational Safety and Health Administration (Department of Labor)	April 3, 2017

218. Federal Agency Rules Repealed under the Congressional Review Act, BALLOTPEDIA, https://ballotpedia.org/Federal_agency_rules_repealed_under_the_Congressional_Review_Act#:~:text=The%20law%20creates%20a%20review,used%20to%20repeal%2017%20rules (last visited June 26, 2021).

Protecting the Privacy of Customers of Broadband and Other Telecommunications Services	Federal Communications Commission	April 3, 2017
Compliance with Title X Requirements by Project Recipients in Selecting Subrecipients	Department of Health and Human Services	April 13, 2017
Savings Arrangements Established by State Political Subdivisions for Non-Governmental Employees	Department of Labor	April 13, 2017
Savings Arrangements Established by States for Non-Governmental Employees	Department of Labor	May 17, 2017
Arbitration Agreements	Consumer Financial Protection Bureau	November 1, 2017
Indirect Auto Lending and Compliance with the Equal Credit Opportunity Act	Consumer Financial Protection Bureau	May 21, 2018

Table 5: Successful Uses 2021

Resolution	Rule Repealed	Agency & Rule Description	Date Repealed
S.J. Res. 13	Pub.L. 117–22	Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Equal Employment Opportunity Commission relating to "Update of Commission's Conciliation Procedures"	June 30, 2021
S.J. Res. 14	Pub.L. 117–23	Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Environmental Protection Agency relating to "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review"	June 30, 2021
S.J. Res. 15	Pub.L. 117–24	Providing for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Office of the Comptroller of Currency relating to "National Banks and Federal Savings Associations as Lenders"	June 30, 2021

Table 6: All CRA Attempts in 2017 and 2018[219]

Rule	House #	Senate #	House Repeal	House Vote	Senate Repeal	Senate Vote	White House
Methane and Natural Gas Waste Rule	H.J. Res. 36	S.J. Res. 11	February 3, 2017	221–191	May 10, 2017	49–51	N/A
Fair Pay and Safe Workplaces EO	H.J. Res. 37	S.J. Res. 12	February 2, 2017	236–187	March 6, 2017	49–48	March 27, 2017
Stream Protection Rule	H.J. Res. 38	S.J. Res. 10	February 1, 2017	228–194	February 2, 2017	54–45	February 16, 2017
Gun Limits for the Severely Mentally Ill	H.J. Res. 40	S.J. Res. 14	February 2, 2017	235–180	February 15, 2017	57–43	February 28, 2017
Oil Anti-Corruption Rule	H.J. Res. 41	S.J. Res. 09	February 1, 2017	235–187	February 3, 2017	52–47	February 14, 2017
Unemployment Compensation Drug Test Rules	H.J. Res. 42	S.J. Res. 23	February 15, 2017	236–189	March 14, 2017	51–48	March 31, 2017
Women's Health Care Protections	H.J. Res. 43	S.J. Res. 13	February 16, 2017	230–188	March 30, 2017	51–50	April 13, 2017
BLM's Land Use Planning Rule	H.J. Res. 44	S.J. Res. 15	February 17, 2017	234–186	March 7, 2017	51–48	March 27, 2017
Wildlife Refuge Oil and Gas Rule	H.J. Res. 45	N/A	N/A	N/A	N/A	N/A	N/A
Drilling Safeguards in National Parks	H.J. Res. 46	N/A	N/A	N/A	N/A	N/A	N/A

219. *Congressional Review Act Resolutions in the 115th Congress*, COAL. FOR SENSIBLE SAFEGUARDS, https://sensiblesafeguards.org/cra/ (last visited June 26, 2021).

Mitigation Policy Protecting Wildlife Habitats	H.J. Res. 52	N/A	N/A	N/A	N/A	N/A	N/A
Rule to Close Tax Inversion Loopholes	H.J. Res. 54	N/A	N/A	N/A	N/A	N/A	N/A
Drilling Civil Penalties Updates	H.J. Res. 55	N/A	N/A	N/A	N/A	N/A	N/A
Drilling Security and Safety Standards	H.J. Res. 56	N/A	N/A	N/A	N/A	N/A	N/A
ESSA Accountability and State Plan Rules	H.J. Res. 57	S.J. Res. 25	February 7, 2017	234–190	March 9, 2017	50–49	March 27, 2017
ESSA Teacher Preparation Standards	H.J. Res. 58	N/A	February 7, 2017	240–181	March 8, 2017	59–40	March 27, 2017
Chemical Facility Safeguards	H.J. Res. 59	S.J. Res. 28	N/A	N/A	N/A	N/A	N/A
Mitigation Policy Protecting Endangered Species	H.J. Res. 60	N/A	N/A	N/A	N/A	N/A	N/A
State Retirement Savings Plans Rules	H.J. Res. 66	S.J. Res. 32	February 15, 2017	231–193	May 3, 2017	50–49	May 18, 2017
State Retirement Savings Plans Rules	H.J. Res. 67	S.J. Res. 33	February 15, 2017	234–191	March 30, 2017	50–49	April 13, 2017
Oil Drilling Measurement Standards	H.J. Res. 68	N/A	N/A	N/A	N/A	N/A	N/A
Alaska National Wildlife Refuges Rule	H.J. Res. 69	S.J. Res. 18	February 16, 2017	225–193	March 21, 2017	52–47	April 3, 2017

Arctic Drilling Safeguards	H.J. Res. 70	N/A	N/A	N/A	N/A	N/A	N/A
Coal Valuation Rule	H.J. Res. 71	S.J. Res. 29	N/A	N/A	N/A	N/A	N/A
Prepaid Card Rule	H.J. Res. 73	S.J. Res. 19	N/A	N/A	N/A	N/A	N/A
ACF River Basin Water Control Standards	H.J. Res. 77	N/A	N/A	N/A	N/A	N/A	N/A
Gas Drilling Measurement Standards	H.J. Res. 82	N/A	N/A	N/A	N/A	N/A	N/A
OSHA Recordkeeping Rule	H.J. Res. 83	S.J. Res. 27	March 1, 2017	231–191	March 22, 2017	50–48	April 3, 2017
Cross-State Air Pollution Update		S.J. Res. 21	N/A	N/A	N/A	N/A	N/A
Broadband Privacy Protections	H.J. Res. 86	S.J. Res. 34	March 28, 2017	215–205	March 23, 2017	50–48	April 3, 2017
Utah Regional Haze Rule	H.J. Res. 87	S.J. Res. 38	N/A	N/A	N/A	N/A	N/A
Energy Efficiency Test Procedures for Compressors		S.J. Res. 37	N/A	N/A	N/A	N/A	N/A
Arbitration Rule	H.J. Res. 111	S.J. Res. 47	July 25, 2017	231–190	October 24, 2017	51–50	November 1, 2017
Payday Lending Rule	H.J. Res. 122	S.J. Res. 56	N/A	N/A	N/A	N/A	N/A

Net Neutrality Repeal	H.J. Res. 129	S.J. Res. 52	N/A	N/A	May 16, 2018	52–47	N/A
Indirect Auto Lending Guidance	H.J. Res. 132	S.J. Res. 57	May 8, 2017	234–175	April 18, 2018	51–47	May 21, 2017
Short-Term Health Insurance Rule	H.J. Res. 140	S.J. Res. 63	N/A	N/A	October 10, 2018	50–50	N/A
Tax-Exempt Organization Reporting Requirements Repeal	H.J. Res. 145	S.J. Res. 64	N/A	N/A	December 12, 2018	50–49	N/A