Most people probably never heard of the Congressional Review Act before now. This law — "CRA" to Beltway folks — is an obscure statute — previously used only once — that allows Congress to strike down an agency rule with an expedited procedure (no filibuster). The GOP is gleefully taking advantage of its control of the federal government to put the CRA to much greater use. Going forward, a key question will whether a future Administration could resume regulating in the same area.

The CRA says that no new regulation can be "substantially similar to" or "substantially the same as" the old, rejected rule. One phrase seems to contemplate the continuation of the same rule making while the other one seems to contemplate a new rule making proceeding, but there's no reason to think that their meanings are different. But what does it mean for one rule to be substantially the same as another? After all, the statute doesn't say tell us what kinds of similarities are important, and "substantial" is one of those weasel words that lawyers love for their propensity to give rise to litigation.

There's an excellent article by Adam Finkel and Jason Sullivan addressing this issue. They conclude a new regulation is substantially similar unless it changes the balance of costs and benefits, either cutting costs or increasing benefits. Given that the main congressional concerns seems to be regulations that cost too much for too little benefit, this is a very plausible standard. But a few additional comments are in order.

First, the cost-benefit standard may not be appropriate in all settings. Some regulations are justified on the basis of values like human dignity that can't be quantified. Other regulations may involve costs and benefits that could be quantified in principle but where it's actually not feasible to do so in practice. Furthermore, a regulation could differ greatly from its deceased predecessor in other dimensions than costs and benefits. A regulation using cap-and-trade isn't "substantially similar" to one that sets a rigid performance standard. So I would prefer to say that cost-benefit standard is just one of several ways of showing sufficient lack of similarity.

Second, they argue that an agency's determination about substantial similarity should receive *Chevron* deference. I'm doubtful of that because *Chevron* doesn't generally apply to statutes like the CRA or like NEPA that apply to many agencies. Thus, I don't think agencies are free to adopt their own interpretations of the meaning of "substantially similar." But if the courts establish a legal standard for determining substantial similarity, the agency's application of the standard to a particular regulation should be set aside only if it is arbitrary and capricious. That's the way the Supreme Court has approached judicial review of whether an action has a significant environmental impact under NEPA, and the same approach seems warranted here.

Third, the CRA doesn’t purport to repeal previous regulatory statutes, so it should not be interpreted so as to deprive them of effectiveness by practically eliminating any possible of further regulation under some statutory mandate. (This is made even more clear by a subsection on deadlines for rule making, which extends the deadline but doesn’t suspend the agency’s obligation to try again.) Regulatory provisions differ in how much discretion they give an agency. The question of what is “substantially similar” should be judged with reference to the range of discretion that an agency had to begin with. For instance, if a new regulation is as different from the old one as the statute allows, it should not be considered substantially similar. By analogy, if a statute were to require that something be green, what counts as a substantially similar color would have to be judged within the spectrum of shades of green, not based on the whole rainbow of colors.

Finally, the “substantially similar” standard should be interpreted narrowly, not to mean “somewhat similar.” The full language is an overturned rule “may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued..” Reading these two clauses together suggests that we are considered with reissues of essentially the same rule. And technically, it’s the substantial identity requirement that applies if a new Administration starts over again and produces its own rule. The deadline provision reinforces this because it contemplates that there will be a new rule dealing with the same subject, issued in accordance with the same statutory requirements. It’s almost inevitable that such a rule will have some similarities to the old rule.

All of this is fairly academic right now. The Trump Administration has no apparent intention of ever regulating again in the areas where Congress is trying to kill current regulations. But history shows that control of the White House won’t stay in the hands of the same party forever. When there is another Democrat in the White House, the question of how much the CRA ties the Administration’s hands could be an important one.