# Weak-Willed Legislatures and Statutory Interpretation

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*Not all statutes are created equal. Contributing to the literature on "super statutes," I suggest that an analogy to the philosophical concept of weakness of will can illuminate circumstances under which some statutes ought to stand above others. Analogizing to philosopher Richard Holton's account of weak will, I develop an account in which some statutes express long-term commitments, are intended to foreclose future deliberation, and enact reasons into the law. Such statutes have the status of what Holton calls "resolutions." Like an individual resolving to stop eating meat, yet finding themself unable to resist, Congress can be weak willed when it violates such statutes, and this weak-willed action jeopardizes the advantages of enacting such statutes in the first place. I then propose that courts may apply familiar canons of statutory interpretation—the presumption against implied repeal, appropriations canon, and* Charming Betsy *canon—to hold Congress accountable to its commitments. This account also provides a new normative justification for each of these canons of statutory interpretation.*



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## INTRODUCTION

Weakness of will is a familiar experience for most people. We set out in January with worthy ambitions and even resolve to conform our actions to these ambitions. Yet come December, we find that our actual behavior has betrayed our noble resolutions. Persistent weakness of will interferes with our ability to meet goals and make needed changes to our lives. This Comment suggests that a similar malady can afflict democratic decision-makers, and democratically elected legislatures in particular, leading to many of the same consequences: it leaves legislatures unable to meet long-term goals and maintain long-term commitments. However, all is not lost. Courts can and should play a role in holding weak-willed legislatures accountable to their commitments. They can do so by applying canons of statutory interpretation—including the canon against implied repeal, the canon against implied repeal through appropriations, and the *Charming Betsy* canon—to render potentially "weak-willed" enactments consistent with the legislature's existing commitments. Accordingly, this Comment will argue that in the absence of a textually explicit intent to repeal, amend, or create an exception to a long-term commitment, courts should favor an interpretation that is consistent with the commitment over an interpretation of the enactment as weak willed.

Part I introduces weakness of will through an account developed by philosopher Richard Holton. In Holton's telling, weakness of will is about too readily abandoning one's resolutions. Resolutions are special intentions meant to guard against anticipated contrary inclinations. (When the word "resolutions" appears in this Comment, Holton's definition is always what it refers to—it does *not* mean the "resolutions" passed by the House and the Senate to express collective opinions, as in "concurrent resolutions" or "joint resolutions." To avoid confusion, I will generally refer to legislative Holtonian resolutions as LHRs.) People resolve to do things because they expect their resolutions to be tested. That is, they expect to encounter future temptations that threaten the strength of their commitments. Weak-willed action consists of succumbing to those very same contrary inclinations that one's resolution was meant to guard against. Drawing from

Holton's account, this Comment posits two central formal features of weakness of will that apply to both individuals and legislatures. Each exhibits weakness of will when (1) they form resolutions meant to defeat contrary inclinations, and (2) they act on those contrary inclinations against which their resolutions were meant to guard.

In Part II, I focus on the first feature: the formation of resolutions. My aim is to develop an account of the features of LHRs by considering examples of statutory and non-statutory legislative actions. This illuminates the value of LHRs, as well as the circumstances under which they are likely to arise. LHRs have three important (and related) functions: they enact reasons, coordinate action over time, and facilitate the long-term commitments required to address certain long-term problems and priorities.

Part III focuses on the second key element of weakness of will: allowing one's resolution to be defeated by the very contrary inclinations the resolution was meant to defeat. Here, the Comment examines when legislatures renege on their resolutions, undermining the usefulness of, and values embodied in, their resolutions. I argue that despite differences between individuals and legislatures who abandon or modify their resolutions—as legislatures are groups whose compositions change over time—weak-willed legislative action can be normatively undesirable for many of the reasons that weak-willed individual action is normatively undesirable: it undermines the ability to maintain long-term commitments and achieve the goals set out by resolutions. Legislatures often have a significant interest in pursuing such long-term policy goals, so weakness of will poses an important challenge.

Finally, in Part IV, this Comment argues that courts can play a role in holding legislatures accountable for weak-willed violations of LHRs. I begin with what courts are *unable* to do, or at least what courts lack the power to do. Where legislatures revise or overturn previous resolutions through textually explicit statutory action, courts must interpret the law as it stands. They cannot flout clear legislative intent, even if the legislature seems to be demonstrating weakness of will. This mitigates concerns about democratic responsiveness and entrenchment—future legislatures, representing and responding to the will of future majorities, can overturn the decisions of previous legislatures, so long as they are clear about their intent to do so.

Instead, my suggestion is that legislative weakness of will can be relevant to the process of interpreting laws with

ambiguous meanings, where under one interpretation, the enactment is weak willed. That is, judges should sometimes consider legislative weakness of will when engaging in statutory interpretation. When a court is faced with conflicting legislative enactments, and it is ambiguous which one the legislature intended to be controlling, it might be that the court can identify one enactment as expressing an LHR meant to guard against contrary inclinations, and the other as acting on the very contrary inclinations the LHR was meant to guard against. That is, the later enactment may be weak willed. If this is the case, the court has a reason, all else being equal, to favor the enactment expressing the LHR over the weak-willed enactment. Courts can do so through established canons of interpretation, including the canon against implied repeal, appropriations canon, and *Charming Betsy* canon. Thus, this Comment suggests a new independent justification for these established canons of interpretation that applies when potentially weak-willed enactments are at issue. More broadly, it suggests that if courts identify one enactment as an LHR, they should use the interpretive tools at their disposal to read future enactments as consistent with the LHR rather than in weak-willed conflict with it. Much like courts apply the constitutional avoidance canon when there are two plausible readings of a statute in order to select against the reading that raises constitutional concerns, courts faced with two plausible readings have reason to select against the reading that conflicts with an LHR.

## I. THE WEAKNESS OF WILL PARADIGM

Kyle is convinced that he should stop eating meat. He has read that raising animals for meat is very harmful to the environment, and that a plant-based diet would be better for his health. Unfortunately, Kyle also loves the taste of meat. He knows that despite believing he should stop eating meat, when he is standing in the grocery store, there is a fair chance he will end up buying pork chops for dinner. He therefore resolves to no longer eat meat, however strong the temptation. He may manage to do this for a while, but eventually the day comes when he decides—just this once—to have a pork chop.

In this moment, Kyle is experiencing weakness of will. It is a familiar experience to most of us, and one that has attracted a tremendous amount of attention from philosophers over the

years.[1] In 380 BCE, Plato grappled with the concept, which he termed *akrasia*, and characterized as voluntary action against one's better judgment.[2] Contemporary philosophers have continued to turn an ever-more-careful eye toward the phenomenon, and a revisionist strand has rejected the akratic formulation—voluntary action against one's better judgment—as a distinct concept inessential to weakness of will.[3] Influential among these revisionists is Richard Holton, who builds upon the intuition that "weak-willed people are irresolute; they do not persist in their intentions; they are too easily deflected from the path that they have chosen."[4] Holton suggests that cases of weakness of will are better understood not as instances where people act against their better judgment, but as instances where they too readily fail to maintain their *resolutions*.[5]

What is a resolution? In Holton's telling, a resolution is a special sort of intention meant to foreclose future deliberation and coordination. Resolutions are intentions, "part of whose function is to defeat contrary inclinations that I fear I might come to have."[6] If Kyle forms an ordinary intention to stop eating meat yet abandons this intention when faced with a plate of steak, he opens himself to the accusation of being fickle. But if he *resolves* not to eat meat, and abandons this resolution, he opens himself to the (in Holton's view, more serious) accusation of being weak willed.[7] That is, abandoning a resolution constitutes a "special kind of failure."[8] It refers to when a person who has deliberately committed to holding out against contrary desires succumbs unreasonably to those very desires when temptation strikes.[9]

However, as Holton notes, one can break a resolution without necessarily being weak willed. In fact, in certain situations, such

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1 For an overview of the philosophical literature, see Sarah Stroud & Larisa Svirsky, *Weakness of Will*, STANFORD ENCYCLOPEDIA OF PHIL. (Sept. 4, 2019), https://perma.cc/7549-KTTQ.

2 *See generally Plato's Protagoras*, FOUND. FOR PLATONIC STUD. (Jan. 7, 2023), https://perma.cc/968S-7C4X.

3 *See generally* Stroud & Svirsky, *supra* note 1.

4 Richard Holton, *Intention and Weakness of Will*, 96 J. PHIL. 241, 241 (1999) [hereinafter Holton, *Weakness of Will*].

5 *See* Richard Holton, *How is Strength of Will Possible?*, *in* WEAKNESS OF WILL AND PRACTICAL IRRATIONALITY 39, 41 (Sarah Stroud & Christine Tappolet eds., 2003) [hereinafter Holton, *Strength of Will*].

6 *Id.* at 42.

7 *Id.*

8 *Id.*

9 *Id.*

as when new reasons come to light, or the contrary desires are significantly stronger or more meaningful than previously imagined, those who persist in their resolutions may demonstrate an "unreasonable inflexibility or stubbornness."[10] Holton gives the example of a resolution formed for a very trivial reason: someone resolves not to drink water for two days just to see what it feels like.[11] They then find that after a day without drinking, they have a tremendous desire for water, much greater than previously anticipated.[12] Under such circumstances, this person can quite reasonably abandon their resolution, and indeed reasonably ought to do so, without opening themselves to the charge of being weak willed.[13]

Thus, not all instances of revising or abandoning a resolution constitute weak-willed behavior. Instead, on Holton's view, one is only weak willed when one's revision or abandonment of a resolution is prompted by the very desires that the resolution was designed to defeat.[14] For instance, assume Kyle made his resolution to stop eating meat knowing that his affection for the taste of meat will lead to contrary inclinations once he is at the grocery store buying dinner. It is those contrary inclinations that his resolution is meant to guard against, making him weak willed if he reconsiders his resolution once faced with precisely those contrary inclinations—if he gets to the grocery store and decides to buy pork chops because he anticipates how delicious they will be.

On the other hand, say Kyle finds himself on a game show where eating a plate of meat means winning millions of dollars.[15] Under such circumstances, his choice to eat the meat may not be weak willed after all. In fact, it might even be irrational for him to refuse to eat the meat, as his reasons for making the resolution—limiting harm to the environment and preserving his health—might be better served by eating it, winning the millions of dollars, and spending his winnings donating to environmental organizations and investing in better healthcare. Regardless, since the abandonment of his resolution was prompted by reasons

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10 Holton, *Strength of Will*, *supra* note 5, at 42.

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 In Season 7, Episode 3 of the Amazing Race, contestants were required to eat four pounds of beef at an Argentinian barbecue in order to progress. *See The Amazing Race: Do You Need Some Mouth-to-Mouth Resuscitation?* (CBS Mar. 15, 2005).

apart from the contrary inclinations the resolution was intended to defeat, it is consistent with strength of will.

Why should lawyers care about weakness of will? My suggestion is that legislatures can also be weak willed, by acting in a way that mirrors the formal features of weakness of will that can be drawn from Holton's account: legislatures are capable of (1) forming resolutions meant to defeat contrary inclinations, and (2) acting on those contrary inclinations against which their resolutions were meant to guard. Weakness of will can be problematic for legislatures for many of the same reasons it is often problematic for individuals. A legislature's weakness of will undermines its ability to maintain commitment to its resolutions, which may be essential to achieving important long-term policy goals requiring consistent action over time.

## II. LEGISLATIVE RESOLUTIONS

In this Part, I argue that some legislative enactments can express resolutions, in roughly Holton's sense, which I later suggest ought to be preferred over conflicting interpretations of subsequent enactments.[16] Other legal scholars have also proposed that particular legislative enactments can occupy a special status over others, resulting in a hierarchy of legislative enactments. Perhaps most notably, Professors William Eskridge, Jr. and John Ferejohn theorized the existence of "super-statutes" which "successfully penetrate public normative and institutional culture in a deep way."[17] An Eskridge and Ferejohn super-statute

> is a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does "stick" in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute.[18]

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[16] I focus in this Comment on legislative action and weakness of will, but the argument should generalize to other lawmaking political entities. An entity is weak willed when it makes and over-readily breaks "resolutions," in the stipulative sense I discuss in Part I. One might think that the President or other executive entities could do this as well. I focus on weakness of will as manifested by legislatures for two reasons: First, legislatures are the primary lawmaking bodies in our system of government. Second, weak-willed legislative action implicates a remedial role for the courts in statutory interpretation.

[17] William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1215 (2001) [hereinafter Eskridge & Ferejohn, *Super-Statutes*].

[18] *Id.* at 1216.

My proposed subcategory of legislative enactments—LHRs—often share these characteristics as a consequence of the formal features that I will identify and define.

Like super-statutes, LHRs should exhibit a sort of "normative gravity" such that they "tend to trump ordinary legislation when there are clashes or inconsistencies."[19] However, Eskridge and Ferejohn focus their efforts on criteria (2) and (3), defining super-statutes based on their effects—super-statutes "stick" and exert an outsized influence, and thus ought to be interpreted under a distinct methodology.[20] It is less clear what story Eskridge and Ferejohn intend, if any, for how a statute *becomes* a super-statute. That is, plenty of statutes may fulfill criterion (1), seeking to establish a new normative or institutional framework for state policy, yet fail to become super-statutes.[21] Eskridge and Ferejohn appear to suggest that there is a degree of randomness to the process, observing that "[s]ometimes, a law just gets lucky, catching a wave that makes it a super-statute."[22]

LHRs, on the other hand, are defined by their formal features, rather than their effects or historical standing. The concept of an LHR might be understood as elaborating what it means for a law to "seek[ ] to establish a new normative or institutional framework for state policy."[23] A statute may become an Eskridge and Ferejohn super-statute based on its impact on both public culture and law over time. However, one can identify LHRs from the moment they are enacted. Because of their status as resolutions, they are owed the special preference that should lead them to stick over time and trump ordinary legislation, thus giving them super-statute-like effect.

The formal structure of an LHR, which I suggest is applicable to the legislative context, is an enactment meant to foreclose deliberation and reconsideration and guard against the contrary inclinations that the resolver foresees. The ultimate example of a Holtonian resolution in U.S. law is the U.S. Constitution, which anchors a body of law against which all other laws must be measured, and which must win out in case of a conflict (until such time as the relevant constitutional provision is repealed or amended through the appropriate process). The Constitution is designed to

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19 *Id.*

20 *Id.*

21 *See id.*

22 Eskridge & Ferejohn, *Super-Statutes*, *supra* note 17, at 1216.

23 *Id.*

stick over time by foreclosing deliberation and reconsideration over fundamental principles, and to guard against contrary inclinations foreseen by the Founders. In contrast, the subject matter of both this Comment and the work of Eskridge and Ferejohn is instead ordinary legislative enactments that attain something like "quasi-constitutional" status over other enactments.[24]

The upshot of finding an enactment to be an LHR is that in the case of an apparent conflict, courts engaging in statutory interpretation may apply a presumption that there was no intent to violate the resolution. There is a clear analogy to the canon of constitutional avoidance. The project of this Comment is to develop an account of how non-constitutional legislative enactments can be Holtonian resolutions and why this status should lend them a quasi-constitutional gravity in statutory interpretation.

### A. Most Legislative Enactments Are Not Resolutions

To help illustrate this class of legislative enactments, it may help to discuss what does *not* count as a Holtonian resolution. A legislative enactment is not a resolution if its effect is one and done, by which I mean fully realizable without paying heed to future legislative actions. Most legislative enactments are like this. They create or alter obligations and entitlements of private citizens, as well as those of other branches of government tasked with enforcing and adjudicating new laws. Prominent legislation from the 117th Congress illustrates this. The American Rescue Plan Act of 2021[25] was a stimulus bill meant to encourage U.S. recovery from the COVID-19 pandemic and corresponding economic crisis.[26] It allocated federal funds for (among other things) a national vaccination program[27] and direct payments to individuals.[28] A decision on spending is one and done because it does not extend its effects to future legislative actions. It also frequently responds to immediate needs and concerns.

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[24] *Cf.* William N. Eskridge, Jr. & John Ferejohn, *Quasi-Constitutional Law: The Rise of Super-Statutes*, *in* CONGRESS AND THE CONSTITUTION 198–219 (Neal Devins & Keith E. Whittington eds., 2005) [hereinafter Eskridge & Ferejohn, *Quasi-Constitutional Law*].

[25] Pub. L. No. 117-2, 135 Stat. 4 (2021).

[26] *President Biden Announces American Rescue Plan*, THE WHITE HOUSE (Jan. 20, 2021), https://perma.cc/VX2D-98WN.

[27] *See* Pub. L. No. 117-2 § 2301.

[28] *See id.* § 9601.

Or take another example. The Emmett Till Antilynching Act[29] defined lynching as a federal hate crime[30] and increased the maximum penalty for committing several hate crimes.[31] Altering the criminal code changes rights and obligations for individuals, as well as for prosecutors and judges involved in administering the criminal justice system. It does not demand anything of future legislators to achieve its intended effect. Creating new private rights of action works similarly.[32]

Other bills, like the Postal Service Reform Act of 2022[33] (PSRA), changed the duties and operations of executive agencies. The PSRA, for instance, required the United States Postal Service (USPS), among other things, to set performance targets and publish performance metrics, and to deliver mail at least six days a week (with exceptions for holidays, emergencies, and areas with existing reduced service).[34] This imposes a continuing obligation on an agency, here the USPS, though not necessarily on legislators. Enactments that involve long-term constraints or guidance on agency action may, however, become LHRs if they also implicate future legislative action. For instance, Congress might restrict agencies from taking actions with certain consequences deemed to be deleterious. This implicates (and perhaps moots) future congressional action funding the sorts of agency projects it has restricted. By binding agencies, Congress also binds itself, at least until such time as the original restriction is repealed or amended. The following Section illustrates how LHRs function through examples, which will also illuminate other important features of legislative resolutions.

### B. Examples of Resolutions

This Section considers three statutory examples of legislative resolutions and one nonstatutory example.

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29 18 U.S.C. § 249.

30 *Id.* § 249(a)(5).

31 *Id.* § 249(a)(6).

32 For instance, the Americans with Disabilities Act creates an express private right of action for individuals discriminated against on the basis of disability. *See generally* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

33 Pub. L. No. 117-108, 136 Stat. 1127 (codified as amended in scattered sections of 5 and 39 U.S.C.).

34 39 U.S.C. § 101(b).

1. The Endangered Species Act of 1973.

The Endangered Species Act of 1973[35] (ESA) was drafted on the principle that maintaining biodiversity and minimizing the loss of genetic variation is an essential goal. Finding that various species of flora and fauna in the United States "ha[d] been rendered extinct as a consequence of economic growth and development untampered by adequate concern and conservation," and that other species of "esthetic, ecological, educational, historical, recreational, and scientific value" were in danger of becoming extinct, Congress set out to "provide a program for the conservation of such endangered species and threatened species."[36]

The first thing to note is that achieving Congress's stated purpose in enacting the ESA necessitates continuous commitment over time. Preserving endangered species is not something Congress can do in one fell swoop through a single legislative action. Rather, it requires consistent and ongoing government attention. A single Congress, acting without the cooperation of future governmental actors, could simply not solve the problem. Thus, the Congress that decided to address the problem of vanishing species sought to do so by attempting to coordinate and constrain the actions of future Congresses.

This points us toward a prime use case for a resolution. Resolutions make it easier to coordinate present and future action in accordance with the goals of the resolution. The ESA does so by directing the Secretary of the Interior to declare species to be "endangered" or "threatened,"[37] and promulgating several protections for such species and their habitats. Some of those protections target action by individuals—for instance, § 9 of the ESA makes it unlawful for people to "take" an endangered species.[38] But others target governmental action itself, including, by implication, legislative action. § 7 states that "[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."[39] This means, in the absence of a repeal of the ESA or an explicit exception to § 7, the provision aims to prevent or render

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35 16 U.S.C. § 1531 et seq.
36 *Id.* § 1531(a)–(b).
37 *Id.* § 1533(a).
38 *Id.* § 1538(a)(1)(B).
39 *Id.* § 1536(a)(2).

moot legislative appropriations to federal agencies for purposes which jeopardize endangered species or destroy their habitats.

This is the crux of the resolution. It targets future agency and legislative action. The ESA had the formal feature of guiding future action, not only by private parties and by other branches of government, but by the legislature itself. It picked out a long-term objective—protecting endangered species and their habitats—and articulated a *commitment* conferring reason-giving force on this objective in future decisions.[40] Through the ESA, Congress conferred reason-giving force upon the interests of endangered species and their habitats; in other words, it held that the interests of endangered species shall be a reason bearing on future governmental actions, including its own actions (through appropriations for federal agencies pursuant to § 7). That is, if § 7 of the ESA is to have any effect at all, it must be to constrain future agency action, making the protection of endangered species and their habitats a reason influencing all relevant actions. Because all federal agencies are funded through annual congressional appropriations, a literal interpretation of §7 suggests that it also transformed the protection of endangered species and their habitats into a reason affecting future congressional appropriations for agency programs.

In addition, the very delegation of power to an agency might also be understood as an LHR. By delegating responsibility through an ongoing command to the Secretary of the Interior, Congress limits its own future policy-making discretion by giving it away (until such time as the delegation is rescinded). Delegating to agencies, especially independent agencies or agencies which enjoy greater stability in composition over time when compared to Congress, offers one method of securing the integrity of long-term commitments by insulating them from the shifting priorities that Congress might predict itself to be subject to. Imagine, for instance, if Kyle resolved to delegate grocery-shopping duties to his friend, who knows of Kyle's resolution not to eat meat. This might be an effective commitment device. The issue then becomes adhering to the commitment device itself—in Kyle's case,

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[40] This notion of commitment is drawn from Professor Ruth Chang, who suggests that commitments are "exercises of our *normative powers*, the power to confer reason-giving force on something through an act of will." Ruth Chang, *Commitments, Reasons, and the Will*, *in* 8 OXFORD STUDIES IN METAETHICS 74, 75 (Russ Shafer-Landau ed., 2013) (emphasis in original). In the legislative context, "act of legislation" replaces "act of will": Congress, by passing an act that is a resolution, creates reasons it must consider when acting in the future.

continuing to leave grocery shopping to his friend; in Congress's case, abiding by delegations of power. The commitment device would lose its effectiveness if Kyle could simply command his friend to buy him pork chops any time he wished, or if Congress could easily dictate or override agency exercises of delegated power.

However, in the congressional context, the Supreme Court has stepped in to interpret delegations to be somewhat like LHRs. Delegations create sticky new defaults that, in the absence of repeal, constrain Congress's future actions. In *Immigration and Naturalization Service v. Chadha*,[41] the Supreme Court considered a delegation in the Immigration and Nationality Act[42] (INA) granting the Attorney General the power to suspend deportations under certain circumstances. However, Congress also reserved the power to veto the Attorney General's determination that a deportation should be suspended if either the Senate or House of Representatives were to indicate through a majority vote that it did not favor the suspension.[43] This one-house veto provision was ultimately struck down as unconstitutional; the Court held that in order to overrule the Attorney General's suspension of deportation, Congress was required to meet the standards of bicameralism and presentment prescribed in Article I.[44] As the majority held, "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."[45] That is, under *Chadha*, Congress, in delegating its authority, makes something like a resolution. It resolves to leave the power to perform certain actions to another branch of government and to give up that power itself. It thus binds itself and constrains its future actions. Of course, it can revoke or amend that delegation of authority, but it must jump through the same procedural hoops required to delegate the authority in the first place.

### 2. The Religious Freedom Restoration Act and the Religious Land Use and Institutionalized Persons Act.

The Religious Freedom Restoration Act[46] (RFRA) declares that "[g]overnment shall not substantially burden a person's

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41 462 U.S. 919 (1983).

42 8 U.S.C. § 1254(a)(1) (repealed 1996).

43 *See* 8 U.S.C. § 1254(c)(2) (*invalidated by Chadha*, 462 U.S. 919).

44 *See Chadha*, 462 U.S. at 956–57.

45 *Id.* at 955.

46 Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb–2000bb-4).

exercise of religion even if the burden results from a rule of general applicability," unless it demonstrates that the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[47] RFRA, as enacted, had a sweeping scope. In preventing the government from substantially burdening religious exercise, RFRA's mandate applied to every agency and official of the federal, state, and local governments and "all Federal and State law[s]."[48]

The Supreme Court then held that the enactment of RFRA, as applied to states and local governments, exceeded Congress's power under § 5 of the Fourteenth Amendment.[49] However, the Court said nothing about Congress's power to proscribe its *own* conduct, which would not implicate such federalism concerns. RFRA, as applied to agencies and officials of the federal government and to federal law, would still stand in conflict with any new enactments that substantially burden religious exercise without demonstrating a compelling government interest and showing that the enactment embodies the least restrictive means to achieve its intended purpose. That is, RFRA intends to guide and constrain future governmental actions, including congressional actions, by imposing an exacting standard on the government should it wish to pass legislation that would burden religious exercise.

Congress later passed a narrower bill to remedy RFRA's constitutional defects. In the Religious Land Use and Institutionalized Persons Act of 2000[50] (RLUIPA), it declared that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person,"[51] and that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . ."[52]

Similar to RFRA, RLUIPA is targeted toward the long-term objective of protecting religious liberty from governmental intrusion. It constrains future governmental action, including legislative action, by committing to an ongoing course of action. This is paradigmatic of LHRs. Its goal is to guard against changes of

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47 *Id.* § 2000bb-1(b).

48 Religious Freedom Restoration Act §§ 5–6(a), 107 Stat. 1489 (current version at 42 U.S.C. §§ 2000bb-2–2000bb-3(a)).

49 *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

50 42 U.S.C. §§ 2000cc–2000cc-5.

51 *Id.* § 2000cc(a)(1).

52 *Id.* § 2000cc-1(a).

heart on the importance of protecting religious exercise, and to articulate the protection of religious exercise as a priority for lawmakers present and future. The target of both RLUIPA and the surviving parts of RFRA is meant to include the legislature itself.

3. The Civil Rights Act of 1964.

A landmark piece of legislation, the Civil Rights Act of 1964[53] (CRA) codified or strengthened prohibitions against discrimination based on protected characteristics in "voting (Title I), public accommodations (Title II), public facilities (Title III), public education (Title IV), programs or activities receiving federal financial assistance (Title VI), and most workplaces (Title VII)."[54] More broadly, it articulated an antidiscrimination principle that, according to Eskridge and Ferejohn, "must animate most federal and state policies."[55]

The CRA, then, is targeted in large part toward guiding and constraining policymakers to act in accordance with an antidiscrimination principle. It should thus come as no surprise that it has "pervasively affected the evolution of public law."[56] Its explicit terms affect other statutory regimes, mandating that the antidiscrimination principle be applied to legal regimes governing voting, public accommodations and facilities, public education, all programs receiving federal funds, and federal employers (as of the 1972 amendments to Title VII[57]).

Like the other example statutes discussed above, the CRA embodies a long-term commitment to a long-term objective: to prevent discrimination on the basis of race, color, religion, or national origin. Its intention is to guide the actions of future policymakers—to articulate a standard of antidiscrimination that all laws must meet. It places itself in direct conflict with potential future laws that might, intentionally or unintentionally, discriminate unlawfully on the basis of a protected characteristic. Of course, there is something funny about describing a law as unlawful in this situation—the CRA is just a statute, like any potentially conflicting future statute would be, and does not have the status of constitutional law. Eskridge and Ferejohn, in calling

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53 Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, and 42 U.S.C.).

54 Eskridge & Ferejohn, *Super-Statutes*, *supra* note 17, at 1237.

55 *Id.* at 1240.

56 *Id.*

57 *See* Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16.

it a super-statute, identify and describe this phenomenon, where a certain statute is elevated above potentially conflicting others, but the phenomenon calls out for explanation. Recognizing that the CRA is an LHR intended to constrain all future actors who make and enforce laws goes some way toward explaining why it is the CRA, and not other conflicting enactments, that wins in case of a conflict.

4. Senate approval of treaties.

The examples considered above all involve statutes. There is, however, one nonstatutory legislative action worth considering as a site of resolution-making, and that is the Senate's role in approving treaties. In what has come to be known as the Treaty Clause, the Constitution provides that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."[58] The Senate therefore votes to approve or reject treaties for ratification. The Supremacy Clause then dictates that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[59]

Treaties, then, are law. They can be and often are enforced as such. Of course, there has been much discussion over exactly how power and responsibility for enforcing treaty compliance should be domestically allocated between the judiciary and the legislature.[60] Some treaties, often described as non-self-executing, "may not be enforced in the courts without prior legislative 'implementation.'"[61] That is, the legislature must pass ordinary legislation implementing the obligations undertaken in the treaty. Other treaties, often described as self-executing, may be directly enforced by courts at the behest of affected individuals even if Congress has not passed implementing legislation.[62] Some have suggested three pathways under which treaties are "regularly enforced in U.S. courts": (1) treaties may create rights that can then be enforced through legislation that makes the right actionable; (2) treaties may be invoked defensively by a private party who

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58 U.S. CONST. art. II, § 2, cl. 2.

59 U.S. CONST. art. VI, cl. 2.

60 *See generally* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995); Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988).

61 Vázquez, *supra* note 60, at 695.

62 *See id.*

has been prosecuted or sued under a statute inconsistent with a treaty provision; and (3) courts may look to treaties when interpreting statutes and (more controversially) even constitutional provisions.[63]

If the first situation obtains, then the implementing legislation passed by Congress may be analyzed as a statutory LHR in much the way previous statutory examples were analyzed. But if a treaty is self-executing, and thus has the force of domestic law even in the absence of implementing legislation from Congress, either pathways (2) or (3) may obtain, and the treaty itself (as opposed to the implementing legislation) might be the site of resolution-making. Of course, treaties have a different constitutional status than statutory law. They are not drafted by legislators or approved by the House, and they create obligations on the plane of international law.[64] But this does not mean they cannot function as resolutions in Holton's sense. A treaty by its terms may intend to guide political decision-makers, including Congress, to a continuous or future course of action. In the act of approving such a treaty, the Senate may thus accede to continuing obligations that guide the course of future legislative decision-making.

Not all treaties involve LHRs, just as not all statutes do. Treaties can end wars (the Treaty of Ghent) or transfer property (the purchase of Alaska), demanding no further action from legislatures. But treaties can also create long-term commitments to fulfill continuing obligations. Such treaties work by restraining domestic decision-makers, including legislatures, from acting on contrary inclinations that the treaty is meant to guard against.[65] For instance, the Convention on the Rights of the Child (CRC) aims to protect the rights of juvenile offenders.[66] Among other things, it prohibits courts from sentencing children to prison for life without parole, and requires signatory governments to establish a legal age below which a child cannot be held criminally

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63 Oona A. Hathaway, Sabria McElroy & Sara Aronchick Solow, *International Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L. L. 51, 76 (2012).

64 This special status may provide independent justification for the later-discussed *Charming Betsy* canon. When I suggest that supporting Holtonian resolutions can be one advantage of applying these established canons of statutory interpretation, I do not mean to take a position on any other reasons a court may consider when interpreting statutes. Resolutions and weakness of will simply provide one additional reason.

65 *See* Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L. L. & POL. 707, 711 (2006) (examining "the particular functions of customary international law and treaty provisions as precommitment devices").

66 Convention on the Rights of the Child, arts. 37, 40, Nov. 20, 1989, 1577 U.N.T.S. 3.

liable for their actions.[67] If the United States were to ratify this treaty, it would stand as an LHR against, for instance, a new criminal statute including provisions mandating or allowing life without parole for children guilty of particular crimes. The Senate, in ratifying the CRC, would be expressing its commitment to a future course of action, intending to constrain its own future ability to impose criminal penalties under certain circumstances.

One might object that in approving a treaty, the Senate is merely expressing a commitment, not truly seeking to hold itself to the commitment. Such a commitment, the objection goes, involves obligations merely under international law, but such obligations cannot be properly thought of as carrying a binding intention toward domestic political actors, as required by an LHR. I might form an agreement with my roommate that I take out the trash every week and she takes out the recycling, but in doing so, I may be merely seeking to convince my roommate that I have formed a resolution to take out the trash, instead of genuinely forming such a resolution. Similarly, Senate approval of a treaty that on its face imposes continuing obligations might be taken not as a commitment to undertake those obligations, but as a mere attempt to *signal* that such a commitment has been made.[68] If a treaty is not truly meant to foreclose deliberation and guard against foreseen contrary inclinations, then no true LHR is made.

Such a situation is theoretically possible, though perhaps unlikely, as it would require a supermajority of the Senate to converge upon a "false" resolution. Bringing together a supermajority of Senators will most often require, even in times of relatively unified government, that Senators of opposing parties (who often have highly partisan motivations) come to an agreement.[69] As Professor Curtis Bradley has noted, "[t]he difficulty of obtaining such agreement is compounded by the Senate's frequent reliance on unanimous consent procedures that allow individual Senators to block the consideration of treaties," leading some to dub the

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[67] *Id.*

[68] *See generally, e.g.*, Lisa L. Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 PRESIDENTIAL STUD. Q. 440 (2005). *But see* Curtis A. Bradley, *Article II Treaties and Signaling Theory*, *in* THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW 123 (Paul B. Stephan & Sarah A. Cleveland eds., 2020) (questioning whether using the treaty process is an effective signaling device for potential treaty partners).

[69] Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236, 1311 (2008).

Senate the "graveyard" of treaties.[70] Treaties, as a result, have been used less and less frequently to conclude international agreements: they accounted for only 6% of international agreements (the vast remainder being executive agreements) concluded by presidents since World War II.[71] Given the difficulty in merely achieving consensus on approving a treaty, and the transparency of legislative history, the chances seem low that convergence on a false resolution could be achieved.

In addition, there are costs to making such false resolutions. The participants to international law and treaty-making are repeat players, and a reputation for noncompliance with treaty obligations undermines the advantages of participation in an international system.[72] Most importantly, as Part IV of this Comment argues, LHRs embodied in self-executing treaties and in the implementing legislation accompanying non-self-executing treaties can be and are enforced domestically in much the same way that statutory resolutions are. Courts may fill interpretive gaps by applying presumptions of compliance with treaty obligations, just as they presume compliance with statutes that have not been explicitly repealed. That is, holding Congress (or the Senate alone, in the case of self-executing treaties) to its face-value commitments disincentivizes the creation of false resolutions. And even if some treaties express false resolutions, it may be better for courts to take sources of law at face value, rather than reading into them a hidden intention *not* to abide by the plain meaning of their commitments. In any event, as Part IV discusses, resolutions cannot and should not fully bind future actions—rather, they simply force future decision-makers to reckon with the reasons embodied in the resolution. A legislature seeking to overturn or create an exception to a resolution need only make clear and explicit its intention to do so. Taking resolutions at face value, even when they are intended as false resolutions, contributes to the end of transparency in legislative decision-making, as discussed in Part II.B.2.

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70 Bradley, *supra* note 68, at 124.

71 *Id.* at 125.

72 *See, e.g.*, Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1849 (2002); ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 5 (1984).

### C. Characterizing Legislative Resolutions

Having surveyed several examples of statutory and nonstatutory legislative actions that have the formal features of a resolution, we are now in a position to examine some of the characteristics of legislative resolutions, which will help in identifying both when a legislative action is a resolution and what normative features resolutions have. Remember that a resolution, as described by Holton vis-à-vis individuals, is a special sort of intention whose function, in part, is to defeat an individual's future inclinations to do that which they have resolved not to do. It is meant to foreclose future deliberation caused by the influence of desires one foresees, fears, and resolves not to be swayed by, thereby coordinating between future actions and the reasons motivating the resolution.

#### 1. Long-term commitments.

Legislative actions with short-term ambitions are unlikely to be resolutions. Resolutions are a mechanism of responding to long-term objectives requiring continuous commitment over time to achieve them. The preservation of endangered species cannot be achieved with a single legislative order; it requires the persistent adherence to a course of action that avoids destroying such species and their habitat. The same thing is true of protecting religious freedom from governmental intrusion and promoting antidiscrimination in public life and the workplace.

The approval of treaties does not always involve a resolution, as not all treaties constrain and coordinate future action. But treaties that impose continuing obligations, such as extradition treaties or the CRC discussed above, also involve long-term objectives with no well-defined endpoint. When we make such a treaty, we buy another nation's continuous commitment to an obligation with our own continuous commitment to an obligation. The ability to generate and bind oneself to a continuing obligation is essential for the credibility that a country needs to negotiate and form agreements with foreign states.

In addition, by imposing continuing obligations to achieve long-term objectives, resolutions are important tools in combatting can-kicking problems. A can-kicking problem arises when one wants to meet a long-term objective but is able to kick the can down the road, so to speak, on the individual actions needed to meet it. Holton provided one example of a can-kicking problem that might arise for individuals:

> I reason that since smoking forty cigarettes a day for the rest of my life will make a considerable difference to my chance of getting lung cancer, I should give it up. But should I deny myself the cigarette I was about to have? Smoking one cigarette will make virtually no difference to my chances of getting lung cancer. So why should I deny myself? Unfortunately, the same argument will work just as well forty times a day for the rest of my life.[73]

Similarly, Congress might reason that widespread habitat destruction will make a considerable difference to the survival of an endangered species, but any one building project will make little difference. But of course, this argument would apply to every building project threatening some marginal amount of habitat. The ESA, like a resolution to stop smoking, aims to end the can-kicking. Until it is repealed, or an explicit exception drawn, it applies to *all* future actions implicating habitat destruction of endangered species.

2. Foreclosing future deliberation.

A resolution is the most basic sort of commitment device. It is needed and used in situations where one doubts one's ability to commit in the absence of the resolution, such as when contrary inclinations are deemed likely to arise. The statutory legislative resolutions we have considered share this central feature: they are intended to foreclose future reconsideration on the basis of foreseeable "contrary inclinations," in Holton's parlance.[74]

The provision of the ESA prohibiting agencies from authorizing, funding, or carrying out actions likely to jeopardize the existence of endangered species or their habitat is meant to prevent deliberation over future actions that would create such jeopardy. The resolution consciously establishes the protection of endangered species and their habitats as a *priority* and an overriding consideration guiding all future actions until the original resolution is repealed or modified.[75] Congress, like individuals making

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[73] Holton, *Weakness of Will*, *supra* note 4, at 246.

[74] Holton, *Strength of Will*, *supra* note 5, at 42.

[75] Congress, while passing an LHR, may be aware that courts can and will use canons of interpretation (like the canon against implied repeal) to maintain the LHR in the absence of an explicit intention to repeal or carve out an exception. If true, this would bolster the claim that in passing an LHR, Congress *intends* to make it sticky, by taking advantage of LHR-favoring statutory interpretation (discussed in Part IV) by courts. However, we need not *assume* Congress has such an awareness (or indeed, that Congress

resolutions, foresees that what it identifies as a priority (protecting endangered species and their habitats) may be compromised by other interests that may arise in the future (such as funding infrastructure projects that threaten endangered species), and the resolution serves to guard against those contrary inclinations.

Similarly, RFRA and RLUIPA foreclose deliberation over actions that are likely to place substantial burdens on religious exercise without meeting the compelling government interest and least restrictive means tests by binding the government from taking such actions. The CRA forecloses deliberation by prohibiting actions that violate the antidiscrimination principle. As the CRA illustrates, resolutions can be found in laws of general applicability that constrain the government in its capacity as a market participant. Similarly, RFRA and RLUIPA show that resolutions can also be found in laws targeting government actors (including legislatures) in their capacity as government actors. Each of these statutes intends to commit future legislatures to a general principle, and in doing so forecloses deliberation over whether those principles should affect future decision-making.[76]

Of course, in one sense, all legislative actions "foreclose deliberation." For example, by deciding how this year's budget is to be spent, Congress forecloses deliberation on that question.[77] But legislative resolutions are intended to foreclose certain *types* of future deliberation over future decisions. If Kyle makes the decision to eat a pork chop, he stops deliberating over whether to eat the pork chop today; if he resolves to stop eating meat, he is

possesses any collective psychological state at all) to determine that an enactment is an LHR. It is enough that part of the enactment's purpose is to foreclose deliberation by a future Congress. Such a purpose can be inferred from the plain text of the LHR. The text of the ESA, for instance, bound future legislatures from funding habitat-destroying infrastructure projects. Enacting an LHR does not require the legislature to expect courts to hold future legislatures to the LHR. (To make this still more obvious, consider Kyle once more: he can make a resolution not to eat meat without necessarily expecting that anyone will hold him to it. So much the better if he makes his resolution against the backdrop of another commitment device, as might be the case if he tells his friend that he is resolving not to eat meat, with the expectation that the friend will slap his hand every time he is about to break his resolution. If Congress passes an LHR while believing that the courts, applying canons of statutory interpretation in the way I suggest in Part IV, will help enforce it as an LHR, then this of course serves as a clear indication that it intended its enactment as an LHR. But such a belief is not a precondition for identifying that an LHR has been formed.

76 This is the case unless the resolution-originating statutes are overturned or amended.

77 Or, if appropriations are allocated through continuing resolutions (in the non-Holtonian sense), Congress forecloses deliberation on how spending is to continue until the continuing resolution expires.

resolving to foreclose deliberation on all future pork-chop-eating decisions. In setting rules, objectives, and principles for *future* governmental actions, LHRs constrain those actions until the resolution is explicitly abandoned. Indeed, LHRs cannot have any intention but constraining future action. They only make a difference when they impact future decision-making. For instance, in enacting the CRA, Congress decided not to leave it up to future governments to uphold a principle of antidiscrimination. The CRA fulfills its intended purpose when it prevents policymakers—including Congress itself—from taking actions it otherwise might have taken that contravene the antidiscrimination principle.[78]

It is also worth noting here that my conception of LHRs is neutral when it comes to interpretive theories. One need neither be an intentionalist nor a legal process theorist to find that a legislative enactment is an LHR. If legislative intent or purpose is prioritized (however such intent or purpose is derived), an LHR can be identified by looking at whether the enacting legislature's intent or purpose behind the legislation was to foreclose deliberation and bind future legislatures. But even if legislative intent is disregarded (due to, for instance, the impossibility of "intent" in collectives[79]), LHRs might be identified solely from the plain text of an enactment. That is, for an enactment to be an LHR, the *enactment* (not the enacting legislature) must have the intent or purpose of foreclosing deliberation in some way. An intentionalist might turn to an enacting legislature's intention as a guide to determining the intention of the enactment itself, but a textualist could simply locate the intention of the enactment in the enactment's text (as the Court did in *Tennessee Valley Authority*). The analogy to individual resolutions, like Kyle's resolution not to eat meat, is useful to the extent that it illuminates structural features of resolutions themselves. We need not assume that legislatures experience mental states analogous to those that

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78 The CRA is a good example of another dynamic that may emerge out of LHRs. An LHR may express a resolution that is so strongly committed to that it is never actually tested. The anticipated contrary inclinations may never arise, and adhering to the resolution may become something of a habit instead. Or other reasons for adhering to the resolution may emerge. In the case of the CRA, the development of increasingly antidiscrimination public norms in the years since its initial passage may account for the lack of any later enactments testing the provisions of the CRAs.

79 *See, e.g.*, Frank Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) ("Intent is elusive for a natural person, fictive for a collective body.").

individuals experience when making resolutions and experiencing weakness of will.

Thus, by their formal terms, LHRs anticipate and intend to guard against contrary inclinations. But how do they achieve this? First, they may force legislatures to confront the tension between courses of action they have committed to and the action they are in fact taking. This is especially likely if courts hold legislatures to their resolutions in the absence of explicit repeal, as I discuss in Part IV. Requiring explicit repeal, or an explicit exception to be made, forces a legislature to acknowledge the conflict between their present decision and a previous resolution and weigh the interests expressed in each. Requiring an explicit repeal or exception thus holds legislatures accountable when they give in to weakness of will and violate their resolutions.

Second, legislative resolutions often make it harder (though not impossible) for future lawmakers to violate the resolution. Resolutions create defaults, and defaults can be sticky and gather inertia for political and procedural reasons. As Eskridge and Ferejohn argued, statutes that enjoy no legal priority over other statutes may over time come to have "quasi-constitutional" status, often trumping statutory regimes that they come into conflict with.[80] It is no accident that so many of their super-statutes are also resolutions. Statutes that have the formal features of a resolution (foreclosing future deliberation, and constraining and coordinating future action) are and should be those that "successfully penetrate public normative and institutional culture in a deep way" by guiding and shaping the future development of the law.[81]

So statutory resolutions guard against reconsideration and foreclose deliberation on the basis of foreseeable contrary inclinations, like short-term goals that conflict with the priority established in the resolution. This creates sticky defaults, which can be useful in two important contexts besides combatting contrary inclinations. First, making the defaults sticky acts as a signal of commitment to the default established in the resolution. Resolving to do something shows others that the individual committing to the resolution is serious about doing the thing that they resolve to do. Resolutions can thus establish credibility and demonstrate sincerity. Treaties serve this function. When the Senate approves

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80 Eskridge & Ferejohn, *Super-Statutes*, *supra* note 17, at 1266.

81 *Id.* at 1215.

a treaty for ratification, it signals to the international community that a commitment is being made.

Second, sticky defaults help combat decision paralysis, as illustrated by the resolutions embodied in delegations. The questions of who should decide, and how, must be answered before anyone can actually make the decisions. If resolutions are understood as commitment mechanisms, delegating power is a resolution committing legislatures to a future decision-making *process*, rather than requiring future decisions to conform to a particular rule or principle.

3. Enacting reasons.

Statutory resolutions also play the important role of enacting reasons that legislatures must weigh when deciding whether and how to act. Decision-makers are often influenced by a variety of reasons and counter-reasons, especially since political decisions often involve competing interests. Resolutions convert certain interests, principles, or objectives into reasons that legislatures must at least consider in all future decisions relevant to the resolution.

For instance, by passing the ESA, Congress ensured that protecting endangered species and their habitats would be a consideration that all future lawmakers would have to weigh before taking actions that would potentially threaten such species and their habitats. RFRA and RLUIPA enact the protection of religious exercise as a consideration binding future governmental actions. The CRA similarly enacts the antidiscrimination principle as an additional consideration. In doing so, these resolutions allow for the coordination of reasons and actions over time. Legislatures, with their shifting compositions and political moods, might be thought prone to fickleness in their attention, priorities, and reasons for action. By enacting reasons, a resolution allows for coordination. The enacted reasons will serve as reasons for legislative action (or inaction) today and in the future.

Under some views of democracy and the U.S. Constitution, enacting reasons is essential to the core function of democratically representative lawmaking. Professor Cass Sunstein proposed that the Founders aimed to implement a system not of "interest-group pluralism" where "naked preferences" decide political outcomes, but a "republic of reasons" where laws are impartially deliberated.[82] The democracy that results is "deliberative," with

[82] CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 24–25 (1993).

decisions guided by debate on "recognized aims and shared principles that define a notion of the public good."[83] Philosopher Philip Pettit identified the challenge posed to the ideal of deliberative democracy by the discursive dilemma—the doctrinal paradox of collective reasoning in which majorities of a decision-making body can support each of the premises of a syllogism, yet no majority supports its conclusion. He argued that the best solution is to prefer whatever conclusions come out of majority-supported reasons, rather than simply going along with majority-supported conclusions.[84] This is because of an argument Pettit raised from the republican value of contestability:

> [I]f the state's power of interference is to be rendered non-arbitrary then whatever other devices are in place, people must be able to contest the decisions made by various arms of government. They must have access to the reasons supporting those decisions and they must be able to contest the soundness of those reasons or the degree of support they offer to the decisions made.[85]

That is, public decision-making on the basis of bare preferences is not enough: decision-makers in a republican system of government must be responsive and accountable, most importantly, to publicly available reasons. And holding future decision-makers accountable to reasons is precisely what resolutions do.

In addition to holding future legislatures accountable to the reasons embodied in LHRs themselves, LHRs may, over time, generate reliance, leading to the creation of new reasons to uphold them that are distinct from the original reasons envisioned by their makers. After a long period of time adhering to his resolution not to eat meat, Kyle could develop a disgust for the taste of meat. Similarly, Congress might come to appreciate new, independent reasons for protecting endangered species (say, if ecotourism becomes a major industry). In these cases, the resolution will have generated new reasons distinct from those motivating the resolutions in the first place. So much the better for resolutions here. But the original reasons embodied in the resolution (including the very fact of having resolved it) continue to exist,

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83 Samuel Freeman, *Sunstein on the Constitution*, 15 L. & PHIL. 437, 439 (1996).

84 *See* Philip Pettit, *Deliberative Democracy and the Discursive Dilemma*, 11 PHIL. ISSUES 268, 269 (2001) ("[T]he role in which republican theory casts deliberative democracy argues for preferring the imposition of reason, where possible, at the collective level.").

85 *Id.* at 281.

even if they are not as salient as they would be if they were the only reasons pulling in favor of action in conformity with the resolution.

## III. LEGISLATIVE WEAKNESS OF WILL

The preceding discussion of the features and the value of legislative resolutions paves the way toward understanding legislative weakness of will. From Holton's account, two elements of weakness of will can be drawn: a legislature is capable of being weak-willed if it is capable of (1) forming resolutions meant to defeat contrary inclinations, and (2) acting on those contrary inclinations against which their resolutions were meant to guard. Part II made the case that legislatures regularly make use of resolutions meant to defeat contrary inclinations, which aim at, and often succeed in, foreclosing certain types of deliberation, enacting reasons, and allowing for long-term commitments. Now, this Part seeks to illustrate what happens when legislatures fail to adhere to their resolutions for the very reasons the resolutions were meant to guard against. When legislatures fail to foreclose the kind of deliberation they were meant to foreclose, they weaken the reason-enacting force of resolutions, and they undermine long-term commitments. Legislative resolutions function to create a degree of continuity and predictability in the law by seeking to define and commit to a course of action. Failing to keep resolutions frustrates this goal.

First, weak-willed legislatures engage in the very sort of deliberation they intended to foreclose. It is important here to remember, as discussed in Part I, that not all revisions or abandonments of a resolution are weak-willed: circumstances can change, new knowledge can be gained, and one might realize the original resolution to be trivial in light of (or simply not worth) the costs involved in upholding it. (Remember Holton's example resolution of going without water just to see how it feels.) Sometimes, it might be rational to reconsider a resolution in light of the circumstances. The issue lies in distinguishing such cases of "rational reconsideration" from cases of genuine weakness of will.[86] Weakness of will, in Holton's view, occurs only when reconsideration is motivated by the very factors the resolution was intended to guard against. But it can be difficult, even in the individual case, to ascertain when someone is truly acting on impermissible

[86] Holton, *Weakness of Will*, *supra* note 4, at 255.

reasons: individuals might be prone to self-deception and self-justification when they seek to break their resolutions out of weak will. Kyle, when desperately craving his pork chop, might think that he is not in such a different boat as the person resolving to go without water—the cost of keeping his resolution is far higher than he anticipated. With legislatures, the difficulty may be exacerbated since they are group agents whose composition changes over time.

All this is to say that it may sometimes be difficult to pinpoint exactly what sort of deliberation legislatures intend to foreclose through their resolutions. But courts have familiar tools for examining the purpose of legislative enactments, and this Comment is neutral as to which ones they should use. Intentionalists may look to legislative history and the context in which an enactment is passed. Textualists may stick to purposes expressed in the text of an enactment itself, or through the structure of the enactment. Statutory text defining the purpose of a resolution will be most indicative, and intentionalists may look to legislative history for additional indications. For instance, Chief Justice Burger's majority opinion, when considering § 7 of the ESA in *Tennessee Valley Authority v. Hill*,[87] observed that the text of the statute plainly and affirmatively commanded all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species."[88] The Court also pointed out that the 1973 Act carefully omitted qualifying language that existed in the Endangered Species Act of 1966, stating that federal agencies should seek to preserve endangered species only "insofar as is practicable and consistent with their primary purposes."[89] These pieces of evidence indicate that the ESA, as a resolution, intended to foreclose *all* deliberation over whether or not to take (or fund) an action resulting in destruction of habitat for an endangered species.

Such inquiry is par for the course for judges engaging in statutory interpretation. The changing composition of the legislature poses a different challenge, as a later legislature's judgment on the soundness and wisdom of the resolution in the first place might be different from that of the legislature that originally

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87 437 U.S. 153 (1978).

88 *Id.* at 160.

89 *Id.* at 181 (emphasis omitted) (quotation marks omitted) (quoting H.R. 4758, 93rd Cong. § 2(b) (1973)).

enacted the resolution. But as Part IV notes, it may not be critical that judges always "get it right" with regard to the intentions behind legislative resolutions and their reconsideration, because (1) legislatures unambiguously have the power to explicitly repeal or amend legislative resolutions, and (2) existing canons of statutory interpretation may also already cut in favor of upholding resolutions in the absence of explicit repeal.

Second, weak-willed violations of resolutions weaken the reason-enacting force of resolutions and undermine long-term commitments. If a resolution enacts a reason, and later legislatures fail to take account of the enacted reason without explicitly repealing it, its status is unclear: how powerful of a reason is it? Under what circumstances does it apply, and under what circumstances may decision-makers ignore it? This is problematic for the ideal of deliberative democracy articulated in Sunstein's and Pettit's views.

Third, repeated violations frustrate the long-term objectives articulated in resolutions. If Congress regularly makes exceptions to the ESA's § 7 prohibition on taking or funding actions destroying the habitat of endangered species, even if it does so because it believes there to be an overriding interest in each case, then more and more endangered species will vanish, and the objective of the ESA will have been lost. This means that the ESA will have failed as an LHR, just like Kyle's resolution not to eat meat will fail if he continues to buy and eat pork chops.[90] This is particularly damaging when credibility is staked on being able to hold fast to a commitment over time, as is the case with international treaties.

## IV. LEGISLATIVE WEAKNESS OF WILL AND STATUTORY INTERPRETATION

If legislative weakness of will is possible, and potentially damaging, then the question that remains is: what should we do about it? Fortunately, the powers of the judiciary are well calibrated to allow for both a check on legislative weakness of will by ensuring greater legislative accountability, and for rational

[90] That a resolution has failed, however, does not mean that there was never any resolution in the first place. Remember that LHRs can be identified by their formal features at the moment of enactment. Whether an LHR exists is not dependent on how well-kept it is, though its success as a resolution does depend on being well kept. This is perhaps easier to see through the analogy to the individual: there is a difference between Kyle failing to keep his resolution not to eat meat, and never making such a resolution in the first place.

reconsideration given entrenchment concerns and the dynamic composition of the legislature.

### A. Respecting Explicit Repeals, Amendments, and Exceptions

I begin with what courts cannot and should not do when trying to rein in legislative weakness of will. They cannot reject an explicit repeal or amendment of a previous enactment, even if the enactment is a resolution. If Congress passes a later bill as an explicit exception to the resolution, a court may not abrogate such a decision. Congress may, in its later enactment, unreasonably break its resolution, but the court has no authority to ignore an explicit repeal by Congress. Otherwise, the constitutional principle against legislative entrenchment, which holds that "one legislature may not bind the legislative authority of its successors,"[91] would not carry much significance. Embodied in the principle against legislative entrenchment is a concern for the basic "democratic principle that present majorities rule themselves."[92] The sort of dead-hand control that one legislature might wish to exert on future legislatures can be legitimized only by "invok[ing] the constitutional amendment process."[93] In the case of treaties, the analogous principle is the last-in-time rule, under which courts are to enforce statutes that directly conflict with treaty obligations if the statutes are passed after the treaty is made.[94]

Though both the entrenchment doctrine[95] and the last-in-time rule[96] have been criticized, it is not my goal to weigh in on either side of the debate. I seek only to emphasize two things: First, explicitly repealing or amending a resolution to pass a contrary enactment might be evidence of the sort of rational reconsideration that does *not* constitute weakness of will. Second, my view is fully compatible with both the doctrine against

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91 United States v. Winstar Corp., 518 U.S. 839, 872 (1996) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 90 (1765)).

92 Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 509 (1997).

93 John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1776 (2003).

94 *See, e.g.*, Whitney v. Robertson, 124 U.S. 190, 195 (1888); The Cherokee Tobacco, 78 U.S. 616, 620–21 (1870).

95 *See generally* Adrian Vermeule & Eric A. Posner, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665 (2002).

96 *See, e.g.*, Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 425 (1989) ("Our jurisprudence giving treaty and statute equal status so that the later in time will prevail was developed a hundred years ago by constitutional construction based, I believe, on misconstruction of Article VI.").

entrenchment and the last-in-time rule, which apply when a later legislature *explicitly* overturns a previous legislature's enactment. (It is also perhaps more obviously compatible with a world in which these doctrines have been discarded, and earlier legislatures may enact resolutions that do bind future legislatures.)

As a consequence of this, it is no counterargument to suggest that the proposal in this Comment violates principles of democratic responsiveness by unduly binding future legislatures. A future legislature is free to repeal or amend an earlier enactment, or to reject a treaty, so long as it makes its intention to do so clear. Just like Kyle's resolution to stop eating meat cannot ultimately prevent him from purchasing pork chops at the grocery store later, one legislature's resolution does not have the power to bind future legislatures, and the courts cannot give them that power. Rather, a court faced with contradictory legislative enactments, with no indication as to which one the legislature intended to prevail, may prefer the resolution, holding the legislature to its commitments until it acknowledges that it is forsaking or revising the resolution. By analogy to the classic case, the role the court plays is not that of a third party forcefully preventing Kyle from purchasing the pork chops; rather, it is that of a third party reminding Kyle of his resolution, and forcing him to acknowledge that he is in fact violating it by succumbing to the very contrary desires his resolution was formed to guard against. The legislature is fully within its rights to reject the court's determination, but it must first acknowledge its resolution and decide whether it is choosing to enact an exception or partial repeal of the resolution.

### B. Statutory Interpretation for LHRs

This sort of accountability helps to avoid some of the consequences of weak-willed action, and courts can implement it largely through applying existing canons of statutory interpretation. First, courts may force legislatures to confront the tension between courses of action to which they have committed and the actions they are in fact taking. If a later action conflicts with a resolution, courts are faced with a conflict. If the resolution is statutory, courts should apply the canon against implied repeal, requiring a new statutory action to flatly contradict the resolution and clearly express an intent to repeal it.

A version of this canon applies with extra force when the later enactment is an appropriations measure. Appropriations measures are often short-term, meant to address immediate

concerns rather than set out long-term objectives and principles. They are likely settings for resolution-violating and potentially weak-willed actions. Thus, disfavoring repeals by implication through appropriations is a particularly good tool for courts seeking to hold legislatures accountable to their resolutions.

This LHR-favoring use of interpretive canons may be illustrated in the way courts have treated several of the LHRs considered in Part II. The Supreme Court's decision in *Tennessee Valley Authority v. Hill*[97] cites both the canon against implied repeal and the appropriations canon to conclude that Congress could not have intended to repeal or create an exemption from the ESA when it appropriated the funds for the Tellico Dam.[98] In doing so, the Court held Congress accountable to the LHR expressed in the ESA, requiring an explicit exemption in order to contravene it.

The Ninth Circuit in *San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation District*[99] faced a similar set of facts. The court was faced with a potential conflict between the ESA and a statute providing for the construction and operation of the Twitchell Dam. Petitioners argued that the operation of the Twitchell Dam interfered with the reproductive migration of the endangered Southern California Steelhead, constituting an unlawful taking in violation of the ESA. To avoid the taking, the Twitchell Dam's flow rate would need to be modified from the recommended rate set out in a report by the Secretary of the Interior. Respondents argued that the statute authorizing construction and operation of the Dam forbid this modification, because it required that the Dam be operated "substantially in accordance with the recommendations of the Secretary of the Interior."[100] The court instead interpreted the statute to give substantial leeway in the operation of the dam, including to serve the purpose of avoiding the taking of an endangered species in violation of the ESA.[101] In doing so, the court preserved the long-term commitments undertaken in the ESA.

RFRA has also been interpreted by courts and commentators to supersede potentially conflicting legislative enactments.[102] RFRA explicitly codifies the presumption against implied repeal

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97 437 U.S. 153 (1978).

98 *Id.* at 189–90.

99 49 F.4th 1242 (9th Cir. 2022).

100 Pub. L. No. 83-774, 68 Stat. 1190.

101 *San Luis Obispo Coastkeeper*, 49 F.4th at 1247.

102 *See, e.g.*, Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995).

or exemption, providing that "[f]ederal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act."[103] As such, there is an explicit textual hook courts may turn to in determining that RFRA is an LHR when holding future legislatures accountable to the commitments contained in it. Justice Neil Gorsuch, for instance, has explicitly characterized RFRA as a "kind of super statute, displacing the normal operation of other federal laws . . . ."[104] Courts have acted accordingly. For instance, plaintiffs have brought a spate of challenges demanding exemptions under RFRA from the contraception mandate,[105] a regulatory requirement imposed by the Department of Health and Human Services to implement the Patient Protection and Affordable Care Act.[106] Courts have broadly held the RFRA challenges likely to succeed.[107] In addition, RFRA may potentially be brought into conflict with and win out over another federal statute passed by Congress three years later. Section 1997e of the Prison Litigation Reform Act[108] (PLRA) prohibits prisoners bringing civil claims against correctional institutes from receiving compensatory damages for mental or emotional injuries unless they can show a physical injury.[109] But RFRA allows plaintiffs to recover monetary damages against federal officials in their individual capacities.[110] Arguably, prisoners bringing RFRA claims against correctional institutes should receive compensatory damages unlimited by the PLRA.[111]

Finally, if the later action conflicts with a resolution in the form of a treaty, courts may engage in what scholars have called "interpretive enforcement,"[112] under which acts of Congress are to be construed "so as not to conflict with international law or with

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[103] 42 U.S.C. § 2000bb-3(b).

[104] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

[105] *See, e.g.*, Korte v. Sebelius, 735 F.3d 654 (7th Cir. 2013); Religious Sisters of Mercy v. Becerra, 55 F.4th 583 (8th Cir. 2022); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[106] Pub. L. No. 111-148, 124 Stat. 119.

[107] *See Korte*, 735 F.3d at 659; *Religious Sisters*, 55 F.4th at 588; *Hobby Lobby*, 573 U.S. at 734.

[108] 42 U.S.C. § 1997e(e).

[109] *Id.*

[110] *See* Tanzin v. Tanvir, 141 S. Ct. 486, 493 (2020).

[111] *See generally* Bethany Ao, *Achieving Appropriate Relief for Religious Freedom Violations in Prisons After* Tanzin, 90 U. CHI. L. REV. 1967 (2023).

[112] Hathaway, McElroy & Solow, *supra* note 63, at 87.

an international agreement of the United States."[113] This principle, now dubbed the *Charming Betsy* canon, traces its legal roots to Chief Justice John Marshall's declaration in *Murray v. Schooner Charming Betsy*,[114] that "an act of Congress ought never to be construed to violate the laws of nations if any other possible construction remains."[115] Thus, unless a statute clearly abrogates international law to which the United States is subject (including through its treaty obligations) and no other constructions are possible, the Court is to avoid a potential conflict by construing the statute in line with international law.

While *Charming Betsy* itself concerned and avoided a potential conflict between an act of Congress and customary international law, the "law of nations"[116] contemplated by the *Charming Betsy* canon also includes—and perhaps applies with particular force to—treaties that the Senate has approved and the United States has ratified. The Senate, in approving such a treaty, thus acknowledges a commitment to upholding its terms. If it decides it wants to violate the treaty, it must explicitly acknowledge this, or the Court may hold it to the treaty terms in its construction of the violating statute.

For instance, the Senate advised and consented to the ratification of the Chemical Weapons Convention (CWC), which imposed obligations on parties by prohibiting the development, production, acquisition, stockpiling, retention, transfer or use of chemical weapons.[117] This constitutes a continuing commitment to a course of action that aims to guide and constrain future governmental action, including legislative action: it stands against any potential future bill that, for instance, appropriates funding for the development of chemical weapons. A court may thus exploit any ambiguity in this future bill to read it in compliance with, rather than in violation of, the CWC.

Note that in applying such canons, courts can also preserve the reason-enacting function of resolutions in some form. That is, by requiring a clear statement of intent to abrogate or create an exception to the resolution, the resolution will still have influenced lawmakers to consider the reasons for which the resolution was enacted, as well as the reason-giving force of simply having

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113 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 114 (AM. L. INST. 1987).

114 6 U.S. (2 Cranch) 64 (1804).

115 *Id.* at 118.

116 *Id.* at 71.

117 Chemical Weapons Convention art. 1, Apr. 29, 1997, 1974 U.N.T.S. 45.

made a resolution. Even if Congress creates an exception to the ESA, as it ultimately did in response to the Court's decision in *Tennessee Valley Authority*, it will have considered the reason the ESA was meant to enact—that protecting endangered species and their habitats is of paramount importance—before acting.

This could bring the later revision of the resolution closer to rational reconsideration. When an actor is forced to acknowledge that a resolution has been made, she is more likely to require particularly strong reasons (including reasons unforeseen when the resolution was made) to contravene the resolution. If Kyle consciously decides to make an exception to his resolution not to eat meat (or abandon his resolution altogether), he is perhaps more likely to do so because of weightier reasons than those he would have used to justify eating meat, had he not resolved to do otherwise. Similarly, a Congress forced to face up to inconsistencies between its desired course of action and an LHR might be expected, if it does ultimately decide to continue with its LHR-violating action, to do so because of better reasons, given the costs associated with breaking resolutions.

The ultimate upshot for statutory interpretation is that in cases of legislative weakness of will, there is an additional normative thumb on the scale in favor of holding a legislature to its expressed resolutions over its "contrary inclinations."[118] That is, when a court is faced with an apparently intractable conflict between two legislative enactments, and it identifies one as expressing a resolution meant to guard against unreasonable reconsideration, and the other as expressing the sort of reconsideration guarded against by the resolution, the court has a reason to prefer, *ceteris paribus*, the resolution over the reconsideration. This reason may not overcome other reasons a court considers when faced with an intractable conflict between legislative enactments, and it may even be a last resort, when the balance of other reasons does not point to a clear decision in favor of either enactment. But courts have long used canons of interpretation in such a way, so this should come as no surprise.[119]

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[118] Holton, *Strength of Will*, *supra* note 5, at 42.

[119] *See, e.g.*, Varity Corp. v. Howe, 516 U.S. 489, 511 (1996) ("Canons of construction . . . are simply 'rules of thumb' which will sometimes 'help courts determine the meaning of legislation.'" (quoting Conn. Nat. Bank v. Germain, 503 U.S. 249, 253 (1992))); WILLIAM N. ESKRIDGE, JR., JAMES J. BRUDNEY, JOSH CHAFETZ, PHILIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 832–33 (West Academic 6th ed. 2020); Anita S.

In addition, if courts consistently apply canons of interpretation to uphold LHRs in the suggested way, then we may expect Congress to begin legislating against a backdrop of "LHR-avoidance," analogous to the familiar backdrop of constitutional avoidance. Congressional reliance on courts to engage in interpretation to preserve LHRs over potentially conflicting enactments generates further reason to think that Congress, when enacting an LHR, may intend for courts to "enforce" the LHR by holding future Congresses accountable to the commitments contained in it, in the absence of explicit repeal. This dialogue between courts and legislatures would bolster the normative justification for engaging in such LHR-saving constructions.

Preference for legislative resolutions might also be thought of as lending new normative support for the canon against implied repeal, the appropriations canon, and the *Charming Betsy* canon when the earlier enactment is a resolution meant to guard against the contrary inclination expressed in the later enactment. Such support is valuable, because unlike other justifications, it does not rest on assumptions about the legislative process and legislative intent that have come under fire.[120] For instance, it need not be the case that a later LHR-violating enactment be the result of a "hectic, opaque, and nondeliberative" appropriations process (as Professors Mathew McCubbins and Daniel Rodriguez have argued that the appropriations process has been misunderstood to be) to be disfavored.[121] The interpretive favor bestowed on LHRs need not depend on the claim that they were enacted with a more deliberative or somehow more legitimate process. It also need not rest on a literal presumption that Congress did not, or could not, have intended to act furtively and indirectly where it could have acted openly and expressly.[122] The Fourth Circuit and D.C. Circuit have described the traditional rationale for the presumption against implied repeal as resting on an assumption that "Congress 'legislate[s] with knowledge of former related statutes,' and will expressly designate the provisions whose application it wishes to suspend, rather than leave that consequence to the

Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 833 (2017) ("Substantive canons sometimes operate as tiebreakers, or thumbs on the scale . . . .").

120 *See* Mathew D. McCubbins & Daniel B. Rodriguez, *Canonical Construction and Statutory Revisionism: The Strange Case of the Appropriations Canon*, 14 J. CONTEMP. LEGAL ISSUES 669, 671 (2005) (arguing against the canon disfavoring amendment of substantive law through appropriations).

121 *Id.* at 714.

122 *See id.* at 688.

uncertainties of implication compounded by the vagaries of judicial construction."[123] But it is unverifiable, and possibly dubious, that Congress makes decisions with any particular knowledge in mind, and that it would always act expressly rather than implicitly. A rationale based on the normative value of LHRs avoids assuming that Congress legislates with any particular knowledge or other mental state.[124] This should be appealing to theorists who find it unappealing to rest interpretive choices on the premise that Congress, as a collective body, can hold mental states like knowledge.

## CONCLUSION

Weakness of will, a long-studied phenomenon in philosophy, presents an illuminating lens for thinking about a certain class of legislative enactments and statutory interpretation. That class of enactments is what I have called "legislative Holtonian resolutions," or LHRs, borrowing from Holton's conception of weakness of will. Legislatures make resolutions through both statutory and nonstatutory enactments that seek to establish continuing obligations and commit to long-term objectives, principles, and courses of action. Violations of these resolutions may constitute weak-willed action and frustrate the goals and advantages of resolutions when it comes to foreclosing some types of future deliberation, enacting reasons to help coordinate future legislative action, and facilitating long-term commitments. Courts can and should protect these advantages by applying well-established canons of statutory interpretation, including the canon against implied repeal, the canon against implied repeal especially through appropriations, and the *Charming Betsy* canon.

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[123] United States v. Mitchell, 39 F.3d 465, 472 (4th Cir. 1994) (quoting United States v. Hansen, 772 F.2d 940, 944–45 (D.C. Cir. 1985)).

[124] As discussed in Part II, an enactment's status as an LHR depends not on any intention of the enacting legislature, but on the purpose expressed by the enactment itself.