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SOFT LAW:

LESSONS FROM CONGRESSIONAL PRACTICE

Jacob E. Gersen & Eric A. Posner

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*Soft law consists of rules issued by lawmaking bodies that do not comply with procedural formalities necessary to give the rules legal status yet nonetheless influence the behavior of other lawmaking bodies and of the public. Soft law has been much discussed in the literatures on international law, constitutional law, and administrative law, yet congressional soft-lawmaking, such as the congressional resolution, has received little attention. Congressional soft law affects behavior by informing the public and political institutions about the intentions and policy preferences of Congress, which are informative about future hard law as well as of Congress's view of the world, and thus relevant to the decision making of various political agents as well as that of the public. Congressional soft law is important for a range of topics, including statutory interpretation and constitutional development. Other types of soft law—international, constitutional, and judicial—are compared.*

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## INTRODUCTION

Soft law has taken the legal academy by storm. In constitutional law, a deluge of recent scholarship argues that the “small c” constitution of unwritten legal norms deserves as much attention as the “big C” written Constitution.<sup>1</sup> Scholars have devoted increasing attention to “the constitution outside the constitution”—extraconstitutional or subconstitutional norms, especially those developed by nonjudicial agents such as legislatures.

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1. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001); Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1267979](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1267979) (examining the relationship between constitutional crises and constitutional development); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991 (2008) (discussing the way confrontations between branches generate constitutional development); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523 (2004) (distinguishing constitutional and preconstitutional understandings); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007); Jon Elster, *Unwritten Constitutional Norms* (2007) (unpublished manuscript) (describing binding constitutional norms that do not appear in the written constitution). The idea is not new. See, e.g., Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

In international law, too, scholars have turned their attention from the traditional manifestations of international law—treaties, judicial opinions, government announcements—to what they have also called soft law.<sup>2</sup> Soft international law includes nonbinding declarations such as the Universal Declaration of Human Rights and General Assembly resolutions. Despite their lack of formal legal status, these materials can ultimately have real effect—by working their way into customary international law or by providing the framework for informal interstate cooperation.<sup>3</sup> Soft law in international relations, like small-c constitutional law, consists of norms that affect the behavior of agents, even though the norms do not have the status of formal law.

Or consider the recent controversy about presidential signing statements.<sup>4</sup> When Congress presents a bill to the President for signature, the President sometimes issues a signing statement that interprets some of the bill's provisions.<sup>5</sup> Signing statements are not binding law, but many people believe that they do, or should, influence courts and agencies when these bodies interpret statutes. If signing statements affect the beliefs of private parties about how the President will execute the law, signing statements might affect private behavior. Thus, signing statements, although lacking formal legal power, could have an effect similar to that of the other forms of soft law.

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2. See, e.g., COMMITMENT AND COMPLIANCE (Dinah Shelton ed., 2000) (studying cases of compliance with nonlegal norms); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 91-100 (2005) (discussing differences in domestic effects of the two types of law); ROBERT E. SCOTT & PAUL B. STEPHAN, THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW 110-20 (2006) (arguing that soft-law-style informal cooperation sometimes is possible when formal agreements are not); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000) (providing a typology and general analysis); Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord*, 5 J. INT'L ECON. L. 647 (2002) (providing empirical evidence that many states, especially democracies, comply with the Basle Accord, even though this instrument is not legally binding); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 INT'L ORG. 495 (1991) (arguing that informal agreements can be negotiated more quickly, are more flexible, require less information, and can avoid publicity, but provide less of a commitment, than legal agreements).

3. See Ho, *supra* note 2 (providing empirical evidence for the Basle Accords).

4. See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006); Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994); William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699 (1991); Kristy L. Carroll, Comment, *Whose Statute Is It Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH. U. L. REV. 475 (1997); see also PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 199-230 (2002).

5. Neil J. Kinkopf & Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001-2006* (Ohio State Pub. Law, Working Paper No. 106, 2007), available at <http://ssrn.com/abstract=1022202> (assembling collection of presidential signing statements).

The controversy about signing statements mirrors an older dispute about other soft-law practices in the executive branch. Agencies issue statements of “best practices” and policy manuals that may induce voluntary compliance by regulated parties.<sup>6</sup> Critics complain that administrative agencies produce too much policy through informal and nonbinding guidance documents and policy statements in order to avoid costs associated with formal mechanisms like notice and comment rulemaking or formal adjudication.<sup>7</sup> For example, if a statute requires that wild animals be contained by fences that are “structurally sound,”<sup>8</sup> an agency might use notice and comment proceedings to issue a formal rule interpreting the phrase “structurally sound” to require a fence taller than eight feet. Alternatively, the agency might issue a guidance document stating that the agency understands the statute to so require and pronouncing that the agency intends to enforce the statute only against owners with fences less than eight feet high. This statement has no formal legal force; the agency must still defend its interpretation of the statute in an enforcement proceeding or litigation. Nonetheless, many regulated parties will simply construct a fence to comply.

To the private-law scholar, soft law might not seem as exotic as it does in these other fields. A judicial opinion contains a holding that has binding legal effect and reasoning that, in the case of some higher courts, might also have binding effect. But generally speaking, the reasoning in judicial opinions is only “dicta”: it does not have binding force. And yet clearly dicta have a great deal of importance, influencing the decision making of subsequent courts<sup>9</sup> and hence people who bring their behavior in line with predictions of how courts will act.

As a final example, also from private law, consider the ubiquitous presence of nonbinding instruments in commercial relations. A letter of intent, for example, signals that two parties have an interest in further negotiations leading up to a binding contract but rarely has legal force itself.<sup>10</sup> It is clear that such “soft contracts” have commercial importance and affect the behavior of the parties that enter them.<sup>11</sup>

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6. See David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 307-13 (2006) (discussing trend towards best practices in agency actions in past decade).

7. See generally John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 914-17 (2004) (discussing doctrine governing what type of rules must be issued using procedural formality); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1480-81 (1992) (discussing tradeoffs entailed in enhanced procedural formality in rulemaking).

8. See Jacob E. Gersen, *Legislative Rules Revisited*, 74 U. CHI. L. REV. 1705 (2007) (discussing *Hootor v. U.S. Dep't of Agric.*, 82 F.3d 165 (7th Cir. 1996)).

9. Cf. Ethan Bueno de Mesquita & Matthew Stephenson, *Informative Precedent and Intrajudicial Communication*, 96 AM. POL. SCI. REV. 755 (2002).

10. See, e.g., *Empro Mfg. Co. v. Ball-Co Mfg. Co.*, 870 F.2d 423, 426 (7th Cir. 1989).

11. See, e.g., Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

The academic literatures on these topics have different concerns, yet the themes are similar. Soft law refers to statements by lawmaking authorities that do not have the force of law (most often because they do not comply with relevant formalities or for other reasons are not regarded as legally binding<sup>12</sup>), but nonetheless affect the behavior of others either (1) because others take the statements as credible expressions of policy judgments or intentions that, at some later point, might be embodied in formally binding law and reflected in the coercive actions of executive agents, or (2) because the statements provide epistemic guidance about how the authorities see the world.<sup>13</sup> Individuals, governments, states, and other agents use soft law in order to enter commitments and influence behavior where legal mechanisms are regarded as undesirable.

Against this backdrop, it is a puzzle that no parallel literature has emerged in the field of legislation and legislative process.<sup>14</sup> One does not have to look hard to find a similar form of soft law: the congressional resolution. Congressional resolutions—whether concurrent or one-house—generally have no formal legal effect.<sup>15</sup> Periodically, proposals surface to pay more attention to the resolution as a mechanism for influencing statutory interpretation,<sup>16</sup> foreign policy,<sup>17</sup> or some other external matter. Yet the soft statute has

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12. With this qualification, we hope to avoid taking a position in the debate between positivists and their critics, who disagree about whether formalities mark the border between law and nonlegal statements.

13. The final example, involving private contracting, does not involve lawmaking authorities except in the metaphorical but usefully analogous sense that private parties can make “law” for themselves by entering contracts. *Cf.* H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1997).

14. The closest work is on the “expressive functions” of law, which focuses on the communicative impact of hard law. *See, e.g.*, ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); Robert Cooter, *Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1598 (2000); Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 595 (1998); Dhammika Dharmapala & Richard H. McAdams, *The Condorcet Jury Theorem and the Expressive Function of Law: A Theory of Informative Law*, 5 AM. L. & ECON. REV. 1 (2003) (formal law serves expressive functions, revealing information about legislative information); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1652 (2000) (arguing law can provide a resolution to coordination problems by specifying a focal point); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2029-31 (1996). For an overview, see Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000).

15. There are familiar exceptions. Consider, for example, the Senate’s approval of treaties, the approval of proposed constitutional amendments, and the decision to impeach by the House.

16. Rankin M. Gibson, *Congressional Concurrent Resolutions: An Aid Statutory Interpretation?*, 37 A.B.A. J. 421 (1951).

17. *See, e.g.*, Doyle W. Buckwalter, *The Congressional Concurrent Resolution: A Search for Foreign Policy Influence*, 14 MIDWEST J. POL. SCI. 434, 442-44 (1970) (arguing that the concurrent resolution is often used by Congress to attempt to influence foreign policy).

received little attention in scholarly work on legislation.<sup>18</sup> The conventional wisdom is that such measures lack importance because they do not create binding legal obligations.<sup>19</sup> They are cheap and often happy talk by legislatures, commending military officers for good service or sports teams for winning championships.

In fact, many congressional resolutions are very serious: they assert controversial foreign policy judgments, urge the President to intervene in humanitarian crises or to avoid a military conflict, criticize allies and enemies, forecast plans for taxation and regulation, send signals to regulatory agencies about Congress's expectations, criticize the President's interpretations of executive power, advance interpretations of constitutional provisions and statutes, encourage state and local governments to address policy problems, identify public health threats that need funding, and much more.<sup>20</sup> Statutory soft law deserves more attention than it has received, especially in light of the large cognate literatures that examine the workings of soft law in other fields. In the course of analyzing congressional resolutions and other forms of legislative soft law—including hortatory statutes—we advance a general theory that explains the attractiveness of soft law, its advantages and disadvantages, and its place in our constitutional order. We show that soft public law is preferable to hard public law in identifiable cases and contexts.

The congressional resolution is essentially a “soft statute”—a device for communicating the policy views and intentions of one or both houses of Congress. Legislative soft law communicates congressional intentions more accurately and cheaply than does a regular statute, which will usually reflect the views of the President as well. Legislative soft law communicates the views of a chamber or the Congress more accurately than do statements of individual legislators, whose views will often diverge from that of the majority.

These communications can influence the behavior of the public and of other political institutions through three main mechanisms. First, a congressional communication affects people's beliefs about how Congress will (formally) regulate in the future, to the extent that it credibly reveals the political preferences of Congress (or its members or a substantial coalition of its members or its leadership, etc.). A soft statute thus anticipates a hard statute,

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18. *But see* GABRIELE GANZ, *QUASI-LEGISLATION: RECENT DEVELOPMENTS IN SECONDARY LEGISLATION* (1987). Ganz surveys the use of extrastatutory codes of practice, circulars, and guidelines in the United Kingdom. She argues that quasi legislation can be an effective way of regulating behavior when there is already consensus; it plays a coordination role. Although Ganz has a somewhat different set of nonstatutory laws in mind, she draws a parallel distinction between quasi legislation aimed at private parties and quasi legislation aimed at other public entities that we develop here. Our theoretical apparatus differs in that we emphasize the informational effects of soft statutes or, in her terms, nonstatutes.

19. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 756 (1986) (“A *concurrent* resolution, in contrast, makes no binding policy; it is a means of expressing fact, principles, opinions, and purposes of the two Houses . . .” (citations and internal quotation marks omitted)).

20. We discuss examples *infra* Part I.B.

but when the target audience reacts appropriately to the soft statute, the hard statute may become unnecessary. Second, a congressional communication may have a purely epistemic effect. Information about Congress's views might cause people to change their beliefs about the state of the world.<sup>21</sup> Third, in some settings other institutions that generate formal law take legislative views as an input. Agencies, courts, and the President regularly incorporate legislative views as one of many factors in the construction of binding policy.

Part I defines soft law and distinguishes it from related concepts. Part II explains how legislative soft law affects behavior. Part III discusses applications of the theory to the public, the President, and administrative agencies. Part IV discusses the implications of the theory for courts, focusing on statutory interpretation and constitutional adjudication. Part V offers a general theory of soft law, linking our analysis of soft statutes with soft constitutional law, soft international law, and other fields. We hope to stimulate thinking about the role of informal or nonlegal behavior in lawmaking institutions—a public-law analogue to the private-law-focused literature on law and social norms.<sup>22</sup>

## I. SOFT LAW IN LEGISLATURES

We define soft law as *a rule issued by a lawmaking authority that does not comply with constitutional and other formalities or understandings<sup>23</sup> that are necessary for the rule to be legally binding*. We define hard law as a rule issued by a lawmaking authority that does comply with constitutional and other formalities or understandings that are necessary for the rule to be legally binding. The lawmaking body uses soft law because the hard-law approach has disadvantages. Sometimes, but not always, soft law will produce the same behavioral effects that an otherwise equivalent hard law would have produced; at other times, soft law might have more desirable consequences than the nearest hard-law equivalent would.

### A. *Hard Statutes*

Article I, section 7 of the U.S. Constitution requires that a bill be approved by both houses of Congress (bicameralism) and signed by the President (presentment).<sup>24</sup> The Supreme Court has rejected many schemes that deviate from this “‘finely wrought’ procedure.”<sup>25</sup> However, congressional

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21. *Cf.* Dharmapala & McAdams, *supra* note 14 (discussing expressive effects of hard law).

22. *See* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

23. *See supra* note 12.

24. U.S. CONST. art. I, § 7.

25. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 440 (1998) (line item veto)



pronouncements can become the law of the land in other ways as well. Treaties are approved by two-thirds of the Senate.<sup>26</sup> Bills vetoed by the President nonetheless become law if approved by two-thirds of the House and the Senate.<sup>27</sup> In these latter cases, however, the law still satisfies the relevant procedural requirements. In most cases, compliance with these formalities distinguishes hard statutes from soft statutes. However, we will discuss some ambiguous cases below.

### B. *Soft Statutes*

Soft statutes do not meet the formal requirements for duly enacted legislation, but nonetheless may affect behavior. Two prime examples of soft legislation, and the ones on which we focus, are the simple resolution and the concurrent resolution.<sup>28</sup> A simple resolution is a resolution passed by a majority of one house of Congress.<sup>29</sup> Concurrent resolutions are approved by majorities of both houses of Congress.<sup>30</sup> Resolutions are used for a remarkably varied assortment of activities. A nonexclusive list from recent Congresses includes: (1) foreign policy judgments (for example, urging the European Union to maintain an arms embargo on China,<sup>31</sup> and calling on the President to recognize the Armenian genocide<sup>32</sup>); (2) urging revision of administrative regulations (such as those affecting industrial truck operator training,<sup>33</sup> labeling of clothing,<sup>34</sup> and the distribution of resources held for disaster relief<sup>35</sup>); (3)

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(“What has emerged in these cases from the President’s exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the ‘finely wrought’ procedure that the Framers designed.”); *INS v. Chadha*, 462 U.S. 919, 951 (1983) (legislative veto) (“It emerges clearly that the prescription for legislative action in Art. I, §§ 1, 7 represents the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”).

26. U.S. CONST. art. II, § 2.

27. *Id.* art. I, § 7.

28. As distinguished from the joint resolution, which is presented to the President just like a bill.

29. For a discussion of the history of concurrent resolutions, see Howard White, *The Concurrent Resolution in Congress*, 35 AM. POL. SCI. REV. 886, 886-87 (1941).

30. STANDING RULES OF THE SENATE, S. DOC. NO. 110-9, at 9 (2007), available at <http://rules.senate.gov/senaterules/Rules091407.pdf>; LEWIS DESCHLER, *DESCHLER’S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES*, ch. 24 § 5, at 4802 (1974).

31. See S. Res. 91, 109th Cong. (as passed by Senate, Mar. 17, 2005).

32. See S. Res. 320, 109th Cong. (as introduced Nov. 18, 2005).

33. See S. Con. Res. 35, 103d Cong. (1993) (recognizing that “workplace accidents involving powered industrial trucks are often the result of operation by poorly trained, untrained, or unauthorized operators”).

34. See H.R. Con. Res. 80, 105th Cong. (as introduced May 15, 1997); see also “Made in USA” and Other U.S. Origin Claims, 62 Fed. Reg. 63,756 n.19 (discussing concurrent resolution).

35. See S. Con. Res. 63, 104th Cong. (as passed by Senate, June 12, 1996); see also

low-cost symbolic interest group payoffs (celebrating Cancer Awareness Month<sup>36</sup>); (4) empty happy talk (congratulating a college football team for winning the championship<sup>37</sup>); and (5) administrative acts and housekeeping.<sup>38</sup> Resolutions from earlier Congresses are similar.

Congress agrees to a few dozen concurrent resolutions per year; each house agrees to a few hundred simple resolutions per year. Most of the concurrent resolutions fall into categories (3), (4), and (5); only a few express important sentiments, usually regarding foreign policy. The same is true for the House's simple resolutions. However, the Senate agrees to many, sometimes dozens of, significant simple resolutions in the first two categories.

Consider some recent proposed and agreed-to resolutions from 2007. One resolution expresses "disapproval of the Indiana Department of Environmental Management's issuance of a permit allowing BP to increase their daily dumping of ammonia and total suspended solids into Lake Michigan"<sup>39</sup> and urges Indiana to reconsider the issuance.<sup>40</sup> Another resolution states that:

it is the goal of the United States that, not later than January 1, 2025, the agricultural, forestry, and working land of the United States should provide from renewable resources not less than 25 percent of the total energy consumed in the United States and continue to produce safe, abundant, and affordable food, feed, and fiber.<sup>41</sup>

A third states that there should be an expansion of the program under which state and local law enforcement authorities arrest aliens who have violated U.S. law and encourages the Secretary of Homeland Security to ensure expedited consideration of a border fence.<sup>42</sup> Finally, the Iraq War Policy Resolution

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Flood Compensation Program, 64 Fed. Reg. 47,358 (discussing concurrent resolution).

36. See H.R. Con. Res. 250, 109th Cong. (as introduced Sept. 27, 2005) ("[s]upporting the goals and ideals of Gynecologic Cancer Awareness Month").

37. See S. Res. 12, 109th Cong. (as introduced Jan. 25, 2005) ("[c]ommending the University of Southern California Trojans football team for winning the 2004 Bowl Championship Series national championship game").

38. For example, adjournment is accomplished via resolution, as is adoption of the House Rules to govern the session.

39. H.R. Con. Res. 187, 110th Cong. (as passed by Senate, July 24, 2007).

40. *Id.*

41. S. Con. Res. 3, 110th Cong. (as introduced Jan. 17, 2007).

42. H.R. Con. Res. 218, 110th Cong. (as introduced Sept. 24, 2007) ("[I]t is the Sense of the Congress that—(1) Congress should verify that current immigration and border security laws are enforced; (2) the Secretary of Homeland Security should ensure that construction of the border fence is expedited . . . ; (3) the report required by the Secretary should include recommendations that would enhance United States national security on the northern border and emphasize the Administration's commitment to protecting both the southern and northern borders . . . ; (5) construction of the fence along the southern border should not be delayed; (6) Congress should fully fund the 18,000 Border Patrol agents as authorized under current law; and (7) State and law enforcement [sic] should be provided the necessary resources to prosecute those individuals who disregard United States immigration laws.").

expresses the sense of Congress that the United States should not deepen its military involvement in Iraq and specifies goals for the ongoing mission.<sup>43</sup>

These four statements provide important information to affected parties. Factories, municipalities, and residents living along the Great Lakes will make investments with an eye to possible congressional regulation in the future. So will the energy industry and people who live along the borders. The Iraq resolution signaled to the President that congressional and public support for the Iraq intervention had waned.

### C. *Ambiguous or Excluded Categories*

Many forms of legal pronouncements have features that resemble soft law and therefore warrant mention even if they are not the centerpiece of our analysis. These limitations make an already unwieldy topic more tractable.

#### 1. *Procedural rules*

The Rules of Procedure in the House and the Senate are a hybrid of soft and hard law. Because the House and Senate Rules are enacted pursuant to established procedural formalities, they meet our definition of hard law. However, they do not have formal legal effect outside the legislature: they are not judicially enforceable and they are not regarded as binding law by other legal authorities. In this way, congressional rules resemble soft law. Because others have discussed procedural rules,<sup>44</sup> and because we emphasize soft law that regulates external behavior rather than the decision making of government bodies,<sup>45</sup> we do not discuss procedural rules.

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43. See S. Con. Res. 2, 110th Cong. (as introduced Jan. 17, 2007) (“[I]t is the sense of Congress that—(1) it is not in the national interest of the United States to deepen its military involvement in Iraq, particularly by increasing the United States military force presence in Iraq; (2) the primary objective of United States strategy in Iraq should be to have the Iraqi political leaders make the political compromises necessary to end the violence in Iraq; (3) greater concerted regional, and international support would assist the Iraqis in achieving a political solution and national reconciliation; (4) main elements of the mission of United States forces in Iraq should transition to helping ensure the territorial integrity of Iraq, conduct counterterrorism activities, reduce regional interference in the internal affairs of Iraq, and accelerate training of Iraqi troops; (5) the United States should transfer, under an appropriately expedited timeline, responsibility for internal security and halting sectarian violence in Iraq to the Government of Iraq and Iraqi security forces; and (6) the United States should engage nations in the Middle East to develop a regional, internationally-sponsored peace and reconciliation process for Iraq.”).

44. See generally Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361 (2004) (collecting constitutional rules that regulate internal congressional practice).

45. We also exclude framework or procedural statutes that are duly enacted and therefore formally legally binding, but do not directly regulate external behavior. Instead, like internal rules, they regulate Congress’s internal business. The most prominent examples are framework statutes. See generally William N. Eskridge, Jr., *America’s Statutory*

## 2. Resolutions given legal effect by prior statutes

Sometimes a congressional enactment does not meet the formal procedural requirements for new legislation, but is given formal legal effect because of a prior duly enacted law. The legislative veto, for example, allows one or two houses of Congress to override a policy decision of the executive branch or administrative agency by using a simple or concurrent resolution.<sup>46</sup> The negative legislative veto allows policy to be implemented unless Congress disapproves; the positive legislative veto forbids policy to be implemented unless Congress approves *ex post*.<sup>47</sup> The Supreme Court has held a negative one-house legislative veto unconstitutional, and its reasoning clearly suggested that the positive legislative or two-house veto would be unconstitutional as well.<sup>48</sup> A related mechanism permits Congress to use a resolution to terminate a prior statutory delegation of authority to the President.<sup>49</sup> The legislative veto and related mechanisms are soft statutes in the sense that they do not satisfy the bicameralism and presentment requirements. But they are hard law because a prior duly enacted statute grants formal legal effect to the simple or concurrent resolution.

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*"constitution"*, 41 U.C. DAVIS L. REV. 1, 7-9 (2007) (describing the regulation provided by both constitutional mandates and framework statutes for the judicial, executive, and legislative branches); Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005) (identifying several examples of framework legislation and describing five of its purposes); Ernest A. Young, *Toward a Framework Statute for Supranational Adjudication*, 57 EMORY L.J. 93 (2007) (proposing "a set of statutory principles to regulate the delegation of authority to supranational adjudicatory institutions").

46. BARBARA HINKSON CRAIG, *THE LEGISLATIVE VETO: CONGRESSIONAL CONTROL OF REGULATION* 8 (1983). See generally JOHN R. BOLTON, *THE LEGISLATIVE VETO: UNSEPARATING THE POWERS* (1977).

47. See, e.g., Energy Conservation and Production Act, Pub. L. No. 94-385, § 305, 90 Stat. 1125 (1974) (no longer in force) (requiring sanctions involving federal assistance performance standards for new buildings to be approved by resolution of both houses); Export-Import Bank Amendments of 1974, Pub. L. No. 93-646, § 8, 88 Stat. 2333 (1975) (no longer in force) (requiring concurrent resolution to approve of presidential limitations for exports to the USSR); Trade Expansion Act of 1962, Pub. L. No. 87-794, § 351(a)(2), 76 Stat. 872 (no longer in force) (requiring concurrent resolution to approve of Tariff Commission recommended tariffs or duties); Export-Import Bank Amendments of 1974, Pub. L. No. 93-646, § 8, 88 Stat. 2333, 2336, (codified at 12 U.S.C. § 625(e)) (requiring concurrent resolution to approve of presidential limitations for exports to the USSR); Energy Conservation and Production Act, Pub. L. No. 94-385, § 305, 90 Stat. 1125, 1148 (1976), (codified at 42 U.S.C. § 6834) (requiring sanctions involving federal assistance performance standards for new buildings to be approved by resolution of both houses). For more examples, see *INS v. Chadha*, 462 U.S. 919 (1983) (holding the one-house legislative veto unconstitutional); *id.* at 1003-13 (White, J., dissenting) (listing statutes with provisions authorizing congressional review).

48. See *Chadha*, 462 U.S. at 946-47, 955.

49. See, e.g., Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23 (no longer in force); *Allen v. Grand Cent. Aircraft Co.*, 347 U.S. 535, 541-42 (1954) (discussing this legislation); *United States v. Moore*, 340 U.S. 616, 621 (1951) (discussing use of concurrent resolution as a condition subsequent for termination of legislation).

### 3. *Bill introduction and other internal actions and statements*

It is tempting to say that the soft statute is similar to the introduction of a bill. Bills are introduced constantly in both houses. Most are never passed; on some, virtually no action is taken at all. At the same time, the introduction of a bill might reveal information about congressional preferences, and in this way may be functionally similar to a soft statute—providing weaker but still informative signals of congressional views. A similar argument could be made about other statements that are made in a legislative session—speeches on the floor, statements made at oversight hearings, reports, and so on. As we will argue in Part II.C, however, these types of statements rarely have much credibility. In addition, they have been extensively discussed in the literature on legislative interpretation. For these reasons, we emphasize other forms of legislative soft law and discuss these mechanisms only in passing.

### 4. *Ambiguously worded statutes*

International relations scholars sometimes classify ambiguous treaties as soft law. Whatever the merits of this judgment for understanding international relations,<sup>50</sup> we adopt a different approach in our analysis of statutes. American courts almost always enforce ambiguous statutes, using canons of interpretation to clarify the meanings of those statutes. These statutes thus are lawfully binding. In rare cases, courts refuse to enforce ambiguous statutes. In administrative law, for example, the nondelegation doctrine—to the extent that it remains valid law<sup>51</sup>—prohibits Congress from granting authority to executive agencies without an “intelligible principle” to guide them. The vagueness doctrine renders criminal statutes unenforceable if they are too vague.<sup>52</sup> In extreme cases where statutes are unenforceable because they are ambiguous, it might make sense to classify them as soft law, but their very ambiguity also means that they can have little effect on people’s behavior, as no one can know what they mean. For this reason, we will exclude ambiguous statutes from the category of soft law as well.

### 5. *Hortatory statutes*

By contrast, there are numerous statutes that are absolutely clear and that satisfy the procedural requirements for legislation, but that also have no formal legal effect because the statute, by its terms, provides that the rules it sets down cannot be enforced, or because Congress refuses to appropriate funds to enforce

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50. For criticism, see GOLDSMITH & POSNER, *supra* note 2, at 91-100; Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581, 588-91 (2005).

51. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1740 (2002).

52. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

them.<sup>53</sup> For example, the Supreme Court interpreted the weak language in the Developmentally Disabled Assistance and Bill of Rights Act as intending “to encourage, rather than mandate, the provision of better services to the developmentally disabled.”<sup>54</sup> In another case, the Court noted that “Congress sometimes legislates by innuendo, making declarations of policy and indicating a preference while requiring measures that though falling short of legislating its goals, serve as a nudge in the preferred directions.”<sup>55</sup> Weak fair-housing laws were sometimes said to be hortatory pronouncements with extremely weak enforcement mechanisms.<sup>56</sup> Before the courts interpreted the National Environmental Policy Act to impose procedural burdens on agencies, the command to “consider” environmental impact was thought to impose no enforceable obligations.<sup>57</sup> Consider also statutes that create voluntary regulatory programs.<sup>58</sup> These hortatory statutes are hard law under our definition because they satisfy procedural requirements; however, because they have no binding legal effect, they resemble soft law.

#### 6. *Substantively unconstitutional statutes*

Many other statutes satisfy the bicameralism and presentment requirements, and other procedural formalities, but they are “substantively” unconstitutional—they violate the First Amendment or due process requirements or exceed the scope of Congress’s delegated powers. We will treat these statutes as hard statutes because, in the usual case, Congress seeks to achieve a legal effect but is thwarted by the courts or the Constitution. In a system with judicial review, the substantively unconstitutional statute or even procedurally invalid statute imposes binding legal obligations unless and until a court strikes down the statute. In a system without judicial review, when legislators overstep constitutional limitations and the President agrees,

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53. For discussions of “symbolic” statutes, see, for example, John P. Dwyer, *The Pathology of Symbolic Legislation*, 17 *ECOLOGY L.Q.* 233 (1990) (criticizing symbolic statutes); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 *DUKE L.J.* 1, 74-76 (1997) (comparing instrumental, expressive, and symbolic statutes).

54. See *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 20 (1981).

55. See *Rosado v. Wyman*, 397 U.S. 397, 413 (1970).

56. Duane Lockard, *The Politics of Antidiscrimination Legislation*, 3 *HARV. J. ON LEGIS.* 3, 4 (1965).

57. See ROBERT G. DREHER, *NEPA UNDER SIEGE: THE POLITICAL ASSAULT ON THE NATIONAL ENVIRONMENTAL POLICY ACT* 14-15 (2005); John H. Barton, *Behind the Legal Explosion*, 27 *STAN. L. REV.* 567, 579 (1975) (“The 1969 National Environmental Protection Act directed federal agencies to consider the environmental effects of their actions. These hortatory provisions, perceived as unenforceable, indicated that Congress had not yet decided what should be sacrificed for the sake of the environment.”).

58. See generally Sophie Hsia, *Foreign Direct Investment and the Environment: Are Voluntary Codes of Conduct and Self-Imposed Standards Enough?*, 9 *ENVTL. LAW.* 673 (2003).

substantively unconstitutional statutes will nevertheless carry formal legal force. In some cases, however, Congress might enact a statute that it expects to be struck down, in the hope of achieving soft-law-style effects—sending a signal to the courts that their jurisprudence conflicts with public values or to dissenting members of the public that their behavior violates fundamental social norms. The Flag Protection Act of 1989, struck down by the Supreme Court in *United States v. Eichman*,<sup>59</sup> is a law of this sort. The Act was passed after the Supreme Court held flag burning a form of protected speech in *Texas v. Johnson*.<sup>60</sup> In addition, many statutes are nonjusticiable: courts refuse to hear the merits of cases brought under them because they believe the statutes implicate political questions such as the balance of power between the legislative and executive branches. The War Powers Resolution,<sup>61</sup> which regulates the executive's use of military force, is one such example.<sup>62</sup>

## II. HOW DOES SOFT LAW AFFECT BEHAVIOR?

We propose two main theories for the use of soft statutes in particular and soft law in general. First, Congress or another lawmaking body uses soft law to convey information about future intentions to enact hard law, allowing people to adjust their behavior in advance of binding statutes and in some cases avoiding constitutional requirements that apply to hard law. As we will show, soft law can be useful in this way even when the anticipated hard-law successor never materializes: if people adjust their behavior in anticipation of hard law, hard-law enactment might not be necessary.<sup>63</sup>

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59. 496 U.S. 310 (1990).

60. 491 U.S. 397 (1989).

61. War Powers Resolution, 50 U.S.C. §§ 1541-1548 (2000).

62. See *Campbell v. Clinton*, 203 F.3d 19, 24-25 (D.C. Cir. 2000) (Silberman, J., concurring) (“[I]n my view, no one is able to bring this challenge because the two claims are not justiciable. We lack ‘judicially discoverable and manageable standards’ for addressing them, and the War Powers Clause claim implicates the political question doctrine.”). In principle, a rule can be hard law and nonjusticiable; other agents regard the rule as legally binding but courts do not enforce it. In the case of the War Powers Act, Presidents have generally declined to say that they will not comply with it, preferring to interpret it narrowly in light of their constitutional war-making powers.

63. There is a related hard-law theory that hard laws that are not enforced may nevertheless affect behavior by serving as a focal point around which people coordinate. See McAdams, *supra* note 14. As McAdams points out, this theory can be extended to government actions that are merely symbolic. See Richard H. McAdams, *An Attitudinal Theory of Expressive Law*, 79 OR. L. REV. 339, 379-80 (2000) (analyzing government displays of flags and religious symbols); see also Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998) (analyzing symbolic government behavior). For evidence, see Patricia Funk, *Is There an Expressive Function of Law? An Empirical Analysis of Voting Laws with Symbolic Fines*, 9 AM. L. & ECON. REV. 135 (2007) (providing evidence that the abolition of voting law that was never enforced affected voting behavior).

Second, Congress uses soft law to convey information about its beliefs about the state of the world—both factual and normative. The Armenian Genocide resolution, for example, expressed the factual belief that the Armenian Genocide actually occurred—a historical event that is officially denied in Turkey—and the normative belief that the Armenian Genocide was wrong, rather than (as Turkey sometimes argues in the alternative) a series of massacres that were an excusable incident to war. Congress's beliefs about states of the world may influence the beliefs of other people.

In both settings, soft law is a signal that provides information. Like other signals, soft law can convey information more or less accurately and more or less efficiently. Soft law is preferable to hard law when the signal conveys information more reliably or more cheaply than hard law does. This Part surveys the relevant variables that affect the direction and magnitude of these tradeoffs.

### *A. Soft Law as a Strategic Instrument*

#### *1. How law conveys information*

At first sight, it may seem that the difference between soft and hard statutes is considerable. Hard statutes have the force of law; people comply with them in order to avoid sanctions. Soft statutes do not, so people should not follow them. However, we can profitably think about both types of statutes in a different way. A regular statute is essentially an act of communication that satisfies certain formal requirements set out in the Constitution and embodied in tradition. By voting and satisfying other formalities, Congress communicates to courts and other legal agents that certain behavior will now be subjected to sanctions. The courts and other agents in turn interpret these communications in light of specific disputes or factual settings, and issue orders to another set of agents who have coercive powers—police officers, wardens, soldiers, marshals. Thereupon these agents engage in the designated actions. Anticipating this chain of events, most people engage in the desired behavior rather than risk sanctions.

The agents who receive this signal from Congress do not in any sense act automatically. Indeed, agents often refuse to comply with Congress's order. Most commonly, judges refuse to order agents to comply with a regular statute that violates the Constitution. Executive officials, in turn, will refuse to enforce the statute if judges forbid them to. Less commonly, the President and executive agencies will refuse to follow or enforce a statute if they believe that it violates the Constitution.<sup>64</sup> Anticipating these responses, many ordinary

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64. See Walter Dellinger, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. Off. Legal Counsel 199 (1994).



people might refuse to comply with the statute. Although scholars typically treat sanctions as “fixed,” that is, exogenously determined, in fact they emerge endogenously in a large-scale game in which people with sanctioning power obey lawmakers only as long as lawmakers behave legitimately and lawmakers create sanctions in anticipation of how the people with sanctioning power respond.<sup>65</sup>

A soft statute also reveals legislative information. The relevant audience no longer has a legal obligation to follow Congress’s order, but it may nonetheless change its behavior. When parties change their behavior in response to soft law, it cannot be because they fear immediate formal legal sanctions. Nonetheless, because soft law reveals information about legislative beliefs, there are settings in which rational observers will react as if it were hard law.

## 2. *Theories of communication*

To explain the influence of soft statutes, we need a theory of how legislative communication can influence behavior. Fortunately, there are many such theories, and we draw on them below.

### a. Signaling theories

One theory is that Congress’s statement provides the addressee with information about Congress’s goals or interests. If Congress says that it opposes the Iraq war, the public learns that Congress disapproves of the Iraq war, or at least that it is more likely that Congress disapproves of the war than would be the case if Congress did not make this statement. The public might also learn more generally that Congress does not approve of preventive or humanitarian wars. This information is useful, and it might cause some members of the public to change their behavior. For example, investors might be more reluctant to invest in firms that supply the military, and people who seek military training but not combat experience might become more willing to join the army. When one house of the legislature expresses a clear viewpoint that diverges from the President’s or the other chamber’s, the public will rightly understand that a new statute inconsistent with the one chamber’s view is less likely.

But why is Congress’s statement credible? Maybe Congress does not really mean that it disapproves of the Iraq war, but is trying to obtain some short-term political advantage by pandering to temporary passions. Perhaps the legislature is exploiting a transient public mood in the hope of pressuring the President to yield in some other political disputes between the two branches.

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65. See George J. Mailath et al., *Maintaining Authority* (Sept. 26, 2007) (unpublished manuscript), available at <http://www.princeton.edu/%7Esmorris/pdfs/authority.pdf> (modeling legal authority).

A standard insight of the signaling theory literature in economics is that as a general matter, a statement is credible when it is accompanied by a costly action—in particular, an action that is more costly for a dishonest speaker to engage in.<sup>66</sup> Passing resolutions is costly: it takes time that could be used for other things—passing legislation, engaging in constituent service, meeting supporters, enjoying leisure. These other activities benefit members of Congress either directly or by improving their chances for reelection. If Congress spends resources to enact a resolution disapproving the Iraq war, observers will rationally infer that Congress cares more about this issue than it cares about other issues for which it does not enact resolutions. In turn, people who are taking actions with an eye toward how Congress might, in the future, regulate the Iraq intervention or other military interventions would do well to take note of the resolution.

There is another signaling mechanism that can explain why soft statutes are credible. Suppose that Congress can benefit from resolutions because they let the President know Congress's view on a particular issue—say, budgetary priorities. If the President knows Congress's view, he can take account of it when formulating a budget prior to its submission to Congress. By doing so, the President can avoid a subsequent budgetary impasse that hurts both him and Congress.<sup>67</sup> Moreover, if the President takes the soft statute seriously, then Congress thereby reduces the first-mover advantage (however slight) that otherwise accrues from the President's ability to propose an initial budget.

Congress and the President engage in repeated play extending indefinitely into the future. The President may well adopt the strategy of taking seriously Congress's resolutions as indications of Congress's views only as long as Congress in fact acts consistently with the resolutions when the budget is submitted. If Congress can commit its members to act consistently with resolutions, then it benefits from having a reputation for complying with its resolutions. The resolutions are credible; others, such as the President, the courts, and the public, will believe them.

#### b. Cheap-talk theories

Communication can be credible even when it is not costly, as long as certain other conditions are satisfied. One such setting exists when parties have sufficiently aligned preferences.<sup>68</sup> Suppose, for example, that a congressional oversight committee seeks to publicly disclose internal executive branch memoranda to which it has been given access on condition that it maintain the memoranda's confidentiality. The committee demands permission from the

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66. Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355, 361-62 (1973).

67. Cf. Posner & Vermeule, *supra* note 1.

68. Vincent P. Crawford & Joel Sobel, *Strategic Information Transmission*, 50 ECONOMETRICA 1431 (1982).

executive branch. The President prefers to avoid such disclosure but will consent to it if the public is likely to react negatively to nondisclosure. Suppose further that Congress has better information about the public's likely reaction than the President does. If the oversight committee is dominated by the opposite party, the President is not likely to heed its assurances that public disclosure is politically necessary. A partisan committee's argument lacks credibility because it benefits when the President's standing is damaged. But if Congress as a whole passes a resolution advocating disclosure—especially if known moderates and many members of the President's party support the resolution—the claim that disclosure is politically necessary gains credibility, and the President might therefore acquiesce.

The difference between this type of model and the signaling model is that in the signaling model the cost associated with a particular behavior is assumed—it is exogenous—whereas in the cheap-cost model the cost arises in the equilibrium. In the example, the congressional resolution is assumed to be costless; nonetheless, it conveys information to the president, and affects the President's behavior, because some members of Congress have interests that are aligned with those of the President.

In a related cheap-talk model, a political agent must express its view about some issue, where there are two separate audiences with conflicting political preferences.<sup>69</sup> Suppose, for example, that when Congress issues a condemnation of the Armenian Genocide, the relevant audience consists of Armenians and Armenian-Americans, on the one hand, and Turkey and its American supporters, on the other hand. Assume that both groups have political power and can punish members of Congress for adopting a resolution that they disapprove. Here, when Congress condemns the Armenian Genocide, it incurs a cost in the form of political pressure or loss of political opportunities from Turkey and its supporters. Congress's willingness to incur this cost indicates that its support for Armenia is credible. Indeed, analytically this is very similar to the signaling game: the cost is not intrinsic, but related to a consequence of the statement. Nonetheless, so long as the cost is observable, it will have the same effect of producing credibility.

### 3. Implications

As long as Congress can credibly reveal its intentions with congressional resolutions, it is likely that people's behavior can be affected by these resolutions as well. If resolutions reveal Congress's policy views and hence the path of future legislation, then potentially affected parties will adjust their

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69. Joseph Farrell & Robert Gibbons, *Cheap Talk with Two Audiences*, 79 AM. ECON. REV. 1214 (1989). For an overview as applied to legislative process, see David Austen-Smith, *Strategic Models of Talk in Political Decision Making*, 13 INT'L POL. SCI. REV. 45, 57 (1992).

behavior in light of their updated beliefs about the legal environment in the future. Indeed, occasionally soft statutes anticipate, and appear to cause, the adoption of voluntary codes of conduct. The Recording Industry Association of America adopted advertising guidelines for notice of explicit lyrics<sup>70</sup> after a congressional resolution urged a uniform labeling and disclosure system.<sup>71</sup> Colleges and universities adopted voluntary guidelines on illegal file-sharing on university computer networks after congressional resolutions encouraged such action.<sup>72</sup> The decision of several major food companies to restrict advertising for “junk food” during children’s television programs follows this pattern, too.<sup>73</sup> It is possible, of course, that private parties would have taken these actions even without the resolutions, but the coincidence is striking. This way of affecting behavior need not take the form of resolutions. Simple threats or promises from congressional leaders or oversight committees can also do the trick, as others have noted.<sup>74</sup> But soft statutes, because they reflect the views of the entire body (a chamber, or Congress as a whole), should be a particularly useful vehicle for accomplishing this purpose. We will consider additional examples in Part III.

### B. *Soft Law as an Epistemic Instrument*

In international law, much discussion has revolved around the possibility that soft law reflects normative commitments that governments will not initially treat as law but that nonetheless eventually influence them or their successors.<sup>75</sup> The Universal Declaration of Human Rights is the preeminent

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70. See Mariea Grubbs Hoy & J. Craig Andrews, *Entertainment Industry Ratings Disclosures and the Clear and Conspicuous Standard*, 40 J. CONSUMER AFF. 117, 123 (2006) (discussing history of the RIAA’s voluntary guidelines).

71. H.R. Con. Res. 328, 101st Cong. (1990).

72. See S. Res. 488, 109th Cong. (2006) (enacted) (“Expressing the sense of Congress that institutions of higher education should adopt policies and educational programs on their campuses to help deter and eliminate illicit copyright infringement occurring on, and encourage educational uses of, their computer systems and networks.”); see also Vincent Kiernan, *Higher-Education Organizations Urge a Crackdown on Illegal File Sharing*, CHRON. HIGHER EDUC., Oct. 25, 2002, at A37.

73. See H.R. Con. Res. 204, 109th Cong. (2005) (stating that “the Federal Government has a responsibility . . . to target prevention and intervention to reduce obesity and overweightedness in children and adolescents”); Andrew Martin, *Leading Makers Agree to Put Limits on Junk Food Advertising Directed at Children*, N.Y. TIMES, Nov. 15, 2006, at C3.

74. See Matthieu Glachant, *Non-binding Voluntary Agreements*, 54 J. ENVTL. ECON. & MGMT. 32 (2007); Guy Halfteck, *Legislative Threats*, 61 STAN. L. REV. 629 (2008) (arguing that threat of legislative action prompted voluntary guidelines or self-regulatory changes in the U.K. in digital obscenity, hazardous waste recycling, greenhouse-gas emissions, and automobile pollution); Matthieu Glachant, *Voluntary Agreements Under Endogenous Legislative Threats* (Fondazione Eni Enrico Mattei, Working Paper No. 36.2003, 2003), available at [http://ssrn.com/abstract\\_id=406460](http://ssrn.com/abstract_id=406460).

75. See, e.g., Abbott & Snidal, *supra* note 2.

example. Formally, the Declaration had no legal effect; it was merely a declaration to which states agreed on condition that it create no legal obligations.<sup>76</sup> Today, it has a great deal of normative authority. States criticize others for failing to live up to the Declaration's aspirations, and they go to the trouble of defending themselves when subject to like criticism. How did this happen?

An initial puzzle concerns the moral status of the Declaration itself. If the Declaration merely embodied universal or widely held moral views, then it is not clear what the Declaration adds to this prior moral consensus. Writing down our moral views on a piece of paper should not make them any stronger. On the other hand, if the Declaration deviates from moral views, then presumably the Declaration would not have much moral force.<sup>77</sup>

To understand how norms might spread, suppose that agents have some but not full information about the state of the world; that their beliefs are independent, that is, not derived from the same sources or sources that are in some way correlated; and that they sincerely express their views through a voting process. As the size of the group increases, the probability that the majority will vote correctly approaches one. So even if each individual has only a low probability of being correct, a relatively small group will jointly reveal the correct state of the world with a probability that rapidly approaches one as the group size increases. This phenomenon is known as the Condorcet Jury Theorem.<sup>78</sup>

In the real world, people who vote in groups do not always satisfy these conditions. They do not always vote sincerely, and they sometimes have zero rather than a little information about the issue in question. If individual members of a group pick the wrong answer more often than the right answer, then the aggregate judgment of the group will not tend towards accuracy. Nonetheless, the larger point is that when an institution (or person) expresses its views about a topic, it reveals information that others can benefit from, and the informational benefits can sometimes be dramatic.<sup>79</sup>

Let us distinguish two types of facts: descriptive and normative (moral). A descriptive fact is that the Armenian Genocide occurred. A moral fact is that the Armenian Genocide was wrong. No one doubts that descriptive facts exist; the case for moral facts is more complicated, but it is at least plausible that certain moral judgments are facts or otherwise have the necessary features such that the Condorcet Jury Theorem can be applied to them.<sup>80</sup>

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76. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

77. Some scholars have argued that states might imitate other states that enjoy greater international prestige. See, e.g., Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 671 (2004).

78. Dharmapala & McAdams, *supra* note 14.

79. *Id.*

80. See Eric A. Posner & Cass R. Sunstein, *The Law of Other States*, 59 STAN. L. REV.

In the case of congressional resolutions, the Condorcet Jury Theorem operates at two levels. The congressional resolution aggregates the votes of members, and the congressional resolution can be treated as one vote in a larger, more informal national or global debate about a particular moral or descriptive fact. If one thinks that the members of Congress voted sincerely and had independent (or roughly independent) sources of information, then one should be more inclined to believe that the Armenian Genocide occurred (and was wrong, assuming that moral facts exist) as a result of the resolution. And if multiple legislatures, governments, or other institutions around the world issue similar resolutions or statements, and one believes that they vote sincerely and on the basis of independent sources of information, then one's inclination to believe that the genocide occurred should be strengthened. A similar point can be made about resolutions that praise military withdrawals and peace agreements,<sup>81</sup> condemn human rights violations, military threats, and internal meddling,<sup>82</sup> urge reform in foreign countries,<sup>83</sup> and identify domestic problems that need attention.<sup>84</sup>

There is reason to be skeptical about whether congressional resolutions actually do work in a Condorcetian manner.<sup>85</sup> The opposite phenomenon—herding or cascading, where people imitate others for reputational or informational purposes—is just as plausible.<sup>86</sup> Voting might simply reflect public sentiment or a desire to go along with colleagues for other reasons. Still,

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131, 136 (2006).

81. *See, e.g.*, S. Res. 139, 109th Cong. (2005) (enacted) (“[e]xpressing support for the withdrawal of Russian troops from Georgia”).

82. *See, e.g.*, H.R. Res. 738, 110th Cong. (2007) (enacted) (“[e]xpressing the sense of the House of Representatives regarding the government of Syria’s continued interference in the internal affairs of Lebanon”); H.R. Res. 523, 109th Cong. (2005) (enacted) (“[c]ondemning Iranian President Mahmoud Ahmadinejad’s threats against Israel”); S. Res. 63, 109th Cong. (2005) (enacted) (“[c]alling for an investigation into the assassination of Prime Minister Rafiq Hariri and urging steps to pressure the government of Syria to withdraw from Lebanon”).

83. *See, e.g.*, S. Res. 231, 109th Cong. (2005) (enacted) (“[e]ncouraging the Transitional National Assembly of Iraq to adopt a constitution that grants women equal rights under the law and to work to protect such rights”).

84. *See, e.g.*, H.R. Res. 716, 110th Cong. (2007) (enacted) (expressing the sense of the House of Representatives with respect to raising awareness and enhancing the state of computer security in the United States).

85. *See* Adrian Vermeule, Many-Minds Arguments in Legal Theory (Jan. 26, 2008) (unpublished manuscript, on file with author), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1087017](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1087017). The theorem implies that groups have more accurate views than individuals only if voting is sincere, which will normally conflict with the premises of rational choice theory. *See* David Austen-Smith & Jeffrey S. Banks, *Information Aggregation, Rationality, and the Condorcet Jury Theorem*, 90 AM. POL. SCI. REV. 34, 42 (1996).

86. *See* Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. ECON. PERSP. 151 (1998).

if the Condorcetian theory applies with respect to either descriptive facts or moral facts, then the soft statute can be informative and useful.

### *C. Soft Law Versus Hard Law: Costs and Benefits*

There are two main advantages of soft law. First, it is cheaper to produce than hard law, as it does not require presidential consent. Second, soft law more accurately conveys information about congressional views than hard law does. That information is particularly useful in domains where Congress acts without the President's cooperation—as it does when it expresses its views about its constitutional role, exercises oversight over regulatory agencies, and expresses legislative views where the President's views are already known, are in tension with Congress's views, or are not relevant.

The main disadvantage of soft law is straightforward: it does not produce legally binding rules except in the uncertain case where a prior hard-law enactment vests it with this authority. Another possible disadvantage of soft law is that it may violate rule-of-law values such as clarity that procedural formalities are supposed to protect.<sup>87</sup>

#### *1. Advantages of soft law*

We have argued that soft law conveys congressional views. But Congress also communicates using hard statutes—directly influencing behavior and advancing normative judgments. Why are soft statutes ever a preferable mechanism for conveying information, given that ordinary statutes convey information and have the additional desired effect of binding force?

*Cheapness.* The first advantage of soft laws is that they can sometimes accomplish what hard laws accomplish but at a lower cost.<sup>88</sup> Suppose, for example, that at time 1 Congress is considering whether to pass a law at time 2. This law will tax some behavior *X*. However, at time 1 Congress is not certain whether *X* is desirable or undesirable, or whether a law that taxed *X* would have undesirable consequences. Congress could handle its uncertainty with various hard law methods: (a) it could pass the law at time 1, realizing that it can repeal the law if it has undesirable effects at time 2; (b) it could pass the law at time 1 and subject it to a sunset provision, realizing that it can reenact the law if it has desirable effects at time 2; (c) it could wait until time 2 before enacting the law and possibly make the law retroactive; (d) it could also pass the law with moderate sanctions or loopholes so that the effect of the law reflects Congress's

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87. Reducing this uncertainty is the usual explanation of the purpose of legal formalities. See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 618-19 (1992).

88. This is a theme of the cognate literature on international soft law. See, e.g., Abbott & Snidal, *supra* note 2.

uncertainty about the undesirability of *X*. All of these approaches have various costs and benefits.<sup>89</sup>

The soft-law alternative is (for example) to issue a resolution at time 1 that condemns *X*. Such a law will lead people to believe that enactment of a hard law at time 2 is more likely but still not certain. The law will produce fewer behavioral changes than (a) and (b) (if the sanction is high enough), but more effects than (c). And it could have more or less effect than (d), depending on what the sanctions and loopholes are. With respect to (a) and (b), the soft law approach is cheaper; it need not be cheaper with respect to (c) and (d). Depending on the degree of Congress's uncertainty and the relative costs of enacting soft and hard law, the legislature could prefer soft law to the alternatives. An additional advantage of the soft law is that it may stimulate debate. Seeing that a hard law is possible in the future, people will come forward with arguments for or against, which will in turn improve Congress's ability to evaluate *X*.<sup>90</sup>

Or consider the earlier suggestion that Congress's judgment about states of the world can influence the public's views. Suppose Congress seeks to condemn the Armenian Genocide while the President prefers not to, fearing injury to American relations with Turkey. Nonetheless, the President would be willing to sign into law a bill condemning the Armenian Genocide in return for congressional cooperation on some other issue. A hard-law condemnation of the Armenian Genocide would be more costly for Congress than a soft-law condemnation would be. At the same time, the soft-law condemnation could be just as effective as the hard-law condemnation. If the public trusts Congress but not the President, then presidential participation in the statement adds nothing to its credibility. Thus, in the right conditions, the cheapness of the soft law approach can produce benefits for Congress without offsetting costs.

*Information about legislative preferences.* Soft statutes can be better indicators of legislative intent than hard statutes or legislative history.<sup>91</sup> As an indicator of underlying views of the Senate, the Senate Resolution is a better instrument than a hard statute. As an indicator of congressional views, the concurrent resolution is a better indicator than a hard statute. In the former case, the views of the President and the House will affect what proposals are

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89. See Jacob E. Gersen & Eric A. Posner, *Timing Rules and Legal Institutions*, 121 HARV. L. REV. 543, 559-61 (2007).

90. Here, soft law is a parallel mechanism to the Notice of Proposed Rulemaking or Notice of Inquiry that administrative agencies use.

91. One caveat is in order. Whether a multimember institution actually can have an intent has been much debated. As Kenneth A. Shepsle observed, "Congress is a they, not an it." Kenneth A. Shepsle, *Congress Is a 'They,' Not an 'It': Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992). We treat legislative intent as a stand-in for a collection of ideas like contemplated effect, mood, or views of the legislature. In most of our analysis, it will not matter in a significant way. If the soft statute reveals information, be it about the world at large or about future congressional action, that is enough to generate the effects we note.



passed by the Senate. In the latter case, the prospect of a presidential veto will affect the legislation that Congress proposes.<sup>92</sup> To illustrate, suppose there are three potential meanings of a statutory provision: *A*, *B*, and *C*. Congress prefers interpretation *A* to *B* and prefers *B* to *C*. The President prefers meaning *C* to *B* and *B* to *A*. If the President would veto a statute with meaning *A*, Congress will pass a statute with meaning *B*. The statute is a correct indicator of congressional intent in the sense that a majority of both houses preferred meaning *B* to *C* and meaning *B* to the status quo. It is, however, a poor indicator of what Congress thought best (meaning *A*) precisely because what Congress “says” in hard statutes is a function of what the President prefers. A hard statute is not a clear instrument with respect to congressional intent because it reflects the views of multiple institutions.<sup>93</sup>

Why should one care about the intent of the Senate or House alone, or even the two houses jointly? After all, a common view is that they can create law only by securing the consent of the President. One reason is that this last statement is not accurate. When Congress acts on its own (for example, overriding a veto), or houses operate separately (the Senate handles appointments, consents to treaties, adjudicates impeachments; the House initiates impeachments, originates revenue bills), observers will want more refined information than that contained in a statute. The hard statute provides crude information because it reveals only that Congress preferred the enacted outcome to the status quo, but it does not convey preference orderings for other available alternatives. And when the President’s views are already well known, or the President is on his way out of office, Congress’s views might be all that people need to learn. Indeed, in several important cases that we discuss below, Congress’s views alone are of crucial importance: in Congress’s effort to stake out its constitutional role vis-à-vis that of the President, and in oversight of regulatory agencies. In these cases, the soft statute conveys better information about future political outputs than hard statutes do.

Soft statutes can convey information only if people have reason to believe that they actually reflect Congress’s views. Skepticism about the credibility of congressional documents, such as legislative history, is widespread, and might extend to soft statutes as well. Legislative actors often make statements that are not reliable indicators of their actual views. When a legislator makes a speech on the floor proclaiming her view on some matter, it is sometimes cheap talk. There is virtually no cost to entering a statement in the Congressional Record.

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92. William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523, 528-29, 532 (1992).

93. See Ethan Bueno de Mesquita & Dimitri Landa, *Transparency and Clarity of Responsibility* (Sept. 25, 2007) (unpublished manuscript, on file with author) (arguing that accurate inferences about a given institution’s views turn on clarity—the ability to infer which actor is making a statement—and transparency—the ability to infer actual views from a public statement).

Other than sanctions imposed by fellow legislators or the public, there are no concrete costs that the legislator must bear in making the statement.

Be that as it may, it is incorrect to say that the simple resolution is cheap talk and therefore not credible; it entails some positive cost less than the cost of enacting a statute but more than the cost of a legislative speech.<sup>94</sup> In addition, as we discussed in Part II.A.2.b, even cheap talk can be credible.

## 2. *Disadvantages of soft law*

The binding effect of hard law is its straightforward advantage over soft law, and we need not dwell on this issue. A more interesting possibility is that hard law better satisfies rule-of-law values such as publicity than soft law does. The main distinction between hard law and soft law is that hard law complies with formalities that clearly distinguish binding law. A central tenet of the rule of law is that law be public, so that people may debate it, object to it, and plan their lives around it. Secret law is anathema and perhaps soft law resembles secret law.

This concern can be easily overstated, however. If soft law is secret, then it cannot regulate, in which case it cannot serve any useful purpose. Congressional resolutions themselves also comply with publicity formalities that distinguish them from unenacted bills. Nonetheless, one might worry that unsophisticated people, or people who cannot get legal advice, are likely to misunderstand the importance of soft law, putting them at a disadvantage with respect to savvier fellow citizens.

Consider, for example, Susan Rose-Ackerman's critique of the Supreme Court's interpretation of The Developmentally Disabled Assistance and Bill of Rights Act in *Pennhurst State School v. Halderman*.<sup>95</sup> The Court rejected the plaintiffs' argument that the statute created judicially enforceable rights for the developmentally disabled, arguing instead that the weak language in the Act indicated that Congress intended to announce a policy in the hope of eliciting a favorable response from states.<sup>96</sup> Rose-Ackerman argues that the Court's holding permitted Congress to earn public credit by enacting a statute that expressed popular aspirations but did not have any effect. Perhaps the Court should have "repealed" the statute, which would have embarrassed Congress and forced it to enact clearer legislation.<sup>97</sup>

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94. Cf. Matthew C. Stephenson, *The Price of Public Action: Constitutional Doctrine and the Judicial Manipulation of Legislative Enactment Costs*, 118 YALE L.J. 2 (2008) (surveying legislative and agency contexts in which higher-cost actions are more credible).

95. 451 U.S. 1 (1981); Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT'L REV. L. & ECON. 191, 205-06 (1992).

96. *Pennhurst*, 451 U.S. at 31-32.

97. Rose-Ackerman, *supra* note 95, at 206.

Importantly, the Act was not a soft statute but rather was a hortatory hard statute. It was duly enacted but had no formal legal effect.<sup>98</sup> Nonetheless, one concern is that such a statute would deceive the public, leading it to extend credit to a Congress that accomplished nothing at all. The problem with this view is that Congress did, in fact, do something: it announced a policy on the treatment of developmentally disabled people, a policy that was consistent with other hard-statute rules and could well have anticipated further legislative developments.<sup>99</sup> Announcing the policy in advance might well have encouraged states and private actors to adjust their behavior in advance of hard legislation. It is possible therefore to view soft law as facilitating rule-of-law values rather than undermining them.

However, rule-of-law values might require that courts strike down statutes that are ambiguous and confusing, at least in certain conditions. The rule of lenity in criminal law reflects this idea: people should not go to jail because they violate criminal statutes that they cannot understand. If this concern is valid for hard law, it is even stronger for soft law, where people might not understand that a soft statute may affect behavior. If only sophisticated people can anticipate Congress's changing views about the treatment of developmentally disabled people on the basis of hortatory statutes or concurrent resolutions, then unsophisticated people are put at a disadvantage.

By the same token, if the public typically associates hard statutes with binding obligations, then using the hortatory statute with only precatory language creates confusion and ambiguity. If the public associates soft statutes with nonbinding obligations, then the soft statute will be superior to the hard hortatory statute because it will accomplish the same communicative ends, but avoid the confusion produced by using a hard statute. In terms of public knowledge of and reaction to soft law, rule-of-law problems are certainly not inevitable.

A different rule-of-law objection concerns the enactment of law without the consent of the President. If Congress can regulate with soft statutes, then the constitutional requirement of presentment is rendered void and the President's role in producing legislation is eliminated. The procedural formalities of legislation do not just clarify congressional action; they also ensure that Congress does not cut the President out of the picture. Just such a concern lay behind the Supreme Court's rejection of the legislative veto. The analogous concern can be found in the literature on international soft law. If international law obtains its legitimacy from the consent of states, as is often argued,<sup>100</sup> how can international soft law—that is, international law that lacks

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98. *Id.* at 192.

99. *See* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 443-45 (1985).

100. *See, e.g.*, JAMES LESLIE BRIERLY, *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS* 9-18 (1958) (discussing the consent theory).

the consent of at least some states—have any legitimacy?<sup>101</sup> We address the constitutional question in Part IV.C. For now, consider two points.

First, to the extent that the regulative power of soft law comes from the fact that it anticipates constitutionally valid hard law (with the President's consent, or approved in another constitutionally accepted way), then the concern falls away. Potentially regulated parties will understand that the congressional resolution does not predict the President's action and will place only as much weight on the resolution as it will bear standing alone. The problem, if there is one, arises only when a congressional resolution affects behavior by generating knowledge about states of the world or supplying focal points, and when courts or other legal institutions use soft law as inputs for statutory interpretation, common law development, and other regulatory activities. In these cases, Congress affects behavior without presidential involvement, but importantly not by using constitutionally prohibited mechanisms. Simple and concurrent resolutions have an old pedigree and are explicitly contemplated by the U.S. Constitution, if not for the specific uses at issue here.

Second, any concern that soft statutes could give Congress an excessive role in affecting public behavior must take account of the President's own ability to sway the public using the presidency as a bully pulpit, and the President's other institutional advantages such as the presidential signing statement. Congress's statements about its view of the world must compete with the President's, and in modern times the President has much greater public visibility than Congress does. To the extent that balance of powers or influence is a background constitutional value, resolutions would seem an important counterbalance to the tools of the President's bully pulpit. For this reason, the claim that soft statutes subvert legitimate presidential authority is, at least in modern circumstances, difficult to credit.

### III. APPLICATIONS

#### A. *The Public*

Congress seeks to influence public behavior, and enactment of statutes is the normal method for doing so. As we argued above, a statute can be analyzed as a type of communication that affects people's beliefs about the legal consequences of their actions—in the form of sanctions (or rewards). If a legislature enacts a statute at time 1 that governs behavior at time 2, people will update their beliefs about the probability that a sanction will be applied to that behavior. Enactment of a hard statute, however, only affects probabilities; it does not create certainty. If no statute exists, people might still believe that at

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101. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 416-17 (1983).

time 2 a sanction will be applied to the behavior in question with probability  $p$ . For example, Congress might enact a later statute that applies retroactively. If instead a statute is enacted at time 1, people will raise their probability estimate to  $p^*$ , but  $p^*$  need not equal 1. Congress might subsequently repeal the statute before it has any effect or enact additional statutes that offset the sanction of the first statute. And even if the hard statute remains in force, officials who administer the statute will have discretion about how stringently to enforce it. The enactment of a hard statute, then, should only cause individuals to update their beliefs that the relevant behavior will be sanctioned in the future from  $p$  (prior to the statute) to  $p^*$ , where  $p < p^* < 1$ .

Now consider a soft statute of equivalent content. By revealing information about Congress's intentions, the soft statute will cause people, in most cases, to update their beliefs about the probability that a sanction will be applied to the relevant behavior at time 2. The new probability,  $p'$ , in general will be less than  $p^*$ . A congressional resolution that disapproves of the relevant conduct makes it more likely that a subsequent statute will prohibit that conduct, but tends to increase the probability of that prohibition being in effect by less than a hard statute would. In the case of a hard statute, the behavior will not be regulated at time 2 *only if* the hard statute is *repealed*; in the case of a soft statute, the behavior will not be regulated at time 2 *unless* a hard statute is *enacted*. Nonetheless, it is important to see that we are dealing only with probabilities.

As a broad generalization, a soft statute is a cheaper but weaker instrument than a hard statute: it is easier to pass but will have less effect on people's beliefs about the legal regime in the future, and hence on their actual behavior. It is not the case, however, that the soft statute will have no effect on public behavior because it does not create legal sanctions. Even if individuals are purely instrumental—that is, influenced only by the costs and benefits of the given behavior—the soft statute reveals information about future legal rules, and therefore will often affect behavior. If Congress says that it will not raise taxes,<sup>102</sup> then people should accordingly update their beliefs about the likelihood of higher taxes. If the Senate urges that sanctions should be imposed on the government of Myanmar,<sup>103</sup> then exporters will take note that they are only one house away (plus presidential consent) from disruption of their business. If the Senate expresses doubt about further need for emergency unemployment payments, then those who administer or benefit from those payments will similarly need to adjust their behavior.<sup>104</sup>

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102. See H.R. Con. Res. 208, 106th Cong. (1999) (enacted) (expressing the sense of Congress that “there should be no increase in federal taxes in order to fund additional government spending”).

103. See S. Res. 112, 103d Cong. (1993) (enacted) (“[u]rging sanctions to be imposed against the Burmese government”).

104. See S. Res. 156, 103d Cong. (1993) (expressing doubt about further need for emergency unemployment payments and urging the administration to propose legislation to reform the current unemployment insurance system).

To make the point crisper, compare a hard statute with a deferred implementation rule. The statute is passed in the year 2015, but will not go into effect until the year 2020. It is tempting but wrong to conclude the statute will have no impact on public behavior between 2015 and 2020. Individuals will anticipate the change in legal regime. This may mean they rush to complete prohibited activity before the statute goes into effect or it may mean that individuals start investing in substitute activities in anticipation of the new rule. Here too, the issue is one of probabilities because the new law will not go into effect in 2020 with certainty; it might be repealed prior to that point or intervening statutes could limit its effect. Rational Bayesian decision makers will, nonetheless, alter their behavior, even during the time period when the hard statute does not yet have legal effect.<sup>105</sup>

Despite their unenforceability, in some situations soft statutes can be more effective than hard statutes. Suppose, for example, people are concerned about how agencies will regulate them, and further believe that Congress, by virtue of its oversight authority, exercises some control over agencies.<sup>106</sup> Congressional resolutions that provide an indication of Congress's regulatory goals may well provide better information about future regulations than statutes do, especially if the statutes, because they must involve compromise with the sitting (as opposed to future) President, have only limited influence on agency action. In a similar way, signing statements provide a better indicator of how the President will attempt to influence statutory implementation than the text of the statute itself.

For example, the 109th Congress approved a resolution that the legislature should enact mandatory, market-based limits on greenhouse-gas emissions.<sup>107</sup> Expectations about binding legislation have prompted some emitters of greenhouse gases in the United States to voluntarily agree to inventory and reduce carbon emissions through the EPA's Climate Leaders Program.<sup>108</sup> Today, a bill that regulates greenhouse-gas emissions is pending before Congress.<sup>109</sup> Firms that adjusted in response to the soft statute may have a

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105. We note again the insight from the expressive-law literature that a hard statute can affect behavior, even if it does not create sanctions, by creating a focal point. See McAdams, *supra* note 14. The same argument can be made about soft statutes even if no one expects them to anticipate enactment of a hard statute.

106. Cf. Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 71, 110-19 (2006) (discussing extensive mechanisms of congressional control of administration); H. Lee Watson, Commentary, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CAL. L. REV. 983 (1975) (same).

107. 151 CONG. REC. S7033-37 (daily ed. June 22, 2005) (expressing the sense of the Senate on climate change); Nicholas DiMascio, Note, *Credit Where Credit Is Due: The Legal Treatment of Early Greenhouse Gas Emissions Reductions*, 56 DUKE L.J. 1587, 1588-90 (2007).

108. DiMascio, *supra* note 107, at 1592.

109. See John M. Broder, *Senate Panel Passes Bill to Limit Greenhouse Gases*, N.Y. TIMES, Dec. 6, 2007, at A39.

competitive advantage should the bill pass. There are numerous other soft statutes that fit this pattern.<sup>110</sup>

State legislatures use soft statutes to anticipate potential hard statutes in the future as well. For example, in 1985, the Oklahoma legislature adopted a concurrent resolution requesting that certain utility companies using coal-fired generating plants consider blending ten percent Oklahoma coal with the Wyoming coal that they were using.<sup>111</sup> After the utility companies declined to comply, a hard statute was passed by the subsequent legislature. After a year of noncompliance with the hard statute, the legislature passed another concurrent resolution directing Oklahoma's state regulatory agency to investigate the noncompliance.<sup>112</sup>

## B. *The President*

### 1. *Constitutional authority*

Soft statutes can also play an important role in the allocation of authority between Congress and the President. Consider the question of how the courts should evaluate executive action at the boundaries of Article II authority. In *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>113</sup> Justice Jackson famously established a typology for understanding the borders of Article II power. "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . ." <sup>114</sup> When Congress has said nothing or there is concurrent authority, there is a "zone of twilight"<sup>115</sup>:

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110. See, e.g., S. Res. 260, 108th Cong. (2003) ("[e]xpressing the sense of the Senate that the Secretary of Health and Human Services should take action to remove dietary supplements containing ephedrine alkaloids from the market"); S. Res. 127, 108th Cong. (2003) ("[e]xpressing the sense of the Senate that the Secretary of Agriculture should reduce the interest rate on loans to processors of sugar beets and sugarcane by 1 percent to a rate equal to the cost of borrowing to conform to the intent of Congress"); S. Res. 61, 107th Cong. (2001) ("[e]xpressing the sense of the Senate that the Secretary of Veterans Affairs should recognize board certifications from the American Association of Physician Specialists, Inc., for purposes of the payment of special pay by the Veterans Health Administration"); S. Res. 159, 103d Cong. (1993) (expressing the sense of the Senate that the Department of Labor should fund states' worker profiling programs).

111. S. Res. 21, 40th Leg., 1985 Okla. Sess. Laws 1694. See generally *Wyoming v. Oklahoma*, 502 U.S. 437, 443 (1992).

112. S. Res. 82, 41st Leg., 1988 Okla. Sess. Laws 1915.

113. 343 U.S. 579 (1952).

114. *Id.* at 635 (Jackson, J., concurring); see also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (examining whether or when the President should act in contravention of congressional limitations).

115. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.<sup>116</sup>

The President is on weakest ground when Congress has disapproved of the action: “When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>117</sup>

Justice Jackson’s language is instructive. He does not say “when a formal statute grants or denies presidential authority.” Instead, he refers to the express or implied will of Congress, suggesting that implicit acquiescence will be enough to justify executive action in the zone of ambiguous executive authority.

The soft statute should be the preferred mechanism for articulating congressional views in this setting<sup>118</sup> because it is a better indicator of legislative views than legislative inaction. There are dozens of reasons Congress fails to act, and negative inferences in the context of Article II powers are especially hazardous. In fact, the soft law analytic frame makes clear that Justice Jackson’s typology is actually incomplete. Speaking of congressional agreement, disapproval, or silence is unnecessarily crude. The House might authorize the presidential action and the Senate might expressly disavow it (or vice versa), creating a twilight of the twilight category.

In fact, Congress does sometimes use resolutions for these purposes. For example, during 2007, a concurrent resolution was introduced, “[e]xpressing the sense of Congress that the President should not initiate military action against Iran without first obtaining authorization from Congress.”<sup>119</sup> During the same Congress, Senate Resolutions were offered to censure the President, Vice-President, and Attorney General for conduct related to the war in Iraq, detainment of enemy combatants, and wiretapping practices undertaken without warrants.<sup>120</sup> Another proposed resolution expressed the sense of the Senate that the President has constitutional authority to veto individual items of appropriation without additional statutory authorization.<sup>121</sup> These potential soft

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116. *Id.*

117. *Id.* (footnotes omitted).

118. *Cf.* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 193-95 (1994) (discussing legislative veto-like mechanism to disapprove executive action in fields with ambiguous constitutional authority).

119. H.R. Con. Res. 33, 110th Cong. (2007).

120. S. Res. 303, 110th Cong. (2007); S. Res. 302, 110th Cong. (2007).

121. S. Res. 61, 104th Cong. (1995) (“[I]t is the sense of the Senate that (1) the Constitution grants to the President the authority to veto individual items of appropriation; and (2) the President should exercise that constitutional authority to veto individual items of



statutes were not passed by majorities, but they are precisely the sort of information on the scope of permissible executive authority that would inform Justice Jackson's analysis.<sup>122</sup>

In this scenario, legislative sentiments, expressed in nonbinding mechanisms, are taken as inputs in the decision-making processes of other institutions—the courts—that themselves generate binding rules, that is, hard law. Even without judicial involvement, however, resolutions that assert congressional authority or limitations on presidential authority may influence the way that the two political branches share power with each other—either as moves in a game where each side must both cooperate and compete, or as appeals to public opinion.<sup>123</sup>

## 2. *Soft statutes as political support*

This is not, however, the only way for a soft statute to affect presidential decision making. Suppose that the President announces that recent developments in Iran pose a threat to the interests of the United States and he intends to send troops. Congress enacts one of two potential soft statutes. The first proclaims that a majority of both houses of Congress disagree with the President's determination. The hostilities, in the view of the legislature, do not constitute a threat to U.S. interests. The second potential soft statute proclaims agreement with the President's determination and expresses the mood of the chambers that the conflict warrants U.S. engagement. Even if neither resolution generates legal authority for the President's troops, a soft statute might nonetheless affect presidential decision making in two ways.

If the President believes that he will need congressional cooperation to complete a successful military campaign, he will need to pay attention to the views of the legislature. The President will need appropriations, of course; he may also have needs incidental to the war effort where his constitutional power does not plausibly extend—to raise the salaries of officers, for example. He may need Congress to cooperate in his domestic programs, and a Congress that

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appropriation without awaiting the enactment of additional authorization.”).

122. Beyond these contemporary examples, it also bears mention that one of the major targets of concurrent resolutions historically was foreign policy. *See* Buckwalter, *supra* note 17. Many of these efforts tried to use soft statutes as mechanisms of hard law by making authorization, implementation, or termination of previously enacted statutes a condition of subsequently enacted concurrent resolutions. For example, the Neutrality Act of 1939 allowed either the President “or Congress by concurrent resolution to determine the existence of state of war between foreign states.” Ch. 2, 54 Stat. 4 (1939). The soft statute in this scenario is like the legislative veto; it seeks to make hard law using the soft-statute mechanism. Like the legislative veto, these efforts are hybrid mechanisms in our scheme. They comply with statutory procedural requirements, but arguably are not constitutional procedural requirements.

123. *Cf.* Posner & Vermeule, *supra* note 1 (discussing how Congress and the President assert and defend their constitutional roles against each other).

opposes the war may be unwilling to do so. The soft statute will express Congress's opposition more effectively than communications from leaders or other members because Congress acts as a body. If Congress later breaks its word, then its credibility will be diminished, and future efforts to influence the President will be hampered. To avoid this institutional cost, members of Congress may feel bound by earlier votes.

Alternatively, the soft statute might have Condorcetian effects, revealing that members of Congress independently agree or disagree with the President's assessment. Such a resolution might affect the President's own views, but even if it does not, it could affect the views of important others—the American public or foreign governments, for example. Since the President needs the cooperation of these groups, the soft statute influences future presidential decisions.

For example, a concurrent resolution introduced in the 104th Congress expressed Congress's opposition to President Clinton's planned deployment of United States ground forces to Bosnia.<sup>124</sup> A proposed Senate resolution in the next session urged the President to facilitate the withdrawal of the Iranian Revolutionary Guards from Bosnia-Herzegovina.<sup>125</sup> The first resolution signaled potential opposition in Congress. The second expressed support for a potential action by the President. Similarly, a proposed concurrent resolution in 2001 expressed "support for the President in using all means at his disposal to encourage the establishment of a democratically elected government in Iraq."<sup>126</sup> Contrast an alternative proposed resolution urging that the United States work through the United Nations to assure Iraq's compliance with existing U.N. resolutions.<sup>127</sup> Each proposed resolution reveals information both about legislative preferences and about the underlying state of the world.

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124. S. Con. Res. 35, 104th Cong. (1995).

125. S. Res. 225, 104th Cong. (1996).

126. H.R. Con. Res. 286, 107th Cong. (2001); *see also* H.R. Con. Res. 460, 107th Cong. (2002) ("Resolved by the House of Representatives (the Senate concurring), That it is the sense of Congress that the President may order acts of war against a foreign or other entity only in the following circumstances: in compliance with a treaty obligation or to repel a military attack against United States territory, possessions, or Armed Forces engaged in peaceful maneuvers; to participate in humanitarian rescue operations; or in response to a declaration or resolution of prior specific approval by a majority of the Members of each House of Congress.").

127. H.R. Con. Res. 473, 107th Cong. (2002) ("Resolved by the House of Representatives (the Senate concurring), That the United States should work through the United Nations to seek to resolve the matter of ensuring that Iraq is not developing weapons of mass destruction, through mechanisms such as the resumption of weapons inspections, negotiation, enquiry, mediation, regional arrangements, and other peaceful means.").

*C. Agencies*

Congress uses a range of instruments to influence administrative agencies, including restrictions on the appointment and removal of personnel, specification of substantive or procedural restrictions, appropriations, oversight hearings, and deadlines. Before the Supreme Court held it unconstitutional, the legislative veto was another such mechanism.<sup>128</sup> Assume that the hard law version of the legislative veto is unavailable because it is unconstitutional. Could a soft statute variant accomplish similar ends?<sup>129</sup>

*INS v. Chadha* addressed whether a person's immigration status could be adjusted by a simple resolution, where the initial decision to adjust or not was made by the Attorney General.<sup>130</sup> Consider a hypothetical variant. Suppose the Attorney General makes a determination that person A should be deported. Using a concurrent resolution, both houses of Congress object to this determination and urge the Attorney General to reverse it. The Attorney General has no legal obligation to do as Congress wishes, but the Attorney General may nonetheless be influenced by the resolution. As between contradicting the wishes of Congress and avoiding a confrontation, the latter will often be preferred because Congress controls appropriations, holds oversight hearings, and has other ways to express displeasure. In this way, the soft legislative veto would do some of the practical work done by the hard legislative veto. To make the actual legal adjustment to immigration status, action by the executive branch would still be required, but the nonbinding congressional resolution increases this probability, perhaps substantially.

Congress does, in fact, use soft statutes to affect agency behavior. Agencies also reference soft statutes in their decision-making process. Consider the FTC's proposed changes to the "Made in USA" labeling requirements.<sup>131</sup> Over 200 members of the House cosponsored a resolution opposing the proposed guidelines and urging the commission to retain the old standards.<sup>132</sup> The FTC ultimately abandoned the proposed changes, citing, in part, the opposition in Congress.<sup>133</sup>

In another case, a 1988 concurrent resolution sought "[t]o acknowledge the contribution of the Iroquois Confederacy of Nations . . . and to reaffirm the continuing government-to-government relationship between Indian tribes and

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128. See *supra* Part I.C.2.

129. See Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 99 (1976).

130. 462 U.S. 919 (1983).

131. See 60 Fed. Reg. 53,922 (Oct. 18, 1995).

132. H.R. Con. Res. 80, 105th Cong. (1997); 62 Fed. Reg. 63,756, 63,758 (1997); see also S. Con. Res. 52, 105th Cong. (1997) (supporting retention of the "all or virtually all" standard).

133. See 62 Fed. Reg. 63,756 (Dec. 2, 1997) (discussing H.R. Con. Res. 80, 105th Cong. (1997)).

the United States established in the Constitution.”<sup>134</sup> The Federal Emergency Management Agency took the statement to be a relevant input in its decision to formulate a “government-to-government” relationship policy with American Indian tribes.<sup>135</sup> Another concurrent resolution suggested that the proceeds of a reserve fund should be used for the assistance of livestock producers adversely affected by disaster conditions.<sup>136</sup> In response, the Secretary of Agriculture did so.<sup>137</sup> Even resolutions not formally voted on may influence agency behavior. Resolutions introduced in both the House and the Senate, with strong bipartisan support,<sup>138</sup> urged that the Occupational Safety and Health Administration (OSHA) revise regulations on powered industrial truck operator training. Soon thereafter, OSHA published a notice of proposed rulemaking to revise the training requirements.<sup>139</sup> It has long been appreciated that Congress uses all sorts of formal and informal mechanisms to influence administrative agencies.<sup>140</sup> Other mechanisms enjoy the lion’s share of scholarly attention, but soft statutes are critical mechanisms in this regard as well.

#### IV. IMPLICATIONS FOR COURTS

##### A. *Statutory Interpretation*

Soft statutes can be useful for statutory interpretation in two ways. First, if the legislative intent behind a hard statute is relevant to interpretation of that statute, then a contemporaneous or subsequent soft statute that reveals the legislative intent provides relevant information for an interpreter such as a court. Second, if a later Congress’s policy views are relevant for interpreting or construing the earlier statute, then the interpreter should draw on soft statutes in order to obtain information about these views as well.<sup>141</sup>

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134. H.R. Con. Res. 331, 100th Cong. (1988).

135. Final Agency Policy for Government-to-Government Relations with American Indian and Alaska Native Tribal Governments, Part VI, 64 Fed. Reg. 2096 (Jan. 12, 1999).

136. S. Con. Res. 63, 104th Cong. (1996) (enacted).

137. Flood Compensation Program, 64 Fed. Reg. 47,358 (Aug. 31, 1999).

138. See S. Con. Res. 17, 102d Cong. (1992) (55 cosponsors); H.R. Con. Res. 92, 102d Cong. (1991) (236 cosponsors from both parties).

139. Powered Industrial Truck Operator Training, 60 Fed. Reg. 13,782 (proposed Mar. 14, 1995) (to be codified at 29 C.F.R. pts. 1910, 1915, 1917, and 1918). See also the examples in *supra* note 109.

140. See, e.g., Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

141. *But see* Gibson, *supra* note 16 (arguing that subsequently passed interpretive resolutions should not control judicial interpretation because this would allow Congress to amend or repeal prior statute without signature of the President and interpretation of the law is a judicial rather than legislative function).

The first argument sits atop a complicated debate about the value of preenactment and postenactment legislative history. Some scholars and judges believe that courts should not rely on legislative history as evidence of legislative intent because members of Congress can easily insert statements in the record that contradict the views of the majority that passed the statute.<sup>142</sup> Other scholars and judges believe that courts should use those portions of legislative history that are credible, such as committee reports, statements by sponsors, or speeches just prior to votes.<sup>143</sup> The latter group should have no objection if courts rely on contemporaneous resolutions expressing Congress's understanding of a statute. Such resolutions are better indicators of congressional understanding than virtually any other form of legislative history. Legislative-history skeptics should object less to giving interpretive authority to resolutions than to other types of preenactment and postenactment legislative history produced during the enacting period Congress: resolutions express the views of a majority, while other legislative history does not.<sup>144</sup>

However, it would be unusual for Congress to issue a resolution expressing its understanding of a statute at the same time that it passes a statute, and we have found no such example.<sup>145</sup> In the more usual case, Congress passes a resolution subsequently—later in the same session or during a later session—in response to a supervening event. The question then arises whether this postenactment history should be given weight by courts when interpreting the earlier enactment. For example, in December 2006, President Bush signed the Postal Accountability and Enhancement Act into law and issued a signing statement construing a provision to permit searches of sealed mail in exigent circumstances.<sup>146</sup> In January 2007, a Senate Resolution was introduced “[r]eaffirming the constitutional and statutory protections accorded sealed

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142. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring); *Hirschey v. FERC*, 777 F.2d 1, 7-8 (D.C. Cir. 1985); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). See generally Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988) (discussing judges' and scholars' concern about the extent to which legislative history reflects a coherent congressional view).

143. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (arguing that legislative history can reveal legislative intent or purpose and resolve statutory ambiguity).

144. This line of argument sets aside scholars and judges who do not think the intent of the legislature is relevant for statutory interpretation.

145. The closest example we have found is S. Con. Res. 107, 81st Cong. (as passed by Senate, Sept. 12, 1950), which was passed by the Senate within sixty days of the enactment of the G.I. Bill of Rights, Pub. L. No. 610, 64 Stat. 336 (1950), and would apparently have passed the House shortly thereafter, but for a congressional recess. The resolution purported to clarify the intent of the enacting legislature with respect to interpretation of the act. See Gibson, *supra* note 16, at 421-22 (discussing statute and resolution); *id.* at 479 (“During the past forty years at least, [1910-1950] there have been very few congressional attempts, by concurrent resolution, to construe federal statutes.”).

146. Statement on Signing the Postal Accountability and Enhancement Act, 42 WEEKLY COMP. PRES. DOC. 2196 (Dec. 20, 2006).

domestic mail.”<sup>147</sup> The resolution could be interpreted as an effort to reassert the legislative understanding of the original statute; if so, a court might properly rely on it when interpreting the Postal Accountability and Enhancement Act.

In the sealed mail example, the enactment of the statute, the intervening act (President Bush’s signing statement), and the postenactment soft statute occurred within a few months of each other. Sometimes a good deal more time elapses. For example, in 1983, the House passed a resolution purporting to declare the intent of the 1972 legislature about the breadth of Title IX.<sup>148</sup> Here, we might expect a court to be more suspicious about the House’s claim to know the legislative intent of the 1972 Congress, and, in fact, the conventional rule is that courts should give no weight to such resolutions.<sup>149</sup> “[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”<sup>150</sup>

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147. S. Res. 22, 110th Cong. (2007). The debate concerned the Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006).

148. H.R. Res. 190, 98th Cong. (1983), 129 CONG. REC. H10100 (daily ed. Nov. 16, 1983) (declaring that Title IX intended institution-wide rather than program-specific prohibitions on discrimination on the basis of sex). Under the “program-specific” approach, receipt of federal funds would trigger Title IX’s obligations only within cabined programs or departments. The “institution-wide” approach implies that the receipt of federal funds by any subdivision of the institution or university triggers obligations for the entire institution.

149. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 96 (1988) (“Thus, nonbinding resolutions, passed by both Houses of Congress but not presented to the President, are not formally entitled to authoritative weight in statutory interpretation.”); see also John C. Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into “Speculative Unrealities”*, 64 B.U. L. REV. 737, 748 (1985) (noting that the Supreme Court has shown great reluctance to give weight to subsequent resolutions for construction of earlier statutes, and discussing the failure of the *Grove City College* Court even to mention a subsequent concurrent resolution that spoke directly to whether Title IX was program-specific or institution-wide). *But see* *Butler v. U.S. Dep’t of Agric.*, 826 F.2d 409, 413 n.6 (5th Cir. 1987); see also *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 686 n.7 (1979); *F.H.E. Oil Co. v. Comm’r*, 150 F.2d 857, 858 (1945) (“The Resolution . . . does not make law, or change the law made by a previous Congress or President. . . . As an expression of opinion on a point of law it would . . . be entitled to most respectful consideration by the courts . . .”).

150. *United States v. Price*, 361 U.S. 304, 313 (1960); see also *Massachusetts v. EPA*, 127 S. Ct. 1438, 1461 n.27 (2007) (quoting *Price*); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998) (citing *Price*); *Hagen v. Utah*, 510 U.S. 399, 420 (1994) (“The subsequent history is less illuminating than the contemporaneous evidence”); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980) (“[W]hile arguments predicated upon subsequent congressional actions must be weighed with extreme care, they should not be rejected out of hand as a source that a court may consider in the search for legislative intent.”); *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 411 n.11 (1979) (noting that isolated statements made by members of Congress after the enactment of a statute cannot substitute for legislative intent at the time of enactment); *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) (“[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight.”); Eskridge, *supra* note 149, at 95 (quoting *Price*). For an earlier attempt to use a concurrent resolution to influence interpretation of a previously enacted

However, this rule sits uneasily with another judicial practice—that of giving weight to legislative inaction by subsequent legislatures.<sup>151</sup> Legislative inaction is sometimes interpreted as implicit approval of a judicial or agency interpretation of an earlier statute.<sup>152</sup> The acquiescence rule infers legislative approval from the failure to overrule a prior interpretation. The reenactment rule infers legislative approval of a prior interpretation when a legislature reenacts or amends a statute without specifically changing the prior interpretation. The rejected proposal rule presumes majoritarian approval of a prior interpretation when an amendment altering a judicial interpretation (or changing the text of a statute to clarify) is considered, but rejected in Congress.<sup>153</sup> Each of these rules creates a presumption about legislative views on the basis of congressional inaction or congressional action that has multiple interpretations.

There is ample reason to be skeptical of the Court's periodic reliance on congressional inaction in subsequent legislatures for purposes of statutory interpretation,<sup>154</sup> and recent judicial treatment is less hospitable.<sup>155</sup> Nevertheless, if subsequent congressional silence of this sort is ever relevant for statutory interpretation, surely congressional voice (in the form of soft statutes) should be as well.<sup>156</sup> Congress may not always have an incentive to express its views candidly,<sup>157</sup> but there is no reason to think that voice approved by a majority will be usually less reliable than silence.

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statute, see S. Con. Res. 4, 69th Cong. (as passed Jan. 9, 1928), interpreting the Tariff Act of 1922, 42 Stat. 858 (1922), such that “with respect to imported broken rice, ‘broken rice’ shall include only the class ‘brewers’ milled rice,’ as specified in the united standards for milled rice.” Interestingly, the House refused to enact the concurrent resolution, stating in House Resolution 92 that the proposed concurrent resolution “contravenes the first clause of the seventh section of the first article of the Constitution of the United States.” H. Res. 92, 70th Cong. 2d Sess. (Jan. 16, 1928); see also Gibson, *supra* note 16, at 480 (discussing interaction between the House and Senate on the issue).

151. See Eskridge, *supra* note 149; Daniel A. Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 2 (1988).

152. *N. Haven Bd. of Educ.*, 456 U.S. at 535. See generally William N. Eskridge, Jr., *Post-Enactment Legislative Signals*, 57 LAW & CONTEMP. PROBS. 75 (1994) (discussing legislative inaction as a ratification of statutory precedents).

153. Eskridge, *supra* note 149, at 69.

154. See Eskridge, *supra* note 149, at 95-108 (surveying range of formalist, realist, and systemic problems with inferring legislative intent from inaction). But see Farber, *supra* note 151, at 10 (noting that subsequent legislative silence is informative of approval, even if not perfectly informative).

155. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989).

156. See *Mass. Credit Union Share Ins. v. Nat'l Credit Union Admin.*, 693 F. Supp. 1225, 1230-31 (D.D.C. 1988). For a similar proposal, see Greene, *supra* note 118. Greene argues in favor of allowing concurrent resolutions to block the exercise of the presidential powers exercised pursuant to an implicit delegation.

157. For a discussion of legislative incentives to tell the truth, see McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3 (1994) [hereinafter McNollgast, *Legislative Intent*]; McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J.

The second argument rests on a more controversial premise, but if the premise is accepted, then the case for relying on postenactment soft statutes to interpret previously enacted hard statutes is even stronger. The premise is that when a court interprets a statute that was enacted by a past Congress, it should allow itself to be influenced by the views of the current Congress.<sup>158</sup> Others have argued that, whether courts should be influenced in theory by the current Congress, they will be influenced in practice, because the current (or future) legislature could overturn the court's decision and judges dislike seeing their holdings overturned.<sup>159</sup> For these scholars, congressional resolutions should be reasonable devices for Congress to reveal its evolving policy views to judges. As a possible illustration of this view, consider the dissent by Justice Souter in *Garcetti v. Ceballos*.<sup>160</sup> Justice Souter relied, in part, on Congress's endorsement, via concurrent resolution, of the view that citizens should expose corruption in government to inform his view on the scope of First Amendment protection for government employees.<sup>161</sup>

We already noted the 1983 House Resolution attempting to clarify legislative views on the meaning of Title IX.<sup>162</sup> State legislatures also occasionally use resolutions for similar reasons. For example, in response to confusion in the courts, the Michigan legislature passed a concurrent resolution declaring that an existing statute was "not designed to disrupt benefits which were already being received by an employee prior to the effective date of this act or benefits resulting from injuries incurred prior to the act's effective date."<sup>163</sup> The Delaware legislature once passed a concurrent resolution clarifying that the repeal of a statute was not to be applied retroactively.<sup>164</sup> In *Vaught v. Wortz*,<sup>165</sup> the Delaware supreme court held that the ambiguity in the initial statute was properly resolved by the subsequent concurrent resolution "which evidence[d] a clear legislative intent that the Repealer is to be given only prospective application."<sup>166</sup>

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705 (1992) [hereinafter McNollgast, *Positive Canons*].

158. Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162 (2002); Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002).

159. McNollgast, *Positive Canons*, *supra* note 157.

160. 547 U.S. 410, 432 n.4 (2006) (Souter, J., dissenting).

161. *Id.*

162. H.R. Res. 190, 98th Cong. (1983).

163. S. Con. Res. 575, 81st Leg., 2d Reg. Sess. (Mich. 1982). The concurrent resolution was adopted by the state senate on April 1, 1982, and by the state house on May 18, 1982. 1982 House J. 1262; 1982 Senate J. 626, 706-707; *see* Gen. Motors Corp. v. Romein, 503 U.S. 181, 184 (1992).

164. *See* Marcucilli v. Boardwalk Builders, No. 99C-02-007, 2000 Del. Super. LEXIS 137, at \*16 (Del. Super Ct. Apr. 13, 2000) (discussing the repeal of the Automobile Guest Statute by the Delaware General Assembly and the General Assembly's subsequent passage of the concurrent resolution stating that the repeal would not be applied retroactively).

165. 495 A.2d 1132 (Del. 1985).

166. *Id.* at 1133. Other state courts disagree. *See* State v. Barnes, 45 P.2d 293, 297



A soft statute purporting to clarify the meaning of an earlier hard statute should not control if the text of the earlier statute is clear. In a case of statutory ambiguity however, a soft statute should be given weight. Unlike other forms of legislative history—commonly given weight by judges already—the soft statute is majoritarian and provides a better indication of congressional intent than congressional silence or inaction.

If we are right, it is puzzling that Congress rarely uses soft statutes in this way. However, there is a possible explanation. Given that courts rarely permit Congress to offer interpretations of earlier statutes by passing resolutions, there is no reason for Congress to enact them. If judicial practice changed, congressional behavior would likely shift as well.

### B. *Constitutional Interpretation*

There are many views about which institution should have ultimate authority to say what the Constitution means, but scholars and judges with divergent interpretive philosophies agree that legislative interpretations of the Constitution should have some weight, and this consensus appears to be accepted by the Supreme Court as well.<sup>167</sup> A long history of a congressional practice is often taken as evidence that the Constitution does not prohibit that practice.<sup>168</sup> Indeed, in exercising only narrow judicial review of statutes, the Supreme Court often emphasizes that it takes a deferential approach—implicitly acknowledging that Congress’s judgment about the constitutionality of legislation deserves weight. As a practical matter, when Congress decides that a statute would not be constitutional and therefore does not pass it, it will not matter that the Supreme Court disagrees.<sup>169</sup> Additionally, the political question doctrine carves out swaths of constitutional controversy that the judiciary will not resolve.<sup>170</sup> When the Constitution commits an interpretive question to another branch or when there are no judicially ascertainable standards, courts let the political branches resolve the dispute.<sup>171</sup> And

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(Idaho 1935) (Morgan, J., concurring) (“It is not, in the Constitution, anywhere directed or permitted that the Legislature, having enacted a law, shall dictate the interpretation or construction to be placed upon it.”).

167. See ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY* 267-69 (2006).

168. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 200 (2003) (“History reveals an unbroken congressional practice of granting to authors of works with existing copyrights the benefit of term extensions so that all under copyright protection will be governed evenhandedly under the same regime.”).

169. See Daniel A. Farber, *Legislative Constitutionalism in a System of Judicial Supremacy*, in *THE LEAST EXAMINED BRANCH: THE ROLE OF LEGISLATURES IN THE CONSTITUTIONAL STATE* 431, 436 (Richard W. Bauman & Tsvi Kahana eds., 2006).

170. See *id.* at 443; Mark Tushnet, *Non-Judicial Review*, 40 *HARV. J. ON LEGIS.* 453 (2003).

171. See *Baker v. Carr*, 369 U.S. 186 (1962) (discussing justifications for and applications of political question doctrine).

Congress's judgments about the constitutionality of its internal procedures often receive absolute deference from the courts.<sup>172</sup> For those more skeptical of judicial supremacy,<sup>173</sup> legislative views about constitutional meaning are all but dispositive. Thus, although scholars differ about the amount of weight congressional judgments about the Constitution deserve, nearly everyone agrees that they deserve at least some weight.

If congressional views of constitutional meaning have importance, then the question arises what mechanism is likely to be most effective for articulating a body of legislative constitutional law. Unfortunately, the mechanism for articulating legislative views about the Constitution has received little attention from commentators. Prior suggestions include using committee reports,<sup>174</sup> confirmation hearings,<sup>175</sup> and the brute fact of legislative enactment or approval.<sup>176</sup> Each of these mechanisms is inferior to soft statutes as a way of advancing legislative views about constitutional law. Unlike the first two, the concurrent resolution requires the support of a majority of Congress and thus presumptively expresses the view of Congress as a whole. Unlike the third, the resolution need not be influenced by the President's view.

One might argue that only hard statutes should be valued in constitutional interpretation. The case for relying on hard statutes is that when the legislature

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172. For example, the enrolled-bill rule dates to *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672-73 (1892) (holding that the judiciary must treat the attestations of "the two houses, through their presiding officers" as "conclusive evidence that [a bill] was passed by Congress"). See also *Pub. Citizen v. U.S. Dist. Court*, 486 F.3d 1342 (D.C. Cir. 2007) (declining to review whether passage of different versions of a bill by House and Senate violated constitutional requirements). But see *United States v. Muñoz-Flores*, 495 U.S. 385, 387-88 (1990) (holding a special assessment statute did not violate the Origination Clause on grounds it was not a bill for raising revenue). Justice Scalia concurred in the judgment, applying *Marshall Field's* enrolled-bill rule. *Id.* at 408-09 (Scalia, J., concurring).

173. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL (2007); Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001); see also Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335 (2001) (arguing that the legislature should use mechanisms of advice and consent or impeachment for purposes of constitutional interpretation).

174. Garrett & Vermeule, *supra* note 173; Keith E. Whittington et al., *The Constitution and Congressional Committees: 1971-2000*, in *THE LEAST EXAMINED BRANCH*, *supra* note 169, at 396.

175. Katyal, *supra* note 173.

176. That is, if Congress passes a statute of dubious constitutionality, the fact of enactment should be taken as evidence that the Constitution permits the statute. See, e.g., Mark Tushnet, *Interpretation in Legislatures and Courts: Incentives and Institutional Design*, in *THE LEAST EXAMINED BRANCH*, *supra* note 169, at 355. In the same volume, Daniel A. Farber describes settings in which the legislature exercises constitutional power that is not reviewed by courts (e.g., impeachment and regulation of internal functions of the legislature); therefore, the legislature has practical final say. Farber, *supra* note 169, at 431, 436.

and the President agree, their agreement is more likely to reflect a constitutional norm than when they do not agree. As constraints on regular politics, constitutional norms are typically thought to require a public consensus, and the implicit supermajoritarianism of the legislature-and-the-President could be better evidence of such a consensus.

But the hard-statute approach has defects as well. One problem is that when a bill is *not* enacted because legislators harbor constitutional concerns, reliable evidence of their constitutional views may be difficult to identify. A committee report might claim that the bill is unconstitutional,<sup>177</sup> or the Congressional Record might contain pronouncements to that effect. However, because there are dozens of reasons why a bill fails to pass, fragments of the legislative history of an unenacted bill are a hazardous way to advance a coherent body of constitutional law. Those who thought the bill constitutional will later claim that the bill had nothing to do with the constitutional dispute. There will be no reliable way to evaluate these claims.

In addition, if a hard statute is the only legislative vehicle for articulating constitutional views, some statements will not be produced because of an anticipated presidential veto, even when Congress thinks the statute constitutionally unproblematic. Especially when a particular bill has implications for the constitutional roles of Congress and the President, Congress and the President might have good-faith disagreement about the relevant constitutional norms. The President may veto statutes that violate his interpretation of his constitutional powers, in which case Congress's opposing interpretation will not have a formal public airing. In this case, the legislature alone must advance its interpretation of the Constitution; the legislature and the President can only advance a consensus interpretation.<sup>178</sup> Exclusive reliance on hard statutes will produce a body of constitutional law that is biased and incomplete.

In both cases, the soft statute is a better vehicle for legislative constitutional interpretation. Congressional majorities would indicate that they do not proceed with a proposed hard statute because they believe that it is unconstitutional. This judgment also would produce legislative precedent. Congress's constitutional views would have a formal venue akin to the presidential signing statement and the Department of Justice opinion, and courts would know where to look for the legislature's interpretation of the Constitution.<sup>179</sup> Courts might or might not give much weight to these

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177. As proposed by Garrett & Vermeule, *supra* note 173, at 1308.

178. For a similar proposal, see Greene, *supra* note 118 (advocating use of concurrent resolutions to negate some presidential powers, drawing on Justice Jackson's *Youngstown* concurrence).

179. Other mechanisms exist as well. The House and Senate precedents are in this vein; they contain legislative precedents, viewed as more or less binding, on procedures used to generate legislation. See generally CLARENCE CANNON, CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES (U.S. Gov't Printing Office ed. 1936);

statements, again, depending on their theory about the role of the legislature in determining constitutional meaning. Much would also depend on traditional indications of credibility: whether both houses or just one passed the resolution and the extent of the majority; and whether the interpretation has been advanced consistently by a succession of Congresses over time<sup>180</sup> or for the first time; and so forth.

The advantage of soft statutes over committee reports or hearings is clear as well. The majoritarian nature of soft statutes makes them more credible than committee reports or hearings; soft statutes are more reliable (for courts and the public) indicators of legislative views.<sup>181</sup> In addition, soft statutes would give Congress the best chance to develop an institutional position on its constitutional role, one that could compete effectively with the executive's longstanding position on executive power, which has gained authority because it has been maintained across successive presidencies.

Both state and federal legislatures sometimes use resolutions in this way. As early as 1873 the Missouri legislature adopted a resolution expressing "grave doubts" about the constitutionality of a hard statute.<sup>182</sup> The Mississippi legislature used a concurrent resolution to condemn the U.S. Supreme Court decision in *Brown*.<sup>183</sup> In the current U.S. Congress, a concurrent resolution was introduced "expressing the sense of Congress that the Supreme Court misinterpreted the First Amendment to the Constitution in the case of *Buckley v. Valeo*."<sup>184</sup> Another House resolution stated that federal judges should not treat foreign law as a source of authority for interpreting U.S. constitutional law.<sup>185</sup> As we saw earlier, Congress used a concurrent resolution to disagree on constitutional grounds with a presidential signing statement that interpreted a statute to permit the executive branch to inspect sealed domestic mail.<sup>186</sup> Congress has also used resolutions to express views on the meaning of the Second Amendment,<sup>187</sup> the First Amendment,<sup>188</sup> federalism,<sup>189</sup>

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ASHER HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES (U.S. Gov't Printing Office ed. 1936).

180. See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding practice of paying legislative chaplains despite Establishment Clause, partially because practice dates back to first Congress).

181. Garrett & Vermeule, *supra* note 173, at 1307-09.

182. See *Woodson v. Murdock*, 89 U.S. 351 (1874).

183. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 197 (1970).

184. H.R. Con. Res. 6, 110th Cong. (2007).

185. H.R. Res. 372, 110th Cong. (2007).

186. See *Postal Accountability and Enhancement Act*, Pub. L. No. 109-435, 120 Stat. 3198 (2006); S. Res. 22, 110th Cong., CONG. REC. S394-95 (2007).

187. H.R. Con. Res. 27, 101st Cong. (1989) (expressing the "sense of the Congress that the Constitution provides that all individual citizens have the right to keep and bear arms, which right supersedes the power and authority of any government").

188. See H.R. Con. Res. 194, 109th Cong. (2005) (display of Ten Commandments in public buildings does not violate the First Amendment to the Constitution of the United States); H.R. Con. Res. 428, 107th Cong. (2002) (recitation of pledge of allegiance in public

apportionment,<sup>190</sup> Supreme Court decisions,<sup>191</sup> executive authority,<sup>192</sup> and the scope of federal powers.<sup>193</sup>

Congress could probably use soft statutes in a more effective way than it has so far. Consider the longstanding dispute between the executive branch and the Senate over the proper role of Senate “ratification history” for the interpretation of a treaty. The executive branch believes that statements in committee reports, debates, and hearings in the Senate should have little weight in interpretations of treaties;<sup>194</sup> the Senate disagrees. The Senate’s view was awkwardly attached as a condition to its advice and consent to a particular treaty.<sup>195</sup> The President ratified the treaty while expressing disagreement with the Senate’s view.<sup>196</sup> In essence, the Senate used a resolution-like mechanism to advance its interpretation of its constitutional authority, one that courts can then consider when deciding how to use Senate ratification history in order to interpret a treaty. Because the President and the Senate disagreed about the relevant constitutional norm, the hard-statute (or hard-treaty) approach to legislative involvement in constitutional interpretation could not be used.

schools is constitutional under the First Amendment); H.R. Con. Res. 199, 106th Cong. (1999) (prayers at public schools and sporting events “are constitutional under the First Amendment to the Constitution”); H.R. Con. Res. 294, 103d Cong. (1994) (Department of Housing and Urban Development should not interfere with exercise of free-speech rights); H.R. Con. Res. 35, 101st Cong. (1989) (“public desecration of the United States flag is not considered symbolic speech under the first amendment to the Constitution”).

189. See H.R. Con. Res. 299, 105th Cong. (1998) (specifying criteria for executive departments to follow when preempting state law consistent with the Constitution); H.R. Con. Res. 161, 101st Cong. (1989) (expressing the “sense of the Congress that it is in the interest of a viable Federal system of Government that primary regulatory authority over alcohol beverages within their borders shall remain with the States”).

190. See H.R. Con. Res. 195, 101st Cong. (1989) (expressing the “sense of the Congress that illegal aliens should not be counted in the 1990 decennial census for purposes of congressional reapportionment”).

191. See H.R. Con. Res. 160, 102d Cong. (1991) (resolving, in response to *Rust v. Sullivan*, 500 U.S. 173 (1991), that “no Federal employee . . . may be denied freedom of speech”).

192. See H.R. Con. Res. 102, 108th Cong. (2003) (“[P]ursuant to Article I, Section 8 of the Constitution of the United States, Congress has the sole and exclusive power to declare war.”).

193. See H.R. Con. Res. 368, 107th Cong. (2002) (expressing the sense of Congress that compulsory military service would be “violative of individual liberties protected by the Constitution”); H.R. Con. Res. 49, 107th Cong. (2001) (“[T]reaty power of the President does not extend beyond the enumerated powers of the Federal Government, but is limited by the Constitution, and any exercise of such Executive power inconsistent with the Constitution shall be of no legal force or effect.”).

194. Relevance of Senate Ratification History to Treaty Interpretation, 11 Op. Off. Legal Counsel 28 (1987).

195. 134 CONG. REC. S6700-01 (1988) (on the treaty between the U.S. and the Soviet Union on the elimination of intermediate-range and shorter-range missiles).

196. Message to the Senate on the Soviet-United States Intermediate-Range Nuclear Force Treaty, 24 WEEKLY COMP. PRES. DOC. 779, 780 (June 13, 1988).

In sum, soft statutes will generally be a superior mechanism for expressing legislative interpretations of the Constitution than committee hearings, floor speeches, confirmation hearings, committee reports, hard statutes, or the failure to enact hard statutes. Depending on one's view of judicial review, soft statutes that express Congress's constitutional views might be dispositive or merely evidentiary, but regardless they constitute a clear improvement over other vehicles for constitutional interpretation in the legislature.

### C. *Constitutional Law of Soft Statutes*

We have advocated greater use of soft statutes by Congress and greater reliance on soft statutes by courts. Are there potential constitutional obstacles to elevating the role of soft statutes in the United States? In the past fifty years the Supreme Court has often proved wary of legislative innovations, including the legislative veto,<sup>197</sup> the line item veto,<sup>198</sup> and other policy-making regimes that blur the boundaries between lawmaking and law implementing by the legislative and executive branches. To the extent that soft statutes could be used for some similar ends, does the Constitution impose a bar?

The most prominent constitutional requirement concerning soft statutes is the murky doctrine surrounding the Orders, Resolutions, and Votes Clause.<sup>199</sup> This clause, sometimes known as the Residual Presentment Clause, requires that:

Every Order, Resolution, or Vote, to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.<sup>200</sup>

The conventional wisdom about this provision is that it ensures Congress cannot avoid the presentment requirement of Article I, Section 7, Clause 2, simply by labeling a proposed law a "resolution" or enacting proposed legislation as a "vote" rather than a "bill."<sup>201</sup> Indeed, in the early Congresses,

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197. *INS v. Chadha*, 462 U.S. 919 (1983).

198. *Clinton v. New York*, 524 U.S. 417 (1998).

199. U.S. CONST. art. I, § 7, cl. 3. See generally Seth Barrett Tillman, *A Textualist Defense of Article I, Section 7, Clause 3: Why Hollingsworth v. Virginia Was Rightly Decided, and Why INS v. Chadha Was Wrongly Reasoned*, 83 TEX. L. REV. 1265 (2005) (providing an exhaustive review of history and debate surrounding the Residual Presentment Clause).

200. U.S. CONST. art. I, § 7, cl. 3.

201. See *Chadha*, 462 U.S. at 946-47 ("Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented. During the final debate on Art. I, § 7, cl. 2, James Madison expressed concern that it might easily be evaded by the simple

proposals were labeled “bills” and “resolutions” almost interchangeably. Anticipating this practice, the clause was arguably intended to close a loophole in the requirement for presentment. Although there has been some dissent from this view,<sup>202</sup> the clause has not garnered sustained attention for several decades.<sup>203</sup>

On its face, the clause might be taken to require presentment for all orders, votes, or resolutions, except relating to adjournment. Modern judicial understanding is otherwise. Proposed constitutional amendments passed by two-thirds majorities need not be presented to the President.<sup>204</sup> Early congressional practice used concurrent resolutions and joint resolutions interchangeably, but by the late 1800s, Congress sought to distinguish a class of resolutions that must be presented to the President from the class that need not be.<sup>205</sup> In 1897, the Senate Judiciary Committee argued that a concurrent resolution must be presented to the President only if it is “properly to be regarded as legislative in its character and effect.”<sup>206</sup> Views of the House were largely the same. Only proposals that are legislative in purpose or effect must be presented.<sup>207</sup> The practice of presenting all resolutions to the President has been abandoned for more than a century, “apparently on the theory that the

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expedient of calling a proposed law a ‘resolution’ or ‘vote’ rather than a ‘bill.’ As a consequence, Art. I, § 7, cl. 3, . . . was added.”) (internal citations omitted); *see also* 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 304-05 (1911):

Mr. Randolph, having thrown into a new form the motion, putting votes, Resolution &c. on a footing with Bills, renewed it as follows. “Every order resolution or vote, to which the concurrence of the Senate & House of Reps. may be necessary (except on a question of adjournment and in the cases hereinafter mentioned) shall be presented to the President for his revision; and before the same shall have force shall be approved by him, or being disapproved by him shall be repassed by the Senate & House of Reps according to the rules & limitations prescribed in the case of a Bill[.]”

Mr. Sherman thought it unnecessary, except as to votes taking money out of the Treasury which might be provided for in another place. . . . The Amendment was made a Section 14[] of Art VI.

*See generally* 2 *THE FOUNDERS’ CONSTITUTION* 388-89, 399, 404 (Philip B. Kurland & Ralph Lerner eds., 1987); Michael B. Rappaport, *The President’s Veto and the Constitution*, 87 *NW. U. L. REV.* 735, 753-55 (1993) (analyzing various interpretations of the Residual Presentment Clause to argue against the constitutionality of the implicit selective veto).

202. Tillman, *supra* note 199.

203. *See* H. Lee Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 *CAL. L. REV.* 983, 1051, 1072-75 (1975) (discussing the clause’s implications for what he terms “extralegislativ congressional action”).

204. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798).

205. *See* Doyle W. Buckwalter, *The Congressional Concurrent Resolution: A Search for Foreign Policy Influence*, 14 *MIDWEST J. POL. SCI.* 434, 437 (1970).

206. S. REP. NO. 54-1335 (1897).

207. *See* Howard White, *The Concurrent Resolution in Congress*, 35 *AM. POL. SCI. REV.* 886 (1941).

resolution is not a legislative act.”<sup>208</sup> This view was summarized by the Supreme Court in *Bowsher v. Synar*.<sup>209</sup>

A concurrent resolution, in contrast, makes no binding policy; it is “a means of expressing fact, principles, opinions, and purposes of the two Houses,”<sup>210</sup> and thus does not need to be presented to the President. It is settled, however, that if a resolution is intended to make policy that will bind the nation and thus is “legislative in its character and effect,”<sup>211</sup> then the full Article I requirements must be observed. For “the nature or substance of the resolution, and not its form, controls the question of its disposition.”<sup>212</sup>

As an aside, note that the Supreme Court’s reliance on the 1897 Senate Report as a source for its own judgment about constitutional meaning is further evidence of the relevance of legislative views about the Constitution to the courts. The case for giving weight to the report would be all the stronger had the report been affirmatively voted on by both houses of Congress, resulting in a soft statute interpreting the Orders, Resolutions, and Votes Clause.<sup>213</sup>

This clause has been interpreted to require presentment only for “legislative acts,” which are best taken to mean acts imposing binding legal obligations. Because soft statutes do not impose binding obligations, the clause does not require presentment. Still, we have argued that soft statutes will often induce behavioral changes. Perhaps any legislative pronouncement that produces such effects should be deemed legislative and if it is, an “order, vote, or resolution” must be presented to the President. This reading is textually plausible, but it would be inconsistent with more than 100 years of actual congressional practice and Supreme Court pronouncements on the matter. Given that a presentment requirement would eliminate the advantages of soft statutes, requiring presentment of all soft statutes seems an unwise deviation from the existing doctrine.

Nor would relying on soft statutes run afoul of other limitations on congressional powers. A straightforward argument is that congressional power to rely on soft statutes for purposes of statutory or constitutional interpretation is necessary and proper to the execution of other legislative powers. Having the power to clarify the meaning of earlier hard statutes would allow Congress to legislate at lower cost and with greater precision.<sup>214</sup> Indeed, if judges refuse to

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208. 1A NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 29:3 n.1 (6th ed. 2000).

209. 478 U.S. 714, 755-56 (1986).

210. WILLIAM HOLMES BROWN, *CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES* 176 (1991).

211. S. REP. NO. 54-1335, at 8.

212. *Id.*

213. One concern here is self-dealing. Because the legislature is interpreting a constitutional restriction on legislative behavior, the legislature might advance a self-serving interpretation.

214. *Cf.* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115



give weight to soft statutes in statutory interpretation (not constitutional interpretation), the Constitution arguably permits Congress to pass a hard statute directing courts to do so.<sup>215</sup> Others have proposed enacting a general statute that specifies interpretive principles for judges to apply in statutory interpretation.<sup>216</sup> A more modest proposal would direct or request that courts give weight to soft statutes when interpreting another hard statute.

## V. A GENERAL THEORY OF SOFT LAW

### A. *Law as Communication Generalized*

We can now generalize our discussion of soft statutes and address soft law more broadly. Consider an agent that has lawmaking powers. The agent could be a legislature, a common law court, an administrative agency, a government that participates in international lawmaking, or a similar entity. Authoritative documents, such as written constitutions and unwritten customs, set the rules that determine when the agent's communications are taken to be law and when they are not taken to be law. When the agent complies with the rules, then other agents—typically, those with executive power—will treat the communication as law, and act in conformity with it. They will arrest people who break the rules, or enforce civil damage judgments. The public will react accordingly.

When the lawmaking agent does not comply with the rules, its communications will not be treated as law in the strong sense. Executive officials will not arrest or otherwise sanction people whose behavior is inconsistent with the policy judgment reflected in the communication. However, the public (and other political agents) will often react as though the communication were in fact law, as we have argued. The public might bring its behavior into conformity with the policy goals expressed in the communication because (for example) it predicts that later the lawmaking agent or some other lawmaking agent will convert the communication into law, or because the pronouncement is a focal point for behavior. As behavior changes, it may become easier for the original lawmaking agent to enact a hard-law version of the soft law, or for some other lawmaking agent (such as a court) to convert the soft law into hard law.

A hypothesis follows from this analysis. All else equal, the relative importance of soft law to hard law—at the risk of spurious precision, we might say the ratio of soft law to hard law—will rise as the formalities for creating hard law become stricter. This hypothesis explains the high soft law content of

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HARV. L. REV. 2085, 2102-03 (2002) (arguing that a statute establishing federal rules of statutory interpretation would accomplish similar ends).

215. *Id.* at 2086.

216. *Id.* at 2148-50.

international law, where hard law requires the consent of all affected states; and of the common law, where hard law can be generated only in response to a justiciable dispute; and of constitutional law in the United States, where hard law can be created only through the strict Article V process or in response to justiciable disputes.

Hard law is easiest to create in the regulatory setting, where not much more than notice and comment are required. Our topic—statutory law—is a middle case. As we have seen, statute making faces significant formalities, with the result that various soft law substitutes—concurrent resolutions, hortatory statutes, signing statements—have emerged. One might also predict that soft law will become popular in periods of uncertainty, where lawmaking agents might seek to test the waters of public opinion before committing themselves to a hard-law enactment.

In many cases, there is nothing troubling about soft law even though it has real effects on people's behavior. One can think of it as a useful regulatory instrument that allows governments to obtain policy goals without resorting to law, which is sometimes too costly, crude, and inflexible. But in other cases, resort to soft law may be troubling. Some people are better at perceiving soft law than others; the latter group will often find themselves in a worse position to control their lives. However, much of this argument turns on current expectations about hard and soft law. If people come to expect that soft law will function as a substitute for hard law, then they will endeavor to identify soft public law in the same way they do hard public law. Soft statutes are recorded alongside hard statutes; identifying the content of concurrent resolutions is no easier or harder than identifying the content of hard resolutions.

Some may be troubled by the way that soft law also plays havoc with the separation of powers. It allows lawmaking institutions to avoid the participation of other political institutions. We already discussed how soft statutes could exclude the President from the lawmaking process. Although our view is that the Constitution does not forbid the use of nonbinding legislative resolutions without presentment to the President, if parties react to soft statutes, in some circumstances the President's involvement could be reduced.

Similarly, the use of legislative soft law will often escape judicial review when hard law will not. A sustained strategy of legislative soft law pronouncements could exclude the judiciary from a role in the interpretive process of lawmaking. Again, this is not obviously a problem. The benefit of the soft statute is that it provides a clear indicator of legislative views without the influence of the President's veto and without subsequent judicial interpretation.

## B. *Dicta*

American judicial opinions contrast with those in many other countries, where only a holding is stated, or sometimes a formulaic statement of the reasoning that sheds no light on the real basis of the holding. American opinions overflow with reasoning that has no legally binding effect—*dicta*. The *dictum* is a type of soft law because it is a form of communication from a lawmaking body (a court) that an audience will take as guidance because it anticipates that future courts (as well as legislatures) may convert that soft law into hard law.<sup>217</sup>

The advantages of *dicta* are well known. Litigants who know the reasons for the holding as well as the holding itself can better predict how courts will react in similar but not identical cases, and they can plan their behavior accordingly. As in our example of Congress, courts can, in *dicta*, express their general views without committing themselves to them. This may provide a desirable balancing of two opposing virtues: settling the law so that people can plan their behavior, and leaving the law open so that it can be determined on the basis of better information as conditions change over time. Note how *dicta* blur the traditional distinction between prospective (and binding) legislation and retrospective (and binding) judicial interpretation: it is a form of prospective but nonbinding legislation.

Judges, unlike legislators, do not have the option to issue “binding” *dicta* in the form of prospective laws, though sometimes judges will purport to summarize previous holdings as a binding rule of precedent. Nonetheless, precedent is always vulnerable to narrowing as litigants persuade judges that the reasons behind the precedent do not apply in *their* case. So *dicta*, if skillfully employed, just seem like a useful way for judges to give hints about the potential future path of the law—and this additional information will always benefit the public (although it will benefit those who have sophisticated legal advice more than those who do not).

There is, however, a danger from *dicta*, which our analysis brings clearly into view. To the extent that the public adjusts its behavior in light of *dicta*, the felt need for legislation over the relevant issue may diminish. That is to say, judges can use *dicta* to legislate, impinging on the legislature’s prerogatives. If legislatures are generally better at legislating than courts are—and surely this is usually the case, especially because *dicta* do not reflect facts before the court—then *dicta* might crowd out good legislation. To be sure, if the public predicts a legislative reaction, then it will not be as heavily influenced by *dicta*. How these forces play out in any specific context is a difficult question. Virtually everyone agrees that it is better to have a mix of binding precedent and

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217. The distinction between *dictum* and holding is famously contested; in judicial opinions, hard law blurs into soft law, and in virtually every case the boundaries are open to debate.

nonbinding dicta in judicial opinions.

### C. *Constitutional Law*

At one time, one might have argued that hard constitutional law would comprise only the original text and amendments issued under Article V. However, it has long been clear that federal courts have the authority to recognize new constitutional rights. Courts have hard-law authority to issue binding interpretations of the U.S. Constitution when—and here is the main formality—a justiciable dispute arises, and the Constitution develops as precedents accumulate.<sup>218</sup> The formalities that distinguish hard constitutional law and soft constitutional law are essentially those of justiciability. When courts refuse to settle conflicting constitutional positions, and the Article V hurdle is too high, soft law is the only mechanism for constitutional development.

The modern soft-law analogue in constitutional development is thus the set of constitutional rules and norms that have emerged outside the judicial and Article V process.<sup>219</sup> Presidents make claims about executive power, embodied in veto messages, signing statements, speeches, briefs, and messages to Congress.<sup>220</sup> Congress makes opposing claims in resolutions, committee reports, speeches, regular hard law, and other documents. Usually courts refrain from resolving disputes between the President and Congress over the scope of executive and legislative power, and so nonjudicial precedents ultimately determine how these powers are allocated.

The enormous soft-law component of the separation of powers is likely due to the courts' failure to intervene, plus the difficulty of amending the Constitution. If the Constitution were easier to amend, it may be that presidential powers would have been formally adjusted as circumstances changed. Instead, the real constitutional allocation of authority is ambiguous, contested, and perhaps unstable. The public can only make rough predictions about whether the President's or Congress's views will prevail when conditions force a decision and the President and Congress disagree about what to do. That is when a constitutional crisis arises, and paralysis can ensue.<sup>221</sup>

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218. See, e.g., David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

219. See generally Young, *supra* note 1 (canvassing various materials, such as statutes, executive materials, and legal practices outside of formal constitution, that regulate practice in the way that formal constitutions do).

220. See generally Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 907-11 (1990) (discussing settings in which the President may deviate from a statute's requirements or judicial judgments because he disagrees about what the Constitution requires); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1270-71, 1286-92 (1996) (offering textual reading of the Constitution granting presidential power to interpret the Constitution).

221. See Posner & Vermeule, *supra* note 1.

Still, whether we would be better off with a “harder” Constitution than the one we have is a difficult question. As we have seen, the advantage of soft law is that it is cheap to change, and so can be altered easily as conditions evolve. What does seem to be clear is that courts and the public should pay attention to the constitutional views of the executive branch and the legislature, and those institutions should use the means at their disposal to make their views known.

In other constitutions, soft law has been institutionalized. For example, the Indian Constitution establishes directive principles that “shall not be enforceable by any court, but . . . are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”<sup>222</sup> These principles incorporate positive rights to health care, a fair distribution of wealth, education, and so forth.<sup>223</sup> Like other forms of soft law, they are communications—here from the founders of the modern Indian state—that express their vision of the overall ambition of that state, one that could well have influenced the subsequent quasi-socialist path of Indian development. Not surprisingly, the soft law has, to some extent, hardened. The Supreme Court of India has drawn on the directive principles as interpretive guidance, and these principles have thus made their way into India’s hard constitutional law.<sup>224</sup>

#### D. *International Law*

International law has faced a similar problem. Under conventional doctrine, states create international law mainly by entering treaties, which require the consent of all treaty parties. This system works well enough when two or a small number of states are involved. But many international problems have global scope, and can be solved only if all or nearly all states participate. Examples include the problem of maintaining peace, global environmental problems such as climate change, human rights atrocities, and the depletion of fisheries. States seeking to solve these problems cannot always persuade other states to consent to an appropriate treaty regime, and so such a treaty regime cannot come into existence.

The formality required to create international law—essentially, unanimous consent—is far stricter than the formalities required to amend the U.S. Constitution, and as a result international law is even harder to create. But just as political agents in the United States work around the amendment rules by creating soft constitutional law, so do states work around the international-law rules by creating soft international law. States enter nonbinding agreements,

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222. INDIA CONST. art. 37.

223. INDIA CONST. arts. 39-41.

224. *See, e.g.,* *Tellis v. Bombay Mun. Corp.*, A.I.R. 1986 S.C. 180 (holding that municipal government must offer alternative dwellings to squatters evicted from public property).

hoping that they will help bring into existence a political consensus for binding agreements, or that they will provide a framework for informal cooperation that may later occur. Notable examples include the Universal Declaration of Human Rights and the Basle Accords. The Universal Declaration set the stage for subsequent hard-law treaties such as the International Covenant for Civil and Political Rights,<sup>225</sup> while the Basle Accords, despite their soft-law status, led directly to cooperation between the central banks of different states.<sup>226</sup> In addition, states increasingly recognize a new type of customary international law, which is not rigidly tied to state practice and hence clear evidence of state consent.<sup>227</sup> Many scholars believe that states eventually come around and start complying with this type of soft law, at which point it “hardens” into conventional customary international law.<sup>228</sup> Others do not, and worry that violation of soft-law norms will weaken incentives to comply with hard international law.<sup>229</sup> In both the treaty and customary-international-law cases, we see the international-law analogies to two of our public-law arguments: that soft law can anticipate hard law and that soft law can directly change behavior by supplying information about the goals of lawmakers.

The ubiquity of soft international law is also due to the absence of an authoritative interpreter that takes care to distinguish communications that comply with formalities and those that do not. States comply with soft law when they have an interest in cooperating, just as they do for hard law.<sup>230</sup> At the other extreme, ordinary domestic legal regulation has greater hard-law content; the reason is that the authority to create, interpret, and enforce domestic law is more settled. Individuals take hard law seriously because they expect that it will be enforced; soft law therefore has a residual role, mainly that of providing information about the possible future path of hard law. In between, constitutional law has substantial hard-law content where courts have successfully asserted themselves as the authoritative interpreters of constitutional law, and not where they have refrained from doing so—chiefly, as we have noted, separation of powers and political questions. The executive and legislative branches cooperate when they can, generating soft-law norms in the process. Otherwise, they defer to the hard-law constitutional norms generated by the courts or work around their conflicting legal positions.

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225. MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS* 221-29 (2004).

226. *See* Ho, *supra* note 2.

227. For a discussion of this process, see Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757 (2001).

228. *See* COMMITMENT AND COMPLIANCE, *supra* note 2.

229. *See* Jonathan I. Charney, *Customary International Law in the Nicaragua Case Judgment on the Merits*, 1988 HAGUE Y.B. INT'L L. 16, 24; Weil, *supra* note 101, at 416-17.

230. *See* GOLDSMITH & POSNER, *supra* note 2.

## CONCLUSION

It is easy to dismiss soft law as inconsequential. When lawmaking authorities create laws that by their own terms or common understanding have no effect, one immediately suspects a cynical public-relations ploy. The international lawyer Hersch Lauterpacht said that states agreed to the terms of the Universal Declaration only because they would not be bound by them.<sup>231</sup> As we saw above, critics of hortatory laws assume that they are designed to mislead the public, so that Congress wins credit without having to raise taxes or regulate powerful interest groups.<sup>232</sup> Yet no one makes the similar claim about the private-law analogue—nonenforceable letters of intent that set the stage for negotiations that will culminate in a binding agreement, or nonenforceable contracts that provide a basis for cooperation but no appeal to the courts. Soft public law has similar desirable properties, as we have shown.

Agents may demand soft law because the formalities for creating hard law are strict, and so prevent legislation that the agents seek. Sometimes, soft law provides a second-best solution: agents would prefer hard law but can only obtain soft law, which allows for some cooperation but less than hard law would. But soft law can also be a first-best way of affecting behavior. Soft law avoids unwanted consequences of the use of hard law, such as the involvement of other agents (for example, judges or the President). In the domestic context, political agents who use soft law might fear that judges do not understand their interests and the nature of their cooperation; or they might fear that judges will protect interests that they wish to ignore. In either case, from the perspective of the political agents, soft law is not a second-best, but is simply an alternative regulatory instrument that has advantages that formal legislation lacks.

We have provided theoretical reasons for believing that soft statutes affect behavior, and some anecdotal evidence. We have identified several categories of behavior where soft statutes are likely to be important: where expression of the sense of Congress can help parties adjust to future hard legislation; can provide an independent basis of cooperation by revealing Congress's view of the world; and can enable Congress to stake out its congressional authority vis-à-vis the President and other constitutional agents when the judiciary declines to intervene. These activities have implications for statutory interpretation and constitutional adjudication, though precisely how courts should take account of soft statutes depends on contested theories of statutory interpretation and constitutional development.

We have only scratched the surface of a difficult topic, and we conclude by identifying subjects for further research. One question concerns the conditions under which soft law becomes hard law. In international law, a general view is

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231. HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 397-98 (1950). For other criticisms of international soft law, see Weil, *supra* note 101, at 416-17.

232. See *supra* Part II.C.2.

that soft law tends to harden: states eventually incorporate it in treaties or it enters customary international law. The Universal Declaration illustrates both these paths. In domestic constitutional law, this sometimes happens—when the Supreme Court recognizes a political norm as a constitutional norm, for example, the 1897 Senate’s understanding of the Orders, Votes, and Resolutions Clause that was ultimately approved by the Supreme Court.<sup>233</sup> But soft law often seems to exist in parallel (and in tension) with hard law. People who do not like soft constitutional norms appeal back to the written Constitution. International lawyers fear that soft international law will weaken the legitimacy of hard international law.<sup>234</sup>

Another question concerns whether hard law might crowd out soft law, in a harmful (or beneficial) way. In the social-norms literature, this possibility is a recurrent theme. Scholars often argue that legal norms might injure social norms without fully replacing them, so that people find it harder to cooperate despite well-intended legal intervention.<sup>235</sup> In the legislative and agency context, the concern seems to be the opposite—that congressional resolutions or agency guidance statements might crowd out formal legislation and regulation, because they are easier to enact. In the agency context, critics worry that the informal approach reduces public input and inappropriately lowers the costs of agency action. In the legislative context, one might worry that Congress can use soft law to obtain ends that would otherwise contravene constitutional limits.

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233. *Bowsher v. Synar*, 478 U.S. 714, 755-56 (1986).

234. See Charney, *supra* note 229, at 24.

235. See POSNER, *supra* note 14, at 219-22.



