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House Resolution on the Appropriate Role of
Foreign Judgements in the Interpretation of the
Constitution of the United States: Hearing Before
the Subcomm. on the Constitution, H. Comm. on
the Judiciary, 109th Cong., July 19, 2005
(Statement of Nicholas Quinn Rosenkranz, Prof. of
Law, Geo. U. L. Center)

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HOUSE RESOLUTION ON THE APPROPRIATE ROLE
OF FOREIGN JUDGMENTS IN THE INTERPRETA-
TION OF THE CONSTITUTION OF THE UNITED
STATES

HEARING
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

ON

H. Res. 97

JULY 19, 2005

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CONTENTS

JULY 19, 2005

HEARING ON H. RES. 97, EXPRESSING THE SENSE OF THE HOUSE OF REPRESENTATIVES THAT JUDICIAL DETERMINATIONS REGARDING THE MEANING OF THE CONSTITUTION OF THE UNITED STATES SHOULD NOT BE BASED ON JUDGMENTS, LAWS, OR PRONOUNCEMENTS OF FOREIGN INSTITUTIONS UNLESS SUCH FOREIGN JUDGMENTS, LAWS, OR PRONOUNCEMENTS INFORM AN UNDERSTANDING OF THE ORIGINAL MEANING OF THE CONSTITUTION OF THE UNITED STATES

OPENING STATEMENT

	Page
The Honorable Steve Chabot, a Representative in Congress from the State of Ohio, and Chairman, Subcommittee on the Constitution	1
The Honorable Jerrold Nadler, a Representative in Congress from the State of New York, and Ranking Member, Subcommittee on the Constitution	3
The Honorable Tom Feeney, a Representative in Congress from the State of Florida, Subcommittee on the Constitution	4

WITNESSES

Mr. Viet D. Dinh, Professor, Georgetown University Law Center	
Oral Testimony	7
Prepared Statement	9
Mr. M. Edward Whelan, III, President, Ethics and Public Policy Center	
Oral Testimony	11
Prepared Statement	14
Mr. Nicholas Q. Rosenkranz, Professor, Georgetown University Law Center	
Oral Testimony	28
Prepared Statement	30
Ms. Sarah Cleveland, Professor, University of Texas School of Law	
Oral Testimony	36
Prepared Statement	38

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Tom Feeney, a Representative in Congress from the State of Florida	57
Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia	58
Prepared Statement of Public Citizen's Global Trade Watch	59

Mr. CHABOT. Mr. Rosenkranz, or Professor Rosenkranz, you are recognized for 5 minutes.

**TESTIMONY OF NICHOLAS Q. ROSENKRANZ, PROFESSOR,
GEORGETOWN UNIVERSITY LAW CENTER**

Mr. ROSENKRANZ. I thank you, and I thank the Committee for the opportunity to express my views on this important topic.

I largely agree with what has been said so far, so I will limit myself to three brief comments:

First, I will discuss the separation of powers implications of directing a resolution regarding constitutional interpretation to the judiciary.

Second, I hope to show that the reliance on current foreign law undermines the bedrock principle of democratic self-governance.

Third, I will explore whether the Congress should also take up the same issue in the context of statutory interpretation.

The first point I wish to make is that House Resolution 97 is consistent with separation of powers. At a prior hearing before this Committee, my colleague, Professor Vicki Jackson, suggested that legislative directions to the courts on how to interpret the Constitution raise serious separation of powers questions. She may well be right.

But the key point today is that House Resolution 97 does not give directions to the courts. It does not purport to bind them. It simply expresses the sense of the House on this question. Because the resolution does not bind the judiciary, it cannot be objected to on separation of powers grounds. Indeed it should be applauded on these grounds. It is entirely proper for Congress to inform the courts of its views on constitutional interpretation. It is particularly appropriate when the method under discussion has such dramatic implications.

Which brings me to my second point. The current predilection for using contemporary foreign law to interpret the U.S. Constitution necessarily entails a rejection of the quest for original meaning. Simply put, those who would cite contemporary foreign law necessarily embrace the notion of an evolving Constitution.

The notion of the Court updating the Constitution to reflect its own evolving view of good government is troubling enough, but the notion that this evolution may be brought about by changes in foreign law raises fundamental issues of democratic self-governance. This, I think, puts the finest point on what is really at stake here. When the Supreme Court declares that the Constitution evolves, and declares further that foreign law affects its evolution, it is declaring nothing less than the power of foreign governments to change the meaning of the United States Constitution.

Moreover, it might take only a single foreign country to tip the scales and create a consensus in the eyes of the courts. And there is no reason why a foreign country could not do this self-consciously. Indeed, France has expressly announced that one of its priorities is the abolition of capital punishment in the United States. Yet surely it would come as a shock to the American people to imagine the French Parliament deciding whether to abolish the death penalty not just in France, but also in America.

After all, foreign control over American law was a primary grievance of the Declaration of Independence. King George III had “subject[ed] us to a jurisdiction foreign to our constitution.” This is exactly what is at stake here: foreign government control over the meaning of our Constitution. Any such control is inconsistent with basic principles of democratic self-governance, reflected both in the Declaration of Independence and in the Constitution itself.

The third point I wish to make is that while the resolution is limited to interpretation of the Constitution, courts often rely on foreign and international law in the interpretation of other federal law as well. Now, Professor Dinh has explained how foreign judgments may be relevant to the interpretation of treaties. A different question is whether international law may be relevant to the interpretation of Federal statutes.

Under current doctrine, courts regularly bend over backwards to construe Federal statutes to be consistent with international law, even when the text of the statute would perhaps be a different construction. Now, particularly in light of the dramatic expansion and metamorphosis of customary international law since World War II, Congress may want to consider whether it approves of this doctrine.

If it decides that the answer is no—that it would prefer for its statutes to be read according to their plain terms without reference to international law—then it might consider a subsequent resolution parallel to the present one, expressly rejecting the general use of international law in interpreting Federal statutes.

Indeed, while congressional mandates to foreign—Federal courts regarding constitutional interpretation may raise separation of powers concerns, congressional mandates regarding statutory interpretation generally do not. Thus Congress could, in fact, go further and enact a mandatory statute along the following lines: “Future acts of Congress shall not be interpreted by reference to foreign or international law unless they expressly reference and incorporate such bodies of law.” I believe that such a statute is worthy of serious consideration.

In conclusion, House Resolution 97’s nonbinding message to the courts does not violate separation of powers but, rather, reflects a healthy step toward interbranch constitutional dialogue. Moreover, the resolution rightly rejects the troubling notion that our Constitution can be made to evolve at the behest of foreign institutions. My only suggestion is that Congress next study this same issue as it applies in the context of statutory interpretation.

I applaud House Resolution 97, and I thank the Committee for the opportunity to endorse it.

Mr. CHABOT. Thank you very much.

[The prepared statement of Mr. Rosenkranz follows:]

PREPARED STATEMENT OF NICHOLAS QUINN ROSENKRANZ

**House Judiciary Subcommittee on the Constitution Legislative Hearing:
H. Res. 97 and the Appropriate Role of Foreign Judgments
in the Interpretation of American Law**

July 19, 2005

**Prepared Statement of Nicholas Quinn Rosenkranz, Associate Professor of Law
Georgetown University, Washington, DC**

I thank the Committee for the opportunity to express my views on the appropriate role of foreign judgments in the interpretation of American law. I applaud House Resolution 97 and its declaration that:

judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.

There are many arguments in support of the Resolution, and I expect that Mr. Whelan and my colleague Professor Dinh will canvass them thoroughly. In addition, this Subcommittee held excellent hearings on this subject last year, and I largely agree with the learned testimony of Professors John O. McGinnis and Michael D. Ramsey at that hearing.¹ Without repeating what has already been said, I will limit myself to three basic comments. I hope to show, first, that the stakes are very high here, because the new trend of reliance on current foreign law undermines the bedrock principle of democratic self-governance. Second, I will discuss the separation of powers implications of directing a resolution regarding constitutional interpretation to the judiciary. And third, I will briefly explore whether Congress should also take up this same issue in the context of statutory interpretation.

I. Democratic Self-Governance

I begin with the last clause of the Resolution, which is a crucial exception to the rule. The Resolution declares that foreign sources should not be used to interpret the U.S. Constitution “unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.”

This clause implicitly endorses a particular theory of constitutional interpretation. It does so in two words: “original meaning.” The Resolution reminds us that the project of interpreting the Constitution involves discerning what its text would have meant to a reasonable reader *at the time of its ratification*.

¹ See *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H. Res. 568 Before the Subcomm. on the Constitution of the H. Judiciary Comm., 108th Cong. (2004)*.

As the Resolution recognizes, foreign sources may be relevant to that project. It may well be appropriate to look to Blackstone, or to pre-constitutional British statutes or judgments, because these sources may have been known to readers at the time of the ratification, and they may reflect the way in which legal terms of art were used at that time. The Resolution wisely allows this uncontroversial use of foreign sources, to inform the original meaning of the Constitution.

But the new and disturbing trend at the Court has nothing to do with original meaning. The Court has taken to citing not Blackstone or Coke but *contemporary* foreign law.² As a matter of logic, these bodies of law are irrelevant to the original meaning of our constitutional text, not merely because they are foreign, and not merely because they are written to construe entirely different legal texts, but also because they are contemporary.

And this brings me to my first point. The current predilection for using contemporary foreign law to interpret the U.S. Constitution necessarily entails a rejection of the quest for *original* meaning. Simply put, those who would cite contemporary foreign law necessarily embrace the notion of an *evolving* Constitution.³ Justice O'Connor sees this connection and, unfortunately, she has sometimes exemplified this point. Just a few months ago, she announced: "Our Constitution is one that *evolves*."⁴ And for this reason, she said, "of course we look at foreign law."⁵

The notion of the Court "updating" the Constitution to reflect its own "evolving" view of good government is troubling enough. But the notion that this "evolution" may be brought about by changes in foreign law raises fundamental issues of democratic self-governance. What this means, in effect, is that a change in foreign law can alter the meaning of the United States Constitution. And this, I think, puts the finest point on what is really at stake here. When the Supreme Court declares that the Constitution evolves, and declares further that foreign law effects its evolution,⁶ it is declaring nothing less than *the power of foreign governments to change the meaning of the United States Constitution*.

² See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 572-73, 576-77 (2003); *Roper v. Simmons*, 125 S.Ct. 1183, 1194, 1198-1200 (2005).

³ Conversely, however, even those who reject original meaning and accept the notion of an "evolving" Constitution need not—and should not—deem contemporary foreign law relevant to its evolution. See John O. McGinnis, *Foreign to Our Constitution*, 100 N.W. L. REV. __ (2005) (forthcoming).

⁴ *Candid Camera with Supreme Court Justices*, MSNBC, April 22, 2005, <http://msnbc.msn.com/id/7598231/> (emphasis added).

⁵ *Id.*

⁶ We should presume that if foreign citations are present, the Court is relying on them at least in part. The Court has no business spending government money to print its thoughts in the United States Reports unless those thoughts are in service of an exercise of the judicial power. See *Roper v. Simmons*, 125 S.Ct. 1183, 1229 (2005) (Scalia, J., dissenting) "'Acknowledgment' of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*—which is surely what it parades as today."

Moreover, it might take only one foreign country to tip the scales and create a consensus. At the margin, a single country could make the difference. So in short, if constitutional interpretations are based even in part on foreign law, then under some circumstances, *a single foreign country would have the power to change the meaning of the United States Constitution.*⁷

And there is no reason why a foreign country could not do this self-consciously. Indeed, France has expressly announced that one of its priorities is the abolition of capital punishment *in the United States.*⁸ Yet surely it would come as a shock to the American people to imagine the French Parliament deciding whether to abolish the death penalty—not just in France, but also in America.

After all, ending foreign control over American law was the primary reason given for the Revolution in the Declaration of Independence; as House Resolution 97 recites, the Declaration’s most resonant protest was that King George III had “subject[ed] us to a jurisdiction foreign to our constitution.”⁹ After the Revolution, it was not supposed to be this way. “We the People *of the United States* ... ordain[ed] and establish[ed] th[e] Constitution,”¹⁰ and we included a mechanism by which we could change it if necessary.¹¹ There is no reason to believe that foreign governments were also granted a free-standing power to change the meaning of the United States Constitution.¹² As Chief Justice Marshall declared in another context:

To impose on [the federal government] the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might

⁷ See, e.g., *Roper v. Simmons*, 125 S.Ct. 1183, 1199 (2005) (“The United Kingdom’s experience bears particular relevance here in light of the historic ties between our countries and in light of the Eighth Amendment’s own origins.”). *But see id.* at 1228 (Scalia, J., dissenting) (“The Court has ... long rejected a purely originalist approach to our Eighth Amendment, and that is certainly not the approach the Court takes today. Instead, the Court undertakes the majestic task of determining (and thereby prescribing) *our* Nation’s *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War ... a legal, political, and social culture quite different from our own.”).

⁸ See Ken I. Kersch, *Multilateralism Comes to the Courts*, PUB. INT., Winter 2004, at 3, 4-5.

⁹ THE DECLARATION OF INDEPENDENCE (U.S. 1776). The Declaration protests further:

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.

To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

Id.

¹⁰ U.S. CONST. pmb1. (emphasis added).

¹¹ *See id.* art. V.

¹² *See* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867, 1911 (2005).

disappoint its most important designs, and is incompatible with the language of the constitution.¹³

This is what is at stake here: foreign government control over the meaning of our Constitution. Any such control, even at the margin, is inconsistent with basic principles of democratic self-governance reflected both in the Declaration of Independence and the Constitution itself. The issue is thus a very important one, and all the more important today with a Supreme Court nomination pending. The Committee is to be commended for addressing it here.

II. Separation of Powers and Interbranch Constitutional Dialogue

The Resolution focuses expressly on “judicial” interpretations. At a hearing before this committee last year concerning a similar Resolution, my colleague Professor Vicki Jackson suggested that “legislative directions to the courts on how to interpret the Constitution raise serious separation of powers questions.”¹⁴ She may well be right.¹⁵ But the key point today is that House Resolution 97 does not give “directions” to the courts; it does not purport to bind them. It simply expresses the “sense of the House of Representatives” that judicial interpretations of the Constitution generally “should not” be based on foreign law. Because the Resolution does not purport to bind the judiciary, it cannot be objected to on separation-of-powers grounds.

Indeed, it should be applauded on these grounds. Each branch of government has an independent obligation to consider carefully the proper method for interpreting the United States Constitution. And it is entirely proper and commendable for one branch to inform another of its views on this topic. (One possible criticism of the Resolution as drafted is that it is *limited* to judicial interpretations; each branch of government is responsible for constitutional interpretation, and *none* of them should base its interpretation on foreign law.) This interbranch constitutional dialogue is eminently healthy for our system of separation of powers. If anything, I would urge Congress to let its opinions be known on such questions more often.

III. The Use of Foreign Sources in the Interpretation of Non-Constitutional Federal Law

Finally, it is worthy of note that the Resolution is limited to interpretation of the Constitution. Courts often rely on foreign and international law in the interpretation of other federal law as well, and it may be worth considering whether this is appropriate and when. Professor Dinh’s testimony contends that foreign judgments are peculiarly

¹³ *McCulloch v. Maryland*, 17 U.S. 316, 424 (1819).

¹⁴ *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H. Res. 568 Before the Subcomm. on the Constitution of the H. Judiciary Comm.*, 108th Cong. 18 (2004); *See also id.* at 18 (“Efforts by the political branches to prescribe what precedents and authorities can and cannot be considered by the Court in interpreting the Constitution in cases properly before it would be inconsistent with our separation of powers system.”).

¹⁵ *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2088 n.7 (2002).

relevant to the interpretation of treaties, and I generally agree with him. A different question is whether such judgments may be relevant to the interpretation of federal statutes. Some statutes are passed precisely to execute non-self-executing treaties,¹⁶ and the text of such statutes often track the treaties verbatim. In such cases, just as a foreign judgment may be relevant to interpret the treaty, it may likewise be relevant to interpret the implementing statute.

On the other hand, courts rely on international law to interpret federal statutes much more often than that. Indeed, international law is used to interpret federal statutes far more often than foreign law is used to interpret the Constitution. The primary reason for this is the famous *Charming Betsy* canon, which provides: “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”¹⁷ According to one scholar, “the interpretive role of international law, as reflected in the *Charming Betsy* canon, is arguably more important than its substantive role [C]ourts regularly rely on the *Charming Betsy* canon in interpreting domestic law.”¹⁸

One of the primary rationales for the canon is that it reflects congressional intent—that Congress is extremely unlikely to wish to violate international law.¹⁹ This was certainly a sound assumption in 1804, and it was probably a sound assumption for most of our nation’s history. But one might ask whether this is still a sound assumption in light of “the radical changes in customary international law after World War II.”²⁰ Customary international law now “can arise much more quickly,”²¹ and it is also “less tied to state practice and consent.”²² And—perhaps the most “radical development in the whole history of international law”²³—customary international law “increasingly regulates the ways in which nations treat their own citizens.”²⁴

Congress may wish to consider whether it still wishes to legislate against the background rule of the *Charming Betsy* canon, in light of this radical metamorphosis in customary international law.²⁵ If it decides that the answer is no—that it would prefer for its statutes to be read according to their plain terms without reference to international law—then it might consider a subsequent Resolution parallel to the present one, expressly rejecting the general use of international law in interpreting federal statutes.

¹⁶ Cf. Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 HARV. L. REV. 1867 (2005).

¹⁷ *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

¹⁸ Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 482-83 (1998).

¹⁹ See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115, cmt. a (“[i]t is generally assumed that Congress does not intend to repudiate an international obligation of the United States by nullifying a rule of international law or an international agreement as domestic law.”)

²⁰ Bradley, *supra* note 18, at 512.

²¹ *Id.*

²² *Id.*

²³ John J. Humphrey, *The Revolution in the International Law of Human Rights*, 4 HUM. RTS. 205, 208 (1975).

²⁴ Bradley, *supra* note 18, at 512.

²⁵ See *id.* at 518-19 (offering “empirical evidence suggesting that compliance with international law is often not the political branches’ paramount concern”).

Indeed, while mandatory congressional instructions to federal courts regarding *constitutional* interpretation may raise separation-of-powers concerns,²⁶ mandatory congressional instructions regarding *statutory* interpretation generally do not.²⁷ Thus Congress could, in fact, go further if it wished and *require* the federal courts to abandon the *Charming Betsy* canon. A simple statute to this effect might read as follows: “Acts of Congress shall only be interpreted by reference to foreign or international law if they expressly reference and incorporate such bodies of law.” I believe that such a statute is worthy of serious consideration.

Conclusion

In conclusion, the Resolution rightly endorses a jurisprudence of “original meaning” and rejects the troubling notion that our Constitution can be made to “evolve” at the behest of foreign institutions. Its precatory framing as a “Sense of the House of Representatives” about how the judiciary “should” approach constitutional analysis does not violate separation of powers principles, but rather reflects a healthy step toward interbranch constitutional dialogue. My only suggestion is that Congress next address this same issue as it applies in the context of statutory interpretation.

I applaud House Resolution 97 and I thank the Committee for the opportunity to endorse it.

²⁶ See *supra* notes 14-15.

²⁷ See Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085 (2002).