

MAKING STRANGE LAWS

SHELDON BERNARD LYKE*

ABSTRACT

The central argument of this Article is that conflict over the judicial practice to use foreign authority leads to the manufacture of foreign law into a dangerous stranger. Drawing on philosopher and sociologist Georg Simmel's conceptualization of the stranger as a cultural object that sits on the border of the insider and outsider, I argue that there is a resistance to the use of foreign law in the United States. Foreign laws, like immigrants in the United States, are being constructed as tolerable illegals or threatening legals.

I perform an empirical qualitative content analysis of the senate confirmation hearings for Supreme Court nominees and their discussions of the practice of judicial citation of foreign law. The hearings of nominees Alito, Kagan, O'Connor, Roberts, and Sotomayor are studied. During these hearings, conservatives label foreign law as biased and dangerous. Most interestingly, however, are the ways in which foreign law emerges from these debates linked to otherness—particularly the otherness of disadvantaged gender and racial minorities. The Article connects the transformation of foreign law into a stranger to other conservative movements that have constructed foreign national immigrants as illegal strangers who should be feared. This work argues that foreign laws and decisions constitute a new American stranger.

* Assistant Professor, Whittier Law School. Ph.D., Department of Sociology, University of Chicago (2013); J.D., Northwestern University School of Law (1999); A.B., Princeton University (1996). The author is especially grateful to Betsy Rosenblatt, Leonard Rubinowitz, Mario L. Small, and Saskia Sassen for their feedback on this project. I received valuable feedback when I presented an earlier draft of this Article in a workshop at the Center for International and Comparative Law at Whittier Law School. I am thankful to the Williams Institute at the UCLA School of Law who provided support during the preliminary writing phase of this Article.

TABLE OF CONTENTS

1.	Introduction.....	677
2.	Theorizing the Stranger	682
	2.1. <i>What is a Stranger?</i>	683
	2.2. <i>Why the Stranger?</i>	684
	2.2.1. <i>Functional</i>	684
	2.2.2. <i>Structural/Social Construction</i>	686
	2.3. <i>Distinguishing Strangeness</i>	689
3.	Method	691
4.	Data/Results.....	692
	4.1. <i>Shared Understanding/Agreement</i>	694
	4.1.1. <i>Accepted Uses</i>	694
	4.1.2. <i>Unacceptable Uses</i>	696
	4.2. <i>Otherness and Boundaries</i>	697
	4.2.1. <i>Proper Authority and the Constitution</i>	697
	4.2.2. <i>Disadvantaged Minority Status</i>	699
	4.3. <i>Bias and Danger</i>	705
	4.3.1. <i>Judicial Activism</i>	705
	4.3.2. <i>Domestic Constraints</i>	708
	4.4. <i>Danger</i>	710
	4.4.1. <i>Diluted Meaning</i>	712
	4.4.2. <i>Anti-Democratic: Destroys Democracy</i>	714
	4.4.3. <i>Sovereignty</i>	718
	4.5. <i>Learning</i>	721
5.	Discussion.....	730
6.	Conclusion and Implications for Future Research.....	734

2014]

MAKING STRANGE LAWS

677

Resistance is futile.
– *The Borg*¹

1. INTRODUCTION

US courts have long relied on authorities from outside the US when rendering opinions. At the very beginning of the 19th century, Chief Justice John Marshall wrote several well-known opinions—including *The Antelope*²—that cited to foreign precedent.³ Concurring and dissenting opinions in the famous 1857 case of *Dred Scott v. Sandford*⁴ made significant reference to foreign law. Legal scholars have provided detailed evidence that the judiciary’s practice of citing foreign and international legal precedents has been taking place since the founding of the United States and has continued into the 21st century.⁵ In addition, there

¹ The Borg are a fictional alien race from the popular television science fiction universe of *Star Trek*. They are a collective of cybernetic organisms, which when they come into contact with other species, forcefully assimilate them and thereby add the “biological and technological distinctiveness” of the other species to their own. The quote “Resistance is futile,” is sent as an audio message when the Borg targets a species and announces its plan for assimilation. The Borg’s continued attempts to assimilate Earth and the humanoids that comprise the Federation are unsuccessful. The story illustrates that when faced with conflict, and odds in favor of failure, human resistance need not be futile. In fact, it can be productive. This Article attempts to illustrate that conflict and resistance—by both conservatives and progressive politicians—has productive and transformative effects with respect to how society understands the judicial citation to foreign and international laws.

² 23 U.S. (10 Wheat.) 66 (1825). *The Antelope* was a ship seized off the coast of Florida illegally importing slaves to the United States. The Court ruled that federal slavery laws did require forfeiture of the foreign-owned slaves and that the slaves should be returned to their owners.

³ Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 763–80 (2005). John Marshall was the fourth and longest serving chief justice in the history of the Supreme Court of the United States, from the years 1801–1835.

⁴ 60 U.S. (19 How.) 393 (1856). The *Dred Scott* decision ruled that Dred Scott, a person of African descent, was not a citizen, and neither were any individuals of African descent intended to be citizens under the U.S. Constitution. As a result, Dred Scott did not have standing to sue in court.

⁵ Calabresi & Zimdahl, *supra* note 3. See also David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297 (2006) (examining how federal courts have used foreign legal authorities between 1945 and 2005).

isn't a significant record of resistance to courts using foreign law prior to the 21st century.⁶

Yet despite two centuries of undisturbed practice, citing foreign authority became a controversial activity – practically overnight – when the Supreme Court issued its ruling in *Lawrence v. Texas*.⁷ The decision overturned state anti-sodomy statutes, and in its reasoning, cited decisions from the European Court of Human Rights.⁸ The debate over the use of foreign law began in the Court largely in the form of critiques lodged by Justice Scalia in dissent to the *Lawrence* majority.⁹ The press characterized the foreign citation in *Lawrence* as new, with one particular journalist mistakenly writing, "Never before had the Supreme Court's majority cited a foreign legal precedent in such a big case."¹⁰ Chief Justice Rehnquist actually cited foreign judicial opinions in two important civil rights due process cases. These citations appear in the Court's majority opinion in the assisted suicide case of *Washington v. Glucksberg*,¹¹ and in the *Planned Parenthood v. Casey*¹² decision on the

⁶ *But see* Calabresi & Zimdahl, *supra* note 3, at 781–85 (highlighting a debate between the majority and dissenting opinions in *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), where Justice Livingston took issue with the majority's use of foreign law and its references to foreign authors).

⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁸ *Id.* at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981)).

⁹ *Id.* at 586–605 (Scalia, J., dissenting). One might argue that *Lawrence* is not the beginning of the resistance to the citation of foreign law and point to Justice Stevens' majority opinion in *Atkins v. Virginia*, 536 U.S. 304, 316–17 (2002), where in footnote 21, he referenced the world community's disapproval of the imposition of the death penalty for crimes committed by mentally retarded offenders. Chief Justice Rehnquist rebuked the majority decision in dissent, writing that foreign law was irrelevant. *Id.* at 322. At the time, however, this issue did not draw much public attention. Therefore, I agree with Calabresi & Zimdahl that the normative contestation over judicial foreign law citation began with *Lawrence*, *supra* note 3, at 748.

¹⁰ Joan Biskupic, *Supreme Court Citing More Foreign Cases*, USA TODAY (July 7, 2003, 9:19 PM), http://www.usatoday.com/news/washington/2003-07-07-foreign-usat_x.htm.

¹¹ *Washington v. Glucksberg*, 521 U.S. 702 (1997). In *Glucksberg*, Chief Justice Rehnquist highlighted that there were other countries "embroiled" in a similar debate on euthanasia and relied on two foreign opinions. *Id.* at 718 n.16. The first case he cited was *Rodriguez v. British Columbia*, [1993] 3 S.C.R. 519 (Can.). Rehnquist noted that in *Rodriguez*, the Canadian court refused to state that the Charter of Freedom established a right to assisted suicide. The second case that Rehnquist cited was *Corte Constitucional [C.C.] [Constitutional Court]*, mayo 20, 1997, M.P: Carlos Gaviria Diaz, *Sentencia C-239/97* (Colom.), where the *Corte Constitucional Colombia* (Colombian Constitutional Court) decided to accept euthanasia.

right to reproductive choice. Even after *Lawrence*, the press documented the contentious nature of federal court citation to foreign law.¹³

The contestation over the use of foreign law took on a number of forms. For example, the justices aired their views concerning foreign law in public debates between the justices,¹⁴ and public speeches given by the justices.¹⁵ A vigorous debate over the proper role of foreign law began in the legal academy.¹⁶ Some federal legislators have attempted (and continue to attempt) to regulate foreign citations by questioning Supreme Court nominees during the confirmation hearings on the propriety of using foreign law. Resistance to the judiciary's use of foreign law has taken the form of states banning (or considering banning) the use of foreign,

¹² *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

¹³ See, e.g., Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER (Sep. 12, 2005), http://www.newyorker.com/archive/2005/09/12/050912fa_fact; Tim Wu, *Foreign Exchange: Should the Supreme Court Care What Other Countries Think?*, SLATE (Apr. 9, 2004, 5:03 PM), <http://www.slate.com/id/2098559/>.

¹⁴ Justice Antonin Scalia & Justice Stephen Breyer, Discussion of the Constitutional Relevance of Foreign Court Decisions at American University Washington College of Law (Jan. 13, 2005), available at <http://domino.american.edu/AU/media/mediaref.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>.

¹⁵ See, e.g., Justice Ruth Bader Ginsburg, Address at the International Academy of Comparative Law at American University: A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication (July 30, 2010), in 26 AM. U. INT'L L. REV. 927 (2011) (expressing her view as to how foreign legal materials contribute to American constitutional development); Justice Stephen Breyer, Address at the American Society of International Law: The Supreme Court and the New International Law (Apr. 4, 2003), available at http://www.supremecourt.gov/publicinfo/speeches/viewspeeches.aspx?Filename=sp_04-04-03.html (quoting Justice Ginsburg in expressing a firm opinion that "[w]e are the losers if we neglect what others can tell us about endeavors . . . in our world").

¹⁶ See, e.g., Vincent Martin Bonventre, Aristotle, Cicero and Cardozo: A Perspective on External Law, Address at the Albany Law Review Symposium: "Outsourcing Authority?" Citation to Foreign Court Precedent in Domestic Jurisprudence (Feb. 10, 2006), in 69 ALB. L. REV. 645 (2006) (discussing the recent revival of the historical debate over the role of foreign law in domestic judicial decisions); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005) (outlining the benefits and risks of American courts considering foreign and international law when ruling on domestic issues).

international, and/or Sharia law in state courts.¹⁷ Similar contemplative banning measures have taken place at the federal level.¹⁸

Representative Sandy Adams, a Republican member of the House representing the state of Florida, introduced a bill “to prevent the misuse of foreign law in Federal courts,” which, if enacted, would place limitations on the use of foreign law in federal courts.¹⁹ The bill states:

In any court created by or under article III of the Constitution of the United States, no justice, judge, or other judicial official shall decide any issue in a case before that court in whole or in part on the authority of foreign law, except to the extent the Constitution or an Act of Congress requires the consideration of that foreign law.²⁰

Shortly after introducing the bill, Adams wrote in an op-ed that

[t]he imposition of foreign precedent into our federal court system is a real threat to our Constitution and could fundamentally break down the very system put in place by our forefathers more than 200 years ago. Each case that

¹⁷ On Nov. 2, 2010, Oklahoma voters approved State Question 755, amending the Oklahoma state constitution and forbidding the state courts from considering or using international law or Sharia Law. See MARTHA F. DAVIS & JOHANNA KALB, AM. CONST. SOC'Y FOR L. & POL'Y, ISSUE BRIEF: OKLAHOMA STATE QUESTION 755 AND AN ANALYSIS OF ANTI-INTERNATIONAL LAW INITIATIVES (2011) (analyzing anti-international law initiatives); Donna Leinwand, *More States Enter Debate on Sharia Law*, USA TODAY (Dec. 9, 2010, 10:29 AM), http://usatoday30.usatoday.com/news/religion/2010-12-09-shariaban09_ST_N.htm (highlighting the debate on the application of sharia law in different states). See, e.g., LA. REV. STAT. ANN. § 9:6001 (2010) (banning the use of foreign law when “[its] application . . . will result in the violation of a right guaranteed by the constitution of [Louisiana] or of the United States”).

¹⁸ See, e.g., John Cornyn, *Domestic, Not Foreign: Our Laws Should be Judged by our Laws*, NAT'L REV. ONLINE (Mar. 28, 2005, 7:34 AM), <http://www.nationalreview.com/articles/214011/domestic-not-foreign/john-cornyn>. Both legislative houses have introduced legislation in order to prevent the judiciary from using foreign law. On March 20, 2005, Senator John Cornyn introduced Senate Resolution 92 stating that American courts should not be influenced by decisions in foreign courts. S. Res. 92, 109th Cong. (2005). See also *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. Res. 568 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 108th Cong. (2004) (discussing the appropriateness of citing foreign authorities in American case law).

¹⁹ H. R. 973, 112th Cong. (1st Sess. 2011) (internal quotation marks omitted).

²⁰ *Id.*

cites foreign law is another opportunity to set precedent and for the Constitution to be challenged and overruled.²¹

Adams does not see the use of foreign law merely as different, or problematic. Instead, Adams characterizes it as hostile to U.S. tradition and capable of harming society. Foreign law, for Adams, is dangerous.

Given the existence of these multiple normative battles, I argue that we are witnessing the social transformation of foreign law (a longtime, historically noncontentious concept) into a stranger—specifically a dangerous stranger. Upon cursory glance and given a general definition of strangeness, it might be easy for a consensus of society to think about foreign law as strange. When a person or object is foreign, it by definition lacks autochthonism. But foreignness and strangeness are not necessarily synonymous.

This Article assumes that there is nothing natural about the existence of strangers, and that their presence is manufactured by individuals and groups interacting in society. I argue that in resisting judicial reference to the citation of foreign authorities, conservative politicians and social movement organizations have worked to construct foreign law as a dangerous social stranger.²² My goal is to understand normative arguments against the use of foreign law—arguments that never existed prior to the 21st century. I hope to achieve this by analyzing these arguments using the sociological theories of the stranger.

My argument is that the very nature of the debate is based on socially constructed categories that have no resonance in history or historical reference. I believe that the foundation and framework that house the normative debate on the use of foreign law will shape its outcome. Therefore, it is necessary to interrogate how all participants and society conceptualize the parameters of the debate. The sociology of the stranger may illuminate this inquiry on foreign law, as it has been useful in better understanding the

²¹ Sandy Adams, *ADAMS: Ban Foreign Law from Courts*, WASH. TIMES (Mar. 9, 2011), <http://www.washingtontimes.com/news/2011/mar/9/in-recent-years-supreme-court-justices-have-interj/>.

²² While I argue that strangers are socially constructed, I do not argue that the construction of strangers is necessarily deliberate, or that individuals and groups that construct the stranger are even cognizant or aware that they are involved in a social process that is constructing a stranger identity.

social lives and societal responses to foreigners and outsiders in a variety of settings.²³

Additionally, from a sociological and theoretical standpoint, the empirical example of foreign law as a site for observation may help push and advance the theory of the sociological stranger. Can the concept be broadened to include the material products that people produce, as opposed to the people themselves? Can the concept of the stranger be applied to non-material objects, like ideas? Instead of talking about stranger relations, I argue that Georg Simmel's original notion of the stranger and stranger relations can be deconstructed and broadened to discuss a generalized 'strangeness' that explains a wide variety of social interactions not solely limited to the stranger (interactions between people), but one that also includes strange things (interactions between people and cultural objects).

This Article begins in Part 2 with a critical review of the sociological literature that theorizes the stranger. I continue this inquiry by grounding theory in an empirical case study of senate judiciary confirmation hearings for nominees to the Supreme Court of the United States. The high profile nature of these proceedings provides a great site to observe the political attempts and processes to transform foreign laws into strangers. I discuss the methods used in designing the research study of confirmation hearings in Part 3. In Part 4, I present my results where I analyze how legal and political elites understand and make meaning of foreign law. This Section illustrates the various framing techniques and conflicts that lead to the production of foreign law as a dangerous stranger. These results are discussed in relation to the previous literature in Part 5, where I also touch on a theory of conflict that may offer a better explanation of strangers than a functionalist account. Finally, I conclude briefly and offer thoughts for future research.

2. THEORIZING THE STRANGER

This Section critically reviews the relevant literature on the stranger in order to describe and better theorize the citation of foreign and international law in American society. A key

²³ See generally, Robert Ezra Park, *Cultural Conflict and the Marginal Man*, in 1 THE COLLECTED PAPERS OF ROBERT EZRA PARK 372-76 (Everett Cherrington Hughes et al. eds., 1974); MARGARET MARY WOOD, *THE STRANGER: A STUDY IN SOCIAL RELATIONSHIPS* (1934).

component to this literature is that a stranger—or strangeness more generally—is a specific form of social interaction.²⁴ Therefore, this project seeks to understand how human interaction changes and affects the use of foreign law. This Section proceeds with defining the sociological concept of the stranger, and seeks to understand the various cultural, functional, and structural reasons for the existence of the stranger.

2.1. *What Is a Stranger?*

Most sociological discussions of the stranger have their origins in Georg Simmel's 1908 work called "The Stranger." At the heart of Simmel's stranger is the notion of ambivalence and competing duality. He writes that while the stranger may hold a meaningful place in the intimate personal relations of society, he is no "landowner" in the social environment.²⁵ The stranger has the specific character of mobility and is therefore not fixed with respect to the origin of society. Simmel writes:

He is fixed within a certain spatial circle—or within a group whose boundaries are analogous to spatial boundaries—but his position within it is fundamentally affected by the fact that he does not belong in it initially and that he brings qualities into it that are not, and cannot be, indigenous to it.²⁶

The sociological literature on the stranger further develops the notion of the stranger's duality at odds with itself. Scholars describe the stranger as a being who operates on both sides of social borders. The language used to describe strangers in main societies encompasses concepts linked to hospitality and hostility, and the stranger can act as a guest or an enemy, and at times

²⁴ Simmel wrote that "[t]he state of being a stranger is of course a completely positive relation; it is a specific form of interaction." Georg Simmel, *The Stranger*, in GEORG SIMMEL: ON INDIVIDUALITY AND SOCIAL FORMS 143, 143 (Donald N. Levine ed., 1971).

²⁵ Simmel writes: "Although in the sphere of intimate personal relations the stranger may be attractive and meaningful in many ways, so long as he is regarded as a stranger he is no 'landowner' in the eyes of the other." *Id.* at 145. Earlier in the essay, Simmel expands on his notion of the stranger's landlessness, writing that "[t]he stranger is by his very nature no owner of land—land not only in the physical sense but also metaphorically as a vital substance which is fixed, if not in space, then at least in an ideal position within the social environment." *Id.* at 144.

²⁶ *Id.* at 143.

simultaneously serve as both depending on the social moment.²⁷ Beck writes that the “stranger has lost for himself the reference point of being here, of being at home. There are natives and foreigners, friends and enemies—and there are strangers who do not categorically fit into this model, who dodge, obstruct, and irritate oppositions.”²⁸ Bauman writes of such irritations when he says that “they [strangers] befog and eclipse the boundary lines which ought to be clearly seen.”²⁹ We can think about communities as having boundaries that distinguish insiders from outsiders. The insiders are positioned safely within the boundary, while the outsider exists beyond social boundaries. The stranger, however, is located on the boundary. Monterescu discusses the stranger as “located on the boundary between the group and what lies outside it.”³⁰ But due to the ambivalent and mobile nature of the stranger, the stranger is not fixed on the boundary. The stranger can cross boundaries and, in doing so, “defines and defies [community] boundaries, or builds bridges over them.”³¹

2.2. *Why the Stranger?*

2.2.1. *Functional*

Karakayali wisely asks the question “why are there ‘strangers’?”³² Karakayali wants to understand what would motivate people to enter into relations that Simmel states is an unclear, ambiguous, twilight social position.³³ Karakayali argues that instead of labeling individuals as strangers, it would be easier

²⁷ See e.g., Rudolf Stichweh, *Stranger*, in *ENCYCLOPEDIA OF SOCIAL THEORY* 599, 599–600 (Austin Harrington et al. eds., 2006).

²⁸ Ulrich Beck, *How Neighbors Become Jews: The Political Construction of the Stranger in an Age of the Stranger in an Age of Reflexive Modernity*, 2 *CONSTELLATIONS* 378, 383 (1996).

²⁹ Zygmunt Bauman, *Making and Unmaking of Strangers*, 43 *THESIS ELEVEN* 1, 1 (1995).

³⁰ Daniel Monterescu, *Stranger Masculinities: Gender and Politics in a Palestinian-Israeli “Third Space”*, in *ISLAMIC MASCULINITIES* 123, 127 (Lahoucine Ouzgane ed., 2006).

³¹ Tanya M. Cassidy, *‘Race to the Park’: Simmel, the Stranger and the State*, 8 *IRISH COMM. REV.* 14, 15 (2000).

³² Nedim Karakayali, *The Uses of the Stranger: Circulation, Arbitration, Secrecy, and Dirt*, 24 *SOC. THEORY* 312, 313 (2006).

³³ *Id.* at 313.

to expel them from, or adopt them into, society.³⁴ Partly relying on examples that Simmel provides, Karakayali offers a functionalist argument and states that strangers exist because “strangers often carry out special tasks that no one else in the group is capable of (or willing to) perform.”³⁵ Karakayali identifies four functions, categorizing the stranger as a: (1) circulator of items (i.e., goods, money, and information); (2) arbiter and resolver of conflict; (3) police or manager of secret/sacred domains; and (4) cleanser of group impurities, or performer of “dirty jobs.”³⁶

While Karakayali’s functionalist argument provides valuable insight into understanding the role of strangers in society, there are two issues that limit its explanatory power. First, the claim that adoption or expulsion might be easier alternatives doesn’t stand up to scrutiny. Karakayali argues that maintaining a hybrid category, like a stranger, must provide some benefit to society because absorbing or expelling a group would “require much less ‘effort,’ much less institutionalization,” and would likely “lead to much fewer complications than stranger-relations.”³⁷ To test this claim, one needs simply to consider opposition to undocumented Mexican immigration to the United States. Mexican undocumented immigrants serve a beneficial function to the societies that they live and work in.³⁸ Challengers of anti-immigration policies often ask individuals to imagine the costly and inconvenient world if immigrant labor were removed from the economy.³⁹ Following Karakayali’s thesis, it would be easier if we

³⁴ *Id.* Bauman addresses the same question, noting that nation-states deployed both anthropophagic (annihilation through the processes of assimilation and absorption) and anthropoemic (banishing through the process of exclusion and expulsion from the social world) strategies for dealing with modern strangers). Bauman, *supra* note 29, at 2.

³⁵ Karakayali, *supra* note 32, at 313.

³⁶ *Id.* at 313. In addition, Virnoche highlights Karakayali’s second use of the stranger, noting that the stranger can serve as one who can hold on to secrets, specifically, a “safekeeper of shared hopes, dreams and fears.” Mary E. Virnoche, *The Stranger Transformed: Conceptualizing [sic] On and Offline Stranger Disclosure [sic]*, 24 SOC. THOUGHT & RESEARCH 343, 344 (2002).

³⁷ Karakayali, *supra* note 32, at 313.

³⁸ See, e.g., JUDITH GANS, UNIV. OF ARIZ. UDALL CTR. FOR STUD. IN PUB. POL’Y, IMMIGRANTS IN ARIZONA: FISCAL AND ECONOMIC IMPACTS (2008), <http://udallcenter.arizona.edu/immigration/publications/impactofimmigrants08.pdf> (assessing the impact of Mexican immigrants on Arizona’s fiscal health).

³⁹ See Dean E. Murphy, *The Nation: A New Order; Imagining Life Without Illegal Immigrants*, N.Y. TIMES (Jan. 11, 2004), <http://www.nytimes.com/2004/01/11/weekinreview/the-nation-a-new-order-imagining-life-without-illegal->

either legally absorbed Mexican immigrants as permanent legal residents/citizens, or expelled them from the United States and deported them to Mexico. Yet instead, we enter into stranger-relations with them because they confer a benefit to society.

Karakayali overlooks the empirical reality that adoption and exclusion might require so much effort that society cannot afford the price. Integrating current immigrants into American society is costly. Undocumented immigrants would need access to social services. The granting of these social services might encourage more individuals to see the United States as a place for opportunity. Expelling undocumented immigrants from the United States, while possible, would require intense police surveillance of borders and domestic immigrant communities and workplaces. This intense border monitoring is extremely expensive.⁴⁰

The second limitation of Karakayali's claim is situated in general critiques of the weakness of strict functional arguments. Functional arguments are criticized because they fail to account for social change, and they can be, in a sense, tautological. For example, Karakayali's account fails to explain why some immigrant groups with long histories in the United States (i.e., Mexicans) maintain stranger-relations, while other immigrant groups originally labeled as strangers (i.e., the Irish) were able to escape stranger-relations. Understanding the function of the stranger is useful because it helps articulate the processes that lead to the continued existence of the stranger. Yet, I believe that in order to understand the existence of the stranger and strange laws requires examining the structures and social conditions that enable their construction and production.

2.2.2. *Structural/Social Construction*

While Simmel acknowledged the functional activities of the stranger, he suggests that this functionality is marginalized. Simmel's work explores how structural forces produce the

immigrants.html (exploring American society without illegal immigrants). Gans seeks to answer this question in the state of Arizona through simulated modeling. GANS, *supra* note 38, at 5.

⁴⁰ AMALIA GREENBERG DELGADO & JULIA HARUMI MASS, AM. C.L. UNION OF N. CAL., COSTS AND CONSEQUENCES: THE HIGH PRICE OF POLICING IMMIGRANT COMMUNITIES (2011), available at http://www.aclunc.org/docs/criminal_justice/police_practices/costs_and_consequences.pdf.

stranger. He writes that strangers emanate from “a distinct structure composed of remoteness and nearness.”⁴¹ In an attempt to understand why strangers exist, Bauman highlights structural forces that work to create strangers, which complement functional explanations. He writes that “[a]ll societies produce strangers; but each kind of society produces its own kind of strangers, and produces them in its own inimitable way.”⁴² Bauman argues that strangers are the by-product of the nation-state’s boundary drawing and are problematic because of “their capacity to befog and eclipse the boundary lines which ought to be clearly seen.”⁴³

Bauman distinguishes between modern and postmodern strangers. He writes that:

[t]he typical modern strangers were the waste of the state’s ordering zeal. What the modern strangers did not fit was the vision of order. When you draw dividing lines and set apart the so divided, everything that blurs the lines and spans the divisions undermines the work and mangles its products Their mere being around interfered with the work which the state swore to accomplish, and undid its efforts to accomplish it. The strangers exhaled uncertainty where certainty and clarity should have ruled.⁴⁴

Where modern strangers are the by-products of modernity’s attempt to order, postmodern strangers were the result of the ongoing and never-ending process of identity building.⁴⁵ Bauman also adds that in our postmodern times, the boundaries that are both strongly desired and missed center around identity. For Bauman, this centering around identity implicates the “rightful and secure position in the society, of a space unquestionably one’s own, where one can plan one’s life with the minimum of interference, play one’s role in a game in which the rules do not change overnight and without notice, act reasonably and hope for the better.”⁴⁶

Bauman agrees with Karakayali that there are two strategies that society can deploy with respect to strangers: (1) to assimilate

⁴¹ Simmel, *supra* note 24, at 145.

⁴² Bauman, *supra* note 29, at 1.

⁴³ *Id.* at 8.

⁴⁴ *Id.* at 2.

⁴⁵ *Id.* at 7–8.

⁴⁶ *Id.* at 8.

the strangers and transform them into insiders, or (2) to banish the strangers and exclude them as outsiders.⁴⁷ However, Bauman identifies these strategies as responses to the modern stranger in societies' attempts to maintain order and create boundary markers.⁴⁸ The response to the postmodern stranger moves beyond assimilation and expulsion to a method of ongoing management. In a postmodern world, the nation-state—being more concerned with the construction of identity as opposed to sheer order—cannot erase the stranger, and therefore employs a never-ending project where the stranger is invented and socially produced/constructed.⁴⁹ The stranger is then used as a signal for the boundaries of what is acceptable with respect to identity. Bauman writes that

the postmodern [strangers] are by common consent or resignation, whether joyful or grudging, here to stay. To paraphrase Voltaire's comment on God: if they did not exist, they would have to be invented. And they are indeed invented, zealously and with gusto, patched together with salient or minute and unobtrusive distinction marks. They are useful precisely in their capacity of stranger; their strangerhood is to be protected and caringly preserved. They are indispensable signposts in the life itinerary without plan and direction. They must be as many and as protean as the successive and parallel incarnations of identity in the never ending search for itself.⁵⁰

This structural-functionalist perspective identifies that while the stranger may hold some social function that benefits society, there are actors who perform work and are engaged in the production of strangers. This work either creates the social conditions and structures for which a society can conceptualize a group of individuals as strangers (i.e., drawing boundaries of insiders/outsideers when groups exist that do not fit the binary distinction), or invents and constructs a group as a social stranger (i.e., via labeling and ongoing management practices) in pursuit of a specific function.

⁴⁷ *Id.* at 2.

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 8–9.

⁵⁰ *Id.* at 12.

2.3. *Distinguishing Strangeness*

Marotta points out that there is a conceptual distinction between the stranger and strangeness.⁵¹ He writes that the notion of strangeness is linked to the spatial distance and proximity between social actors. For Marotta, strangeness exists when social actors “who are physically close are socially and culturally distant.”⁵² Strangeness and an individual being constructed as a stranger may overlap, but it might not. Marotta illustrates this point by arguing that young people—who aren’t considered or constructed as strangers—may experience strangeness while living in close proximity to their parents because they feel social and cultural distance due to differing values and ideas.⁵³ What constitutes their strangeness can be tied to culture and described as the close proximity of their divergent cultural views.

Alexander highlights the importance of culture in understanding the social construction of strangeness and takes issue with Simmel’s overemphasis on social structure.⁵⁴ He argues that in order to understand strangeness, one must be aware of the cultural interpretation of social structures.⁵⁵ He states that “it is the construction of difference . . . that makes potentially marginal groups into dangerous [strangers].”⁵⁶ Alexander states that structural marginality alone doesn’t produce strangeness.⁵⁷ He gives examples of the Protestant English who immigrated to the Massachusetts Bay Colony in the first half of the 17th century who were “never convicted of strangeness.”⁵⁸ While these immigrants underwent years of forced indentured servitude, they eventually became equal workers and citizens.⁵⁹

⁵¹ Vince P. Marotta, *The Cosmopolitan Stranger*, in QUESTIONING COSMOPOLITANISM 105, 107 (Stan Hooft & Wim Vandekerckhove eds., 2010).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ See Jeffrey C. Alexander, *Rethinking Strangeness: From Structures in Space to Discourses in Civil Society*, 79 THESIS ELEVEN 87, 91 (2004) (“[W]e must focus on the cultural interpretation of social structures and the categories within which these active interventions are made.”).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 92.

⁵⁸ *Id.*

⁵⁹ *Id.*

Stichweh reaffirms the possibility that culture may have a role in the production of strangeness. He notes that even in the presence of foreigners, there are societies incapable of “recognizing strangers.”⁶⁰ He points to a 1930s example where native New Guinea tribes identified foreign Australian gold prospectors that they unexpectedly encountered as returning tribe members.⁶¹ This is an example of a possible cultural interpretation of structural difference that didn’t lead to strangeness. Even when foreigners are strangers, they don’t necessarily have to be conceptualized as dangerous. In fact, Appiah believes the contrary and argues that valuable learning can occur via cosmopolitan exchange between strangers with different values, backgrounds, and norms.⁶²

Alexander states that if we are to understand what makes a stranger, we must look beyond the stranger’s structural position and examine how culture intervenes and allows the dominant group in society to assume a specific group occupies a place of strangeness.⁶³ He writes:

We discover that the employment of the *language* of strangeness creates the strangeness of a status, not the other way around. This is not to deny that many and various social structural pressures come into play. Imperialism may lead to the demand for rationalizing ideology; immigration may lead to the need to defend jobs; economic impoverishment may lead to renewed class conflict; military defeat or political instability may provide opportunities for new social actors to take power. None of these factors, however, can, in and of themselves, specify who will be constructed as strange, or how.⁶⁴

If Bauman is correct, and we are in a postmodern moment where the ongoing construction of identity is of great social importance, then it might help us to think about expanding the

⁶⁰ Rudolf Stichweh, *Strangers in World Society – Indifference and Minimal Sympathy*, in SCIENCE + FICTION: BETWEEN NANOWORLDS AND GLOBAL CULTURE 111 (Stefan Iglhaut & Thomas Spring eds., 2004).

⁶¹ *Id.*

⁶² See generally KWAME ANTHONY APPIAH, *COSMOPOLITANISM: ETHICS IN A WORLD OF STRANGERS* (2006).

⁶³ For example, Alexander notes that the physical/structural segregation of Blacks in the U.S. did not precede white American’s cultural construction of Black strangeness. See Alexander, *supra* note 54, at 93.

⁶⁴ *Id.*

idea of the stranger to not just think about stranger relations as social interactions solely between individuals, but to follow in the footsteps of Marotta and Alexander and think about the much broader concept of strangeness in an attempt to capture not only the individual and social interaction, but also those cultural artifacts—both tangible and intangible—that are key to the formation, composition, and production of social identity. Other social theorists discuss strangeness and the stranger in a non-human form, particularly with respect to technology and the transmission of information.⁶⁵

3. METHOD

To understand the production of meaning surrounding the use of foreign and international law following the landmark Supreme Court rulings, this Article examines the senate judiciary confirmation hearings of nominees to the U.S. Supreme Court. These hearings provide an active site where academic, legal, and political elites discussed the meaning and role of foreign law after their use became controversial in 2003. The method used to analyze the hearings was a qualitative content analysis that searched for mentions of a judge's use of foreign and international law.

The method was systematic. I gathered all of the available and searchable information on the Supreme Court nominee senate judiciary committee confirmation hearings. Records were available for every nominee after 1971 with the exception of rejected nominee Robert Bork.⁶⁶ I searched for the terms "foreign" and "international" in the available records of each nominee and found that mentions of foreign or international law with respect to judicial citation were present in the hearing transcripts of O'Connor (1981), Roberts (2005), Alito (2006), Sotomayor (2009),

⁶⁵ See e.g., William Bogard, *Simmel in Cyberspace: Strangeness and Distance in Postmodern Communications*, 1 *SPACE & CULTURE* 23 (1999) (discussing the technology of cyberspace and computers as Simmelian stranger); Mary E. Virnoche, *The Stranger Transformed: Conceptualizing [sic] On and Offline Stranger Disclosure [sic]*, 24 *SOC. THOUGHT & RESEARCH* 343 (2002) (arguing that telecommunications transforms social interactions between strangers and proposing the concept of stranger-making technologies that create remoteness and distance identified by Simmel).

⁶⁶ The list includes Powell, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer, Roberts, Alito, Sotomayor, Kagan, and the elevation of Justice Rehnquist to Chief Justice.

and Kagan (2010). This was not surprising because prior to 2003, the citation of foreign law was not a politically contested issue. The Roberts nomination was the first Supreme Court nomination to follow 2003.

After identifying the text of the testimony relevant to this project, I coded. Coding is the process of transforming “raw” data into a form that is standardized and able to be used in comparisons.⁶⁷ Coding generates themes and a conceptual scheme for organizing the data and understanding meaning of the concepts—in this instance the citation to foreign authority—being observed and analyzed

4. DATA/RESULTS

The earliest mention of the use of foreign ideas in conjunction with the interpretation of American law in the senate confirmation hearings occurred in the testimony of a witness towards the end of Sandra Day O'Connor's hearing. Anne Neamon, the national coordinator for an organization called Citizens for God and Country, sought affirmation in the public record that nominee O'Connor was loyal to the “U.S. Constitution, Christian law priority.”⁶⁸ Neamon expressed concern that “foreign ideology” had “illegally altered” and “misrepresented” the U.S. Constitution.⁶⁹ She wanted the committee to question whether O'Connor would challenge the “status of plaintiffs whose policies advocate foreign ideological changes to our Constitution, such as some members of the left-thinking membership of ABA, ACLU, and others who propagate communistic worldwide atheism.”⁷⁰

Contrasted to today's political climate, Anne Neamon's query about foreign influence on American law is interesting, given the fact that not one member of the committee raised this issue during O'Connor's questioning. This is evident in the following exchange between Neamon and the committee chairman:

Ms. NEAMON. Senator, since these matters were never brought out by any member of the committee, in justice to

⁶⁷ For a discussion of coding qualitative data, see CARL F. AUERBACH & LOUISE B. SILVERSTEIN, *QUALITATIVE DATA: AN INTRODUCTION TO CODING AND ANALYSIS* (2003).

⁶⁸ *Nomination of Sandra Day O'Connor: Hearings Before the S. Comm. on the Judiciary, 97th Cong.* 385–86 (1981).

⁶⁹ *Id.* at 385.

⁷⁰ *Id.* at 386.

2014]

MAKING STRANGE LAWS

693

the national outcries, the moral crisis, and the President's anxiety to restore U.S. Constitution and our ethics, could you find opportunity to address these questions to the nominee?

The CHAIRMAN. Well, you have made your statement. That will be available to all the Senators.

Ms. NEAMON. I wonder if they will find the time to really, collectively address it, and will the nominee have the opportunity to respond to their addressing of this matter?

The CHAIRMAN. Well, you see, the nominee now is through with her testimony, and it is too late to address questions in these proceedings.

Ms. NEAMON. Can she be recalled?

The CHAIRMAN. No; we cannot recall her. We are giving everybody an opportunity. We have had 3 days of hearings.

Ms. NEAMON. Thank you very much. I would appreciate it if there was anything you could do to extend your concerns, at least.

The CHAIRMAN. Thank you very much.⁷¹

Neamon's presence at the senate judiciary committee gives some evidence that while probably a super-minority, there were some who thought, and sought to construct a platform, that foreign ideas had a negative effect on American law. It is noteworthy that her particular framing of the issue was not publicly shared by any member of the senate judiciary committee, and that her views, while entered into the record, were given little publicity and no discussion. Decades later, however, starting with the hearings for nominee John Roberts, a number of conservative senators would replicate Neamon's framing of foreign ideas and begin questioning nominees' views on the use of foreign law.

Before examining how senators and witnesses use the political confirmation process to construct and contest frames surrounding foreign law, it is useful to understand the ways in which these actors agree. Examining the points of convergence amongst adversaries illuminates the parameters of contestation and the

⁷¹ *Id.* at 387.

borders of group identity. All of the actors gathered at the senate judiciary hearing agreed on a number of points, including the accepted and unacceptable uses of foreign and international.

4.1. Shared Understanding/Agreement

4.1.1. Accepted Uses

Conservative nominee Samuel Alito acknowledged that there are appropriate situations for a judge to use foreign law. He said:

There are other legal issues that come up in which I think it is legitimate to look to foreign law. For example, if a question comes up concerning the interpretation of a treaty that has been entered into by many countries, I don't see anything wrong with seeing the way the treaty has been interpreted in other countries. I wouldn't say that that is controlling, but it is something that is useful to look to.

In private litigation, it is often the case—I have had cases like this in which the rule of decision is based on foreign law. There may be a contract between parties and the parties will say this contract is to be governed by the laws of New Zealand or wherever. So, of course, there, you have to look to the law of New Zealand or whatever the country is.

So there are situations in litigation that come up in Federal court when it is legitimate to look to foreign law, but I don't think it is helpful in interpreting our Constitution.⁷²

The Chairman of the Judiciary Committee, Senator Patrick Leahy, cited to this quote by Alito years later in the questioning of liberal court nominee Elena Kagan, just after Senator Jon Kyl, a Republican conservative senator, questioned Kagan about the relevance of the use of foreign law:

Senator LEAHY. Incidentally, I have a quote here, there are other legal issues that come up in which I think it's legitimate to look to foreign law. For example, if a question comes up concerning the interpretation of a treaty that has

⁷² *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 370-71 (2006) [hereinafter Alito Hearing].*

2014]

MAKING STRANGE LAWS

695

been entered into by many countries, I don't see anything wrong with seeing the way the treaty has been interpreted in other countries and other—look at their foreign law. I wouldn't say that's controlling, but it's something that's useful to look to. That's what Justice Salito [sic] said in his confirmation hearing. I don't recall anybody disagreeing with him. Do you disagree with that?

Ms. KAGAN. No, that sounds right.⁷³

There also seems to be a consensus that does not object to the use of foreign law if it is constitutive of the origin of the U.S. legal system. This is illustrated in the following exchange between nominee Alito and Senator Leahy:

Judge ALITO. Well, the *Cruzan* case proceeded assumed for the sake of argument, which is something that judges often do, that there is a constitutional right to say—that each of us has a constitutional right to say, “I don't want medical treatment.” And the *Cruzan* decision recognized that this was a right that everybody had at common law. At common law, if someone is subjected to a medical procedure that the person doesn't want, that's a battery and it's a tort, and the person can sue for it. It is illegal. The Court did not—

Senator LEAHY. One of those cases where we got something from that foreign law, in this case English common law; is that correct?

Judge ALITO. Well, that's correct, and I think that our whole legal system is an outgrowth of English common law.

Senator LEAHY. That popped in to my mind because I was thinking of some of the people talking about paying attention to foreign law. Most of our law is based on foreign law. But go ahead, common law.

Judge ALITO. Most of our common law is an outgrowth of English common law, and I think it helps to understand that background often in analyzing issues that come up.⁷⁴

⁷³ *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong.* 260–61 (2010) [hereinafter *Kagan Hearing*].

Alito registers no problems with the use of foreign law like English common law because the U.S. legal system has its origins in this system, and therefore it might provide more information that could allow for a better interpretation of the American law on which it is based.

4.1.2. *Unacceptable Uses*

There also seems to be overwhelming consensus amongst American judges that foreign law cannot be used as a form of precedent that acts as binding authority on U.S. courts. In her confirmation hearings, Kagan noted that she did not think that foreign law held “any kind of precedential weight” and that it was not an “independent ground” for judicial decision-making.⁷⁵ Repeatedly throughout her confirmation, Sotomayor emphasized the norm that foreign law cannot be used as a source of precedent after Senators Coburn, Sessions, and Cornyn confronted her with the question of whether she would use foreign law.⁷⁶ In her responses, Sotomayor made it clear that foreign law could not be used as a holding or as a source of binding precedent. The following exchange between Sotomayor and Senator Coburn exemplifies her typical response:

Senator COBURN. So you stand by it. There is no authority for a Supreme Court Justice to utilize foreign law in terms of making decisions based on the Constitution or statutes?

Judge SOTOMAYOR. Unless the statute requires you or directs you to look at foreign law, and some do by the way, the answer is no. Foreign law cannot be used as a holding or a precedent or to bind or to influence the outcome of a legal decision interpreting the Constitution or American law that doesn't direct you to that law.⁷⁷

Sotomayor, along with all of the other nominees surveyed in this project, acknowledged clearly that foreign law was not a

⁷⁴ *Alito Hearing*, *supra* note 72, at 580–81.

⁷⁵ *Kagan Hearing*, *supra* note 73, at 259.

⁷⁶ *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States, Hearing Before the S. Comm. on the Judiciary, 111th Cong.* 340–50, 396–97, 463–65 (2009) [hereinafter *Sotomayor Hearing*].

⁷⁷ *Id.* at 349.

2014]

MAKING STRANGE LAWS

697

controlling authority. No actor who participated in the hearings voiced a dissenting opinion.

4.2. Otherness and Boundaries

The social production of the stranger requires an important first step. There must be some structural feature or border that distinguishes the insider/inner-boundary from some outsider/outer-boundary. The data presented in this Section demonstrate how some conservative actors of the senate judiciary hearings use social structure and culture to place social distance between society and foreign and international law. The goal of these actors is to push foreign law into the periphery. If unsuccessful, these framings place foreign law closer to the insider/outsider border (or on the border) and transform it into a stranger. This border may be inscribed on the stranger, or due to the stranger's mobility and lack of fixity, the stranger may make us aware of the border (or be used to define the border) as the stranger moves back and forth across boundaries (or the boundaries are moved).

4.2.1. Proper Authority and the Constitution

Throughout the hearings, Republicans characterized foreign citation as a practice without any support in the U.S. Constitution, domestic law, or the oath of office. Because law does not offer any authority to use foreign law, then conservatives view the citation of foreign authorities as exceeding accepted boundaries. Republicans developed and utilized this theme extensively in the questioning of Sotomayor. In an exchange with the nominee, Senator Coburn said:

You have taken the oath already twice and, if confirmed, will take it again. And I want to repeat it again. It has been said once this morning. Here is the oath: "I do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and will faithfully and impartially discharge and perform all the duties incumbent upon me under the Constitution and the laws of the United States, so help me God."

It does not reference foreign law anywhere. . . .

I think this oath succinctly captures the role of a judge, and I am concerned about some of your statements in regard to that. Your judicial philosophy might be—and I am not saying it is—inconsistent with the impartial, neutral arbiter that the oath describes.⁷⁸

Coburn clearly questions Sotomayor's judicial philosophy as suspect and inconsistent with her duties as a judge. As a result, Coburn argues that because the Constitution does not expressly reference and allow the use of foreign law, then it must therefore expressly forbid it. Following Coburn's perspective, Sotomayor's advocacy for the use of foreign law is antithetical to the role of an impartial judge.

In questioning nominee Kagan, Coburn repeats the idea that because the U.S. Constitution makes no reference to foreign law, its use is, therefore, forbidden.

All right. Let me read something to you. As is obvious, I'm not a lawyer. OK. It's pretty obvious. But Article 3, Section 2 says this: "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and the treaties made."

Nowhere—nowhere—in our Constitution does it give the authority for any judge, chief justice of the Supreme Court, any jurist on the Supreme Court, or any other court, to reference foreign law in determining the interpretation of what our statutes or our Constitution will be. So this is an area where we have grasp, where our judicial majority, much like the Israeli judge, we start reaching beyond the Constitution. You said it was all law. You said the determination will always be law. It's down to law, law, law, the earliest questions that you were asked in this hearing. Well, this is the founding document of what the law is. Nowhere that I can find, in this writing or in these guys' writing, says anything about using foreign law.

⁷⁸ *Id.* at 39.

So please explain to me why it's OK sometime to use foreign law to interpret our Constitution, our statutes, and our treaties.⁷⁹

Yet foreign origin does not necessarily equate into a person or item being an outsider or othered. The Republican framing of foreign law works to situate foreign law as an outsider that is somehow, because of its origins, antithetical to the U.S. Constitution, laws, and traditions. In this framing, there is no room for foreign law, despite its origins, to ever be contemporaneously and currently, a part of American law.

4.2.2. *Disadvantaged Minority Status*

In addition to situating foreign law in opposition to the U.S. Constitution, another strategy that conservatives employed was to link foreign law to the outsider status of American disadvantaged social minorities. During the hearings, disadvantaged minority identities—in the areas of race, ethnicity, gender, and sexuality—were social attributes folded into the framing of foreign law as an outsider. In the sole case of *Sotomayor*, conservatives established a connection between the social identity of the nominee and her advocacy for the citation of foreign law. Specifically, there were attempts to link the subjectivity of her diverse ethnic and gendered background to a bias in the use of foreign law. It was not

⁷⁹ *Kagan Hearing*, *supra* note 73, at 175–76. Senator Coburn's statement echoes a portion of a question posed to the nominee Alito during his hearing. Coburn said:

And Article III, section 2 really delineates the scope for the courts in this country, and what it says is, "All cases in law and equity arising under this Constitution, the laws of the United States and treaties made, or which shall be made under their authority." So that really gives us the scope under Article III, section 2. I was interested when Senator Kyl asked you yesterday about foreign law. That is something extremely disturbing to a lot of Americans, that many on the Supreme Court today will reference or pick and choose the foreign law that they want to use to help them make a decision to interpret our Constitution, where in fact, the oath of office mentions no foreign law. Matter of fact it says the obligation is to use the United States law, the Constitution and the treaties, and that is exactly what Article III, section 2 says. So there is no reference at all to foreign law in terms of your obligations or your responsibility, and matter of fact, the absence of it would say that maybe this ought to be what we use, and the codified law of the Congress and the treaties rather than foreign law.

Alito Hearing, *supra* note 72, at 470–71.

uncommon for the senators to discuss Sotomayor's race and gender in the same breath as foreign law. For example in opening statements, Senator Kyl said:

Many of Judge Sotomayor's public statements suggest that she may, indeed, allow, and even embrace, decision-making based on her biases and prejudices.

The wise Latina woman quote, which I referred to earlier, suggests that Judge Sotomayor endorses the view that a judge should allow gender, ethnic and experience-based biases to guide her when rendering judicial opinions. This is in stark contrast to Judge Paez's view that these factors should be set aside.

In the same lecture, Judge Sotomayor posits that "there is no objective stance but only a series of perspectives. No neutrality, no escape from choice in judging" and claims that "the aspiration to impartiality is just that. It's an aspiration," she says, "because it denies the fact that we are by our experiences making different choices than others."

No neutrality, no impartiality in judging? Yet isn't that what the judicial oath explicitly requires?

Judge Sotomayor. [sic] clearly rejected the notion that judges should strive for an impartial brand of justice. She has already accepted that her gender and Latina heritage will affect the outcome of her cases.

This is a serious issue, and it's not the only indication that Judge Sotomayor has an expansive view of what a judge may appropriately consider.

In a speech to the Puerto Rican ACLU, Judge Sotomayor endorsed the idea that American judges should use good ideas found in foreign law so that America does not lose influence in the world.

The laws and practices of foreign nations are simply irrelevant to interpreting the will of the American people as expressed through our Constitution.

Additionally, the vast expanse of foreign judicial opinions and practices from which one might draw simply gives

2014]

MAKING STRANGE LAWS

701

activist judges cover for promoting their personal preferences instead of the law.

You can, therefore, understand my concern when I hear Judge Sotomayor say that unless judges take it upon themselves to borrow ideas from foreign jurisdictions, America is “going to lose influence in the world.” That’s not a judge’s concern.⁸⁰

Senator Kyl made sure not simply to highlight that he believed that Sotomayor was biased, but that she “accepted that her gender and Latina heritage” was the source of that bias. In another instance, Senator Coburn, in his opening statement in the Sotomayor hearing, stated:

Your assertion that ethnicity and gender will make someone a better judge, although I understand the feelings and emotions behind that, I am not sure that could be factually correct. Maybe a better judge than some, but not a better judge than others.

The other statement, there is no objective stance but only a series of perspectives, no neutrality, no escape from choice in judging – what that implies, the fact that it is subjective implies that it is not objective. And if we disregard objective consideration of facts, then all rulings are subjective, and we lose the glue that binds us together as a Nation.

Even more important is your questioning of whether the application of impartiality in judging, including transcending personal sympathies and prejudices, is possible in most cases or is even desirable is extremely troubling to me.

You have taken the oath already twice and, if confirmed, will take it again. And I want to repeat it again. It has been said once this morning. Here is the oath: “I do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and will faithfully and impartially discharge and perform all the duties incumbent upon me under the

⁸⁰ *Sotomayor Hearing, supra* note 76, at 23.

Constitution and the laws of the United States, so help me God.”

It does not reference foreign law anywhere. It does not reference whether or not we lose influence in the international community. We lost influence when we became a country in the international community to several countries. But the fact is that did not impede us from establishing this great republic.⁸¹

Conservatives like Coburn portrayed Sotomayor as a Puerto Rican woman holding racial, ethnic, and gender bias and linked this to discussions on the impropriety of using foreign legal sources. In addition to the comments made by senators, George Mason professor Neomi Rao stated:

[T]here is the related issue of the role of personal experiences in judicial decision-making. It would be hard to deny that judges are human and made up of their unique life journeys. Many judges recognize this and explain how they strive to remain impartial by putting aside their personal preferences.

Judge Sotomayor’s position, however, has suggested that her personal background, her race, gender and life experiences, should affect judicial decisions.⁸²

One might argue that it was Sotomayor herself who established a connection between her gender and ethnicity and bias when she made the “wise Latina” comment referenced in Senator Kyl’s opening statement.⁸³ The infamous comment was made in a speech that Sotomayor delivered at the University of California, Berkeley School of Law, where she stated: “I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn’t lived that life.”⁸⁴ Prior to the hearing, critics referred to

⁸¹ *Id.* at 39.

⁸² *Id.* at 545.

⁸³ *Id.* at 18.

⁸⁴ Sonia Sotomayor, *A Latina Judge’s Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002).

the statement as racist and sexist.⁸⁵ This assessment of Sotomayor's bias can only be achieved by taking Sotomayor's comment out of context. The "wise Latina" comment was made while she was talking about the effect of social background on decision-making and the value of diversity in the judiciary.

In addition, this linkage between social identity and bias could only be achieved by ignoring similar statements of other justices who relayed struggles based on social identity, albeit not specifically what we consider today as disadvantaged minority status. For example, during his confirmation, Alito stated that his Italian heritage influenced his decision-making process. In an attempt to rehabilitate the impression that Alito didn't care about the less fortunate, Senator Coburn requested that Alito provide a comment that allowed the committee to "see a little bit of your heart."⁸⁶ Alito responded: "When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account."⁸⁷ Senator Coburn did not subject Alito's hearing statements to the same accusations of bias and subjectivity inflicted on Sotomayor.

Highlighting the disadvantaged racial and gendered status of Sotomayor was not the only means that conservatives attempted to other foreign law. Discriminatory responses to same-sex sexual orientation were also part of the narrative framing that senators used in their discussions of foreign law. In his opening statement in the Roberts hearing, Senator Cornyn discusses the problematic nature of foreign law in conjunction with the elimination of the child death penalty in 2005 in *Roper v. Simmons*.⁸⁸ In the next breath, he mentions the *Lawrence* sodomy law decision.

On what legitimate basis can the Supreme Court uphold State laws on the death penalty in 1989, then strike them down in 2005, relying not on the written Constitution, which, of course, had not changed, but on foreign laws that no American has voted on, consented to, or may even be

⁸⁵ Morgan Weiland, *Have Sotomayor's Critics Actually Read Her Berkeley Speech?*, MEDIA MATTERS (May 29, 2009, 8:15 PM), <http://mediamatters.org/research/200905290049>.

⁸⁶ *Alito Hearing*, *supra* note 72, at 475.

⁸⁷ *Id.*

⁸⁸ *Roper v. Simmons*, 543 U.S. 551 (2005).

aware of? When in 2003 the Court decided *Lawrence v. Texas*, the Court overruled a 1986 decision on the constitutionality of State laws based on the collective moral judgment of those States about permissible sexual activity. What changed in that intervening time? Did the Constitution change? Well, no. Did the Justices change? Yes. But should that determine a different meaning of the Constitution? Are some judges merely imposing their personal preferences under the guise of constitutional interpretation? Indeed, this was the same case, as you know, Judge Roberts, that served as the cornerstone of the Massachusetts Supreme Court's decision holding that State laws limiting marriage to a man and a woman amounted to illegal discrimination.⁸⁹

Cornyn then linked the *Lawrence* decision to the state provision of same-sex marriage rights. Senator Sessions explicitly linked his opposition to foreign law to the *Lawrence* sodomy law decision.

Such vague standards provide the Court a license to legislate, a power the Constitution did not provide judges. Indeed, recently this license has led some judges to conclude they may look beyond American standards of decency to the standards of foreign nations in an attempt to justify their decisions. The arrogant nature of this concept is further revealed by a Supreme Court ruling in 2003, when the Supreme Court explicitly declared that the Constitution prohibits the elected representatives of the people—us—from relying on established morality as a basis for the laws they pass. The Court thus declares itself free to, in effect, amend the Constitution by redefining its words to impose whatever it decides is evolving standards of decency. Yet at the same time, it prohibits legislatures from enacting laws based on objective standards of morality.⁹⁰

While Sessions did not acknowledge the *Lawrence* decision by name, there is no other 2003 Supreme Court ruling that involved issues of morality, American standards of decency, and the laws of

⁸⁹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States, Hearing Before the S. Comm. on the Judiciary, 109th Cong. 42 (2005) [hereinafter Roberts Hearing].*

⁹⁰ *Id.* at 30-31.

foreign nations. It appears that the opposition to foreign law is rooted in an opposition to the expansion of rights to same-sex attracted men and women. The senators in opposition to foreign and international law have not only othered foreign law, but grounded their opposition to foreign law to an opposition of disadvantaged domestic 'others'—particularly homosexuals, as well as the racial and gendered othering of Sotomayor.

4.3. *Bias*

In addition to structurally identifying foreign and international law as an other, conservatives have also worked to infuse meaning into these boundaries of otherness. Conservatives have constructed foreign laws as biased. Republican members of the senate judiciary committee do major work in constructing the narrative that liberal judges are unobjective judicial activists who use foreign law in violation of their constitutional oath and without any recognized authority in order to legislate laws that meet their own biased goals. Conservatives form this narrative of bias by linking judges' use of foreign law to (a) judicial activism, (b) a reluctance to remain confined by domestic law, and (c) a desire to step outside of established authority and beyond their judiciary roles.

4.3.1. *Judicial Activism*

One of the most prevalent ways that conservatives attempted to characterize the use of foreign law as a manifestation of bias was to shroud the practice in the decades old trope of judicial activism. Today, judicial activism popularly describes the decision making of judges who are willing to ignore precedent and allow their personal views to guide their decisions and find constitutional violations in democratically promulgated laws.⁹¹ Usually judicial activism is associated with politically liberal policy considerations. Senator Brownback discussed judges' use of foreign law in

⁹¹ See BLACK'S LAW DICTIONARY 922 (9th ed. 2009). Other definitions of judicial activism are not linked to the manifestation of a personal bias within a judge, and instead describe how judges and courts use their power to impose decisions on other branches of government. See e.g., CONGRESSIONAL QUARTERLY, THE SUPREME COURT A TO Z 236 (Kenneth Jost ed., 2d ed. 1998). Despite the term's prominence, the meaning of the term is obscure and has shifted through time. For a more detailed conceptual and historical analysis of the term, see Craig Green, *An Intellectual History of Judicial Activism*, 58 EMORY L.J. 1195 (2009).

association with a wide variety of contemporary political issues. He said:

As I stated at Justice Roberts's hearing, the Court has injected itself into many of the political debates of our day, and as my colleague Senator Cornyn has mentioned, the Court has injected itself in the definition of marriage, deciding whether or not human life is worth protecting, permitting Government to transfer private property from one person to another, even interpreting the Constitution on the basis of foreign and international laws.

The Supreme Court has also issued and never reversed a number of decisions that are repugnant to the Constitution's vision of human dignity and equality. Although cases like *Brown v. Board of Education* in my State are famous for correcting constitutional and court errors, there remain several other instances in which the Court strayed and stayed beyond the Constitution and the laws of the United States. Among the most famous of these Supreme Court cases of exercise of political power, I believe, are the cases of *Roe v. Wade* and *Doe v. Bolton*, two 1973 cases based on false statements which created a constitutional right to abortion. And you can claim whatever you want to of being pro-life or pro-choice, but the right to abortion is not in the Constitution. The Court created it. It created a constitutional right. And these decisions removed a fully appropriate political judgment from the people of several States and has led to many adverse consequences.

For instance, it has led to the almost complete killing of a whole class of people in America. As I noted to my colleagues in the Roberts hearings, this year—this year—between 80 to 90 percent of the children in America diagnosed with Down syndrome will be killed in the womb simply because they have a positive genetic test—which can be wrong and is often wrong, but they would have a positive genetic test for Down syndrome and they will be killed.⁹²

⁹² *Alito Hearing*, *supra* note 72, at 46–47.

2014]

MAKING STRANGE LAWS

707

Brownback makes a judicial activist critique as he claims that the Court is working beyond its judicial role and is exercising more political power.

Senator Mike DeWine aligned foreign law with judicial activism in the following statement:

As of late, however, many Americans believe that the Supreme Court is unmaking the very Constitution that our Founders drafted. Many Americans are concerned when they see the Court strike down laws protecting the aged, the disabled and women who are the victims of violence. Many Americans worry when they see the Court permit the taking of private property for economic development. Many are troubled when they see the Court cite international law in its decisions, and many fear that our Court is making policy when it repeatedly strikes down laws passed by elected members of Congress and elected members of State legislatures.

I must tell you, Judge, I too am concerned. Judges are not members of Congress. They are not elected. They are not members of State legislatures. They are not Governors. They are not Presidents. Their job is not to pass laws, implement regulations, nor to make policy. Perhaps no one said this better than Justice Byron White. During his confirmation hearing in 1962, White was asked to explain the role of the Supreme Court in our constitutional form of Government. Nowadays, in response to this type question, we probably would hear some grand theories about the meaning of the Constitution and its history.

Justice White, however, said nothing of the kind. When he was asked about the role of the Supreme Court in our system of Government, he gave a simple answer. Justice White said the role of the United States Supreme Court was simply to decide cases.

To decide cases. So simple. It sounds too obvious to be true, but, you know, I think that is the right answer. Judges need to restrict themselves to the proper resolution of the case before them. They need to avoid the temptation to set broad policy. And they need to pay proper deference to the role of the Executive, the Congress, and the States, while closely guarding the language of the Constitution.

We would do well to keep this example in mind. The Constitution does not give us all the answers. It does, however, create the perfect process for solving our problems. The Congress and the President have a role in this process, the States have theirs, and when there are disputes, the courts are there to decide cases.

There is a reason that judges need to take on this limited role. As my esteemed colleague from Iowa, Senator Grassley, explained during Justice Souter's confirmation hearing, a judge should not be – and I quote – “pro this and anti that. He should rather be a judge of cases, not causes.”⁹³

Senator Sessions stated:

This result-driven philosophy of activism does not respect law. It is a post-modern philosophy that elevates outcomes over law. Today many believe the law does not have an inherent moral power and that words do not have and cannot have fixed meanings. Judges are thus encouraged to liberally interpret the words to reach the result the judge believes is correct. Activist Supreme Court judges have done this in recent years by saying they are interpreting the plain words of the Constitution in light of evolving standards of decency. This phrase has actually formed the legal basis for a number of recent decisions. But as a legal test, it utterly fails because the words can mean whatever a judge wants them to mean. It is not objective, cannot be consistently followed, and is thus by definition not law, but a license.⁹⁴

The judicial activism label is problematic because it demonstrates bias, but also targets individuals to suggest they are willing to work outside the system to further that bias.

4.3.2. Domestic Constraints

Republican members interpret and characterize the citation of foreign law not only as a reflection of bias, but also its enabler. Chief Justice Roberts in his confirmation hearings stated that

⁹³ *Roberts Hearing, supra* note 89, at 25.

⁹⁴ *Id.* at 30.

2014]

MAKING STRANGE LAWS

709

selection bias exists when judges search for foreign precedent. He said:

The other part of it that would concern me is that relying on foreign precedent doesn't confine judges. It doesn't limit their discretion the way relying on domestic precedent does. Domestic precedent can confine and shape the discretion of the judges.

In foreign law you can find anything you want. If you don't find it in the decisions of France or Italy, it's in the decisions of Somalia or Japan or Indonesia or wherever. As somebody said in another context, looking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them, they're there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution. I think that's a misuse of precedent, not a correct use of precedent.⁹⁵

This quote exemplifies how, during the hearings, conservative thinkers defined domestic law and precedent solely as objective boundaries with the power to confine judges. Following this view, the meaning of domestic law has no subjectivity. It is clear and unambiguous and not subject to multiple interpretations. Therefore, judges who disagree with a specific set meaning of domestic law are biased. In order to implement their bias, however, these unobjective judges need a mechanism like foreign law to act as a precedent, which will authorize and strengthen their position. Next, unobjective judges engage in a second round of bias (i.e., selection bias), and choose those foreign cases that affirm their positions.

This conservative interpretation of the judicial use of foreign law does two things. First, it assumes that domestic laws are objective and discrete and cannot be subjected to liberal interpretation. As a result, all non-domestic laws are subjective and can only be used to further biased actions. Second, this interpretation assumes that judges feel the need to 'cloak' and justify their biases using non-established foreign precedents in the

⁹⁵ *Id.* at 201.

face of other options (i.e., characterizing their rationales and decisions as interpretations of established domestic precedent).

4.4. Danger

In addition to framing foreign law as biased and othered, conservative senators went one step further to color the nature of the strangeness. A distinct project—separate from the construction of the outsider—seeks to interpret foreign law as dangerous. One can imagine the innocuous foreign outsider. The senate judiciary confirmation hearings, however, reveal a framing of foreign law as a dangerous outsider not only unworthy of a judge's time, but whose use actually debilitates the American legal system.

The senators' linking of foreign law to the concept of danger is present early in the Sotomayor hearing during Senator Sessions' opening statement. He said:

[T]his hearing is important because I believe our legal system is at a dangerous crossroads. Down one path is the traditional American system, so admired around the world, where judges impartially apply the law to the facts without regard to personal views.

This is the compassionate system because it is the fair system. In the American legal system, courts do not make the law or set policy, because allowing unelected officials to make law would strike at the heart of our democracy. . . .

Down the other path lies a Brave New World where words have no true meaning and judges are free to decide what facts they choose to see. In this world, a judge is free to push his or her own political or social agenda. I reject that view, and Americans reject that view. . . . Judges have cited foreign laws, world opinion, and a United Nations resolution to determine that a State death penalty law was unconstitutional.

I am afraid our system will only be further corrupted, I have to say, as a result of President Obama's views that, in tough cases, the critical ingredient for a judge is the "depth and breadth of one's empathy," as well as, his word, "their broader vision of what America should be."⁹⁶

⁹⁶ *Sotomayor Hearing*, *supra* note 76, at 5-6.

2014]

MAKING STRANGE LAWS

711

It is not surprising that Sessions connects the use of foreign law to the biased, activist judge, but what is additionally noteworthy is that he characterizes this use as being located at a 'dangerous crossroads' that he fears will further corrupt the American legal system.

In questioning nominee Roberts, Senator Kyl also attaches foreign law to a language of danger. He said:

I also think it would put us on a dangerous path by trying to pick and choose among those foreign laws that we liked or didn't like. For example, many nations have a weak protection for freedom to participate in or practice one's religion. Iran and some other Middle Eastern nations come immediately to mind, but even a modern western nation like France has placed restrictions on religious symbols in the public square. That would be highly unlikely to pass muster in U.S. courts. Should we look to France to tell us what the Free Exercise Clause means, for example?

Even nations that share our common law tradition, such as Great Britain, offer fewer civil liberty guarantees than we do, and the press has far less freedom. Nations such as Canada have allowed their judges to craft a constitutional right to homosexual marriage.⁹⁷

Senator Kyl points out that a judge's method of selecting foreign law simply in terms of what he or she likes may have some type of bias. However, this method of biased selection is not the sole (or primary) basis for his view that the use of foreign law can lead society "on a dangerous path." Kyl first notes the prevalence of countries that in the American imagination occupy the status of a Muslim religious otherness and then discusses how these Middle Eastern nations do not vigorously protect religious freedom. Kyl then moves to France, a more developed, non-Muslim, "modern western nation" with a civil law history, and to other countries that share the common law tradition of the United States in order to demonstrate an American exceptionalism. He argues that whether Muslim and developing, or modern and sharing our legal traditions, these countries offer fewer guarantees of liberty. Kyl points to one example when a nation like Canada provides more civil liberties, i.e., the right to same-sex marriage, but does not

⁹⁷ *Roberts Hearing, supra* note 89, at 200.

specifically put that in the context of nations offering fewer liberties. Kyl's statement places American exceptionalism with respect to the United States offering more civil liberties under a rubric of danger. However, even when foreign nations offer more liberty, i.e., Canada and same-sex marriage, this practice is still linked to the concept of danger.

4.4.1. Diluted Meaning

Conservatives argue that the use of foreign law is dangerous because it dilutes the meaning of the U.S. Constitution and weakens the civil liberties already recognized under the law. In his opening statement in the Roberts hearing, Senator DeWine channels the great Chief Justice John Marshall to warn that the Constitution can somehow be "unmade" through international legal citations. He stated:

Former Chief Justice John Marshall once warned that, and I quote, "People made the Constitution, and people can unmake it." It will be your job, in other words, to ensure that our Constitution is never unmade.

As of late, however, many Americans believe that the Supreme Court is unmaking the very Constitution that our Founders drafted. . . . Many [Americans] are troubled when they see the Court cite international law in its decisions, and many fear that our Court is making policy when it repeatedly strikes down laws passed by elected members of Congress and elected members of State legislatures.⁹⁸

Senator Sessions also discusses how the use of foreign law dilutes the Constitution. In an exchange with a witness, Georgetown Law Professor Nicholas Rosenkranz, during the Sotomayor confirmation hearing, Sessions said:

I think the foreign law matter is a big deal to me. Some people make out like it is nothing to this, this is just talk. But it is baffling to me how a person of discipline would think that foreign opinions or foreign statutes or U.N. resolutions could influence the interpretation of an American statute, some of which may be 1970, 1776.

⁹⁸ *Id.* at 25.

2014]

MAKING STRANGE LAWS

713

I think you mentioned, Mr. Rosenkranz, that Americans revere the Constitution. I remember at a judicial conference, 11th circuit, Professor Van Alstine said that if you respect the Constitution, if you clearly respect it, you will enforce it as it is written, whether you like it or not; if you don't do that, then you disrespect it and you weaken it.

And the next judge, someday further down the line, will be even more likely to weaken it further and just because you may like the direction somebody bent the Constitution this year in this case does not mean you are going to like it in the future, and our liberties then become greater at risk.⁹⁹

Sessions clearly links foreign law to the weakening of the Constitution and to risking the vitality of civil liberties.

Senators were not the only figures at the confirmation hearings constructing foreign law as an agent of constitutional dilution. Hearing witnesses also played a role in this process. For example, during the Kagan hearing, Ed Whelan, President of the Ethics and Public Policy Center, testified:

Ms. Kagan would also provide the fifth vote to continue the court's unprincipled practice of selectively relying on foreign law to alter the meaning of the Constitution, one part of a broader, transnationalist agenda that would displace the constitutional processes of representative government and dilute cherished constitutional rights to free speech and religious liberty.¹⁰⁰

While Rosenkranz doesn't discuss the use of foreign law as diluting or weakening constitutional rights, he does link foreign law to a troubling alteration of the Constitution. He stated:

Those who would rely on such sources must be engaged in a different project. They must be trying to update the Constitution to bring it in line with world opinion. To put the point most starkly, this sort of reliance on contemporary foreign law must be, in essence, a mechanism of constitutional change.

Foreign law changes all the time, and it has changed continuously since the Founding. If modern foreign law is

⁹⁹ *Sotomayor Hearing, supra* note 76, at 555.

¹⁰⁰ *Kagan Hearing, supra* note 73, at 341.

relevant to constitutional interpretation, it follows that a change in foreign law can alter the meaning of the United States Constitution.

And that is why this issue is so important. The notion of the court “updating” the Constitution to reflect its own evolving view of good government is troubling enough.¹⁰¹

4.4.2. *Anti-Democratic: Destroys Democracy*

During the Alito confirmation hearing, Judge Alito and Senator Coburn expressed that the use of foreign law is dangerous because it undermines democracy. Alito testified that “[i]t undermines democratic self-government and it is utterly impractical, given the diversity of legal viewpoints worldwide.”¹⁰² In addition to being anti-democratic, Coburn argued that foreign legal citation is a violation of the Constitution. He stated:

It actually undermines democracy because you get a pick and choose, and the people of this country do not get a pick and choose that law, as people from a different country. So it actually is a violation of the Constitution, and to me, I very strongly and adamantly feel that it violates the good behavior, which is mentioned as part of the qualifications and the maintenance of that position.¹⁰³

If Senator Coburn’s analysis were correct, then the citation of foreign law could constitute a constitutional violation of a judge’s oath and lead to potential impeachment. The hearings reveal multiple voices and contestations on this issue, however. For example, in the Roberts hearing, Senator Coburn notes that the oath of office requires that a judge swear to perform his duties under the laws of the United States. He then asks Roberts whether relying on foreign precedent, which he characterizes as inherently creating “a bias outside of the laws of this country,” constituted good behavior.¹⁰⁴ Roberts responded:

Well, I—for the reasons I stated yesterday, I don’t think it’s a good approach. I wouldn’t accuse judges or Justices who

¹⁰¹ *Sotomayor Hearing*, *supra* note 76, at 549–50.

¹⁰² *Alito Hearing*, *supra* note 72, at 370.

¹⁰³ *Id.* at 471–72.

¹⁰⁴ *Roberts Hearing*, *supra* note 89, at 293.

disagree with that, though, of violating their oath. I'd accuse them of getting it wrong on that point, and I'd hope to sit down with them and debate it and reason about it.

I think that Justices who reach a contrary result on those questions are operating in good faith and trying, as I do on the court I am on now, to live up to that oath that you read. I wouldn't want to suggest that they're not doing that. Again, I would think they're not getting it right in that particular case and with that particular approach and would hope to be able to sit down and argue with it, as I suspect they'd like to sit down and debate with me. But I wouldn't suggest they're not operating in good faith . . .¹⁰⁵

Partially situated in a different, slightly less political sphere, Roberts does not mirror Coburn's interpretation of foreign law as a violation of the Constitution or as a judge acting in bad faith. Roberts's approach is to characterize the citation of foreign law as a misguided approach, and one worthy of conversation and debate. The distinction between the Roberts and Coburn approaches demonstrates that there is nothing inherently natural in the negative labeling of foreign law citation practices as a pariah. Roberts's approach illustrates that a disagreement with the practice of foreign citation could elicit an alternate social response that does not attempt to ban or ostracize the practice. Additionally, Roberts's testimony also highlights that this process is not a simple dialectic contest between political legislators, where we have Democrats on one end of the spectrum who favor the use of foreign law and Republicans who are vehemently against the process on the other end. Roberts shows us the existence of one additional dimension. Nominees like Roberts, along with non-political actors, illustrated that multiple actors' viewpoints are constitutive of the process that makes judges and foreign law as strangers.

Northwestern University law professor John McGinnis testified that the anti-democratic nature of foreign legal citation threatened to alienate citizens from the Constitution. He said:

My subject, the use of international and foreign law, is an issue of substantial importance, not least because the Supreme Court has come to rely on such material. For

¹⁰⁵ *Id.*

instance, in *Lawrence v. Texas*, the Supreme Court recently relied on the European Court of Human Rights as part of its decision to strike down a statute of one of our states.

In my view, such reliance distorts the meaning of our Constitution. It undermines domestic democracy and it threatens to alienate Americans from a document that is their common bond.¹⁰⁶

In an exchange with nominee Sotomayor, Senator Cornyn described the use of foreign law as an attempt to circumvent the democratic process of constitutional amendment. He said:

I would just say if academics or legislators or anybody else who has got creative juices flowing from the invocation of foreign law, if they want to change the Constitution, my contention is the most appropriate way to do that is for the American people to do it through the amendment process rather than for judges to do it by relying on foreign law.¹⁰⁷

There are a number of reasons given why the citation of foreign law may undermine democracy. Judge Alito stated that the process subverts democratic self-government because “it is utterly impractical, given the diversity of legal viewpoints worldwide.”¹⁰⁸ In this instance, Judge Alito is referring to the lack of a systematic method to survey and implement the wide variety of foreign laws available to U.S. judges.

A second means that conservatives articulated as a reason why the foreign legal citation process subverted democracy was because the practice suffers from a democratic deficit and therefore goes against democratic theory. During his hearing, Judge Roberts argued that:

I would say as a general matter that a couple of things that cause concern on my part about the use of foreign law as precedent—as you say, this isn’t about interpreting treaties or foreign contracts, but as precedent on the meaning of American law. The first has to do with democratic theory. Judicial decisions in this country—judges of course are not accountable to the people, but we are appointed through a

¹⁰⁶ *Sotomayor Hearing*, *supra* note 76, at 547.

¹⁰⁷ *Id.* at 465.

¹⁰⁸ *Alito Hearing*, *supra* note 72, at 370.

2014]

MAKING STRANGE LAWS

717

process that allows for participation of the electorate, the President who nominates judges is obviously accountable to the people. The Senators who confirm judges are accountable to the people. In that way the role of the judge is consistent with the democratic theory. If we're relying on a decision from a German judge about what our Constitution means, no President accountable to the people appointed that judge, and no Senate accountable to the people confirmed that judge, and yet he's playing a role in shaping a law that binds the people in this country. I think that's a concern that has to be addressed.¹⁰⁹

McGinnis further highlights the particular democratic deficits found in international law, noting that not only are the laws promulgated by unelected American officials, but that they are formed by totalitarian regimes and law professors. He states:

But raw international law also lacks any democratic pedigree and can cast doubt on our democratically made law. Indeed, international law has multiple democratic defects. Totalitarian nations have participated in its fabrication. Very unrepresentative groups, like law professors, still shape its form.

It's also hardly transparent. American citizens have enough trouble trying to figure out what goes on in hearings like this one, let alone in diplomatic meetings in Geneva.¹¹⁰

Both Senator Coburn and Northwestern University law professor Stephen Presser discuss the perils of using law formed by institutions outside of the United States. Coburn discusses the democratic deficit stating:

We don't want judges to have closed minds, just as much as we don't want judges to consider legislation and foreign law that is developed through bodies, elected bodies outside of this country to influence either rightly so or wrongly so, against what the elected representatives and Constitution of this country says.¹¹¹

¹⁰⁹ *Roberts Hearing*, *supra* note 89, at 200–01.

¹¹⁰ *Sotomayor Hearing*, *supra* note 76, at 547.

¹¹¹ *Id.* at 349.

Presser argues that while the use of foreign law might lead to “wise” results, a problem of the democratic deficit remains:

To put it in the vernacular – and we talked about this – it’s the job of justices to judge, not to make law. In the past few years we’ve seen several instances of justices turning to international or foreign law to make American constitutional law. Thus, Justice Kennedy, turning to the law of the European community, found support for his view, departing clearly from prior precedent, that consensual homosexual acts could not be criminally punished.

In a similar manner, recent Supreme Court decisions, relying in part on European and other international authority, have decided that it is unconstitutional to apply the death penalty to minors and that it is unconstitutional to apply the death penalty to persons suffering from mental retardation.

Now, the results in all of these cases might be wise social policy, but they all represent really legislative acts by the court. In America, where the people are supposed to be sovereign, changes in such social policies are supposed to be for the popular organ, the legislature, or for the ultimate popular organ in action, amending the Constitution.¹¹²

Presser links the democratic deficit issue to a larger problem where the citizens of the United States face a great danger via the loss of sovereignty to foreign nations. The next Section explores how conservatives have employed the language of sovereignty in discussions of foreign law.

4.4.3. *Sovereignty*

There was an incredible amount of testimony during the senate confirmation hearings that the citation of foreign and international law diluted U.S. sovereignty and subjected U.S. citizens to foreign authority. These concerns surrounding sovereignty and governance were expressed most vehemently during the confirmation of Obama nominees Sotomayor and Kagan.

¹¹² *Kagan Hearing, supra* note 73, at 343.

2014]

MAKING STRANGE LAWS

719

During the confirmation hearings for Kagan, Presser argued that while there is a historical precedent for the use of foreign law, the use of recent precedents diminishes sovereignty. He stated:

In the early years of our Republic and subsequently, judges and justices have quite properly sought to understand and apply the Law of Nations, a body of super-constitutional principles that apply to every nation and that have been the subject of work by international scholars for hundreds of years.

But this recourse to the ancient Law of Nations, this traditional recourse to international law, is very different from turning to recent international or foreign jurisprudence to implement policies and rules, very different from those previously prevailing. One is a longstanding legitimate use of international authority, the other is a usurpation of the sovereignty of the people.¹¹³

Presser focuses on a particular type of popular sovereignty. Senator Sessions also links the citation of foreign law to disrupting popular sovereignty when discussing the governance of the American people:

Foreign law, that's a ranging [sic] debate within our country today.

I do not see how anyone can justify a citation to actions outside the country as any authority whatsoever to define what Americans have done. Americans believe that you only govern with the consent of the governed and we have not consented to be governed by Europe or any other advanced nation.¹¹⁴

Nicholas Rosenkranz describes how through the citation of foreign law, foreign governments can control American law. He testified:

When the Supreme Court declares that the Constitution evolves – and it declares further that foreign law may affect its evolution – it is declaring nothing less than the power of

¹¹³ *Id.* at 343.

¹¹⁴ *Id.* at 302.

foreign governments to change the meaning of the United States Constitution.

And even if the court purports to seek a foreign “consensus,” a single foreign country might tip the scales. Indeed, foreign governments might even attempt this deliberately. France, for example, has declared that one of its priorities is the abolition of capital punishment in the United States. Yet surely the American people would rebel at the thought of the French Parliament deciding whether to abolish the death penalty—not just in France, but also thereby, in America.

After all, foreign control over American law was a primary grievance of the Declaration of Independence. It, too, may be found at the National Archives, and its most resonant protest was that 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, even at the margin, is inconsistent with our basic founding principles of democracy and self-governance.¹¹⁵

Rosenkranz constructs an ominous scenario where foreign governments intentionally try to influence the laws of the United States. He also analogizes, and therefore connects, contemporary citations to foreign law to a history of U.S. resistance to foreign control that dates back to the U.S. Declaration of Independence from England.

Rosenkranz’s link between the guiding nature of contemporary foreign law and the overt control of foreign governments prior to the American Revolution is further articulated in an exchange between Presser and Sessions during the expert testimony phase of Kagan’s confirmation hearing:

[Senator SESSIONS.] Professor Presser, I think that this international law issue is important because Americans believe they should not be controlled by anyone that they don’t elect to represent them, or getting taxation without representation. How can we have our law controlled,

¹¹⁵ *Sotomayor Hearing*, *supra* note 76, at 550.

defined, or modified, or influenced by some parliament in Belgium or some potentate somewhere in the world?

Mr. PRESSER. You're absolutely right. We fought a revolution over that and I don't think we can let ourselves be guided by some foreign bodies or some foreign emerging law. I only wish you had had a little bit clearer answers perhaps from General Kagan on that point. I think it's one that you have to be very concerned about.¹¹⁶

4.5. *Learning*

A debate exists surrounding the citation of foreign and international law and whether this can serve as a site for learning and as a source for "good ideas."¹¹⁷ This issue surrounding learning serves as a battlefield where those in favor of the use of foreign law have chosen to fight. While opponents to the use of foreign law point out that foreign law is not a useful source for learning due to its dangerous and biased aspects, proponents combat this narrative, arguing that foreign law is not only safe, but that it is no different from other nonbinding, noncontroversial sources of knowledge that benefit the legal decision-making process.

Opponents argue in hearings that foreign laws do not offer any benefits in the interpretation of U.S. law. The following exchange between Senator Sessions and nominee Alito illustrates this point:

Senator SESSIONS. As you analyze how to interpret the Constitution of the United States or a statute passed by the U.S. Congress, do you believe that authoritative insight can be obtained by reading the opinions of the European Union?

Judge ALITO. I don't. I don't think that it's very helpful—in fact, I don't think it is helpful to look at the decisions of foreign courts for the interpretation of our Constitution. I think we can do very well with our own Constitution and our own judicial precedents and our own traditions. And I

¹¹⁶ Kagan Hearing, *supra* note 73, at 352.

¹¹⁷ Judge Sotomayor stated that in some instances foreign and international law may serve as a source for good ideas. See Video: *Speech to the A.C.L.U. of Puerto Rico*, N.Y. TIMES (June 10, 2009), <http://www.nytimes.com/video/2009/06/10/us/politics/1194840839480/speech-to-the-a-c-l-u-of-puerto-rico.html>.

don't say that with disrespect to the other countries. But I don't think that there are insights to be provided on issues of American constitutional law by examining the decisions of foreign courts.

I think that it's very interesting from a political science perspective to see what they've done, and I've personally been interested in this over the years. And I think it's flattering to us that so many other countries have followed our judicial traditions. But on issues of interpretation of our Constitution, I don't think that that's useful.¹¹⁸

Alito points to serious concerns and questions for the learning paradigm to grapple with. He raises issues of selection bias mentioned earlier, but he also brings up the question of understanding these decisions. He adds:

I also don't think that it's—I think that it presents a host of practical problems that have been pointed out. You have to decide which countries you are going to survey, and then it is often difficult to understand exactly what you are to make of foreign court decisions. All countries don't set up their court systems the same way. Foreign courts may have greater authority than the courts of the United States. They may be given a policymaking role, and therefore, it would be more appropriate for them to weigh in on policy issues. When our Constitution was being debated, there was a serious proposal to have members of the judiciary sit on a council of revision, where they would have a policymaking role before legislation was passed, and other countries can set up their judiciary in that way. So you'd have to understand the jurisdiction and the authority of the foreign courts.

And then sometimes it's misleading to look to just one narrow provision of foreign law without considering the larger body of law in which it's located. That can be—if you focus too narrowly on that, you may distort the big picture, so for those reasons, I just don't think that's a useful thing to do.¹¹⁹

¹¹⁸ *Alito Hearing*, *supra* note 72, at 410.

¹¹⁹ *Id.* at 471.

2014]

MAKING STRANGE LAWS

723

A lengthy exchange between Senator Cornyn and nominee Sotomayor revealed the senator's concern over issues of sovereignty.

Senator CORNYN. I appreciate that. You testified earlier today that you would not use foreign law in interpreting the Constitution and statutes. I would like to contrast that statement with an earlier statement that you made back in April, and I quote, "International law and foreign law will be very important in the discussion of how to think about unsettled issues in our legal system. It is my hope that judges everywhere will continue to do this."

Let me repeat the words that you used 3 months ago. You said "very important" and you said "judges everywhere." This suggests to me that you consider the use of foreign law to be broader than you indicated in your testimony earlier today.

Do you stand by the testimony you gave earlier today, do you stand by the speech you gave 3 months ago, or can you reconcile those for us?

Judge SOTOMAYOR. Stand by both, because the speech made very clear, in any number of places, where I said you can't use it to interpret the Constitution or American law. I went through—not a lengthy, because it was a shorter speech, but I described the situations in which American law looks to foreign law by its terms, meaning it's counseled by American law.

My part of the speech said people misunderstand what the word "use" means and I noted that "use" appears to people to mean if you cite a foreign decision, that means it's controlling an outcome or that you are using it to control an outcome, and I said no.

You think about foreign law as a—and I believe my words said this. You think about foreign law the way judges think about all sources of information, ideas, and you think about them as ideas both from law review articles and from state court decisions and from all the sources, including Wikipedia, that people think about ideas. Okay.

They don't control the outcome of the case. The law compels that outcome and you have to follow the law. But judges think. We engage in academic discussions. We talk about ideas.

Sometimes you will see judges who choose—I haven't, it's not my style, but there are judges who will drop a footnote and talk about an idea. I'm not thinking that they're using that idea to compel a result. It's an engagement of thought.

But the outcome—you could always find an exception, I assume, if I looked hard enough, but in my review, judges are applying American law.¹²⁰

Sotomayor tries to alleviate these fears of sovereignty by stating that it is American law, not foreign law, that is controlling, and that foreign law serves solely as a learning tool for the judge. In the following passage, Cornyn intimates that while foreign law might not be controlling, that even in a persuasive way, it has some impact on a judge's decision-making process.

Senator CORNYN. Your Honor, why would a judge cite foreign law unless it somehow had an impact on their decision or their decision-making process?

Judge SOTOMAYOR. I don't know why other judges do it. As I explained, I haven't. But I look at the structure of what the judge has done and explains and go by what that judge tells me. There are situations—that's as far as I can go.¹²¹

Cornyn seems to create a very high bar in that any idea that has an impact on a judge's thinking can somehow have an effect on sovereignty. Sotomayor reiterates the nonbinding nature of foreign legal citations and again associates it with the process of legal knowledge production (and perhaps legal innovation)¹²² when discussing foreign law with respect to "creative juices."¹²³

¹²⁰ *Sotomayor Hearing*, *supra* note 76, at 463–64.

¹²¹ *Id.* at 464.

¹²² For a discussion of foreign legal citation and legal innovation, see generally Sheldon Bernard Lyke, *Brown Abroad: An Empirical Analysis of Foreign Judicial Citation and the Metaphor of Cosmopolitan Conversation*, 45 *VAND. J. TRANSNAT'L L.* 83 (2012).

¹²³ *Sotomayor Hearing*, *supra* note 76, at 464.

2014]

MAKING STRANGE LAWS

725

Senator CORNYN. You said, at another occasion, that you find foreign law useful because it “gets the creative juices flowing.” What does that mean?

Judge SOTOMAYOR. To me, I am a part academic. Please don’t forget that I taught at two law schools. I do speak more than I should and I think about ideas all the time. And so for me, it’s fun to think about ideas.

You sit in a lunchroom among judges and you’ll often hear them say, “Did you see what that law school professor said” or “did you see what some other judge wrote and what do you think about it,” but it’s just talking. It’s sharing ideas.

What you’re doing in each case, and that’s what my speech said, is you can’t use foreign law to determine the American Constitution. It can’t be used either as a holding or precedent.¹²⁴

Sotomayor’s reference to foreign law as a source of good ideas arose repeatedly during her and Kagan’s confirmation hearings. In an exchange with Senator Coburn, nominee Sotomayor explained her “good ideas” statement and her position on how foreign law could serve as a source of knowledge. She testified that judges do not use foreign law to come to a legal conclusion, but instead,

[w]hat judges do, and I cited Justice Ginsburg, is educate themselves. They build up a story of knowledge about legal thinking, about approaches that one might consider. But that is just thinking. It’s an academic discussion when you’re talking about thinking about ideas. Then it is how most people think about the citation of foreign law in a decision.

They assume that if there is a citation to foreign law, that is driving the conclusion. In my experience when I have seen other judges cite foreign law, they are not using it to drive the conclusion, they are using just to point something out about a comparison between American law or foreign law.

¹²⁴ *Id.* at 464–65.

But they are not using it in the sense of compelling a result.¹²⁵

Professor McGinnis, however, critiqued this educational learning function of foreign law. He stated:

Foreign and international law may well contain good ideas, as Justice Sotomayor suggested, but so many other sources that have no weight and should not, I think, routinely be cited as authority.

To put the question in perspective, undoubtedly, the Bible and the Quran have many legal ideas that many people think are good, but we would be rightly concerned if judges used them as guidance for interpreting the Constitution or even routinely cited them.

Depending on what text the judge cited and what she omitted, we might think she was biased in favor of one tradition at the expense of others.¹²⁶

McGinnis chose an extremely limited religious perspective in citing 'problematic' sources of good ideas. The democratic nominees and democratic senators framed the debate in a slightly different manner and compared foreign and international legal sources to other well-accepted, non-binding sources of knowledge. One popular source that proponents of foreign law referred to repeatedly was the academic law review article. When Senator Grassley asked nominee Kagan whether judges should ever use foreign law for "good ideas,"¹²⁷ she said:

Well, Senator Grassley, I guess I'm in favor of good ideas coming from wherever you can get them, so in that sense I think for a judge to read a *Law Review* article or to read a book about legal issues or to read the decision of a State court, even though there's no binding effect of that State court, or to read the decision of a foreign court, to the extent that you learn about how different people might approach and have thought about approaching legal issues. But I don't think that foreign law should have independent

¹²⁵ *Id.* at 349.

¹²⁶ *Id.* at 548.

¹²⁷ *Kagan Hearing*, *supra* note 73, at 126.

2014]

MAKING STRANGE LAWS

727

precedential weight in any but a very, very narrow set of circumstances.

So I would draw a distinction between looking wherever you can find them for good ideas, for just to expand your knowledge of the way in which judges approach legal issues, but—but making that very separate from using foreign law as precedent or as independent weight. Fundamentally, we have an American Constitution. Our Constitution is our own.

It's the text that we have been handed down from generation to generation, it's the precedents that have developed over the course of the years. And except with respect to a very limited number of issues, that Constitution ought to—the fundamental sources of legal support and legal argument for that Constitution ought to be American.¹²⁸

For Kagan, “good ideas” can come from a variety of sources, and she implies that citation to foreign law is not much different than citation to an academic law review article.¹²⁹ Like Sotomayor, Kagan explicitly confronts concerns regarding legal sovereignty and iterates that the U.S. Constitution and American law is fundamental and controlling. In a question and answer session with Senator Kyl, nominee Kagan highlights sensitivity to U.S. sovereignty while clarifying the comparison between law reviews and foreign law in the following quote:

Senator Kyl, I do believe that this is an American Constitution. That one interprets it by looking at the structure, our own history, and our own precedents. And that foreign law does not have precedential weight.

¹²⁸ *Id.* at 126–27.

¹²⁹ Sotomayor made a similar comparison between foreign law and law review articles in an exchange with Senator Schumer. She stated:

The question of use of foreign law then is different than considering the idea that it may, on an academic level, provide. Judges—and I'm not using my words. I'm using Justice Ginsberg's words. You build up your story of knowledge as a person, as a judge, as a human being with everything you read. For judges, that includes law review articles and there are some judges who have opined negatively about that. You use decisions from other courts. You build up your story of knowledge.

Sotomayor Hearing, supra note 76, at 133.

Now, in the same way that a judge can read a Law Review article and say, well, that's an interesting perspective or I learned something from it, I think that so too a judge may read a foreign judicial decision and say, well, that's an interesting perspective, I learned something from it.¹³⁰

One member of the judiciary committee, Senator Schumer, performed work in constructing the use of foreign law as benign. Schumer made a comparison between the non-binding use of foreign law and law review articles in a question to nominee Kagan. He asked:

Senator SCHUMER. OK. And of course when an American judge considers, they consider many non-binding sources when they reach a determination.

I asked this of Judge Sotomayor because it came up then. Judge Roberts' prominent citation in a voting rights act case decided last year, Justice Roberts, he cited an article by NYU Professor Samuel Isacaroff published in the *Columbia Law Review*.

Would you agree that *Law Review* articles are not binding on American judges even though they might be cited by some?

MS. KAGAN. Some law professors would like them to be binding, but no. I agree, Senator Schumer, that the way they are cited in these decisions are just, this isn't binding, this isn't precedent, but this is a person who had a good idea and the decision in some sense cites or reflects that.

Senator SCHUMER. And it sure wasn't improper of the Chief Justice to consider such sources in reaching his decision, was it?

MS. KAGAN. Absolutely not.¹³¹

Senator Schumer continued to ask both nominees Sotomayor and Kagan about other non-binding sources of knowledge that judges used without controversy, specifically Justice Scalia's use of dictionaries in his decision-making process. In an exchange with nominee Sotomayor, Senator Schumer asked:

¹³⁰ *Kagan Hearing, supra* note 73, at 258.

¹³¹ *Id.* at 156.

2014]

MAKING STRANGE LAWS

729

Senator SCHUMER. Right, and it is important. American judges consider many non-binding sources when reaching a determination. For instance, consider Justice Scalia's well known regard for dictionary definitions in determining the meaning of words or phrases or statutes being interpreted by a court.

In one case, *MCI v. AT&T*, that is a pretty famous case, Justice Scalia cited not one, but five different dictionaries to establish the meaning of the word "modify" in a statute.

Would you agree that dictionaries are not binding on American judges?

Judge SOTOMAYOR. They are a tool to help you in some situations to interpret what is meant by the words that Congress or a legislature uses.

Senator SCHUMER. Right. So it was not improper for Justice Scalia to consider dictionary definitions, but they are not binding, same as citing of foreign law, as long as you do not make it binding on the case.

Judge SOTOMAYOR. Yes. Well, foreign law, except in the situation — —

Senator SCHUMER. Of treaties.

Judge SOTOMAYOR. — which we spoke about and even then is not binding. It's American principles of construction that are binding.¹³²

Senator Schumer repeated this reference to Justice Scalia's use of five different dictionaries in an attempt to establish the meaning of the word "modify" in a statute during the hearing for Solicitor General Kagan.¹³³ His goal was to argue "that American judges of all ideological stripes keep their minds open to sources and ideas other than those that are directly binding on them under the constitution and the laws of the United States," and that foreign and international law was just one iteration of an idea source.¹³⁴

¹³² *Sotomayor Hearing*, *supra* note 76, at 133.

¹³³ *Kagan Hearing*, *supra* note 73, at 156. The particular case to which Senator Schumer was referring was *MCI v. AT&T*, 512 U.S. 218 (1994).

¹³⁴ *Id.* at 156.

5. DISCUSSION

This qualitative study reveals that politicians—specifically senators—are engaged in the production of strangeness and the transformation of foreign law into a stranger. This Article has tried to illustrate the process by which foreign and international laws have become strangers in the United States—or how those who are engaged in the process of using foreign laws are seen as strange, or as engaged in strangeness/strange activity.

The data reveal a variety of cultural, functional, and structural origins to strange laws. This project takes a conflict analysis approach by examining how individuals contest the meaning and use of foreign and international law during the senate confirmation hearings. First, those who oppose the use of foreign law seek to demonstrate that it is somehow structurally different than U.S. domestic law. One might argue that one does not need to demonstrate or construct this reality because U.S. domestic law and foreign law, by definition of their origin, are structurally different. However, simply because they are different doesn't mean that their difference has salience or any particular social meaning. Opponents of foreign law construct these differences of origin into having some meaning of outsider status or social otherness. This occurs when Republican senators imply that foreign law goes against the tradition of the U.S. Constitution and is not allowed by U.S. law. The structural difference of foreign law is further infused with meaning when it is linked to the biased and counter-majoritarian desires believed to be present and represented by the disadvantaged, minority-identity statuses of Sonia Sotomayor and the homosexual male litigants in *Lawrence*. Secondly, conservative opponents of foreign law go an extra step and frame their conceptualization of the othered nature of foreign law as biased and dangerous. They argue that foreign laws are vehicles for judicial activism, threaten American sovereignty, and are anti-democratic.

The data that this project presents illustrate an ongoing issue contested in the senate judiciary confirmation hearings starting in 2005 with the nomination of John Roberts, continuing to 2010 with the nomination of Elena Kagan. It is not clear whether a functional theory is useful in explaining the existence of strangers, or if their status is merely the result of a battle between political and legal elites. Does society create strangers in order to fulfill particular needed roles? Or are they the by-products of conflicts that result

when different political and legal groups work to create a just, functioning, society?

Society has three strategies for dealing with outsiders: (1) absorption and assimilation, (2) expulsion or banishment, or (3) entering into hybrid stranger relations.¹³⁵ Both Karakayali and Bauman present somewhat functionalist accounts for entering into stranger relations. Karakayali offers a strict functionalist account and illustrates the various ways that strangers are useful to society.¹³⁶ Bauman combines a functionalist theory with a structural explanation.¹³⁷ According to Bauman, in a postmodern world, society has no desire to absorb the outsider, yet because of structural limitations, is simply unable to erase and eradicate the outsider.¹³⁸ Therefore, society enters an on-going, never-ending project where the stranger is perpetually constructed and serves the function of signaling the boundaries of what is acceptable in society.

Functionalist accounts of the postmodern stranger (even ones with structural underpinnings) are problematic. First, it may be an oversimplification to characterize the presence of the stranger as the product of an ongoing, monolithic, society-wide management process. Instead, it might be more accurate (and useful) to imagine the stranger as the by-product of the contestation between multiple, powerful societal insiders fighting to determine whether a group or thing will hold insider or outsider status in society. Secondly, Bauman fails to illuminate the mechanisms and social processes that create the postmodern stranger, in part because he engages in feckless futility arguments, which hold that postmodern society is unable to eradicate the outsider (and therefore society enters into an ongoing process of constructing the foreigner as a stranger). This view relies on two great assumptions: (1) a group (or thing) linked to identity in a postmodern society cannot be erased or eradicated from society,¹³⁹ and (2) the social construction

¹³⁵ See *supra* Part 2.

¹³⁶ See *supra* notes 32–40 and accompanying text.

¹³⁷ See Bauman, *supra* note 29 and accompanying text.

¹³⁸ See *supra* notes 43–49 and accompanying text.

¹³⁹ Bauman argues that the postmodern stranger cannot be expelled, erased, eradicated or banished from society. Bauman, *supra* note 29, at 12. This type of futility argument ignores the possibility of social change. The data from this project revealed significant changes simply in the framing of foreign and international law in the more than two decades that separated the O'Connor and Roberts hearings. If one focuses specifically on the lack of formal/legal (i.e.,

of the postmodern stranger is somehow linked to a large, group social consciousness where society is either aware, has knowledge, or can at least understand that the eradication of the outsider is impossible.

The data from the senate judiciary committee hearings may help generate a more complex understanding of the production of strangers in a postmodern world. First, it is not clear from the data that the senators are engaged in an ongoing management process that consciously tries to transform foreign law into a dangerous stranger. The hearings reveal a complex socio-legal political world where judges, legislators, academics, and policy activists debate the proper role of the citation and use of foreign and international law.¹⁴⁰ In this complex world, multiple members, not one conservative arm of the nation-state, are responsible for producing the foreign legal stranger. This contested process is constituted on a number of different scales (i.e., state and national) in multiple spheres (political, government, judicial, academic, non-profit activist), and comprised of a variety of actors of disparate political persuasions and ideologies. The debate surrounding the role of foreign law is so complex that it does not merely exist on a conservative/liberal political ideology scale. One must also consider conservative/liberal ideology on a judicial scale. For example, while liberal judges' foreign citation practices are criticized by their conservative judicial counterparts, conservative judges take an approach different than conservative legislators and do not call for the ban of citation to foreign legal authority, but

structural) bans of the use of foreign law, there are a significant number of state legislatures that have passed legislation outlawing the judicial use of foreign and international law. In addition, federal resolutions and legislations have also been introduced. One might argue that these state legislative actions might not be unconstitutional and unenforceable, and therefore hold mostly a symbolic value. The same argument can be made for non-binding federal resolutions. This argument that these actions are merely symbolic and therefore are not legitimate attempts at manufacturing outsiders ignores the incremental nature of social change and the power of symbolic victories. The passage of the non-binding Universal Declaration of Human Rights (UDHR) in 1948 was symbolic, but also aspirational. The UDHR was the precursor to more binding international treaties in the 1960s, like the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.

¹⁴⁰ While the senate judiciary committee is comprised of eighteen members, there are only a small minority of these members who have (or had) actively and consistently debated the role of foreign law and the judiciary. They include senate Republicans Brownback, Coburn, Cornyn, DeWine, Kyl and Sessions, and Democrats Leahy and Schumer.

2014]

MAKING STRANGE LAWS

733

instead believe that this is something that is to be worked out amongst the courts.

There is no legal world that has decided to enter into an ongoing management process with respect to foreign law. The role of foreign law is contested. One might argue that conservative senators appear to be engaged in ongoing management because over the years, they have not formally banned foreign law. This, however, would be an unreasonably high bar to measure whether a group was trying to eradicate an outsider. Whenever conservative senators discussed foreign law during the hearings, they always discussed why it should be banned, and why it had no place in judicial decision-making.

This debate over the proper role of foreign law takes place in a society with a particular legal structure where there is no explicit Constitutional or federal ban on the judiciary's use of foreign laws as persuasive authority. Therefore, given this legal structure, how do conservative senators go about eradicating foreign law? Senators can attempt to eradicate foreign law by both *de jure* and *de facto* means. Senators can attempt to change the *de jure* law and pass legislation and/or resolutions that ban the use of foreign law.¹⁴¹ Because of federal constitution separation of powers concerns, there are likely to be challenges to these legislative bans, as has occurred when state legislatures have passed their own bans prohibiting the use of foreign and international law.

This Article focused on senators trying to change the practice of foreign citation in a more *de facto* sense. This study showed how senators operated well within the structural limits of the U.S. Constitution and exercised their authority "to advise and consent" with the President of the United States with respect to judicial nominations. Under this authority, senators can refuse to approve nominees who cite foreign law if a majority of the senate judiciary committee members view the citation of foreign law as a prohibited "outsider" practice. In addition, the framing of foreign law as an outsider may have a chilling effect on nominees and other judges and stifle their use and citation of foreign law.¹⁴² The

¹⁴¹ This has already happened at the state level, where a number of state legislatures have passed legislation to ban foreign law. See sources cited *supra* note 17.

¹⁴² The chilling effect is often used in the context of curbing behavior under the threat of litigation. A standard definition of the chilling effect states: "In constitutional law, the inhibition or discouragement of the legitimate exercise of a constitutional right, especially one protected by the First Amendment to the

conservatives that this project highlights are not necessarily trying to create Simmelian strangers who are located on the border of the insider/outsider. Instead, they are trying to produce outsiders and ban the use of foreign law.

The postmodern stranger is not necessarily a conscious construction of ongoing management, but the visible manifestation of conflict. This conflict placed foreign law at the insider/outsider border where it now sits as a sign of the border. Foreign laws become strangers not because the legal and political arena manages them as strangers, but because of the combination of the contestation over their insider/outsider status and the existing structures that shape those contests and limit the roles of conservative legislators. Structurally, foreign laws are not forbidden (i.e., there are no laws prohibiting judges from using foreign authority). Yet a significant conservative segment of legal and political elites have attempted to move foreign law to the periphery. The by-product of this movement is that foreign law sits at (or on) the border of insider/outsider status and now occupies the status of stranger. In occupying this status, it also fulfills a useful and beneficial function—it signals various limits of boundaries of society (i.e., every senator can agree that it would violate sovereignty and democracy if judges used foreign and international law as binding authority). While this function does not explain fully why the status of the stranger exists, it supports the continued existence of the stranger status.

6. CONCLUSION AND IMPLICATIONS FOR FUTURE RESEARCH

The primary goal of this Article was to improve our theoretical understanding of the social production of strangers. The major finding is that strangers, at least in a postmodern sense, are produced as a by-product when members of society contest the

United States Constitution, by the potential or threatened prosecution under, or application of, a law or sanction.” WEBSTER’S NEW WORLD LAW DICTIONARY 70 (Susan Ellis Wild ed., 2006). I do not believe that court judges and justices, at least on a federal level, fear litigation; however, the huge uproar in Congress and in the popular media may have caused some justices to rethink how often, or whether they plan to cite to foreign authority. I think that this is present in the ways in which the nominees discussed the use of foreign law. However, I admit that what may be chilling with respect to how a Supreme Court nominee expresses his or her views on foreign law may not have the same chilling effect on that same nominee once the appointment to the court is confirmed, and he or she has life tenure.

meaning of social boundaries. Social structure is a vital component to this understanding because it not only helps shape the meaning of boundaries, but it can also determine the actual position of whether a subject is fixed inside, outside, or on the border. This Article generates this theory by analyzing the social conflicts that arise over the use of foreign law, where proponents justify the use of foreign law as a useful, innocuous source of learning, and opponents dismiss it as a biased, anti-American dangerous pariah.

Another goal of this Article was to begin a theorization of the stranger that was broader and moved beyond relations merely with people to include the cultural artifacts (e.g., laws) that people produce. This work attempts to establish that these types of relations can include such cultural and social products. Future work should explore the social production of other artifacts as dangerous strangers. One popular example could be the kerfuffle started in the congressional cafeteria when French fries were banned and renamed freedom fries.¹⁴³ Are there other strange socially and/or humanly manufactured items? If so, what is the process that led to their status of strangeness?

Future work should also explore the relationship between the social production of strange objects (i.e., law) and the production of strangers (i.e., people). This project touched on how conservative senators linked the otherness of disadvantaged minority identities to foreign law. It is important, however, to discuss how the transformation of foreign law into a danger stranger affects the holders of disadvantaged minority status. Perhaps the creation of strange law is another iteration of boundary making. Conservatives who seek to regulate what some perceive as the threatening identities of some minorities are able to avoid critiques against claims of bigotry if they use foreign law as a proxy. This strategy allows conservatives to battle foreign elite laws of Europe, as opposed to the rights of lesbian, gay, and bisexual men and women. The end result, however, is that by attacking foreign laws, conservatives are also attacking the progressive principles to which they are attached. Future work can illuminate how the creation of strange laws (or any other strange items) is used in the ordering of society.

¹⁴³ Sean Loughlin, *House Cafeterias Change Names for 'French' Fries and 'French' Toast*, CNN (Mar. 12, 2003, 10:52 AM), <http://www.cnn.com/2003/ALLPOLITICS/03/11/sprj.irq.fries/>.