A Historical Perspective on Filings by Foreign Sovereigns at the U.S. Supreme Court: Amici or Inimici Curiae?

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INTRODUCTION

Over the last decade, the citation of international sources of law in U.S. Supreme Court decisions has stirred up considerable controversy. This has played out not only within the academy,¹ but also among the Justices. If there is

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¹ See, e.g., Steven G. Calabresi & Bradley G. Silverman, Hayek and the Citation of Foreign Law: A Response to Professor Jeremy Waldron, 2015 MICH. ST. L. REV. 1 (2015) (making a Hayekian argument in favor of the citation of foreign law, when informative); Jeremy Waldron, Foreign Law and the Modern Ius Gentium, 119 HARV. L. REV. 129, 132 (2005) (claiming that "the citation of foreign law can rest on the idea of the law of nations"); Ernest A. Young, Foreign Law and the Denominator Prob-
any merit to either the praise or the criticism of foreign law citations evinced from the respective comments of Justices Stephen Breyer and Antonin Scalia,\(^2\) the debate has greatly and puzzlingly missed the target.

Little has been written about foreign governments actively trying to participate in the decision-making process of U.S. courts. And yet, it is the practice of foreign sovereigns playing the role of amici curiae that most frequently brings foreign law to the Justices' attention.\(^3\) This practice has the potential to be much more worrisome than a U.S. judge deciding, \textit{sua sponte}, to research and carefully consider international (or foreign) law. This Note contributes to this underdeveloped discussion.

The scarce literature on the topic of amicus briefs filed by foreign sovereigns seems to imply that scholars are not worried about this practice. Or, as this Note suggests, legal scholarship has largely overlooked foreign amici. Twenty years ago, Stephen Plass wrote an article that did not aim to "provide an exhaustive historical analysis of Supreme Court response to amici efforts, but rather set[] out several historical spotlights which illuminate the futility of foreign amici."\(^4\) Stephen McAllister's 2010 short contribution offered a brief and incomplete history of sovereign amicus briefs filed by the federal and state governments, as well as by Native American Tribes and foreign governments.\(^5\)

No systematic study of foreign amici, however, was available until Kristen Eichensehr's recent article.\(^6\) Descriptively, Eichensehr found that between 1978 and 2013, forty-six foreign countries, the European Union, the European Community, and the Council of Europe filed sixty-eight amicus briefs in thirty-nine merits cases in front of the U.S. Supreme Court.\(^7\) Eichensehr identified four kinds of foreign amicus briefs, relying on (1) international facts, (2) treaty law, (3) customary international law, and (4) foreign law.\(^8\) Based on the forty-six percent citation rate of foreign amici between 1978 and 2013, which favor-


\(^{2}\) \textit{HARV. L. REV.} 148, 150-51 (2005) (arguing that citing foreign law risks turning into "counting noses").

\(^{3}\) See infra Part II (discussing numerous instances in which foreign sovereign amicus briefs cited foreign and international law); Cf. Michael D. Ramsey, \textit{International Materials and Domestic Rights: Reflections on Atkins and Lawrence}, 98 AM. J. INT'L L. 69, 71 (2004) (pointing out that "[i]t remains to be seen whether the use of international materials spreads from amicus briefs to the parties' briefs").


\(^{7}\) \textit{Id.} at 292, 308 fig.2, 313.

\(^{8}\) \textit{Id.} at 312-19.
ably compares to that of the U.S. government as an amicus curiae, Eichensehr convincingly disproved Plass's claims on the futility of foreign amici.\(^9\) Normatively, Eichensehr argued that courts should afford the most weight to foreign sovereign amici’s views on foreign law, but grant almost no deference to foreign amici’s arguments on U.S. law—treating arguments on international facts, customary international law, and treaties similarly to claims by the U.S. government.\(^10\) This conclusion, Eichensehr holds, follows from the fact that rationales comparable to those given in support of deference to the U.S. government hold true for the views of foreign amici.\(^11\)

Eichensehr’s excellent contribution, however, has its limits. Most notably, Eichensehr dispenses with the preceding two hundred years of Supreme Court litigation in three paragraphs.\(^12\) The analysis of this Note counters certain mistaken assumptions about foreign sovereign amici that one might draw based on Eichensehr’s exclusive focus on post-1978 foreign amicus briefs.\(^13\) A reader might wonder if the foreign amici practice is a rather unusual, surprising, recent development due to our increasingly globalized world. If that were the case, it would be reasonable to sympathize with Justice Scalia’s concerns.\(^14\) After all, Eichensehr mentions “the Court’s surprising practice of relying on the views of foreign sovereigns in a variety of circumstances.”\(^15\) Moreover, the fact that Eichensehr’s focus coincides with the Supreme Court’s sharp turn to the right over the last forty years—under Chief Justices Burger (1969-1986), Rehnquist (1986-2005), and Roberts (2005-present)—further complicates the analysis. Some might erroneously conclude that partisanship plays a role in foreign sovereign participation as amici curiae.

This Note complements Eichensehr’s contribution by addressing these limitations. As this Note highlights, foreign sovereign amicus participation is neither novel nor surprising, and any inference from Eichensehr’s findings that it could be a transitory “mood” due to the current preferences of particular Justices is mistaken. And, as Eichensehr acknowledges without explaining,\(^16\) there is nothing partisan about the usefulness and validity of foreign sovereign participation as amici curiae. Foreign amici are regular, though infrequent, repeat players at the Court, and the Justices have relied on the benefits of this practice for centuries. This Note represents the first systematic attempt at unveiling this neglected history and showing the kinds of arguments that have proven effective in front of the Justices. This Note catalogues twenty-five amicus briefs

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9. Id. at 321-22.
10. Id. at 296.
11. Id. at 325-55.
12. Id. at 297-98.
13. Id. at 302-03 n.64 (clarifying that “the analysis in the remainder of the Article is based on the foreign sovereign amicus briefs on the merits from 1978 through 2013”).
14. See Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (“[T]his Court . . . should not impose foreign moods, fads, or fashions on Americans” (internal quotation marks omitted)).
15. Eichensehr, supra note 6, at 325-26; see also id. at 351 (“Perhaps even more surprising than the frequency of such arguments is the extent to which the Court cares about and relies on arguments about the domestic law of foreign countries, typically without comment or explanation.” (footnote omitted)).
16. Id. at 319-20.
filed in fifteen merits cases (and six briefs at the certiorari stage) by thirteen foreign sovereigns up until 1978.  

Through that discussion, the Note intuitively simplifies Eichensehr’s quadripartite framework of analysis. Unlike Eichensehr, I am interested in predicting whether the Court will defer to foreign amici, not to what degree it will do so. The Court’s deferential approach to different kinds of sources undeniably falls on a spectrum.  

But the extremes chosen by Eichensehr lead three out of her four categories to unhelpfully fall somewhere in the middle. Through the lens of the study of pre-1978 foreign sovereign amicus briefs, this Note proposes an alternative, simpler framework. Foreign amici, in addition to more standard legal arguments applying U.S. domestic law, may predominantly offer arguments based on either legal facts or foreign interests.

Fact-based arguments are arguments offering legal facts that, if accepted by the Court, necessitate a specific conclusion (often procedural in nature). This kind of brief is common in foreign immunity controversies; for example, upon the acceptance of the legal fact that a vessel is publicly owned, the only legal argument remaining is conclusory: the vessel enjoys sovereign immunity. Fact-based briefs force the Justices to make a binary choice. On the one hand, the Justices might accept the foreign amici legal facts and their ensuing effects on the ruling; on the other hand, the Court might refute the facts and risk a potential foreign relations fallout.

Interest-based arguments, instead, rely on economic consequences, treaty regulations, international customary law, foreign law, and so forth. This type

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17. See infra notes 126-127 and accompanying text.
18. Eichensehr, supra note 6, at 355.
19. Id. at 325-55.
20. See, e.g., Brief in Support of Suggestion of British Embassy at 29-30, In re Muir, 254 U.S. 522 (1921) (No. 18) ("The vessel is avowed as a public ship during the period of her public service; that official declaration is not to be made the subject of contentious testimony . . . , and that fact establishes her immunity."); Brief for British Embassy at 10, Texas Co. v. Hogarth Shipping Co., 256 U.S. 619 (1921) (No. 555) ("The official avowal by the British Embassy, by its own Certificate, and the Suggestion of its counsel, conclusively establishes the fact of the requisition of the Baron Ogilvy and its governmental character and precludes further inquiry into the validity, legality or effect thereof."); Motion of the Republic of Lebanon for Leave to File a Brief as Amicus Curiae and Brief in Support of the Petition for a Writ of Certiorari at 11, Nat’l Comm. of Gibran v. Shiya, 389 U.S. 1048 (1968) (No. 776) ("The Court of Appeals Decision Overlooks Respondent’s Breach of Duty to Petitioner" by “input[ing] an intent on the part of the petitioner to, in effect, assign a 25% interest in the corpus of the Gibran Trust to respondent.”) (emphasis omitted).
21. See, e.g., Motion of Canada for Leave to File a Brief as Amicus Curiae and Brief of Canada Amicus Curiae at 2-3, Alitalia-Linee Aeree Italiane S.P.A. v. Lisi, 390 U.S. 455 (1968) (No. 70) (arguing that continued relations between the United States and the foreign sovereign, in addition to multilateral treaties, necessitated a decision favorable to amici); Motion for Leave to File a Brief as Amici Curiae and Brief of the Republic of Liberia as Amici Curiae at 5-6, Incres S.S. Co. v. Int’l Mar. Workers Union, 372 U.S. 24 (1963) (No. 33) (“The decision of the Court of Appeals . . . would most seriously threaten the following objectives of the Government of Liberia: 1. The according of full faith and credit to registration of vessels under its flag. 2. The assurance of freedom of the international commerce served by its vessels from unwarranted, unlawful and conflicting administrative regulations and controls.”); Brief of the Government of Denmark, Amicus Curiae at 1, Romero v. Int’l Terminal Operating Co., 358 U.S. 354 (1959) (No. 322) (arguing that maritime nations’ economic survival depended on the Court’s favorable decision); Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae at 2, Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958) (No. 251) (arguing that “[t]he continued observance of these [treaty] obligations—and their common interpretation—are vital to world trade and to the maintenance in international relations of the Rule of
of brief simply calls the Court to engage in a balancing test, evaluating competing considerations. It brings to the table the effects and implications of a potential ruling on a friendly foreign nation in economic, political, or legal terms. Though deference is proper for interest-based arguments, this Note argues that the Court is rightly skeptical of fact-based amicus briefs.

Part I analyzes the practice of indirect amicus-like filing by foreign governments through the Office of the Attorney General. Developed contemporaneously to amicus curiae participation during oral argument in the 1810s, indirect participation maintained "horizontal networks" of communication between the Court and foreign executives. Predating the formal practice of filing amicus briefs, the Spanish government's interposed claim in an 1818 prize case played a de facto amicus role. The Anne thus represents a first attempt at direct amicus-like participation by a foreign government.

Part II relies on the proliferation of foreign sovereign amicus briefs in the nineteenth and twentieth centuries to draw a distinction between interest-based and fact-based arguments. Predictably, the Court has historically shown skepticism towards fact-based briefs, if not previously vetted by the U.S. Executive, while it has felt much more comfortable with interest-based arguments. The British Embassy's experimentation with both fact-based and interest-based arguments plays a central role in the discussion. Overall, the Court has generally been friendly towards foreign amici, not only by citing and engaging with their briefs, but also by granting them oral argument time.

Part III reflects on the historical and normative analyses of the preceding Sections in light of today's political and judicial climate. Notwithstanding the tensions with American isolationism and the incentives to reduce the debate over foreign amici and foreign law in U.S. courts to divergences in judicial philosophy, the history of the foreign amici practice counsels otherwise.

This Note concludes that interest-based foreign sovereign amicus briefs— and the resulting occasional citation of foreign and international law—should be perceived as valuable contributions to litigation in U.S. courts, and not as a threat to the integrity of our judicial system.

I. PRECEDE NTS FOR FOREIGN SOVEREIGN PARTICIPATION: 1800s

As amici curiae began to participate in front of the Court in the first decades of the 19th century, so did foreign sovereigns. However, as Section I.A discusses, foreign sovereigns initially started to interact as claimants in prize proceedings; foreign emissaries would indirectly interpose a claim on the own-

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23. Indirect participation was in use until 1978 when, as Eichensehr discusses in depth, the Court rejected it as inherently problematic. See Eichensehr, supra note 6, at 299 (explaining the bizarre instance in which "Japan's diplomatic note supported the interests of Zenith Radio (the petitioner), but it was transmitted to the Court by the United States (the respondent)") (citing Zenith Radio Corp. v. United States, 437 U.S. 443 (1978)); see infra notes 135-140 and accompanying text.
ership of a seized vessel, relying on the U.S. Attorney General as a proxy. The case of The Anne, analyzed in Section I.B, represents the first attempt at direct participation on the part of a foreign government as a third-party intervener. In those early years, foreign sovereign amici limited themselves to offering fact-based arguments that made the Justices especially uncomfortable with direct participation. Against this historical backdrop, Part II will focus on the evolution of direct participation over the twentieth century and the introduction of interest-based arguments in foreign amicus briefs.

A. Indirect Participation as Claimants

Traditionally, foreign sovereigns did not directly engage with the U.S. Supreme Court. For a large part of history, “[t]he structural core of a disaggregated world order [has been] a set of horizontal networks among national government officials in their respective areas.” For that reason, foreign governments tended not to speak directly to the Court in “diagonal” or “vertical” fashions, but merely relied on “horizontal” channels. While horizontal communications occur among foreign counterparts of the same branch of government (executive-executive or judiciary-judiciary), diagonal interactions are non-hierarchical, intra-branch relations (executive-judiciary). Vertical networks, instead, are created in the rare instances in which a foreign sovereign expressly or impliedly agrees to the jurisdiction of the U.S. judiciary and places itself in a subordinate position vis-à-vis the U.S. courts. The fact that governmental networks have historically been horizontal, however, does not mean that occasions for non-horizontal interactions never occurred until modern times.

The potential for non-horizontal interaction between the Supreme Court and foreign sovereigns was first occasioned in prize cases. As Samuel Krislov argued, participation by third parties (including foreign governments) during in rem proceedings stems from the very nature of these actions. “[B]ecause they established rights of ownership against the world, [in rem proceedings] required full participation by all who might be adversely affected”—namely, the world. Indeed, in the late 1700s and early 1800s, it was customary for foreign governments to interpose claims during prize proceedings, claiming possession over the seized vessel in a U.S. court.

Interactions between the Supreme Court and foreign governments, however, were initially filtered through the respective executive branches. The offi-
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cial, though uncodified, procedure was somewhat cumbersome for all parties involved. The foreign government that wished to make a claim in front of the Court had to rely on diplomatic channels. The foreign government would make its claims known to the U.S. Attorney General by sending its local emissaries (ministers, ambassadors, or consuls) to the Department of State. The Attorney General would then file a “suggestion” in the Court, setting forth the foreign government’s allegations. The Attorney General served as a de facto proxy for foreign sovereign amici.30 Some litigants attempted to object to this practice in front of the Supreme Court, as “an interference and encroachment of the executive on the pro-vice of the Court, not sanctioned by any precedent.”31 But the Court held in 1841 that the U.S. Executive’s interest in enforcing treaties with foreign governments mandated the Attorney General’s intervention.32 Though the Court upheld this practice until the 1978 shift briefly described in Section III.B and more thoroughly analyzed in Eichensehr’s piece,33 Part II shows how it soon became obsolete.

Direct participation would have required the Justices to interact with foreign sovereigns that were not subject to their jurisdiction. In that process, the Court would be compelled to make delicate decisions—such as whether to trust foreign amici’s claims—that could have serious foreign relations consequences. Indirect participation thus provided at least two advantages.

First, indirect participation preserved the classic horizontal structure of foreign relations postulated by Anne-Marie Slaughter.34 Under this model, the foreign executive would interact with the U.S. executive branch. This process nicely squares with the Court’s decision, some one hundred years after the bulk of prize adjudications, in United States v. Curtiss-Wright Export Corp.35 With Curtiss-Wright, the Court recognized “the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”36 This plenary and exclusive power of the Executive, though not limiting the Court’s jurisdiction in deciding cases involving international matters, certainly makes the Justices wary of directly interacting with foreign governments outside of the U.S. jurisdiction.

The Schooner Exchange v. McFaddon exemplifies this benefit offered by indirect participation.37 The U.S. District Attorney offered to the Court a “suggestion” on behalf of Napoleon Bonaparte. Under the facts of the case, Chief Justice Marshall could not have possibly escaped the foreign relations issues

32. Id.
33. See Eichensehr, supra note 6 at 299-300.
34. See supra note 22 and accompanying text.
35. 299 U.S. 304 (1936).
36. Id. at 320.
37. The Schooner Exchange v. McFaddon, 11 U.S. 116, 118 (1812) (reporting the Attorney General’s suggestion that “in as much as there exists between the United States of America and Napole-
on . . . a state of peace and amity; the public vessels of his said Imperial and Royal Majesty . . . may freely enter the ports and harbors of the said United States, and at pleasure depart therefrom without seizure, arrest, detention or molestation”).
altogether. In this dispute over the identity of the rightful owner of the vessel, the Court had two options: it could have either sided with the U.S. citizen and risked a foreign relations crisis, or it could have returned the attached vessel to the foreign sovereign. The U.S. Attorney General also intervened during oral argument; he claimed that “[t]he right to demand redress [for any actual unlawful action] belongs to the executive department, which alone represents the sovereignty of the nation in its intercourse with other nations.” The Chief Justice decided not to interfere with the executive branch’s assessment. He held that the vessel, belonging to a foreign sovereign, was outside of U.S. jurisdiction. This holding did not require the Court to stand up against Napoleon. Instead, the Justices could simply listen to the U.S. Attorney General and the District Attorney.

Second, indirect participation ensured that the Attorney General filtered and vetted foreign sovereigns’ allegations before they reached the Court, maintaining in turn the benefits of foreign amicus participation. On the one hand, opening up the Court’s doors to any foreign government could dangerously transform the Court into a battlefield for warring sovereigns. Denying access to all foreign sovereigns, on the other hand, would annul the foreign relations benefits that come with allowing foreign amici participation. The Attorney General vetting process struck a balance by limiting the privilege of voicing views and interests as amicus curiae to foreign sovereign with friendly relationships with the United States. In fact, governments with hostile relationships with the United States would be less likely to have the necessary diplomatic leverage to effectively make representations to the U.S. executive branch. This approach nicely squares with the doctrine, explicitly recognized only later on by the Court, that “any relationship, short of war, with a recognized sovereign power . . . . embraces the privilege of resorting to United States courts.” And, moreover, some degree of bargaining over the nature of the representations would reasonably occur before a claim was brought to the Justices’ attention.

Through indirect participation, the Court was strengthening its ability to remain within its constitutional boundaries. At the same time, the Court would not be called to second-guess the fact-based information offered by foreign sovereigns. This indirect practice allowed the Court to presume foreign claims to be true—because the Attorney General, a trusted source, provided them. By deferring to the Attorney General’s Office, as the Court customarily does, particularly in the realm of foreign affairs, the Justices could focus their rulings

38. Id. at 117-20.
39. Id. at 132.
40. Id. at 147.
41. Id.; see also The Amistad, 40 U.S. 518, 524 (1841) (reporting a suggestion filed on behalf of the Spanish ambassador).
on the law instead. In other words, the Court was outsourcing part of the labor (and ensuing headaches) to the Attorney General.

The focus of this Note, however, is not on foreign sovereigns' (vertical) participation as claimants. Instead, it discusses instances in which a foreign sovereign (diagonally) participates as a neutral third party to the dispute—as an external agent, in no way under the jurisdiction of the Court. In fact, when a foreign government wishes to intervene as a third party to a dispute, its objective is rather clear: self-interest. Unlike when it plays the role of a litigant, a foreign amicus reasonably has broader interests in addition to a perhaps minor interest in the specific case at stake. The foreign government as amicus may be interested in the protection of its citizens, its sovereign rights, or its fundamental values—but it does not have to explicitly articulate any of these interests for the Court. In these cases, the risk for deception and hidden motives is, in theory, much greater. These are thus the instances that could give rise to an interesting debate surrounding the Court's citation of foreign sources of law: Is the Court, by reading foreign amicus briefs and citing foreign "moods, fads, or fashions," simply giving strength to foreign governments' interests expressed in amicus briefs, at the expenses of domestic ones? Part IV develops a fuller explanation, declining the appeal of those criticisms.

B. First Attempts at Direct Participation as Interveners

The first instance in which a foreign sovereign attempted to directly appear in front of the Supreme Court as a third-party, neutral to the lawsuit, actually predates the formal practice of amicus briefs. The first amicus curiae brief was formally filed in front of the Court in 1821. However, third parties had found other devices to have their interests heard even earlier—by way of suggestions, general courtesy, or formal application by the executive branch. In deed, between 1813 and 1814, U.S. Attorney General William Pinkney appeared at least twice during oral argument as amicus curiae. Spain, as a neutral third-party, attempted to make representations in front of the Court as early as 1818: it interposed a claim in the in rem prize proceeding The Anne. For the reasons discussed in the preceding pages, notwithstanding its novelty,
Spain's participation is not particularly surprising. It was the structure of in rem prize cases that necessarily drew the attention of foreign sovereigns.

The Anne represents an interestingly rare twist on foreign government participation in prize cases. The Spanish consul intervened in the prize proceedings ensuing the capture of the Anne, a British ship. The Spanish consul requested the restitution of the Anne to the British owner on the grounds that the capture occurred on Spanish territory. That is, the alleged violation of Spain's sovereignty was claimed to render the capture of the Anne unlawful under international law.

Though it is easy to imagine the rarity of the fact pattern presented in The Anne, serendipitously one of the U.S. Supreme Court Justices had recently written on the topic. In an 1816 note entitled On the Practice in Prize Causes, Justice Story argued that, "in a case where the capture has been made in violation of the territorial jurisdiction of a neutral country, the claim for restitution must be made, not by the enemy proprietor, but the neutral government." Little did Justice Story know that, two years later, he would be confronted with that same issue in The Anne.

Justice Story wrote the Court's unanimous opinion affirming the validity of the capture. The Court ruled on technical grounds, but, interestingly, it did not completely shut its doors to foreign sovereigns. According to the Court, foreign consuls represent the commercial and property interests of their governments and their subjects. Unless otherwise expressly charged, consuls may not act as ambassadors or diplomatic ministers, enforcing their government's sovereignty rights. Justice Story, writing at a time predating the practice of amicus briefs, explicitly reserved his opinion on the question of whether an ambassador may make representations in front of the Court in the absence of assent or sanction by the U.S. executive branch. However, as he wrote in On the Practice in Prize Causes, Justice Story was confident that some procedure for foreign sovereigns' participation ought to exist. His reservation, then, was

50. Spain was the neutral government making a claim of violation of its territorial jurisdiction. During the War of 1812, the U.S. privateer Ultor seized the Anne, a British ship, in proximity of (or within) the Spanish territory of Santo Domingo. The exact location of the Anne at the time of capture was in dispute. See id.

51. See id. at 442 (reporting opposing counsel's statement that "[t]he neutral government has no right to interpose . . . by compelling restitution to British subjects . . . . The neutral government may, perhaps, require some atonement for the violation of its territory, but it has no right to require that this atonement shall include any sacrifice to the British claimant").


53. I characterize this as a technical argument because the Court failed to address the fact that, in light of Spain's own domestic conflict, "no minister from that country was received by the U.S. government, but the former consuls were continued in the exercise of their functions by its permission." 16 U.S. 435, 437-38 (1818). Eventually, in 1815 and thus after this dispute had commenced, the United States recognized Luis de Onís—who had settled in the Philadelphia, informally, since 1809—as Ambassador of Spain. See JON KUKLA, A WILDERNESS SO IMMENSE: THE LOUISIANA PURCHASE AND THE DESTINY OF AMERICA 516 (2009).

54. The Anne was thereupon cited in support of the proposition that consuls, unless expressly invested with diplomatic powers, are not entrusted with the authority to represent their sovereigns abroad. See, e.g., United States v. Wong Kim Ark, 169 U.S. 649, 678-79 (1898) (citing The Anne, 16 U.S. 435, 445-46 (1818)).

55. See Story, supra note 52, at 21.
just a symptom of the novelty of this practice and the fact-based nature of the arguments offered by Spain. It resulted in the proliferation of the practice of indirect filing, discussed in Section I.A above.

This first attempt by a foreign sovereign to participate in the U.S. judicial process as a neutral party, playing the de facto role of a modern amicus curiae, should be briefly analyzed in the context of international relations and the perceived institutional role of the Court. The Justices had mixed pressures as to whether they should take into account the Spanish consul’s representations. On the one hand, as the counsel for respondent pointed out in The Anne, the Spanish territory of Santo Domingo was “permitted to be made the theatre of British hostility, and in various instances was violated with impunity” during the War of 1812 between the United States and Great Britain. On the other hand, the Court decided The Anne at a time in which the United States and Spain were trying to settle some of their hostilities over the colonies. These negotiations resulted, a few months later, in the Adams-Onis Treaty, which ceded Florida to the United States and redefined the Spanish colonies’ borders. The Court was thus caught in the middle of a foreign relations debate.

The Court’s holding understandably signals its discomfort with the Spanish consul’s intervention and, more generally, with fact-based representations by foreign sovereigns. The Spanish consul was offering a fact-based argument: the Anne was, allegedly, on Spanish territory at the time of capture. Spain was indirectly asking the Justices to evaluate its credibility as a fact-finder. But the procedure of prize cases did not allow for the preliminary vetting of the Attorney General, like it had been the case in The Exchange, for example. Not presenting itself as an amicus curiae, and not requesting the approval of either party, the Spanish consul could participate only with the Court’s acquiescence. The Court had three options: (1) trust the Spanish consul, and accept the inevitable legal conclusion; (2) choose not to trust the consul’s word, risking to chill the negotiations over the Treaty; or (3) find a way to dismiss the consul’s claim. The Court logically chose the third, least controversial, alternative. Justice Story, for a unanimous Court, reasoned the Spanish consul’s claim was “asserted by an incompetent person and on that ground it ought to be dismissed.” It was a compromise position, aimed at maintaining the Court’s neutral institutional role on foreign affairs matters. The Court allowed for foreign sovereign participation through ambassadors, though it kicked the ball back into the executive branch’s field when it came to the indirect or direct nature of such interventions.

56. The Anne, 16 U.S. at 440.
58. The Anne, 16 U.S. at 436.
60. The Anne, 16 U.S. at 445-46.
61. See id. The Court was not called to consider its reservations on whether ambassadors might intervene in the absence of the U.S. executive branch’s approval until 1919. Until then, foreign consuls and ministers simply made their representations in the Court through the U.S. Attorney General. See supra notes 37, 41, and accompanying text.
Perhaps indirect participation was not the only option available. Fifty years after The Anne, in 1870, the Court held in The Sapphire that an agent and representative of a foreign sovereign, advancing a civil claim against a U.S. person, might file in U.S. courts. If foreign representatives (invested with diplomatic powers) are allowed to appear in front of the Court as litigating parties, representing their sovereigns, then it should follow that no particular limitations ought to be placed on foreign representatives' ability to make representations to the Court on behalf of foreign sovereigns. The role of foreign representatives in both instances is the same: making official representations on behalf of foreign sovereigns. Or so it would seem.

The Anne might be interpreted as a link between the old common law practice of amicus curiae as disinterested “friends of the court” and the modern advocacy role of amici on behalf of a party. It represents a first attempt at direct participation by a foreign sovereign, as a neutral party to the dispute, without any oversight on the part of the U.S. Attorney General. Though Spain had no tangible claim to the attached property, its interests in upholding its territorial sovereignty pointed in the same direction as the claims of one of the litigating parties, the United Kingdom. The relations between the United States and Spain exacerbated the Court’s concerns over the fact-based nature of the Spanish claims, thus leading Justice Story to a compromise holding.

II. DIRECT PARTICIPATION OF FOREIGN SOVEREIGNS: 1900s

The Anne, as reinforced by The Sapphire, left the door open for foreign sovereign participation. Foreign representatives with diplomatic powers should be able to directly appear in front of the Court and make representations on behalf of their governments. Sections II.A and II.B below discuss both successful and unsuccessful attempts of ambassadors to take advantage of that gap. These first briefs continued the tradition of foreign sovereign interest in admiralty cases.

As it will become apparent throughout Section II.A.1, foreign amici’s arguments may fall under two categories. Each category is useful in accounting for the Court’s reaction to different kinds of briefs: interest-based or fact-based arguments. First, foreign amici might offer arguments based on international (or simply foreign) interests. This was the case in The Strathearn saga and, later on, in The Archimedes, as discussed in Section II.A.2. There, I analyze the beginning of the formal practice of direct filing of foreign amicus briefs. Second, foreign amici—as in the case of The Anne above—might offer fact-based arguments to the Court. That is, by bringing to the Court’s attention

62. The Sapphire, 78 U.S. 164, 167-68 (1870) (allowing the French Emperor Napoleon III, as “the agent and representative of the national sovereignty,” to file a suit in U.S. courts in the name of “comity and friendly feeling”).
63. Cf. Krislov, supra note 28, at 698-704 (arguing that the Government’s intervention by way of a suggestion in admiralty and other suits may represent one of the early instances of the shift from neutrality to advocacy).
certain set of legal facts, foreign amici hope to shape the Court's rulings by necessitating a given conclusion based on those legal facts. This kind of argument, further discussed in Section II.A.3 with the examples of In re Muir and The Pesaro, represents the line that the Court correctly drew for foreign sovereign participation.

The Court preferred not to allow direct participation of foreign amici offering fact-based arguments, unless formally vetted and filtered by the Attorney General or other members of the U.S. executive branch. While the Justices can comfortably balance different sets of interests in their legal reasoning, they are not usually in the business of evaluating the credibility of conclusory factual allegations—let alone those of foreign amici, risking foreign relations fallout. By allowing interest-based arguments, the Court struck the correct balance in recognizing that foreign amici can and should play an important role by bringing to the fore the foreign affairs implications of litigation. The Court thus indirectly answered the question that Justice Story left open in The Anne.

Before further delving into the history of pre-1978 foreign sovereign amicus participation, a brief note on methodology is in order. Appendix A, which is discussed in detail in Section II.B, includes a comprehensive list of all foreign sovereign amicus filings on the merits filed before 1978. That table lists the relevant cases, the foreign governments that filed an amicus brief, and the outcome of each case (in favor or against the foreign amicus). Because not all amicus briefs from the first half of the twentieth century have been digitalized, printed collections were also consulted. Exhaustive in aspiration, Appendix A may suffer from the inevitable shortcoming of historical, archival research. Nonetheless, the following analysis of these examples of foreign sovereign amicus briefs draws attention to otherwise overlooked aspects of Supreme Court history. This history informs today's important role of foreign amici and the propriety of the Court's reliance on foreign and international law—the focus of Part III.

A. Rejection of Fact-Based Participation: Of Ambassadors and Private Counsels

The first foreign actors to directly engage with the Supreme Court were foreign ambassadors and embassies. The first foreign sovereign amicus briefs were written by one of the most prominent repeat players and members of the U.S. Supreme Court bar of his time: Frederic René Coudert Jr. Between 1913
and 1914, Coudert worked as a Special Assistant to the U.S. Attorney General before becoming Legal Adviser to the British Embassy. As World War I progressed, preserving good relations with the Allied Powers—and, in particular, the United Kingdom—became paramount for the United States. With the permission of the Secretary of State and the Counselor of the Department of State, Coudert sought "to be a buffer between the State Department and the Allied Governments and to absorb as much of the shock as possible." To this end, in the name of continued friendly relations, Coudert filed amicus briefs on behalf of the British Embassy in five cases before the Supreme Court between 1918 and 1927.

The direct filing of amicus briefs in front of the Supreme Court on behalf of a foreign government can thus be seen as a tool to maintain relations of comity with foreign sovereigns. Access to U.S. courts, and in particular to the Supreme Court, increases foreign sovereigns' perceptions of fairness and trust in U.S. institutions. At least in the case of the British Embassy, the Department of State seems to have approved the use of this practice. But this practice is also instrumentally useful for litigation. In keeping with the spirit of the institution of amici curiae, foreign governments can provide helpful information to the Court.

However, direct participation requires diagonal networks of communication between different branches of different governments. It moves away from the horizontal or vertical models, creating potential imbalances of power. In fact, the Court is required to engage directly with the interests of a foreign executive, with no screening or filtering by the Attorney General. Indirect, horizontal participation offered that kind of protection. The risks of diagonal interactions between the Court and foreign governments have different salience based on the kind of arguments offered by foreign amici. As the upcoming two sections discuss, the Court's approach to foreign amici can be predicted based on the kinds of arguments offered in foreign amicus briefs.

1. **An American Lawyer, a British Carpenter, and the Beginning of a Practice**

All of Coudert's briefs dealt with instances in which the interests of the British government, as a matter of international relations, were at stake. Two Supreme Court cases in which Coudert represented the interests of the British Embassy involved John Dillon—a British carpenter—against the British steam-
ship Strathearn. The British Embassy filed amicus briefs at all stages of the litigation in favor of the Strathearn. Though ruling against the Strathearn, the Court extensively engaged with a number of the arguments brought forward by the British Embassy—implicitly recognizing the weight that Coudert's views, and thus the Embassy's, carried with the Justices.

The extent to which the Court engaged with Coudert's arguments is noteworthy, even though the British Embassy's interests were not ultimately upheld. Coudert was asking the Court to "protect the merchant vessels of a friendly foreign government" against deserting seamen. The British Embassy argued that an interpretation of the Act as to nullify valid contracts under foreign law would be in violation of the international law principles against extraterritoriality. Because, "[i]n the 'Seamen's Act,' Congress does not undertake to require compliance . . . in the case of foreign seamen on foreign vessels, . . . it is not necessary to consider what would be the effect of so extraordinary a departure from the usual course of international comity." Though the Court dismissed Coudert's arguments, its willingness to engage with them shows the Court's recognition of the important role that foreign amici play in litigations with foreign relations implications.

A simplistic distinction between fact-based and interest-oriented arguments is helpful in examining the institutional approach to foreign amici. This framework does not deny, of course, that amicus briefs often contain a diverse set of arguments, ultimately attempting to draw (implicit or explicit) logical conclusions on how U.S. domestic law should be applied or interpreted. After all, to borrow Chief Justice Marshall's oft-cited phrase, it is the U.S. Constitution and the U.S. legal system we are expounding. However, the distinction between fact-based and interest-oriented focuses on the kind of argumentative leverage used by foreign sovereign amici to reach those conclusions.

72. Mr. Dillon sued the Strathearn over the wages owed to him pursuant to the Seamen's Act of 1915. The Court of Appeals certified two questions to the Supreme Court in The Strathearn I. The Court dismissed the questions and the Fifth Circuit reversed the lower court, ruling in favor of Mr. Dillon. See The Strathearn, 256 F. 631 (1919). The case was appealed to the Supreme Court in The Strathearn II. See Strathearn Steamship Co. v. Dillon, 252 U.S. 348 (1920). The Court affirmed the Fifth Circuit. Id. at 357.

73. Coudert in his brief made the convincing argument that, if the contract made between Mr. Dillon and the steamship under British law did not prevent the application of laws of the port, then "the contract of a seaman . . . would be governed by a different law at every foreign port where the vessel might touch, and would become so kaleidoscopic and chameleon-like as to leave the legal relations of the parties in hopeless confusion." Brief for British Embassy at 9, Strathearn Steamship Co. v. Dillon, 252 U.S. 348 (1920). 74. Id. at 20.

75. Id. at 14-15.

76. Id. at 17.

77. The Embassy also appealed to an earlier Second Circuit decision, in The Italier, which created a circuit split with the Fifth Circuit's decision in The Strathearn I. See id. at 12. Cf. The Italier, 257 Fed. 712 (1919) (holding, in a similar situation as The Strathearn, that the seaman's request for wages was premature).

78. See McCulloch v. Maryland, 17 U.S. 316, 407 (1819) ("[W]e must never forget that it is a constitution we are expounding.").

79. See supra notes 20-21 and accompanying text (offering a series of examples of fact-based and interest-based arguments).
The problems of diagonal interaction are attenuated when a foreign sovereign is merely making arguments on foreign governments' interests; they are exacerbated when it comes to foreign legal facts. The Justices are able to evaluate foreign interests in their deliberation process as they see fit, balancing the competing interests against one another as in the case of The Strathearn saga. If domestic interests outweigh foreign ones, the Court has the option of explicitly saying so. Foreign amici may be disappointed as a result, because their interests have been given relatively little (though some) importance. However, as discussed in Section 2 below, when the foreign amicus offers fact-based arguments leading to legal conclusions, the Court is pushed into a corner. The Court can either accept or refute a legal fact. Blind acceptance with no vetting by the U.S. executive branch risks error, but refusal can amount to a potential foreign relations crisis. There is only one way of rejecting a fact-based argument that—in light of the factual premises—necessitates only one possible legal conclusion. In order to refute such an argument, the Court has to question the very reliability or truthfulness of the legal fact offered by a foreign government. Doing so would reasonably have more problematic consequences, for it would entail not only giving no importance to the foreign amicus's argument, but also calling into question the sovereign's integrity.

2. In re Muir and The Pesaro: The Opposition to Foreign Amici's Fact-Based Allegations

Despite Coudert's regular appearances, the Court did not wait long to put a break on his novel approach to amicus filing when it went too far. The Justices were open to interest-based arguments, but amicus briefs offering uncorroborated facts that necessitated specific legal conclusions were reasonably unwelcomed. The Court granted the British Embassy's request to file as amicus curiae and participate in the oral argument for In re Muir in December 1918, before the certiorari petition for The Strathearn II was granted. However, In re Muir was decided one year after The Strathearn II. Importantly, unlike in The Strathearn II, the question in In re Muir was one of immunity, and the answer thus largely revolved around legal facts. As outlined below, Coudert offered a fact-based argument, asking the Court for complete deference to the facts alleged by a foreign executive—something the Justices were not ready to do.

The problematic nature of fact-based amicus briefs is exemplified by this case. Coudert intervened, at all stages of this complex lawsuit, as amicus curiae on behalf of the British Embassy. The Italian vessel objected that the representations made by Coudert on behalf of the British Embassy should have come


82. The facts of the case were complex. An Italian steamship, the Giuseppe Verdi, filed a suit in a U.S. District Court against a British vessel, the Glenden, to recover damages for a collision. An arrest warrant was placed on the British vessel. See In re Muir, 254 U.S. 522 (1921).
through official channels—namely, from the Department of State, speaking through the U.S. Attorney General, on behalf of the British Embassy. The Italians were simply asking for indirect participation.\textsuperscript{83}

The main purpose of the British Embassy’s intervention at the Supreme Court was to offer legal facts. Coudert argued that the Gleneden, though privately owned, was immune from judicial process in the United States because it was a vessel in the public service of the British Government.\textsuperscript{84} An entire section of Coudert’s brief focused on arguing that a suggestion of immunity by counsel for the British Embassy is a proper method of procedure and is conclusive as to the official facts stated. As his amicus brief recognized, “[i]t has not been the practice for the Embassy to come into Court as a party, or intervene in litigation except for the purpose of informing the Court of official facts . . . upon which it may then act in conformity with the principles of international law.”\textsuperscript{85} Coudert claimed that the British Government was going through the trouble to argue in court because doing otherwise would be “incompatible with the courtesy which the British Government wishes to show to the Courts of the United States.”\textsuperscript{86}

The Court could not directly question the legal facts themselves without also questioning the good faith of the British Government. Instead, the Court contested their source. Was Coudert, as private counsel for the Embassy, allowed to offer proof that the vessel was publicly owned and make an argument for immunity as a matter of procedure? Coudert argued that he was.\textsuperscript{87} But the Court not only denied the petition for a writ of mandamus; it also implicitly overruled the District Court’s holding that private counsel may, as amicus curiae, make representations on behalf of a foreign sovereign.

Justice Van Devanter, in one of his few opinions on the Court, correctly limited the ability of foreign sovereigns to participate as amici. The Court reasoned that a foreign government has three options to make claims to immunity in U.S. courts. First, “[a]s of right the British Government was entitled to appear in the suit.”\textsuperscript{88} Second, “with its sanction, [the British Government’s] accredited and recognized representative might have appeared and have taken the

\textsuperscript{83.} The British Embassy, in fact, had refused to produce proof of the public status of the vessel, insisting that the District Court was “bound on the mere assertion of the claim of immunity to quash the process and release the vessel.” \textit{In re Muir}, 254 U.S. 522, 528 (1921). Arguably no proof existed, hence the Italian ship’s request for the U.S. executive branch to step in.

\textsuperscript{84.} Brief in Support of Suggestion of British Embassy at 2, \textit{In re Muir}, 254 U.S. 522 (No. 2118).

\textsuperscript{85.} \textit{Id.} at 3.

\textsuperscript{86.} \textit{Id.}

\textsuperscript{87.} Coudert’s distinct arguments in favor of his intervention, as private counsel, on behalf of a foreign sovereign are rather interesting. \textit{See id.} at 27 (listing a number of cases in which Coudert had been allowed to file as amicus curiae on behalf of the British and Greek embassies). In particular, Coudert’s brief points out that a foreign ambassador, in the name of her government, is entitled to bring a suit in U.S. courts under \textit{The Sapphire} and “neither [her] authority nor the authority of [her] counsel . . . is to be questioned.” \textit{Id.} at 28-29. Therefore, Coudert argues, a foreign embassy most certainly may appear, as amicus curiae, to make official representations, “avowing them as the acts of [its] Government.” \textit{Id.}

\textsuperscript{88.} 254 U.S. at 532.
same steps in its interest." 89 Third, if both of the previous options had been rejected, the foreign sovereign might have made diplomatic representations which, "if that claim was recognized by the Executive Department of this government, . . . might be set forth and supported in an appropriate suggestion to the court by the Attorney General." 90 That is, a foreign government hoping to offer legal facts to the Court in support of an immunity claim must either accept the Court's jurisdiction by filing a suit, and thus position itself in a vertical relationship vis-à-vis the judiciary, or it must go through the U.S. executive branch, therefore using horizontal networks.

Coudert's proposed alternative to Justice Van Devanter's three options—namely, a private counsel appearing on behalf of the British Embassy as amicus curiae—was perceived as an unwelcomed novelty. Coudert's approach did not fall within "the usual official channels" and therefore was a "marked departure from what theretofore had been recognized as the correct practice." 91 It was establishing a diagonal network between the Court and the foreign sovereign. According to the Court, traditional methods have a number of advantages: they make for better international relations, they conform to traditional diplomatic usages, they grant respect to the U.S. executive branch, and they tend "to promote harmony of action and uniformity of decision." 92

Justice Van Devanter, however, did not address the ways in which his opinion—if interpreted broadly—would limit foreign governments: indirect participation through the Attorney General is a cumbersome, slow, and potentially conflicted process. Notably, the Court did not explicitly limit its reasoning to fact-based arguments. However, in light of The Strathearn cases and The Archimedes case discussed below, 93 it appears clear that Justice Van Devanter's opinion was not meant to apply with equal force to interest-based arguments. When it comes to the latter, the Court has correctly and undeniably recognized the advantages of diagonal networks for foreign amici.

Ten days after In re Muir was decided, the Court took another chance in The Pesaro 94 to further limit the ability of foreign sovereigns to directly appear in front of the Court on factual grounds. 95 The Court implicitly answered the question that it had left open over one hundred years earlier in The Anne: may the official representative of a foreign sovereign appear directly in front of the Court and make suggestions—or even file an amicus brief—on the issue of immunity without going through the Secretary of State? 96

89. Id.
90. Id. at 533.
91. Id. (citation omitted).
92. Id. (citation omitted).
94. In The Pesaro, the Italian Ambassador filed a suggestion to the effect that the ship subject to an in rem proceeding was owned by the Kingdom of Italy and thus immune. See 255 U.S. 216 (1921).
96. See supra notes 54-55 and accompanying text.
Justice Van Devanter's answer was no. The Court found that the suggestion should have come through "official channels."\textsuperscript{97} Though a certificate from the Secretary of State proving the diplomatic status of the Italian Ambassador accompanied the Ambassador's suggestion, "the Ambassador did not intend thereby to put himself or the Italian government in the attitude of a suitor, but only to present a respectful suggestion and invite the court to give effect to it."\textsuperscript{98} That is, because the Italian Ambassador decided not to interact with the Court in a vertical manner by filing a claim and accepting the Court's jurisdiction, the Ambassador could only act horizontally via the U.S. executive branch.

3. \textit{Following In re Muir and The Pesaro: An Assessment of the Damages}

With the two major cases discussed above, both decided by the admiralty specialist of the Supreme Court at the time, the practice of direct participation of foreign governments proving sovereign immunity through fact-based allegations ceased. Fact-based arguments lived a short life. Quite possibly, the Court did not want to become an active player in U.S. foreign affairs. And playing the role of an arbiter of the good faith and reliability of foreign sovereigns' fact-based allegations would have required the Court to do so. \textit{Texas Co. v. Hogarth Shipping Co.} was another case involving the British Embassy in which Coudert participated as amicus curiae in the lower courts.\textsuperscript{99} This case, which had been granted the same day of \textit{The Pesaro}'s petition for certiorari,\textsuperscript{100} was argued right after the \textit{In re Muir} decision, and decided only after both \textit{In re Muir} and \textit{The Pesaro}.\textsuperscript{101}

Coudert's case was doomed from the beginning. The British Embassy intervened on the side of Hogarth Shipping, a British company sued for breach of a charter party.\textsuperscript{102} Coudert attempted to claim that "the vessel was requisitioned by the British Admiralty for government service and accordingly was not delivered to the charterer,"\textsuperscript{103} Texas Company. Because "[t]here can be no more authoritative source of information . . . of the administrative action of a foreign government within its own territory"\textsuperscript{104} than that government's diplomatic representative, Hogarth Shipping should not pay damages to Texas Company.\textsuperscript{105} Justice Van Devanter did not consider any of the arguments made by Coudert

\textsuperscript{97.} The Pesaro, 255 U.S. at 218.
\textsuperscript{98.} Id. at 219.
\textsuperscript{99.} 256 U.S. 619 (1921).
\textsuperscript{100.} Monday, December 6, 1920, 1920 J. SUP. CT. U.S. 83 (granting the motions to advance to oral argument in The Pesaro and Hogarth).
\textsuperscript{101.} 256 U.S. at 619.
\textsuperscript{102.} A "charter party" is a contract between the owner of a vessel and a person wishing to charter the vessel either for a set period of time or for a certain voyage. 2 C.J.S. Admiralty § 40 (2017).
\textsuperscript{103.} Brief of Counsel for British Embassy at 2, Texas Co. v. Hogarth Shipping Co., 256 U.S. 619 (1921) (No. 555).
\textsuperscript{104.} Id. at 12.
\textsuperscript{105.} Id. at 14-15.
in his brief. In a few sentences, he held that *In re Muir* and *The Pesaro* were controlling. 106

The Court's decisions in *The Pesaro* and *In re Muir* represent a landmark moment in understanding the Court's institutional behavior toward foreign amici. Neither law nor custom necessitated the Court's holding that a representation of immunity can only be made through the executive branch. In fact, it was common for Courts of Appeals of the time to accept ambassadors' claims in support of public status and sovereign immunity. 107

Moreover, questioning the reliability of allegations by official representatives of foreign governments would directly defeat the purpose of allowing for such representations to be made in the first place—namely, comity and amity between the United States and a foreign government. But, at the same time, the Court did not want to be the institution responsible for evaluating the credibility of facts offered by foreign sovereigns: let the executive branch decide, the Justices must have thought. For this reason, the Justices couched their pushbacks in *The Pesaro* and *In re Muir* on procedural grounds. In doing so, the Court struck a proper and reasonable balance between completely shutting its doors to foreign amici and letting all foreign amici participate.

Nonetheless, *The Pesaro* and *In re Muir* risked chilling the ability of foreign amici to take part in proceedings before the Supreme Court. These cases made clear that certain foreign amici were actually perceived as *inimici* by the Court. And, indeed, Coudert only wrote one additional brief on behalf of the British Embassy as amicus curiae, again on the Seamen's Act and the Jones Act. 108 In that case, *Jackson v. The Archimedes*, the Court ruled favorably for the British Government, implicitly agreeing with Coudert's reasoning. 109 Coudert limited the intervention to considerations of the United Kingdom's interests. He argued that ruling in favor of Petitioner would create "a standing invitation to all foreign seamen to collect half wages... and then desert their ships and leave them stripped of their crews... A construction so adverse to the vital interests of a friendly nation should not be placed upon an American statute." 110 Though *The Archimedes* was a win for interest-based arguments, no further amicus briefs were filed by a foreign government until 1952.

The outcomes and effects of *The Pesaro* and *In re Muir* appear especially puzzling if one considers the extent to which the Court had been willing to en-

106. 256 U.S. at 629 (citing *In re Muir*, 254 U.S. 552 (1921) and *The Pesaro*, 255 U.S. 216 (1921), holding that neither a private counsel on behalf of a foreign embassy nor a foreign ambassador may bring factual allegations in front of the Justices without first going through the official channels of the U.S. executive branch).

107. See, e.g., *The Adriatic*, 258 F. 902, 904 (3d Cir. 1919) (holding that "[o]n principles of international comity, we feel bound to accept the suggestion and avowal of the British ambassador as conclusive"); *The Carlo Poma*, 259 F. 369, 370 (2d Cir. 1919) (holding that "[t]hat the suggestion [of the ambassador] was sufficient proof of the statements contained in it is not seriously contested. We accept it as verity").


109. *Jackson v. The Archimedes*, 275 U.S. 463, 470 (1928) (holding that it was not the intention of Congress to forbid advance payments on foreign vessels in foreign ports through the Jones Act).

gage with foreign amici. Coudert was granted leave to participate in the oral argument in four of the five cases discussed above, including *In re Muir*. Therefore, unlike Eichensehr has claimed, participation by foreign amici in the oral argument was far from "highly unusual," at least during the early history of this practice. The Court was willing not only to read briefs but also to hear oral arguments from foreign amici, before proceeding to actively engage with their claims in its written opinions.

Arguably, then, foreign amici's arguments appeared in the Court's opinions because the Justices read them, liked them, and found them useful—and not because law clerks were enticed by them. In those years, indeed, the Justices did not delegate as many tasks to their law clerks (if they had any). The Justices saw the important role that foreign amici did and should play in litigations involving foreign interests, and they acted accordingly.

In light of these facts, the only explanation for the Court's pushback is political in nature. The Court felt comfortable with balancing different sets of interests, but seemingly not with evaluating the credibility of foreign amici's conclusory, fact-based allegations. That is not part of the Court's institutional role as the highest court of appeals. Ultimately, the Court lacks expertise, experience, and knowledge when it comes to international law and foreign relations—namely, foreign interests. The Justices, for this reason, do and should defer to the U.S. executive branch or to foreign governments when it comes to foreign interests. However, deference to a foreign government raises concerns regarding legal facts that shape the outcome of a case. Amici facts may be unsupported. Allison Orr Larsen offers a similar cautionary argument in her study of amicus briefs titled *The Trouble with Amicus Facts*. The identity of amici as foreign governments, outside of the Court's jurisdiction, brings to sali-

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112. Eichensehr, supra note 6, at 325.

113. Cf. Noah Feldman, *The Dark Side of All Those 'Friends' at the Supreme Court*, BLOOMBERG VIEW (Mar. 9, 2016), https://www.bloomberg.com/view/articles/2016-03-09/the-dark-side-of-those-amicus-briefs-at-the-supreme-court (arguing that, since the law clerks and not the Justices read the amicus briefs, the clerks are therefore largely responsible for amicus brief citation in the Court’s opinions).


115. See, e.g., Bradley, supra note 43, at 662 (discussing the “general respect given by courts to the executive branch’s views based upon its status as an able and knowledgeable representative of United States interests”); Eichensehr, supra note 6, at 329 (“The most frequent justification for deference is the executive branch’s expertise with respect to foreign relations issues as both an absolute matter and relative to the Court’s comparative lack of expertise.”).


117. See generally Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. L. REV. 1757 (2014) (arguing that the Court should be careful in its consideration of facts offered by amici, which are necessarily channeled through the lens of advocacy).
ence the troubling nature of fact-based interventions, leading the Court to properly limit foreign amici participation.

Moreover, there might be a direct tie between the pushback against foreign amici and the Court’s view that the executive branch is “the sole organ” responsible for international relations. 118 Three of the Justices of the In re Muir Court also were on the Court that decided Curtiss-Wright. 119 And, importantly, Justice Van Devanter—the author of In re Muir and The Pesaro—was the most senior member of the Curtiss-Wright Court.

The Court was perhaps simply not ready to play a more active role in foreign affairs, directly interfacing with foreign sovereigns. The Justices correctly signaled that their role should not be judging the good faith and reliability of foreign governments’ fact-based allegations, since the Court has no expertise on the matter. But, notwithstanding the Court’s pushback, fact-based arguments are rather rare; the Justices thus continued to be generally welcoming of foreign amici participation in other areas.

B. Acceptance of Interest-Based Participation: Of Foreign Sovereigns and Foreign Interests

Following Coudert’s final brief in The Archimedes on behalf of the British Embassy in 1927, no amicus brief was filed by a foreign sovereign in front of the Court until Lauritzen v. Larsen, in 1952. 120 Given the Court’s pushback against foreign sovereign fact-based briefs, and the escalation of international tensions leading up to World War II, the hiatus is unsurprising. Lauritzen represents not only the rebirth of foreign sovereign amicus briefs, but also the beginning of successful coordinated strategies among foreign sovereigns filing as amici. 121 The Danish Government filed an amicus curiae brief at the certiorari stage, 122 and then again on the merits. 123 Foreign amici engaged in a carefully orchestrated strategy: on the same day in which Denmark filed its amicus brief on the certiorari petition, the United Kingdom also filed. 124 Four days later, the Netherlands and Norway followed. 125

119. The Court handed down In re Muir in 1921 and Curtiss-Wright in 1936. Justices Willis Van Devanter (in office from 1910 to 1937), James Clark McReynolds (from 1914 until 1941), and Louis Brandeis (from 1916 until 1939) sat on both Courts.
120. 345 U.S. 571 (1953).
121. A Danish seaman, Mr. Larsen, filed a suit in New York under the Jones Act for negligent injuries, and he won in the courts below. See id.; Larsen v. Lauritzen, 196 F.2d 220 (2d Cir. 1952).
Here, unlike Coudert’s attempts in *In re Muir*, foreign amici were not offering legal facts and conclusions, but rather arguments and considerations of the effects of the Court’s ruling abroad. In turn, the Court appeared to be comfortable with these briefs on foreign interests. Petitioner’s arguments were actually given the same force of, and at times conflated with, those of the Danish Government’s amicus curiae brief. Moreover, Justice Jackson espoused and succinctly summarized the main arguments of the Danish Government’s amicus brief.

In the end, the coordinated strategy of Denmark, Netherlands, Norway, and the United Kingdom resulted in a 7-1 decision in favor of Lauritzen.

Over the following twenty-five years, there were nine additional instances in which foreign governments filed amicus curiae briefs on the merits. In total, sixteen amicus curiae briefs were filed by foreign governments in this period. Without double-counting amicus briefs filed by the same government at both the certiorari and the merits stages, foreign sovereigns filed as amici in at least six other certiorari petitions denied by the Court. Thus, as outlined in

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126. See, e.g., Larsen, 345 U.S. at 575 (“The shipowner, supported here by the Danish Government, asserts that the Danish law supplies the full measure of his obligation . . . ”)

127. Justice Jackson reasoned that ruling in favor of Respondent would result in “subject[ing] a ship to a multitude of systems of law, . . . put[ting] some of the crew in a more advantageous position than others, and not unluckily in the long run . . . diminish[ing] hirings in ports of countries that take best care of their seamen.” Id. at 588. Cf. Brief of the Royal Danish Government, as Amicus Curiae, supra note 123, at 8-9 (arguing that affirming the lower court would subject the ship to a “multiplicity of laws” and “give rise to discrimination amongst Danish seamen” in addition to the fact that “a Danish ship owner will be reluctant to hire seamen while in [ports whose laws are especially favorable to seamen]”).

Appendix A, twenty-two amicus briefs were filed between 1957 and 1978. This adds up to twenty-five briefs on the merits and six amicus briefs at the certiorari stage between 1918 and 1978. During this time, the best amici of the Court were the United Kingdom (with five briefs), and Canada and Liberia (with four each). A total of thirteen countries filed amicus briefs. And when amici coordinated their efforts, in four separate instances, their success rate was around sixty-six percent.

The cases ranged in topic, but all of those that were granted after 1953 proposed arguments based on foreign interests. For example, they argued that "the continued observance of these [treaty] obligations—and their common interpretation—are vital to world trade and to the maintenance in international relations of the Rule of Law;" that the foreign government’s economic survival depended on the Court’s favorable decision; and that continued relations between the United States and the foreign sovereign, in addition to multilateral treaties, necessitated a decision favorable to amici. Many briefs explicitly pointed out the amici’s limited intentions, reminding the Court that their goal was not to weigh in on domestic and procedural legal issues. That kind of contribution, in fact, would unlikely be novel and should be perceived as unwarranted.
The Court made it a habit to grant motions allowing for the participation of foreign amici even when respondents objected. This is proof of the Court's willingness to consider foreign sovereigns as truly amici, so long as they inform the Court on foreign interests rather than provide legal facts. The Court found foreign amici's contribution meaningful to the resolution of cases involving foreign interests.

With the proliferation of foreign amici and interest-based arguments, it is not surprising that the Court eventually decided to put an end to the practice of indirect participation. Suggestions filed by the U.S. Attorney General continued to occur between 1921 and 1978, though on an increasingly rare basis since interest-based foreign amicus briefs became more frequent. Though indirect participation had been on its dying bed for decades, the Court eventually pulled the plug in Zenith Radio Corp. v. United States. This should not be characterized as a "shift" "instigated" by the Court, but rather as a move that naturally flowed from a long line of precedent.

The complicated dynamics of Zenith Radio are carefully detailed by Eichensehr and only worth briefly summarizing here: the European Commission and Japan filed diplomatic notes with the Department of State, which then asked the Solicitor General to make them available to the Court. The indirect participation of the two foreign governments, however, was not aimed at offering the Court facts, but rather at highlighting foreign interests. There was thus no reason why arguments aimed to show the "broad and far-reaching implications which could have serious effects, not only upon trade between Japan and the United States, but also on world trade" would need to be vetted by the U.S. executive branch.

Interesting to add to Eichensehr's characterization of the shift explicitly signaled in Zenith Radio is an anecdote from the oral argument. Justice Blackmun voiced his skepticism of the suggestion practice. When pressured, the Solicitor General's defense was that "the client of the government here is the Secretary of State and not a foreign prince or potentate." But the Solicitor

137. See, e.g., Motion of the Republic of Italy for Leave to File a Brief as Amicus Curiae and Accompanying Brief, Alitalia-Linee Aeree Italiane S.p.A. v. Lisi, 390 U.S. 455 (1968) (No. 70), 1967 WL 113704, at *1 (stating that "[c]ounsel for the petitioner have consented to the filing of this brief, but counsel for respondent has refused consent"); Motion for Leave to File a Brief as Amicus Curiae and Brief of the Republic of Liberia as Amicus Curiae at 1, Incres S.S. Co. v. Int'l Mar. Workers Union, 372 U.S. 24 (1963) (No. 33) (stating that "[t]he Republic of Liberia hereby respectfully moves for leave to file a brief amicus curiae. Petitioner has consented to the filing of such a brief. Respondents have not").

138. See, e.g., Republic of Mexico v. Hoffman, 324 U.S. 30, 32 (1945) (describing that a "suggestion was then filed by the United States Attorney at the direction of the Attorney General, transmitting a communication from the State Department, stating that it accepted as true the contention that the Baja California was the property of the Mexican government"); Ex parte Republic of Peru, 318 U.S. 578, 581 (1943) ("[T]he Attorney General instructed the United States Attorney for the Eastern District of Louisiana to file in the district court the appropriate suggestion of immunity of the vessel from suit.").


140. Eichensehr, supra note 6, at 299.

141. Id.


General, while representing the interests of the United States, was also making representations based on foreign interests. The advocacy line was thus dangerously blurred. Indirect participation in cases like *Zenith Radio*, where the United States also appears as amicus curiae, causes understandable confusion. In that case, it was not clear to the Court whether the Solicitor General was actively endorsing the importance of the foreign interests or simply offering them in a neutral, almost factual manner.

The Court had two options. The Justices could have taken *Zenith Radio* as a chance to further curtail foreign amici’s participation, had they felt uncomfortable with this practice as a matter of principle. Or, the Court could have instructed the Solicitor General to “request foreign governments to communicate their views to the judicial branch through the more effective method preferred by that branch [and the one authorized by the Court’s rules]—the filing of formal briefs.” 144 The Justices chose the second option. As the Department of State communicated to the embassies in Washington, D.C., “[t]he United States will consent to such a filing in any case in which it is a party. In the unlikely event that any other party should decline to consent, the Supreme Court will almost certainly grant the motion of a foreign government for leave to file a brief.” 145

Unlike Eichensehr, I believe *Zenith Radio* is the product of the well-established history of interest-based foreign sovereign amicus briefs. There was no continued need for indirect participation because the Court had already crafted a workable approach to foreign amici: fact-based briefs out; foreign-interests briefs in.

### III. FOREIGN AMICUS BRIEFS: LESSONS LEARNED FROM HISTORY

Thus far, this Note’s main objective has been to draw conclusions on the practice of foreign sovereign amicus briefs filed before 1978. By providing the

(“Justice Blackmun: ... [A]t the request of the Department of the State, you distributed a communication from the Government of Japan on this matter... What does that mean vis-à-vis this case? 
Solicitor General: I do not think it means anything as far as the duty of this Court is concerned here today. 
Justice Blackmun: You do not regard that as instruct [sic] to this Court? 
Solicitor General: I do not and I certainly circulated it only because it had been forwarded to us from the Department of State and we circulated it for what it was worth. We don’t suggest that this Court should be responsive either to any threat or any apprehension of apocalyptic consequences in the field of international trade. This Court’s task, as we see it, is to decide what did the Congress mean by these words, “bounty or grant,” in the Tariff Act of 1930... [T]his Court has the power, has the absolute power to construe this as it sees it in its inform [sic] judicial judgment. 
Justice Blackmun: In any event, you are here in good faith, doing your best, to uphold the position espoused by the Government of Japan anyway? 
Solicitor General: Well, if the Court please, I regard my role here as seeking to uphold the construction that the Congress, that the Secretary of the Treasury, has placed upon the statute committed to him to administer. And the client of the Government here is the Secretary of the State and not a foreign prince or potentate.”)

first account of the pre-1978 history of foreign amici, it has argued that the Court has welcomed foreign sovereign amicus briefs grounded in foreign interests, but has remained rather skeptical of fact-based arguments. My analysis of the different approaches that the Justices have taken over the years, based on the nature of foreign amici’s claims, distances itself from Eichensehr’s contribution, which focused on the 1978-2013 timeframe. This Note aims to elucidate when the Justices will likely defer to foreign amici. But the preceding discussion provides insights about the role that foreign sovereigns should play in our judicial system, too. The following sections respectively position foreign amici’s role in today’s political and judicial climates.

A. American Isolationism and Today’s Supreme Court

In the present era of nationalistic and isolationist rhetoric, interest-based amicus briefs continue to play a central role in Supreme Court litigation. This past term, in RJR Nabisco Inc. v. European Community, Justice Alito delivered an opinion (joined by Chief Justice Roberts and Justices Kennedy and Thomas) citing multiple foreign sovereign amicus briefs offering interest-based arguments against the extraterritorial application of U.S. antitrust laws. Those briefs argued that “[e]xpanding the jurisdiction of this generous United States private claim system could skew enforcement and increase international business risks” and, more specifically, it could “supersede the national policy decision by Canada that civil recovery by Canadian citizens for injuries resulting from anti-competitive behavior in Canada should be limited to actual damages.” What is most astonishing about Nabisco is that those briefs had been filed over a decade earlier, in cases unrelated to that dispute.

146. Eichensehr, supra note 6, at 303 n.64 (clarifying that “the analysis in the remainder of the Article is based on the foreign sovereign amicus briefs on the merits from 1978 through 2013”).
147. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2107 & n.9 (2016) (quoting multiple amicus briefs on behalf of: Canada; France; Germany and Belgium; and the United Kingdom, Ireland, and the Netherlands).
149. Brief for the Government of Canada as Amicus Curiae Supporting Reversal at 14, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724); see also Brief for the Republic of France as Amicus Curiae in Support of Respondents at 3-4, Morrison v. Nat’l Australia Bank Ltd., 561 U.S. 247 (2010) (No. 08-119) (“As applied to foreign-cubed securities fraud actions, international comity principles preclude application of the anti-fraud rules of U.S. securities laws because the U.S. interest is attenuated and the foreign interest is paramount . . . [since] nations proscribe securities fraud using incompatible regulatory schemes.”); Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae in Support of Petitioners at 5, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) (No. 03-724) (arguing that such an expansion fails “to consider the well-settled principles of comity and respect for the sovereign choices of foreign nations that counsel in favor of a limited application of U.S. antitrust laws to extraterritorial effects . . . [as well as] the negative impact that an expansive application of U.S. antitrust law could have on domestic and international cooperation and enforcement, including prompting retaliatory legislation in other countries”).
Nabisco thus stands for two potentially contradicting propositions: the interests of foreign governments matter when it comes to litigation in U.S. courts; but U.S. courts should limit their jurisdiction as much as possible, in order to avoid clashing with foreign interests.

The Court's reliance on interest-based arguments offered by foreign amici, and the goals such deference serves, are in tension with recent moves towards isolationism. President Donald Trump, during his inauguration speech, purported to be "issuing a new decree to be heard in every city, in every foreign capital, and in every hall of power[:] . . . America first."

This kind of political isolationism on the part of the executive branch is likely going to exacerbate the increasing "litigation isolationism"—the attempt to find ways to dismiss transnational lawsuits because of their predominantly foreign scope. Pamela Bookman has identified the stated goals of litigation isolationism as "promoting separation of powers and international comity (by keeping the courts away from disputes involving delicate foreign affairs issues), and protecting the interests of defendants (by sparing them the burdens of transnational litigation in U.S. courts)."

The interplay between the Court's careful consideration of foreign sovereign amicus briefs in cases like Nabisco and its litigation isolationism is only likely to become even more schizophrenic with the Trump Administration.

B. Interest-Based Amicus Briefs: Voicing Deceptive Foreign Moods?

Two sets of objections may be raised against interest-based amicus briefs: one grounded in the classic critique of citations of foreign law and the other in concerns over the public's perception of the Court.

The classic objection that the citation of foreign law simply gives voice to foreign "moods, fads, or fashions" should readily apply to foreign amici. The Court's citation of foreign law often traces back to foreign amici: as this Note shows, foreign and international law comes to the Justices' attention via amicus briefs. If critics are troubled by the Court's reasoning in Roper or Nabisco, for example, they should not focus on the fact that the Justices cited foreign law and foreign practices. Instead, objections—if any sound ones exist—should be addressed by the practice of foreign sovereign amici.

But if this objection were to hold against foreign amici, it would have extreme consequences for the amicus curiae institution as a whole. Such an objection would in fact necessitate the conclusion that the Court's citation of any amicus brief illegitimately gives voice to interests that are extraneous and, in a sense, detrimental to the litigation. Amicus briefs by third parties external to the


153. Id.
dispute are meant to bring to the Justices’ attention relevant interests and considerations that the Court would otherwise miss. There is no doubt that, for the most part, the success of amicus briefs depends on their ability to provide valuable new information to the Court. Therefore, the Justices cannot be faulted for taking into account any of the arguments presented to them in the amicus briefs. That is the proper role of the Court: to read and evaluate all arguments. The Court, by reading foreign amici, is not empowering foreign governments’ interests at the expenses of domestic ones. Our system entrusts the Court to strike the right balance between differing and competing interests—whether foreign or domestic, whether internal or external to the dispute—in deciding hard cases.

Moreover, the Court’s continued reliance on foreign amici and its willingness to consider foreign interests while interpreting the meaning of U.S. laws could have repercussions on public perceptions of the Court. The role of foreign sovereign amicus briefs at the Court could gain negative symbolic overtones. Although interest-based briefs do not pose the same kinds of concerns as fact-based arguments, the foreign sovereign amici practice could fuel a rhetoric of the Court as an institution that is failing to uphold American standards by giving way to foreign moods.

But such a myopic position mistakenly assumes that the Court is an uncritical consumer of amicus briefs. Even Justice Breyer, arguably the most likely Justice to take foreign amici seriously, has voiced a high degree of caution in dealing with foreign amici. During the oral argument in Nabisco, Justice Breyer questioned both the U.S. Solicitor General and the lawyer for the European Union about the perceived inconsistencies between their cur-


156. See Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) ("[This Court . . . should not impose foreign moods, fads, or fashions on Americans.") (internal quotations omitted); see also infra note 169 (citing a few examples of bills introduced in Congress following Lawrence and Roper, that were born out of this rhetoric).

157. Eichensehr, * supra* note 6, at 363 (quoting Transcript of Oral Argument at *11, F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (No. 03-724), 2004 WL 1047902) (referencing the oral argument in Empagran, where Justice Scalia asked whether the "majority of nations in the world that don’t have effective antitrust enforcement, if indeed they have any antitrust laws," would agree with the seven nations who had filed amicus briefs protesting the extraterritoriality of U.S. antitrust laws; see also *id.* at 363 n.352 (quoting Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 266 (2004)) (questioning whether the European Commission’s opposition to a U.S. law on discovery in foreign judicial proceedings is “widely shared in the international community”).

158. See generally Breyer, * supra* note 2 (arguing that considering foreign law and foreign amicus briefs is useful).

159. Transcript of Oral Argument at *24, RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2107 (2016) (No. 15-138), 2016 WL 1090258 ("[N]ot only do they tell us that the 27 nations of the EU don’t agree with you, [the United States,] but in fact, what’s very confusing about this is, in the Alien Tort Statute case, . . . the EU countries, at least three, were in here with briefs . . . saying, stay out of this stuff. . . . And you were on the other side . . . . So what’s going on?").

160. *id.* at *24-25 ("Is this the right hand not knowing what the left hand is doing in Britain and . . . in Germany? . . . Is it that you [the European Union] actually went and talked to the ambassadors of England, Germany, the Netherlands and asked them why do you want us to take a different position in this case than . . . you took in the other case? . . . I can’t work with [just] a few pages . . . unless I know what . . . you, the State Department, and those other countries, and their ambassadors . . . actually think.").
rent positions (the European Union in favor of extraterritoriality of U.S. law and the United States against it) and previous amicus briefs of both parties (arguing the opposite). Though the Solicitor General dodged the question,161 the lawyer for the European Union reassured the Court that “EU officials have gone over every single line [of the brief] and compared with the positions taken by Member States in other cases.”162 The Court thus seems to be a rather critical user of foreign amicus briefs.

Reference to foreign amicus briefs, in an era in which judicial independence is threatened163 and isolationism has become the new globalization,164 could nonetheless significantly impact the public perception of the Court no matter how sophisticated of a consumer it actually is. In 2003, in Lawrence v. Texas, the Court held that “[t]he right the Petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.”165 In 2005, in Roper v. Simmons, the Court recognized the “overwhelming weight of international opinion against the juvenile death penalty.”166 It did so after considering the interest-based arguments offered by amici, who believed “the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, to be of vital importance both nationally and in the international community.”167 Foreign interests in Lawrence and Roper were less tangible than in most cases in which foreign sovereigns might file amicus briefs, and the litigations had no transnational aspect to them, unlike Empagran and Nabisco. Yet, the Justices relied on foreign amici’s arguments. That reliance sparked academic criticism then,168 and it would arguably become a renewed political weapon now.169

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161. Id. at *26 (“Well, to my knowledge, we didn’t have those consultations.”).
162. Id. at *31.
163. See, e.g., Julie Hirschfeld Davis, Supreme Court Nominee Calls Trump’s Attacks on Judiciary ‘Demoralizing’, N.Y. TIMES (Feb. 8, 2017), https://www.nytimes.com/2017/02/08/us/politics/donald-trump-immigration-ban.html (quoting Jeffrey Rosen, President of the National Constitution Center, as saying “Judicial independence is a fragile and crucial achievement of American constitutionalism . . . and it depends on the public seeing the judiciary as something more than politicians in robes”).
169. See, e.g., S. 520, 109th Cong. (2005) (proposing that it be made an impeachable offense for any federal judge to interpret the U.S. Constitution by relying on foreign and international law) (co-sponsored by nine Republican Senators); H.R. Res. 97, 109th Cong. (2005) (“Judicial interpretations regarding the meaning of the Constitution of the United States should not be based in whole or in part on
This danger would become even more salient if one were to endorse the notion that the relevance of foreign amici and the deference granted to them by the Court comes down to differing judicial philosophies. Under that theory, any Justice referencing a foreign sovereign amicus brief would be an easy target for political attacks. Professor Harold Koh argues that, based on their approaches to the relationship between international law and domestic law, the Justices fall into two distinct factions: the transnationalists (Justices Breyer, Ginsburg, and at times, Kennedy) and the nationalists (Chief Justice Roberts and Justices Scalia, Thomas, and Alito). Justice Breyer has been particularly vocal among the so-called transnationalists, and he has emphatically stressed the relevance of foreign sovereign amicus briefs for the Court. As the title of Justice Breyer’s book suggests, the current debate over the citation of foreign law arises from “the new global realities.” “At stake is nothing less than America’s position in a globalizing world.” Because foreign law often comes to the Court through foreign sovereign amici, and because there appears to be some truth to these two camps, reliance on foreign amici could be condemned along lines of judicial philosophy.

But such an oversimplification would not do justice to the complexity of the Court’s current practice of considering interest-based foreign amicus briefs and the long history of foreign sovereign amici. As this Note highlights, there is more to foreign amici than the transnationalists/nationalists divide, and the debate has not always been about globalization. For a long time, irrespective of judicial philosophy, the Court has signaled that it welcomes and values interest-based foreign sovereign amicus briefs. Indeed, as Eichensehr notes in passing, judicial philosophies and perceived partisan lines do not speak to the entrenched nature of foreign amici. Every single Justice currently on the Court (except Justice Gorsuch) has written or signed onto at least one opinion citing judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the Constitution of the United States.”

170. Harold Hongju Koh, Why Transnational Law Matters, 24 PENN ST. INT’L L. REV. 745, 749 (2006). The judicial writings of Justice Neil Gorsuch during his tenure on the U.S. Court of Appeals for the Tenth Circuit provide practically no guidance on his approach to the citation of foreign and international law. See ANDREW NOLAN ET AL., CONG. RESEARCH SERV., R44778, JUDGE NEIL M. GORSUCH: HIS JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT 84-85 (2017), https://fas.org/sgp/crs/misc/R44778.pdf. However, most likely, Justice Gorsuch will step into the late Justice Scalia’s shoes. See id. During his confirmation hearing, Justice Gorsuch recognized that, in certain instances, such as while “interpreting a contract with a choice of law provision that may adopt a foreign law,” the citation of foreign law is “not just proper but necessary.” Judge Gorsuch: International Law, C-SPAN (Mar. 22, 2017), https://www.c-span.org/video/?4662742/judge-gorsuch-international-law. But, he noted that “as a general matter . . . it is improper to look abroad when interpreting the Constitution.” Id.

171. BREYER, supra note 2, at 97 (“We rely upon briefs filed by the parties and by other interested persons, including the Executive Branch, of course, but also foreign governments.”); id. at 133 (“It is . . . helpful to receive briefs from other nations.”).

172. Id.


174. See Eichensehr, supra note 6, at 293 & n.15.
foreign amici. In fact, the consideration of foreign sovereign amicus briefs even predates the modern era when judicial philosophies became a prominent divisive factor on the Court. The first to engage with foreign quasi-amici was Justice Story, who was appointed by James Madison. In the Strathearn cases, Justice Day, a Theodore Roosevelt appointee, carefully considered the arguments of foreign amici. And Justice Jackson, appointed to the Court by Franklin Delano Roosevelt, wrote the opinion in Lauritzen, citing foreign sovereign amicus briefs. That is to say, foreign sovereigns gained traction because Justices with different judicial philosophies and political leanings have found it worthwhile to engage with foreign sovereign amicus briefs, and they have done so for centuries.

C. Moving Forward: Interest-Based Briefs as Amici and not Inimici Curiae

Foreign sovereign amicus briefs can and should continue to play an important role in Supreme Court litigation. Justices of all judicial philosophies and political leanings rely on interest-based foreign sovereign amicus briefs because foreign interests do play some role in the interpretation of domestic law. As Justice Breyer put it during the oral argument in Nabisco, "what you [the United States] think and what those countries think is very important in matters like this." Justice Scalia confirmed this in Empagran, when he asked "about the majority of nations in the world that don’t have effective antitrust enforcement, if indeed they have any antitrust laws." In fact, in the absence of a clear congressional mandate to the contrary, it would not be in the interest of the United States to infringe upon the policy and the laws of friendly foreign nations. Interest-based briefs ensure that the Justices and their three dozen highly-trained law clerks take into account the vital interests of foreign nations, which often align with those of the United States. And it also provides comfort to friendly foreign governments in knowing that the laws of the United States will not be applied with total disregard for foreign interests.

175. See, e.g., RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2107 & 2107 n.9 (2016) (Alito, J., joined by Chief Justice Roberts and Justices Kennedy and Thomas, quoting amicus briefs on behalf of: Canada; France; Germany and Belgium; and the United Kingdom, Ireland, and the Netherlands); Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659, 1670-78 (2013) (Breyer, J., concurring, joined by Justices Ginsburg, Sotomayor, and Kagan, citing amicus briefs on behalf of the Netherlands and the European Commission). Justice Gorsuch has not yet taken part in deciding a case in which a foreign sovereign has filed an amicus brief.

176. See The Anne, 16 U.S. 435 (1818).


181. See Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.").
Because of the potential benefits of foreign sovereign amici, the Court and the executive branch should continue to encourage this practice insofar as it is limited to interest-based arguments. Ever since Zenith Radio, the executive branch has welcomed foreign sovereign amicus briefs. And, though the U.S. Government’s shift was prompted by judicial invitation, judicial openness to foreign sovereign amici is a longstanding institutional tradition of the Court. As previously discussed, interest-based amicus briefs do not raise the same kinds of concerns as fact-based amicus briefs. Indeed, most importantly, they do not necessitate specific legal conclusions, but they simply provide additional concerns to be considered during the Court’s careful balancing process. The United States should not scale back on its welcoming approach to foreign sovereign interest-based amicus briefs.

CONCLUSION

This Note hopes to shed light on the role and impact of foreign amici: it highlights the types of briefs that have been successful, accounting for foreign amici’s different strategies; it emphasizes the narrow instances in which the Court has considered foreign sovereigns as inimici, and the reasons why such pushback has occurred; and it touches on larger debates regarding the Court’s role in foreign affairs and the citation of foreign law. This Note finds that while the Justices have felt uncomfortable directly evaluating the credibility of foreign sovereigns’ fact-based claims, they have been much more welcoming when the arguments made dealt specifically with foreign interests. In the latter cases, foreign amici have not only been allowed to file briefs, but these briefs have also been actively considered by the Justices in their opinions and, on occasion, even expanded upon during oral argument by counsels for amici.

The Court has accordingly drawn a clear line between amici and inimici, between arguments supporting foreign interests and arguments offering legal facts. This approach is not simply a symptom of recent increasing politicization, nor of the influence of law clerks in drafting opinions. It is a centuries-old practice that evolved organically as the Court’s docket and the Justices’ view of their proper role has evolved. It would therefore be a mistake to shorthand this practice as a recent, controversial development. The Court has correctly cherished and limited the practice of foreign amici, and the Justices should continue to consider today’s foreign amici as friends, not inimici of the Court.

182. See supra notes 125-126 and accompanying text.
# Appendix A: Supreme Court Amicus Briefs Filed by Foreign Sovereigns, 1918-1978

<table>
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<th>Citation</th>
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<tr>
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<td>Certiorari Denied</td>
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<tr>
<td>Year</td>
<td>Case Name</td>
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<td>Outcome</td>
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<td>419 U.S. 215</td>
<td>Liberia</td>
<td>In favor of Amicus</td>
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<td>1978</td>
<td>Pfizer Inc. v. Gov't of India</td>
<td>434 U.S. 308</td>
<td>West Germany</td>
<td>In favor of Amicus</td>
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Many of the social arrangements we think of as quintessentially domestic . . . are inextricably interwoven with complex processes in other countries and regions of the globe. Consider: our security system; our political-economic system; the search to find and retain external markets for our products; our dependence on the natural resources without which an advanced industrial and science-based civilization cannot survive; our health system; our conceptions of fundamental morality . . . . Even “domestic law” courses can no longer be understood adequately—whether for descriptive or practical professional purposes—without an understanding of the organization and dynamics of the international system.

—W. Michael Reisman

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