"When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement," according to the opinion of Mr. Justice James Wilson in an important case before the Supreme Court of the United States in which John Marshall appeared as losing counsel.

What was the "law of nations" or *jus gentium* which the infant American republic thus accepted as part of its own law? It was a species of universal law, based on reason and binding upon all mankind, which eighteenth century jurists did not hesitate to recognize as valid. It embraced three principal divisions: the law merchant, the law maritime, and the body of law between states which is now called public international law.

In that cosmopolitan era, though it might be forbidden to cite English precedents, it was not unusual for American lawyers to be familiar with Roman and civil-law doctrines. Only narrowly did
American municipal law escape a greater infusion of continental principles than it in fact experienced.6

It was therefore very natural that in the field of *jus gentium*, where the law was professedly of more than parochial character, a very eclectic spirit should prevail.

Lord Mansfield's familiar quotation from Cicero was made in a case involving a shipowner's claim for freight: "... the maritime law is not the law of a particular country, but the general law of nations: 'non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit.' "7

And in discussing with the French minister a case pending in an American prize court, Secretary of State Jefferson thus proclaimed the universality of the law applied by such a tribunal: "It happens in this particular case that the rule of decision will be, not the municipal laws of the United States but the law of nations, and the Law maritime, as admitted and practised in all civilized countries; that the same sentence will be pronounced here that would be pronounced in the same case in the Republic of France, or in any other country of Europe. ...",8

Though the universality of the law of nations was clearly perceived, as well as its dependence on the common consent of all civilized nations rather than the dictates of one or a few great powers,9 the possibility of development and creative effort in the field of international law was equally recognized. To such progress the United States itself made notable contributions, especially in the matter of the rights of neutrals.10 In this advancement of the law of nations John Marshall played a significant part.

6. POUND, THE FORMATIVE ERA OF AMERICAN LAW 107 (1938). Jefferson conceded "the superiority of the civil over the common law code, as a system of perfect justice." Jefferson to John Tyler, June 17, 1812. 13 THE WRITINGS OF THOMAS JEFFERSON 166 (Lipscomb and Bergh eds. 1904). "The lawyer finds in the Latin language the system of civil law most conformable with the principles of justice of any which has ever yet been established among men, and from which much has been incorporated into our own." Jefferson to John Brazier, August 24, 1819. 15 id. at 210.

7. Luke v. Lyde, 2 Burr. 882, 887, 97 Eng. Rep. 614, 617 (K.B. 1759). "Nor will it be one law for Rome and another for Athens; one thing today and another tomorrow; but it is a law eternal and unchangeable for all people and in every age." THE REPUBLIC OF CICERO 256-57 (Hardingham ed. 1884). Regarding this quotation, see Sutherland, The Flag, the Constitution, and International Agreements, 68 HARV. L. REV. 1374, 1381 (1955).


9. In Marshall's often-quoted words, "no principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. ... As no nation can prescribe a rule for others, none can make a law of nations. ..." The Antelope, 23 U.S. (10 Wheat.) 66, 122 (1825).

Marshall’s fame as expounder of the Constitution tends to overshadow his achievements in other fields of law. Yet, during his tenure as Chief Justice from 1801 to 1835, the Supreme Court rendered 62 decisions involving questions of constitutional law, of which Marshall wrote the opinion of the Court in 36; while during the same period 195 cases were decided involving questions of international law or relations, and in 80 of these Marshall was spokesman for the Court.11

The noted international lawyer, John Bassett Moore, the first American jurist to sit as a judge of the Permanent Court of International Justice, says of Marshall: “He is known in other lands as the author of important opinions on questions which deeply concern the welfare and intercourse of all nations. In the treatment of questions of international law he exhibited the same traits of mind, the same breadth and originality of thought, the same power in discovering and the same certainty in applying fundamental principles, that distinguished him in the realm of constitutional discussions; and it was his lot in more than one case to blaze the way in the establishment of rules of international conduct.”12

International law, like constitutional law, presented a new and growing field where Marshall’s powerful and perceptive mind could build creatively. In the more technical and minute departments of law, such as those dealing with commercial subjects, where erudition rather than originality was required, Marshall did not excel.13 In such branches of jurisprudence, his scanty legal education14 had not made him the equal of his studious colleague, Joseph Story.15

Much of Marshall’s learning in the realm of international law was derived from Thomas Rutherforth’s Institutes of Natural Law. This digest of Grotius was one of the few law books in Marshall’s library.16 It was an influential treatise in that era, and Marshall relied extensively on its teachings.

13. 3 id. at 16.
14. For about six weeks Marshall attended George Wythe’s lectures at William and Mary College. His notebook contains about 180 pages, some of which he may have written after leaving school. 1 Beveridge, The Life of John Marshall 154, 174-76 (1916). See also 2 id. at 177.
Four epochs in Marshall's career deserve attention in appraising his contributions to the development of the law of nations. In 1797, he was a member of the XYZ mission sent to France by President John Adams. Marshall was greeted with acclaim on his return from this abortive mission, in the course of which he had maintained a firm and dignified position as representative of his nation. Marshall's cogent statement of the American position in a lengthy communication to Talleyrand, the French minister of foreign affairs, and his dispatches to his own government constitute an impressive series of state papers from his pen and deserve to rank as noteworthy diplomatic documents.

After Marshall's return to America and his election to Congress in 1799, he again had occasion to deal with a problem involving the law of nations. His speech in the House of Representatives on March 7, 1800, on the Jonathan Robbins case was one of the most effective addresses ever delivered before that body. John Bassett Moore thus describes the incident: "By the twenty-seventh article of the Jay Treaty it was provided that fugitives from justice should be delivered up for the offense of murder or of forgery. Under this stipulation, Robbins, alias Nash, was charged with the commission of the crime of murder on board a British privateer on the high seas. He was arrested on a warrant issued upon the affidavit of the British consul at Charleston, South Carolina. After his arrest, an application was made to Judge Bee, sitting in the United States circuit court at Charleston, for a writ of habeas corpus. While Robbins was in custody, the President of the United States, John Adams, addressed a note to Judge Bee, requesting and advising him, if it should appear that the evidence warranted it, to deliver the prisoner up to the representatives of the British

exaggerated in 1 Crosskey, op. cit. supra note 4, at 364. On Crosskey's controversial notions of constitutional law, where undue reliance is placed on Rutherforth, see the present writer's review of Crosskey's book in 11 Wm. & Mary Col. Q. 104, 105 (3d ser. 1954).

17. War with France seemed imminent when it became known that the American mission had not been officially received, and that a loan or bribe had been solicited by the French as a condition precedent to the commencement of serious negotiations. Pinckney's irate reply, "No, not a sixpence," as it passed from mouth to mouth became the more rhetorical, "Millions for defense, but not a cent for tribute." Federalist plans for war with France received a setback when President Adams, without consulting his party colleagues, announced that he would send another mission to France if assurance were given in advance that it would be received with proper respect for its diplomatic status. Dumbar, op. cit. supra note 10, at 197. 2 Beveridge, The Life of John Marshall 256-351 (1916); 2 Am. State Papers (Foreign Relations) 161 (1832).


government. The examination was held by Judge Bee, and Robbins was duly surrendered. It is an illustration of the vicissitudes of politics that, on the strength of this incident, the cry was raised that the President had caused the delivery up of an American citizen who had been impressed into the British service. For this charge there was no ground whatever, but it was made to serve the purposes of the day and was one of the causes of the popular antagonism to the administration of John Adams. When Congress met in December, 1799, a resolution was offered by Mr. Livingston, of New York, severely condemning the course of the administration. Its action was defended in the House of Representatives by Marshall, on two grounds: first, that the case was one clearly within the provisions of the treaty; and, second, that, no act having been passed by Congress for the execution of the treaty, it was incumbent upon the President to carry it into effect by such means as happened to be within his power. The speech which Marshall delivered on that occasion is said to have been the only one that he ever revised for publication. It 'at once placed him,' as Mr. Justice Story has well said, 'in the front rank of constitutional statesmen, silenced opposition, and settled forever the points of national law upon which the controversy hinged.' So convincing was it that Mr. Gallatin, who had been requested by Mr. Livingston to reply, declined to make the attempt, declaring the argument to be unanswerable.  

Upon becoming Secretary of State in the closing months of the Adams administration, Marshall was again placed in a position where his official duties brought questions of international law to his notice. Negotiations with England regarding the functioning of the claims commission set up under the Jay Treaty raised questions as to the scope of the treaty provisions. Several other disputed points also required attention. A treaty provision placing in the list of contraband "whatever may serve directly to the equipment of vessels" was being applied so sweepingly by England that Marshall felt that no effect at all was being given to the word "directly." He protested that the United States deemed this construction "alike unfriendly and unjust." Another subject of controversy arose when the British ignored the requirement of international law that a blockade must be maintained effectively in order to be legally valid. Moreover, Marshall directed a strong protest against "the unjust decisions of their courts of Vice Admiralty and the impunity which attends captures totally vexatious and without probable cause of seizure." Conceding that it would be too much to expect all the commanders of naval vessels and privateers to be "men

20. 2 THE COLLECTED PAPERS OF JOHN BASSETT MOORE 453-54 (1944).
of correct conduct and habits,” he stressed the importance of an upright judiciary to review the legality of their seizures. But the English courts were no better than the seamen; they seldom restored a vessel captured in violation of the law of nations and never awarded costs and damages for detention; they were “converting themselves from judges into mere instruments of plunder.” The perennial problem of impressment of sailors from American vessels was likewise acute. These thorny topics occasioned Marshall’s principal state papers in the field of international affairs during this period.\(^21\)

The fourth and final stage in Marshall’s official career, where it became his task to deal with matters relating to the law of nations, was his tenure as Chief Justice of the Supreme Court of the United States. To comment upon or analyze all of Justice Marshall’s opinions upon questions of an international character\(^22\) is of course impracticable here.\(^23\) Mention must be made, however, of several of the most famous opinions written by Marshall which are generally considered as landmarks in the development of the law of nations.\(^24\)

Marshall’s most widely known case in the field of international law is, of course, *The Schooner Exchange v. McFaddon*.\(^25\) An American vessel, which had been captured and confiscated by the French and commissioned as a man-of-war, entered the port of Philadelphia and was libelled by the original American owners, who demanded restitution of their property. In an elaborate opinion rendered on March 3, 1813, Marshall held that a public ship of a foreign state was not amenable to the jurisdiction of an American judicial tribunal.

He pointed out that “the jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.” Such jurisdiction is susceptible of no limitation not imposed by the nation itself. “All exceptions, therefore, to the full and complete

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22. See text at note 11 supra.

23. A convenient digest of these opinions is Ziegler, *op. cit. supra* note 16. Topics treated by Ziegler include international status, acquisition of territory, jurisdiction, nationality and expatriation, consuls, war, piracy, the slave trade, extradition and treaties. Unfortunately, there is no published collection of these cases similar to *Cotton, The Constitutional Decisions of John Marshall* (1905) and *Dillon, John Marshall Complete Constitutional Decisions* (1903). Some are found in Scott, *Prize Cases Decided in the United States Supreme Court 1789-1918* (1923).


25. 11 *U.S.* (7 Cranch) 116 (1812). This case was discussed quite recently in *National City Bank v. Republic of China*, 348 *U.S.* 356 (1955).
power of a nation within its own territories" must be based on its express or implied consent.26

Marshall then reviewed the classes of cases where an implied consent to exemption from territorial jurisdiction is acknowledged. These include the immunity enjoyed by the person of the sovereign himself, by foreign ministers, and by armies permitted to pass through a foreign territory.27 Should the same rule apply to ships of war entering the ports of a friendly power? Or should such ships receive the same treatment as private commercial vessels?

The Chief Justice concluded that a clear distinction is to be drawn between merchant ships and public armed ships. The latter type of vessel "constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects." 28

This famous litigation may be epitomized in the language used by the writer's teacher of international law when the case was being discussed in class: "The shipowner says 'Marshall makes a long speech about visiting sovereigns, diplomats, and troops. That does not interest me. Do I get my ship back or don't I?' and the answer is 'No.' "

Turning from exemptions from sovereign power to acquisition of sovereign power, Marshall, in American Insurance Co. v. Canter,29 put an end to the controversy that his Federalist Party associates had been waging regarding the legality of the Louisiana Purchase during the administration of Thomas Jefferson.30 Marshall declared that "the constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. . . . The right to govern may be the inevitable consequence of the right to acquire territory." 31

The occasion for this pronouncement was presented when the insurers, to whom the owners had abandoned a wrecked cargo, claimed

27. Modern large-scale troop movements make it convenient for the rule of Schooner Exchange v. McFadden to be waived by treaty in some cases, so that offenses by soldiers may be punished in the local courts instead of exclusively by military tribunals of the guest army. See article 7 of NATO Status of Forces Agreement of June 19, 1951, which went into force on August 23, 1953. 48 Am. J. Int'l Law App. 86-89 (1954).
28. 11 U.S. (7 Cranch) at 144.
30. Jefferson himself had been dubious regarding the constitutionality of acquiring this vast "empire for liberty." DUMBAULD, THE POLITICAL WRITINGS OF THOMAS JEFFERSON 50, 144 (1955). Federalists feared that the political predominance of the seaboard states would be destroyed. 3 RANDALL, THE LIFE OF THOMAS JEFFERSON 81 (1888).
31. 26 U.S. (1 Pet.) at 543.
356 bales of cotton which had been awarded to one Canter as salvage by a court at Key West, Florida. The court had been created by an act passed by the territorial legislature of Florida. The territorial government in turn had been established by Congress, under provisions which clearly gave it the power to establish courts having authority to award salvage, unless it could be shown that a restriction was violated which forbade legislation "inconsistent with the Constitution and laws of the United States."

The insurance company contended that such inconsistency existed, for the reason that the Florida statute vested in inferior courts of the territory a jurisdiction given by Congress to the superior courts. Section 8 of the Act of Congress of March 3, 1823, gave to the superior courts of Florida "the same jurisdiction . . . in all cases arising under the laws and constitution of the United States" as had been vested in the Kentucky district court under prior legislation.32

Marshall was prompt to point out that this did not confer on the Florida superior courts all the powers possessed by the Kentucky court, but only such jurisdiction as arose under the laws and Constitution of the United States. The crucial question therefore was whether cases in admiralty and cases under the laws and Constitution of the United States were identical and to be treated as synonymous.

In holding that they were not identical, Marshall could avouch the authority of the Constitution itself, which in article III, section 2, had specifically enumerated these types of cases in separate categories, each of which independently constituted a basis for jurisdiction of the federal courts under that provision of the Constitution. He could also point to the immemorial practice of maritime nations. "A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise."33

Finally, Marshall disposed of the argument that Congress could not authorize the vesting of admiralty jurisdiction in territorial courts because jurisdiction over "all cases of admiralty and maritime jurisdiction" was part of the "judicial power of the United States" which article III, section 1, of the Constitution required to be vested in "one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Rather cavalierly, Marshall noted that since the judges of the territorial courts held office for only four years instead of for life as required by article III, section 1, of the

32. 3 Stat. 752 (1823).
33. 26 U.S. (1 Pet.) at 545. See text at notes 7 and 8 supra.
Constitution, "these courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States." The distinction which Marshall thus improvised between constitutional and legislative courts is still recognized.

A dictum in the Canter case to the effect that all the laws in force in Florida when it was acquired by the United States, except political laws, remained in force until altered by the new government was elaborated in United States v. Percheman. That case upheld the title to 2,000 acres of land which the grantee had acquired under a grant from the Spanish governor of Florida on December 12, 1815. That territory was ceded to the United States by the treaty of February 22, 1819.

Marshall remarked that "it is very unusual, even in cases of conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be confiscated, and private rights annulled. The people change their allegiance; their relation with the ancient sovereign is dissolved; but their relations to each other, and their rights of property, remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"

Hence, in a transaction such as the treaty of 1819, "the king cedes that only which belonged to him; lands he had previously granted, were not his to cede."

The Spanish text of the treaty, the Court noted, contained a provision that such grants of land "shall remain ratified and confirmed."

34. Id. at 546.
35. Ex parte Bakelite Corp., 279 U.S. 438, 450 (1929). Not being constitutional courts, such tribunals may be vested with administrative authority which goes beyond "judicial" power.
37. 32 U.S. (7 Pet.) 51 (1833).
38. Id. at 87. In Brown v. United States, 12 U.S. (8 Cranch) 110, 126 (1814), Marshall held that war does not automatically result in confiscation of enemy property, but merely confers upon the belligerent sovereign a right to confiscate.
The English version of that article said "shall be ratified and confirmed." Rejecting the government's argument that the treaty contemplated further subsequent action by the United States in order to validate the titles involved, the Court construed the English text as harmonious with the Spanish.\footnote{40}

Another legal landmark involving Spanish land grants was \textit{Foster v. Neilson}.\footnote{41} The issue was title to land which the United States claimed was part of the Louisiana Purchase, but which Spain had declared was within West Florida. Petitioner claimed under a Spanish grant made after the Louisiana Purchase but before the cession of West Florida and would have prevailed had the Spanish position been accepted. The Court refused to embark upon an independent investigation of the boundary dispute. Such a question was a matter for the political departments of the government. "In a controversy between two nations, concerning national boundaries, it is scarcely possible, that the courts of either should refuse to abide by the measures adopted by its own government. . . . The judiciary is not that department of the government, to which the assertion of its interests against foreign powers is confided; and its duty commonly is, to decide upon individual rights, according to those principles which the political departments of the nation have established. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. . . . A question like this, respecting the boundaries of nations, is, as has been truly said, more a political than a legal question and in its discussion, the courts of every country must respect the pronounced will of the legislature." In regard to the West Florida boundary controversy, Marshall found that the legislature and the department entrusted with foreign affairs had occupied the field, and that the American government's position with respect to the disputed issue must be followed by its courts.\footnote{42}

Marshall's distinction between political and justiciable questions is still law.\footnote{43} A field in which it is particularly applicable is with regard to recognition of foreign governments.

\footnote{40}{Id. at 89. The Court pointed out that in \textit{Foster v. Neilson}, 27 U.S. (2 Pet.) 253 (1829), where the same treaty language was involved, the Court's attention had not been directed to the discrepancy between the two versions.}

\footnote{41}{27 U.S. (2 Pet.) 253 (1829).}

\footnote{42}{Id. at 307-09. Moreover the American position is intrinsically strong and probably correct. \textit{Id.} at 307.}

The political character of recognition of international status was clearly stated by Marshall in United States v. Palmer. He pointed out that "such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are intrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—may recognize the new state absolutely—or may make a limited recognition of it. The proceeding in courts must depend so entirely on the course of the government, that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arrange the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department."  

In United States v. Klintock, Marshall found it advisable to elaborate on the Palmer decision. A United States citizen, having a commission from one Aury, who styled himself "Brigadier of the Mexican Republic and Generalissimo of the Floridas," took possession of a Danish vessel, upon the pretext of finding Spanish papers which he had "planted" on board the ship. Leaving the crew on a Cuban island, the captors sailed for Savannah, impersonating the Danish master and crew.

Marshall quickly disposed of the defendant's contentions. "... Aury can have no power, either as Brigadier of the Mexican Republic, a republic of whose existence we know nothing, or as Generalissimo of the Floridas, a province in the possession of Spain, to issue commissions to authorize private or public vessels to make captures at

44. 16 U.S. (3 Wheat.) 610 (1818).
45. 16 U.S. (3 Wheat.) at 634-35. In Rose v. Himely, 8 U.S. (4 Cranch) 241, 272 (1808), Marshall said: "It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting." This rule was followed in Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246, 324 (1818), where Story spoke for the Court. See also United States v. Klintock, 18 U.S. (5 Wheat.) 144, 149-50 (1820).
46. 18 U.S. (5 Wheat.) 144 (1820).
sea.” 47 In any event, Denmark was not at war with either of those imaginary sovereignties, and the Danish vessel “was not captured jure belli, but seized and carried into Savannah animo furandi. It was not a belligerent capture, but a robbery on the high seas. And although the fraud practiced on the Dane may not of itself constitute piracy, yet it is an ingredient in the transaction, which has no tendency to mitigate the character of the offence.” 48

Captures jure belli were not only distinguished by Marshall from those animo furandi, as in the Klintock case, but also from those made in the exercise of ordinary territorial sovereignty for violation of the municipal laws of the local sovereign. According to this distinction, which was elaborated with Marshall’s customary logic in Rose v. Himely, 49 a belligerent seizure may be made on the high seas, because war is waged on the high seas, but a seizure for the enforcement of local laws must be made within the territorial jurisdiction of the state. 50 Justice Johnson dissented 51 while Justices Livingston, Cushing, and Chase concurred separately, expressing no opinion on the question whether a seizure could be made lawfully on the high seas for a violation of municipal regulations if the captured vessel were duly brought into port without delay for adjudication. They based their concurrence in the decision on the fact that the ship had been condemned by a St. Domingo court without ever having been brought in to that place at all. 52

However, in Hudson v. Guestier, 53 a companion case decided on the same day, Marshall upheld a condemnation pronounced under the same circumstances as in Rose v. Himely, except that the seizure had been made within French territorial waters. Here Chase and Living- ston dissented because the captured vessel had not been brought into

47. Id. at 149.
48. Id. at 149-50.
49. 8 U.S. (4 Cranch) 241 (1808). “The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign.” Hence “. . . seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas, for the breach of a municipal regulation, is an act which the sovereign cannot authorize.” Id. at 279.
50. Not necessarily within the “three mile limit.” In Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234-35 (1804), Marshall said: “The authority of a nation within its own territory is absolute and exclusive. . . . But its power to secure itself from injury may certainly be exercised beyond the limits of its territory.” The geographical scope of such power may vary with circumstances. “In different seas and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to.” See also Cook v. United States 288 U.S. 102, 112-15 (1933).
51. See MORGAN, op. cit. supra note 11, at 176-77.
52. 8 U.S. (4 Cranch) at 281.
53. 8 U.S. (4 Cranch) 293 (1808).
a French port for adjudication. After retrial, it appeared that the seizure had in fact been made on the high seas. Livingston, speaking for the Court, said that “if the res can be proceeded against when not in the possession or under the control of the court, I am not able to perceive how it can be material whether the capture were made within or beyond the jurisdictional limits of France; or in the exercise of a belligerent or municipal right.” But the decisions on the first trial and in Rose v. Himely had rejected the ground upon which the dissenting judges had wished to place the decision. Marshall now found himself a dissenter, observing “that he had supposed that the former opinion delivered in these cases upon this point had been concurred in by four judges. But in this he was mistaken. The opinion was concurred in by one judge. . . . However, the principle of that case (Rose v. Himely) is now overruled.”

When a ship was validly captured jure belli, what was the status of neutral cargo which it carried on board? Justice Marshall dealt with that problem in the Nereide, a case involving cargo which belonged to a resident of Buenos Aires and which was shipped on an armed British merchantman. The vessel was brought into New York by an American privateer during war between the United States and Great Britain. Marshall held that neutral property did not lose its immunity from capture by being placed in a belligerent armed vessel. If the ship’s armament, or resistance to search, prevents belligerents from exercising their right of search, no harm is done. There is no sin committed if neutral property escapes the inconvenience of search. It is in any event immune from capture; and the right of search is merely ancillary to the right of capture. The neutral property-owner is not chargeable with the ship’s being armed nor its resistance; all he seeks is transportation for his goods. “He meddles not with the armament nor with the war.”

54. Id. at 298.
56. Ibid.
58. 13 U.S. (9 Cranch) 388 (1815).
59. Id. at 390.
60. Id. at 427. Story dissented.
61. Id. at 428.
Rejecting the argument that a treaty between the United States and Spain subject the goods of either party, being neutral, to condemnation as enemy property if found in the vessel of an enemy, Marshall pointed out, with characteristic acumen, that the treaty merely prohibited capture of enemy property when transported in neutral bottoms. It did not provide that enemy bottoms should communicate their hostile character to the cargo they carried. The object of this type of treaty provision, Marshall explained, was to enlarge, not to diminish, the rights of neutrals.

Marshall again demonstrated the sanctity accorded in American courts to the pledged faith of the nation as expressed in treaties in *United States v. Schooner Peggy*. A convention with France, signed on September 30, 1800, and ratified on February 18, 1801, provided in article 4 that "property captured, and not yet definitively condemned shall be mutually restored." The *Peggy* had been condemned in the court below on September 23, 1800, but an appeal was taken to the Supreme Court. Marshall held that the condemnation was not definitive, since it was subject to appellate review; and that since the treaty was law of the land, the ship must be restored. Ordinarily, he conceded, the function of an appellate court is only to determine whether the judgment rendered below was or was not erroneous when rendered; but if during the appeal, a controlling law intervenes, the Court must obey it.

Another notable Marshall decision dealing with captures *jure belli* was *Talbot v. Seeman*. In that case, the *Amelia*, a Hamburg ship, had been captured by the French (who were at peace with Hamburg), and then recaptured by Captain Talbot, of the *Constitution*, an American ship. The *Amelia* was armed and was manned by a French crew when captured. The United States and France were then in a state of partial hostility, so that the recapture was lawful.

The question for decision by the Court was whether Talbot was entitled to salvage. As Marshall pointed out, for salvage to be awarded

62. Article 15 of the treaty of October 27, 1795, 8 Stat. 146 (1795).
63. 13 U.S. (9 Cranch) at 418.
64. 13 U.S. (9 Cranch) at 419.
65. 5 U.S. (1 Cranch) 103 (1801).
66. 2 MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 459 (1931).
67. 5 U.S. (1 Cranch) at 107.
68. Id. at 110. Marshall's decision agreed with President Jefferson's interpretation of the treaty, but conflicted with the opinion of Attorney General Levi Lincoln.
69. 5 U.S. (1 Cranch) 1 (1801).
70. Id. at 32.
it was necessary, not only that the taking be lawful, but that meritorious service be rendered to the ship by the captor.\textsuperscript{71} Talbot contended, and the Court held, that such a service had been rendered by rescuing the vessel from the French. Normally, to recapture a neutral ship would not be such a service, because the prize courts of the nation first capturing the vessel would release it; but in the case at bar, there was proof that France would have in fact condemned the \textit{Amelia}, even though such condemnation would violate international law.

As stated by Marshall, "the principle is that without benefit salvage is not payable: and it is merely a consequence from this principle, which exempts recaptured neutrals from its payment. But let a nation change its laws and its practice on this subject; let its legislation be such as to subject to condemnation all neutrals captured by its cruisers, and who will say that no benefit is conferred by a recapture? . . . It becomes then necessary to inquire whether the laws of France were such as to have rendered the condemnation of the \textit{Amelia} so extremely probable, as to create a case of such real danger, that her recapture by captain Talbot must be considered as a meritorious service entitling him to salvage." \textsuperscript{72}

Whether the record before the Court contained adequate proof of French law was the next question to be determined. Ordinarily foreign law must be proved as a fact, which had not been done. Marshall drew a fine distinction between internal law and public law on a subject of common concern to all nations. The latter type of foreign law, important to a court of admiralty, included the French decree of January 18, 1798, which subjected to capture all merchandise produced in England or in English possessions. Marshall concluded that "this decree having been promulgated in the United States as the law of France, by the joint act of that department which is entrusted with foreign intercourse, and of that which is invested with the powers of war, seems to assume a character of notoriety which renders it admissible in our courts." \textsuperscript{73} The \textit{Amelia}, carrying a cargo from Bengal, an English possession, was therefore not safe from condemnation in French courts; and recapture by Captain Talbot was a genuine service which entitled him to salvage. The Court could not presume that, merely because the French decree of 1798 contravened international law, the courts of that country would refuse to execute it.\textsuperscript{74}

An American court, however, could in Marshall's judgment be expected to display a nicer regard for the obligations imposed by the

\begin{footnotes}
\item[71.] Id. at 28.
\item[72.] Id. at 37.
\item[73.] Id. at 38. As to proof of foreign law, cf. Church v. Hubbart, 6 U.S. (2 Cranch) 187, 236-39 (1804).
\item[74.] 5 U.S. (1 Cranch) at 39-41.
\end{footnotes}
law of nations. In determining what percentage should be awarded as salvage, Marshall found it necessary to lay down the principle that an act of Congress should be construed so as not to violate international law.75

The source of international law was discussed in Marshall's very interesting opinion in The Antelope.76 The question at issue was whether the slave trade violated the law of nations. Marshall held, contrary to a prior decision by Story at circuit,77 that it did not, although it did violate the law of nature.78

Slavery arose, Marshall asserted, as one of the consequences of war in ancient times. "This, which was the usage of all, could not be pronounced repugnant to the law of nations, which is certainly to be tried by the test of general usage. That which has received the assent of all, must be the law of all. . . . If we resort to this standard as the test of international law, the question, as has already been observed, is decided in favor of the legality of the trade."79 However abhorrent to many nations today, "that trade could not be considered as contrary to the law of nations which was authorized and protected by the laws of all commercial nations. . . ."80

Common consent of all nations is required to modify international law.81 Condemnation of the slave trade by the domestic law of individual nations is not enough. "If it be consistent with the law of nations, it cannot in itself be piracy. It can be made so only by statute; and the obligation of the statute cannot transcend the legislative power of the state which may enact it." If it is neither piracy nor a violation of the law of nations, slave trading cannot subject a ship in time of peace to condemnation in a foreign forum, even if the laws of the ship's own nation prohibit the trade.82

75. Id. at 43-44. In Murray v. The Charming Betsey, 6 U.S. (2 Cranch) 64 (1804), Marshall reiterated this principle.
76. 23 U.S. (10 Wheat.) 66 (1825).
78. 23 U.S. (10 Wheat.) at 120. Roman jurists recognized this same distinction. DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY 43 (1950).
80. Id. at 115. Marshall refers to the leading part taken by the United States, after attaining independence, in opposing the slave trade. Earlier attempts by the American colonies to suppress the trade had been disallowed by the crown. This was one of the grievances complained of in the Declaration of Independence. DUMBAULD, op. cit. supra note 78, at 89, 174-75.
81. See the familiar description of the international legal structure quoted in note 9 supra. During argument Key had asserted that "general concurrence" sufficed; universal unanimity was not necessary. 23 U.S. (10 Wheat.) at 77.
Marshall praised counsel who argued the case: "In examining claims of this momentous importance—claims in which the sacred rights of liberty and of property come in conflict with each other—which have drawn from the bar a degree of talent and of eloquence, worthy of the questions which have been discussed, this court must not yield to feelings which might seduce it from the path of duty, and must obey the mandate of the law." 83

A strain of whimsical realism akin to that exhibited in Marshall's treatment of slavery in The Antelope appears in Johnson and Graham's Lessee v. McIntosh, 84 a case dealing with the rights of Indians. The plaintiffs claimed ownership of lands by virtue of grants made in 1773 and 1775 by Indian tribes. The Court held that these titles were invalid. Only the government, not the Indians themselves, could dispose of lands occupied by the natives. The Indians had a right to occupy the lands which they inhabited, but "their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave title to those who made it." The European nations "asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives." 85

The Christian nations of Europe had developed this system of title by discovery in order to obviate conflicts among themselves in connection with their acquisitions of land from the natives. They needed to establish a rule "by which the right of acquisition, which they all asserted, should be regulated, as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it... It was a right which all asserted for themselves, and to the assertion of which, by others, all assented." 86

Insofar as the natives were concerned, Marshall explains: "The potentates of the old world found no difficulty in convincing themselves, that they made ample compensation to the inhabitants of the new, by

83. 23 U.S. (10 Wheat.) at 114.
84. 21 U.S. (8 Wheat.) 543 (1823).
85. Id. at 574. England and the United States had accepted this system of land grants. Id. at 576, 580, 584. The principle expounded by Marshall has been reiterated recently in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).
86. 21 U.S. (8 Wheat.) at 573.
bestowing on them civilization and Christianity, in exchange for unlimited independence.”

The foregoing review of Marshall’s principal decisions involving the law of nations exhibits the originality and cogency of his reasoning in that important and untrodden branch of jurisprudence. His professional prowess and proficiency as a creative genius are displayed in his work there just as in the better known field of constitutional construction. Of that work Beveridge says: “Admirable and formative as were Marshall’s opinions of the law of nations, they received no attention from the people, no opposition from the politicians, and were generally approved by the bar.”

Perhaps the same appraisal will apply to the achievements of the present age in the realm of international law. A formative and creative period, such as evoked the genius of Hugo Grotius and of John Marshall in their respective eras, confronts the legal profession today. If our efforts prove equally fruitful, we can afford to forego the popular acclaim which falls to the lot of practitioners of less recondite skills. Let us hope, too, that our efforts to build a law-governed world will also escape the obstructive zeal of short-sighted and selfish politicians. And finally, thrice and four times blessed shall we be if we may aspire to the accolade of approval by our comrades at the bar. There, if at all, is to be found the “laurel crown.”

87. Ibid.
88. 4 BEVERIDGE, THE LIFE OF JOHN MARSHALL 144 (1919).
89. Pound, Philosophical Theory and International Law, 1 BIBLIOTHECA VISSTERIANA 72 (1923); Dumbauld, Hugo Grotius: the Father of International Law, 1 J. PUB. L. 117 (1952).
90. That the American polity whose constitutional framework was moulded by Marshall was in many respects itself an international society has been emphasized by historians familiar with that period. WARREN, THE SUPREME COURT AND SOVEREIGN STATES (1924); VAN DOREN, THE GREAT REHEARSAL (1948).
91. For Justice Robert H. Jackson’s facetious comments on the esoteric character of international law, see PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 13 (1945). For a detailed description of the actual extent of the practicing lawyer’s concern with international law, see Cowles, To What Extent Will American Lawyers Need an Understanding of International Law to Serve Clients Adequately During the Last Half of the Twentieth Century, 7 J. LEGAL ED. 179 (1954); Dean, The Role of International Law in a Metropolitan Practice, 103 U. PA. L. REV. 886 (1955).
92. Politicians dealing with international affairs too often exhibit “zeal . . . but not according to knowledge.” Romans 10:2. The agitation for the so-called “Bricker Amendment” is a good illustration of this.
93. As Justice Holmes said, “the only thing that gives one real happiness is when one whose judgment one respects says the few words that are the laurel crown,” SHRIVER, JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 200 (1936). How Holmes treasured the esteem of Cardozo is familiar: “I not only owe to him some praise that I regard as one of the chief rewards of my life, but have noticed such a sensitive delicacy in him that I should tremble lest I should prove unworthy of his regard.” Id. at 201. He spurned “the commonplace, under its popular label of the normal.” GLASGOW, THE WOMAN WITHIN 277 (1954).
As Justice Holmes remarked, "there fell to Marshall perhaps the greatest place that ever was filled by a judge; but when I consider his might, his justice, and his wisdom, I do fully believe that if American law were to be represented by a single figure, sceptic and worshipper alike would agree without dispute that the figure could be one alone, and that one, John Marshall." 94

Did Marshall, like Taft, cherish ambition for the office of Chief Justice as such? Or did he, like Holmes, long to "touch the superlative"? 95 In any event, Marshall's "intellectual power" gave him rank with the immortals.96 In two significant branches of public law his work endures. As spokesman of the Constitution he is widely known and acclaimed. Equal glory rightly attaches to his labors for the development of the law of nations.

94. HOLMES, COLLECTED LEGAL PAPERS 270 (1920). If a second figure were to be chosen, it would doubtless be Holmes. Or would it be Pound, Wigmore, Williston, John W. Davis, or George Wharton Pepper?

95. "He marked a fundamental difference in our way of thinking by saying that this office always had been his ambition. I don't understand ambition for an office. The only one that I feel is to believe when the end comes, for till then it is always in doubt, that one has touched the superlative. No outsider can give you that, although the judgment of the competent, of course, helps to confidence—or at least to hope." 2 HOLMES-POLLOCK LETTERS 72 (Howe ed. 1941). "... [T]he C. J. like the rest of us must depend on his intellectual power." 1 id. at 170.

96. There seems to be no evidence that Marshall loved high office as such. He did welcome as a godsend his receiving a diplomatic appointment in 1797, but that was because he needed the money. 2 BEVERIDGE, THE LIFE OF JOHN MARSHALL 211 (1916). His appointment as Chief Justice, Beveridge says, was "totally unexpected," and Marshall had himself recommended someone else for the place. 2 id. at 553. See also 2 id. at 221, 491. In desiring to be Chief Justice, did not Robert H. Jackson miscalculate the true nature of his own greatness? Ought he to have wished that posterity would number him with names such as Ellsworth, Waite, Fuller, Chase, or White, because of the exalted station they held, rather than with Holmes of the laurel crown?