John Marshall's Contributions to American Neutrality Doctrines

Eric A. Belgrad
JOHN MARSHALL'S CONTRIBUTIONS TO AMERICAN NEUTRALITY DOCTRINES

ERIC A. BELGRAD*

INTRODUCTION

The currently accepted view of John Marshall's contributions to the development of international law follows closely what has often been said about his constitutional opinions—that they were the product of sheer intellect and good judgment, untutored by an extensive legal education and unspoiled by a profound reading of legal classics.1 Marshall's most noted biographer, Beveridge, remarked on his lack of learning when he stated:

Where special learning, or the examination of the technicalities and nice distinctions of the law were required, Marshall did not shine. Of admiralty law in particular he knew little. The preparation of opinions in such cases he usually assigned to Story who, not unjustly, has been considered the father of American admiralty law.2

In the only volume devoted exclusively to the international law of John Marshall, Ziegler accepted this view, stating that "his legal training was notably weak, and in the field of international law was conspicuous only by its absence." 3

The claim that Marshall depended to a large extent on his brother justices as well as on the learning of counsel which practiced before his court is rooted in three different sources. In the first instance, Marshall made no secret of the fact that his legal education had been acquired at home, with his father, and during his study at William and Mary College. Unlike many of his colleagues on the Bench, or, for that matter, the political and legal elite of his time, he had attended neither the American schools, such as they were, nor the prestigious European universities.4 Secondly, students of Marshall have been struck

4. I BEVERIDGE, supra note 2, at 174-176.
by his letters, which reveal a deference to Justice Story's erudition, and Story's Life and Letters has made much of Marshall's reliance on his younger colleague in preparing opinions and hunting up precedents. And finally, authorities on constitutional law have noted the surprising absence of legal citations in the opinions which were written by Marshall; comparing these opinions to the ones that were written by Story, they have concluded that Marshall preferred to base his conclusions on general legal principle because he did not have command of legal detail and precedent.

In dealing with the first source of the belief that Marshall was not well-versed in the law, it is easy enough to point out that, insofar as international law was concerned, a lack of formal education in the Eighteenth Century was not necessarily a drawback. Roscoe Pound has indicated that "the Civil law, natural law and admiralty law were not studied in the Inns of Court at that time." Rather, reading lists were prepared by judges, leaders of the local bar, or other prominent men of law for the use of law students. In the field of international law, the following classics were generally recommended: Grotius, Pufendorf, Vattel, Burlamaqui, and Rutherford. These were read by individual students on their own initiative, so that one cannot speak of any kind of uniformity in legal training. Necessarily, the early state courts were affected by this lack of professionalism:

Judicial organization went forward slowly and the personnel of the bench for some time was not such as to make judicial decision an active creative agency. In Massachusetts, of ten chief justices and twenty-three associates between 1692 and 1776, only one chief justice and two associate justices were lawyers. Two of the three justices of the highest court of New Jersey during the Revolution were not lawyers. Of the three justices in New Hampshire after independence, one was a clergyman and another a physician. A blacksmith sat on the highest court of Rhode Island from 1814 to 1818 and a farmer was chief justice of that state from 1819 to 1826.

5. CHARLES WARREN, THE STORY-MARSHALL CORRESPONDENCE (1819-1831), 4, 6, 12 (1942).
6. IV BEVERIDGE, supra note 2, at 120.
7. CORWIN, supra note 1.
9. Id. at 24-26.
10. Id. at 92.
Evidently, Marshall’s legal education, deficient though it was by modern standards, was more than adequate by the standards of the Eighteenth Century.

The attempt to find Marshall unread in the law on the basis of his personal writings and, particularly, on the basis of the deference shown to Justice Story in his letters must be judged in the light of what is known of the character of these two men. Marshall, on the one hand, was an extremely humble man, inclined to make light of his own talents and to praise the ability of his friends. Beveridge has cited innumerable testimonials to Marshall’s friendly, simple behavior with acquaintances and colleagues and his abhorrence of any pomp or ceremonial where he was concerned; in fact, he has likened him to Abraham Lincoln in wit, wisdom and modesty. And yet, his wisdom was recognized even in early years; John Adams, for instance, characterized him as “a plain man, very sensible, cautious, guarded, learned in the Law of Nations” when he appointed him to the commission which was later to be in the center of the XYZ affair. Story, on the other hand, delighted in feeling useful to his older colleagues and, in particular, to Marshall, to the degree that Marshall’s use of his talents became Story’s greatest point of pride. He was more or less in the position of the young prodigy who seeks to coax his master’s approval with the brilliance of his performance. Thus, the combination of Marshall’s modesty in his own behalf, his enthusiasm for his friend’s learning, and the latter’s eagerness to demonstrate his erudition may have led to the impression that Marshall was yielding to Story’s greater fund of legal knowledge.

The third source of the belief that Marshall lacked technical knowledge of the law as demonstrated by the lack of citation of precedents in his opinions can be examined in a number of ways. It has been suggested, for instance, that if Marshall failed to use precedents to bolster his arguments, it was because he felt that he was working in a legal vacuum in which no appropriate precedents existed, or that he believed that where they did exist, they did not materially add weight to his argument and were, therefore, superfluous. The lack of citations in those cases involving international law, including the great majority of

12. II Beveridge, supra note 2 facing plate at 228.
admiralty cases which Marshall had to decide can readily be explained in the light of the stage of development that branch of the law had attained at the time these opinions were written.

International law, known in Marshall’s time as the Law of Nations, was based on a limited number of sources, none of which were legislative in nature. The foremost source was a body of international usages and customs which were loosely recognized by civilized nations as acceptable norms of behavior in their mutual relationships. They had developed inchoately as self-imposed limitations in the mutual relations of Western European nations, and were not considered by the nations as universal legal principles to be applied in all situations and in all areas of the world. Significantly, there was no thought of applying these norms in dealing with non-Christian, non-white colonial peoples and societies. Even where these customs and usages were applied, there was no uniformity in content or degree of adherence, since the limitations which they imposed were not founded on any legal principles, theories, or philosophies; they were simply useful restrictions on behavior, based on the practice of international relations.

Another source of law could be found in the content of treaties and agreements between various European nations, but since these were rarely more than bilateral in nature they were not considered binding on any nation which was not a signatory to them. Such general legal principles as did exist, for instance, pacta sunt servanda, only referred to compliance with agreements rather than respect for well-established international norms of behavior not specifically contained in an agreement.

The third source of the Law of Nations in Marshall’s time consisted of a body of writings by publicists, beginning with Grotius and ending with Vattel. Here were the beginnings of the codification of international usages as well as the first attempts at prescriptive law. However, a serious division had developed in the views these writers had taken of the nature of international law. Neither the positivist nor the

15. Ziegler, supra note 3 at 12, gives a very revealing break-down of the opinions written by Marshall. “Between 1801 and the time of Marshall’s death in 1835, there were 1215 cases decided. Of these there were 62 involving constitutional questions, and 195 involving questions of international law or in some way affecting international relations. Of the total cases, Marshall delivered the opinion in 519; 36 of which were in constitutional law and 80 in international law, while he dissented in only 9 cases.”

natural law camp could claim that a preponderant number of nations, in their policy-making, considered their prescriptions as legally binding. In any case, in those areas of international law in which Marshall was to make his mark, no legal consensus had been achieved. In that branch of admiralty law which deals with the rights and obligations of neutrals toward belligerents and of belligerents toward neutrals, the body of law consisted exclusively of national claims and rules. Concepts of neutrality were still in a formative stage in which political imperatives played a far larger role than any established juridical principles. At the heart of the matter was a dispute between England, the foremost maritime power from the end of the Seventeenth Century on, and the lesser European powers, which were generally neutral in the frequent Anglo-French wars and which wished to protect their commerce from British interference in time of war. Some of the neutrals were able to secure their shipping by negotiating treaties with England which specifically guaranteed their neutral status; others were forced to submit to British power, regardless of their claims to the contrary. In either case, there was no question here of legal principles securing neutral rights. The United States position was, from the very beginning of the Republic, embodied in the Plan of 1776, which was a precondition in all treaties negotiated with foreign powers. This plan espoused the following principles:

[F]ree ships free goods, freedom of neutrals to trade in noncontraband between port and port of a belligerent, . . . restricted and carefully defined lists of contraband not including foodstuffs and naval stores and generally liberal and considerate treatment of neutral shipping.\textsuperscript{17}

The American position was in contravention to British practice, based on the famous Consolato del Mare (or Consolat del Mer) which had regulated Mediterranean commerce since the Thirteenth Century. French practice, when there was sufficient naval power to enforce it, was even more rigorous.\textsuperscript{18}

Although the American view of neutrality had been developed inde-

\textsuperscript{17} S. Bemis, A DIPLOMATIC HISTORY OF THE UNITED STATES 26 (5th ed. 1965).

\textsuperscript{18} "English practice had generally adhered to the formula of the Consolat del Mer, that neutral goods in an enemy ship should be free, but that enemy goods in a neutral ship might be condemned. The French, more severe, held that 'la robe d'ennemi confisque celle d'amis': a friend's goods in an enemy ship and a friend's ship with enemy goods were both subject to condemnation." J. Wolf, THE EMERGENCE OF THE GREAT POWERS, 198 (1962).
pendently, it was echoed by the lesser European maritime nations. In the war which developed between England and France as a consequence of French recognition of American independence, the Netherlands, the Scandinavian states, and the Russian Empire leagued together to preserve their neutrality rights in the light of liberal interpretations of neutrality law and formed the First Armed Neutrality in 1780. The following principles were established jointly, as proposed by Catherine the Great of Russia:

1. That neutral vessels may navigate freely from port to port and along the coasts of the nations at war.
2. That the effects belonging to subjects of the said Powers at war shall be free on board neutral vessels, with the exception of contraband merchandise.
3. That, as to the specification of the above-mentioned merchandise, the Empress holds to what is enumerated in the 10th and 11th articles of her treaty of commerce with Great Britain, extending her obligations to all the Powers at war.
4. That to determine what constitutes a blockaded port, this designation shall apply only to a port where the attacking Power has stationed its vessels sufficiently near and in such a way as to render access thereto clearly dangerous.
5. That these principles shall serve as a rule for proceedings and judgments as to the legality of prizes.

The Continental Congress attempted to use the similarity between this declaration and the Plan of 1776 as a means of acquiring wider recognition of American independence and sovereignty in Europe but was not successful in doing so. In fact, the Armed Neutrality of 1780 was not successful in establishing a liberal doctrine of neutrality, and its successor of 1800 failed completely in its design to deter British naval power. Bemis summed up the status of neutrality in international law when he stated:

In short, international law then as now was in a state of uncertainty and evolution. It may be said, however, . . . that the principle of the consolato del mare was still regarded as the prevailing international law in regard to the status of neutral property on the high sea, except when specifically set aside by particular treaties.

The liberal conception of neutrality rights was not incorporated into international law until the Declaration of Paris of 1856.\textsuperscript{21}

Quite clearly, then, the prize cases which were adjudicated in admiralty courts in England, France, and other well-established European maritime nations before and during Marshall's lifetime were merely expressions of national policy rather than statements of international law. They could not automatically serve as precedent or guidelines in American prize cases.

**JOHN MARSHALL'S CITATION OF PRECEDENTS AND AUTHORITIES IN PRIZE CASES**

The allegation that Marshall failed to support his decisions with citations of precedents or of authorities is partially substantiated by an examination of some twenty prize cases in which he either wrote the opinion of the Court or in which he dissented with the opinion of the majority of justices.\textsuperscript{22} It should be pointed out here, that a considerable number of cases so examined are no longer of any historical or judicial value and that they were chosen for analysis solely on the basis that they were prize cases, that is, cases in which international law played a large role in the arguments of counsel as well as in the formulation of decisions. It should be further noted that admiralty law, which is used to adjudicate prize cases, is a particularly difficult branch of legal science in that it is a municipal application of international law standards as interpreted by a municipal court.\textsuperscript{23}

Since the American legal system was in its infancy during Marshall's tenure as Chief Justice, the procedure of the Supreme Court hearing prize cases on appeal as well as the authorities cited by counsel and

\textsuperscript{21} Id. at 135.

\textsuperscript{22} The cases examined were as follows: The Gran Para, 20 U.S. (7 Wheat.) 471 (1822); United States v. Palmer, 16 U.S. (3 Wheat.) 610 (1818); Olivera v. The Union Insurance Company, 16 U.S. (3 Wheat.) 183 (1818); The Friendschaft, 16 U.S. (3 Wheat.) 14 (1818); The Anna Maria, 15 U.S. (2 Wheat.) 327 (1817); The Astrea, 14 U.S. (1 Wheat.) 125 (1816); The Mary and Susan, 14 U.S. (1 Wheat.) 25 (1816); The Nereide, 13 U.S. (9 Cranch) 388 (1815); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191 (1815); The Venus, 12 U.S. (8 Cranch) 253 (1814); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814); The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 116 (1809); Yeaton v. Fry, 9 U.S. (5 Cranch) 335 (1809); Rose v. Himely, 8 U.S. (4 Cranch) 241 (1808); Fitzsimmons v. The Newport Insurance Co., 8 U.S. (4 Cranch) 185 (1808); Jennings v. Carson, 8 U.S. (4 Cranch) 185 (1807); Maley v. Shattuck, 7 U.S. (3 Cranch) 438 (1806); Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801); Talbot v. Seeman (The Amelia), 5 U.S. (1 Cranch) 1 (1801).

\textsuperscript{23} THE LAW OF NATIONS—CASES, DOCUMENTS, AND NOTES 966 (H. Briggs ed. 1942).
justices had to follow foreign examples, borrowing from more highly developed judicial systems whenever possible and referring to foreign cases when necessary. Consequently, the municipal element referred to above consisted mainly of British admiralty practice, since this was the only legal tradition with which both counsel and justices were conversant. As will later be demonstrated, this created a number of great difficulties, since British practice and precedent could fit into American jurisprudence only to a limited degree.

With regard to the citation of cases and authorities, some general features which most opinions written by Marshall have in common become evident. From an examination of the selected prize cases it is clear that Marshall wrote his opinions exclusively in the light of counsel's argument in all but two cases. In the remainder, Marshall contented himself either with an examination of authorities and precedents cited by counsel, elaborating and critically commenting on the material in the light in which it was used by counsel, or completely disregarding authorities cited and arriving at his judgment by a logical analysis of the matters in contention. Of these cases, Marshall commented on citations by counsel in eight instances and failed to do so in ten.

In those cases in which Marshall echoed the citations of counsel, he showed some marked preferences. In the matter of precedent, his frequent use of Christopher Robinson's *Admiralty Reports*, which were published in six volumes in an English and in an American edition and which covered British admiralty cases from 1798 to 1808, demonstrated a great reliance on English admiralty practice. In particular, Marshall was fond of Sir William Scott's opinions, stating, "I respect Sir William Scott, as I do every truly great man; and I respect his decisions; nor could I depart from him on light grounds." Nevertheless, such reliance as was placed on British practice made Marshall and the outstanding members of the bar uncomfortable. In a spirited exchange between the two most outstanding attorneys of the day, William Pinckney and Robert Harper, this difficulty was brought into the open. Harper, counsel for the appellant, stated:

What is the law of nations? Not a rule adopted by one nation only, but the law of nature, of reason, and of justice applied to

---

24. The Nereide, 13 U.S. (9 Cranch) 388 (1815); and Brown v. United States, 12 U.S. (8 Cranch) 110 (1814). These two cases are generally conceded to be the most notable of the twenty cases cited earlier.

the intercourse of nations, and admitted by all such as are civilized. What is there in the Code of any other nation to support this rule? It is to be found only in the maritime code of Great Britain; which is not more binding upon us than that of any other maritime power.\textsuperscript{26}

Pinckney was clearly placed on the defensive by this statement; he replied by affirming the general principle which Harper had proclaimed, amending it lamely only to suit the needs of his own position:

But it is asked, is Great Britain to legislate for other nations? We say no. But this Court will pay great respect to the English decisions on the subject; especially as the rule has been acquiesced in by all the nations of Europe.\textsuperscript{27}

In his opinion, Marshall ruled on the appropriateness of using English cases as precedents in American courts:

The United States having, at one time, formed a component part of the British Empire, their prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it. It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British Courts, or that any recent rule of the British Courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.\textsuperscript{28}

Marshall's declaration is probably more important in the qualifications it made to the use of British precedent than in the principles it established. Clearly, American prize courts would use principles of international law as established in British courts and as accepted by courts of other European nations; but United States courts would not be bound by any British decisions which were self-serving, which reflected England's desire to use her preponderant naval power in concert with her admiralty law to defeat her enemies while robbing neutral mari-

\textsuperscript{26} Thirty Hogshead of Sugar v. Boyle, 13 U.S. (9 Cranch) 193 (1815).
\textsuperscript{27} Id. at 194.
\textsuperscript{28} Id. at 197-198.
time states of their neutrality rights. Marshall's rejection of cases "de-
cided on ancient principles" but "very unreasonable, or founded on a
construction reflected by other nations" is an unmistakable allusion to
the fact that American legal interests might be better served by the
construction these principles were given by the nations of the two
Armed Neutralities.

If Marshall was willing to follow counsel in their citation of foreign
cases with some reservations, what was his objective in citing authorities
independently without previous discussion by counsel? Previously, it
was mentioned that only two cases out of the twenty examined come
under this category. It is remarkable that in both of these cases, Mar-
shall's opinion served to reverse the judgment of a lower court which
had found against a neutral and had permitted the seizure of neutral
goods by a belligerent on the basis of British precedent. In the first case,2

counsel for the appellant protested the use of English law to condone
the seizure of his client's property:

But the practice of the British government is relied upon, as a
rule by which the Courts are to be governed in the present case.
It is admitted that the English courts of admiralty have condemned
vessels detained in port by an embargo, and found there at the
breaking out of hostilities: but it is explicitly denied that they
have ever condemned property found on land, in that situation.
1 Rob. 228. If, however, the English courts of admiralty have done
wrong, and proceeded against the modern law of nations in these
cases, this honorable Court will not, for that reason, adopt so un-
just a practice.3

In reversing the lower court decision, Marshall agreed with appellant's
counsel; he reviewed the appellant's citations, commented upon them
approvingly, and proceeded to cite Bynkershoek, an authority not men-
tioned in counsel's argument, to further strengthen his opinion:

Even Bynkershoek, who maintains the broad principle, that in war
everything done against an enemy is lawful; that fraud, or
even poison, may be employed against him; that a most unlimited
right is acquired to his person and property; admits that war does
not transfer to the sovereign a debt due to his enemy; and there-

30. Id. at 119.
fore, if payment of such a debt be not exacted, peace revives the
former right of the creditor; “because,” he says, “the occupation
which is had by war consists more in fact than in law.” He adds
to his observation on this subject, “let it not, however, be sup-
possed, that it is only true of actions, that they are not condemned
_ipso jure_, for other things also belonging to the enemy may be
concealed and escape condemnation.”

It is further significant that Story dissented vigorously and at length
from Marshall’s opinion in this case.

The second case in which Marshall cited materials not included in
counsel’s argument provides us with a classic definition of the free ship
free goods doctrine. The issue involved here was the status of the
goods of a neutral, in this instance a subject of Spain, which were found
on board an armed belligerent vessel, in this case of British registry
and traveling as part of a convoy, and which were condemned along
with the belligerent ship in the port of New York, where they were
brought by their captor, an American privateer. After going through
the District Court and the Circuit Court, which upheld the condemna-
tion of these neutral goods, the case came before the Supreme Court.
To support the right of the captors to the goods of the neutral found
on the belligerent ship, which had resisted capture, A. J. Dallas cited
a case decided in an English admiralty court by Sir William Scott.

In the case of _The Elsebe_, 5 _Rob_. 174 (Eng. ed.), one of the ques-
tions was whether the cargoes, belonging to the subjects of the
_Hans Towns_ laden on board Swedish vessels, and sailing under
Swedish convoy, were liable to condemnation? . . . Sir William
Scott, after stating that there was in the charter party an express
stipulation that the ship should sail with convoy, says, “But I will
take the case on the supposition that there was no such engage-
ment. The master associates himself with a convoy, the instruc-
tions of which he must be supposed to know; he puts the goods
under unlawful protection, and it must be presumed that this is
done with due authority from the owners, and for their benefit . . .
The Court has, therefore, thought it not unreasonable to apply
the strict principle of law, in a case not entitled to any favor, and
holds, as it does in blockade cases of that description, that the
master must be taken to be the authorized agent of the cargo,

31. _Id_. at 123.
32. _The Nereide_, 13 U.S. (9 Cranch) 388 (1815).
33. These were independent, sovereign, and neutral towns of the Hanseatic League.
that he has acted under powers from his employer. . . . To put the goods of one country on board the ships of another, would be a complete recipe for the safety of the goods with a trifling alteration, easily understood and easily practiced, while the mischief itself would exist in full force. 34

Pinckney, the second attorney for the captors, argued that under the principle of reciprocity, an American privateer might take the goods of a neutral Spaniard carried on board a belligerent ship, since Spain espoused the principle that enemy ships shall make enemy goods. To support his argument, he again cited a British precedent, in the form of a ruling by Sir William Scott:

It is said also that the rule of reciprocity applies only to the case of re-capture and salvage. But Sir W. Scott in the *Santa Cruz* (1 Rob. 53, Am. Ed.) says that "this principle of reciprocity is by no means peculiar to cases of re-capture: it is found also to operate in other cases of maritime law: at the breaking out of war it is the constant practice of this country to condemn property seized before the war, if the enemy condemns, and to restore if the enemy restores. It is a principle sanctioned by the great foundation of the law of England, *Magna Charta* itself; which prescribes that at the commencement of a war the enemy's merchants shall be kept and treated as our own merchants are treated in their country." 35

Counsel for the appellant countered the argument of Pinckney and of Dallas by clearly demonstrating that the captor's case rested on political justification rather than on international law and usage.

The rule of retaliation is not a rule of the law of nations. This violation of the law of nations by one nation does not make it lawful for the offended nation to violate the law in the same way. It is true that states may resort to retaliation as a means of coercing justice from the other party. But this is always done as an act of state, and not as the mere result of a judicial execution of the law of nations. . . . The cases alluded to by Sir W. Scott, in *The Santa Cruz*, are cases in which the government could lawfully exercise its discretion in receding from its acknowledged rights. Thus in the case of property seized at the breaking out of a war,
the government would have an unquestioned right to condemn or to release it. It was not the right to condemn which depended upon the rule of reciprocity, but the expediency. It was not a question of law, but of policy.\textsuperscript{36}

In finding for the appellant, Marshall drew largely on the writings of Bynkershoek and Vattel to demonstrate that the English practice of condemning neutral goods found on belligerent vessels was not acceptable to other maritime states.\textsuperscript{37} The capstone of his opinion was, however, that whereas these other maritime nations had been forced to accept British practice in the past in deference to overwhelming British naval might, they had now clearly indicated an intent to translate their theory on the law of condemnation into practice. To support this contention, Marshall enthusiastically endorsed the spirit of the Armed Neutrality:

\textit{The celebrated compact termed the armed neutrality, attempted to effect by force a great revolution in the law of nations. The attempt failed, but it made a deep and lasting impression on public sentiment. The character of this effort has been accurately stated by the counsel for the Claimants. Its object was to enlarge, and not in any thing to diminish the rights of neutrals. The great powers, parties to this agreement, contended for the principle, that free ships should make free goods; but not for the converse maxim; so far were they from supposing the one to follow as a corollary from the other, that the contrary opinion was openly and distinctly avowed. The king of Prussia declared his expectation that in future neutral bottoms would protect the goods of an enemy, and that neutral goods would be safe in an enemy bottom. There is no reason to believe that this opinion was not common to those powers who acceded to the principles of the armed neutrality.}\textsuperscript{38}

Again significantly, Justice Story dissented very learnedly and at great length from the opinion of the Court.

There are a number of general conclusions which can be deduced from an analytical examination of Marshall's prize cases. The first and most obvious of these is that in rendering his opinions, Marshall preferred to base his findings on authorities cited as part of the argument

\textsuperscript{36} Id. at 409-410.
\textsuperscript{37} Id. at 425.
\textsuperscript{38} Id. at 420.
of the contending parties and that he ventured beyond these authorities only when he felt that a major judicial point had to be made; that the legal foundations as laid down by counsel for this point were not perfectly secure; and that since he was working in something of a legal no-man's land, he had to make his meaning as well as the justification for his opinion absolutely clear. It is equally clear from looking at the cases that Marshall's facility in using authorities and precedents—his perfect ease in discussing, comparing, and weighing the fine points of international law—go far beyond what one would expect of a jurist who, in the process of hearing a case, has just been confronted with a body of legal materials that are entirely new and foreign to him. Obviously, in those cases in which he contented himself with comments on precedents and authorities already cited, he was following a self-imposed policy of avoiding extraneous arguments and unnecessary complications. The two dissenting opinions rendered by Justice Story in *Brown v. The United States* and *The Nereide*, in which he demonstrated his erudition by citing an overwhelming profusion of authorities, denote a departure from the style which was commonly accepted by the other justices on Marshall's Court. The prize cases opinions which were delivered for the Court by Justices Bushrod Washington, William Johnson, and Henry Livingston show the same severe restraint in the citation of precedents and authorities for which Marshall has been adjudged ignorant of the law.39

**Availability of Legal Materials in Marshall's Time**

There remains the problem of determining where John Marshall acquired his knowledge of international law, since he did not have the benefit of formal training in this discipline. Ziegler has attributed his learning the complexities of the law of nations at least in part to his experiences as a diplomatic envoy to Paris in the XYZ Affair.40 It seems certain that Marshall became acquainted with the law of neutrality

39. The following are some examples of cases in which these three justices delivered the Courts opinions: Washington delivered the opinion in *The Grotius*, 12 U.S. (8 Cranch) 456 (1814); and in *The Brig Alberta v. Moran*, 13 U.S. (9 Cranch) 359 (1815). Johnson delivered the opinion in *The Frances*, 13 U.S. (9 Cranch) 183 (1815); and in *The Mary and Susan*, 14 U.S. (1 Wheaton) 46 (1816). Livingston spoke for the Court in *Hazard v. Campbell*, 13 U.S. (9 Cranch) 205 (1815); and in *The Ruger*, 14 U.S. (1 Wheaton) 62 (1816). These and the previously cited cases may be conveniently found in I & II Prize Cases Decided in the United States Supreme Court (James Brown Scott ed. 1923).

40. Ziegler, supra note 3 at 15, 28.
during this mission, since the matter he was to negotiate was an agree-
ment by which the French government would refrain from seizing
American neutral shipping under the pretext of only doing what England
was permitted according to the provisions of the Jay Treaty. The frus-
trations Marshall was to endure in dealing with the blackmailing agents
of Talleyrand, the French foreign minister, are well known; since he
could not communicate with the proper authorities in person without
committing the United States government to the payment of a large
bribe, Marshall resolved to explain the American position in a long
memorial to Talleyrand. This was a reasoned, closely argued statement
which already demonstrated Marshall’s unique talents for explaining
a legal position in a clear, devastatingly convincing fashion. Drawing
on his knowledge of international law, he admitted that “Vattel, 1b. 3.
115, says, ‘that effects belonging to an enemy, found on board a neutral
ship, are seizable by the right of war,’” \(^\text{41}\) and that the Armed Neutrality
of 1780 was not binding on France insofar as it changed standards of
neutrality.\(^\text{42}\) Nevertheless, the treaty between the United States and
France of 1778 bespoke the fact that:

The desire of establishing universally the principle that neutral
bottoms shall make neutral goods, is, perhaps, felt by no nation
on earth more strongly than by the United States. Perhaps, no
nation is more deeply interested in its establishment. It is an
object they keep in view, and which, if not forced by violence
to abandon it, they will pursue in such manner as their own
judgment may dictate as being best calculated to attain it; but
the wish to establish a principle is essentially different from a
determination that it is already established.\(^\text{43}\)

We have here a statement which antedates Marshall’s judicial career by
three years, and which clearly indicates his understanding of the law
of neutrality as it was practiced in Europe and as the United States
wished it to be practiced in Europe and the United States. And this,
without the aid of well-informed lawyers to advise him and without
Story to explain these difficult matters to him.

Some twenty years later, Marshall expressed the same opinions with
regard to the rights and obligations of neutrals, but, as evidenced by the

\(^{41}\) II DOCUMENTS, LEGISLATIVE AND EXECUTIVE OF THE CONGRESS OF THE UNITED STATES
171 (W. Lowrie & M. St. Clair Clarke ed. 1832).
\(^{42}\) Id. at 174.
\(^{43}\) Id. at 172.
prize cases, he now marshalled the works of Grotius, Pufendorf, Bynkershoek, Burlamaqui, Azuni, and Chitty in support of his opinions, and not just Vattel's text. The obvious question arises: Where and how did he become acquainted with these authorities? Admittedly, Marshall's personal library was a small one; furthermore, a number of writers have commented on the lack of availability of legal materials in Marshall's time.

There is some evidence that the amount of published materials available late in the Eighteenth Century and early in the Nineteenth has been vastly underestimated. According to Lehmann-Haupt, American publications in law and related fields in the period 1639 to 1763 comprised fully 30.5 percent of the whole and ran behind theological publications only. The dollar value of book production in 1820 for the field of law was $200,000 and comprised almost 10 percent of the total; its value exceeded that of the publications in the fields of medicine and theology and was surpassed only by school books and classical books. An examination of the catalog of the Library of Congress reveals some surprisingly early American publications of international law classics. Vattel was printed in New York as early as 1787, with a second edition in 1796. Burlamaqui's Principles of Natural and Political Law was printed in Boston in 1792 and again in 1807. Azuni's The Maritime Law of Europe was published in New York upon its completion by the author in 1806. Bynkershoek, who will be discussed later in greater detail, was published in Philadelphia in 1810. There do not appear to be any early American editions of Pufendorf and Grotius, but since these authors were published in England in dozens of different editions, and since there was a brisk book trade between England and America before and after the Revolutionary War, it is safe to assume that representative works of these authors could be found on American book shelves.

Not much is known about Marshall's book-buying habits except that he seemed to follow impulse rather than design. Beveridge has described how, during the second year of his practicing law, Marshall spent a considerable sum of money buying bookcases and books, but all that is known about these new additions to his library is that they included the Lex Mercatoria Rediviva, a handbook of commercial law,

44. ZIEGLER, supra note 3 at 20. 1 Beveridge, supra note 2 at 184.
45. POUND, supra note 8 at 8, 9.
47. Id. at 123.
Kain's *Principles of Equity*, Blair's *Lectures*, Blackstone's *Commentaries on the Laws of England*, and the works of Machiavelli. His readings before becoming Chief Justice included Vattel, as evidenced by the memorial to Talleyrand, and Rutherford's *Institutes of Natural Law*, which he quoted as a member of the House of Representatives in 1800. Beyond this, nothing is known with any certainty; however, there is a good deal of circumstantial evidence to indicate the extent of his reading.

Henry Wheaton, who studied law in France and in England and who became the reporter of the Supreme Court, was highly regarded by Marshall. In 1815, he published his *Digest of the Law of Maritime Captures and Prizes*, with which Marshall undoubtedly was familiar, since the suggestion for the book had originated with Justice Story. In this text as well as in a number of legal articles which appeared in the *North American Review*, a periodical which was included in the Chief Justice's regular reading fare, he reflected his observations of British Courts:

> Learning, purity, and impartiality seem to preside in them. In this my opinion of the English tribunals I do not mean, however, to include the Court of Admiralty, which, though proceeding according to the law of nations, is confessedly under a political direction and governed in its decisions by considerations of state.

If Marshall had high regard for Wheaton, this feeling was enthusiastically reciprocated. In 1836, Wheaton published his *Elements of International Law*, which has since become a classic in the field, in which he supported some of his contentions with references to Marshall's Supreme Court opinions and even incorporated portions of the Chief Justice's decisions verbatim into his text. There can be no doubt that there was a great friendship between these two men, and that certainly in the period during which Wheaton was Court reporter (1816-1827),

---

51. *Id.* at 21.
52. XIV *Proceedings of the Massachusetts Historical Society* 347 (2nd series 1900-1901).
Marshall was familiar with the work of his young friend and in turn impressed the latter with his knowledge of international law.

Another clue to Marshall's reading habits can be found in his reaction to the publication of the Algernon Sidney letters in the Richmond Enquirer, a newspaper which fed the flames of distrust between Marshall and Jefferson and which was regarded as the latter's organ. The feud between the two Virginians was of long standing, being based as much upon differences of personality as those of politics. Marshall assumed that these letters had been written by Jefferson or at least at his instigation and feared their further publication. Actually, they had been written by Judge Roane, Jefferson's protégé, and Marshall was wise not to give in to the temptation of answering. In his letter to Story of September 18, 1821, he asked his colleague to intercede with John E. Hall, the editor of the American Law Journal, "an influential legal periodical published in Philadelphia," where he feared these accusations might be given wider circulation.

I am a little surprised at the request which you say has been made to Mr. Hall, although there is no reason for my being so. The settled hostility of the gentleman who has made that request to the judicial department will show itself in that & in every other form which he believes will conduct to his object. For this he has several motives, & it is not among the weakest that the department would never lend itself as a tool to work for his political power. The Batture will never be forgotten. Indeed, there is some reason to believe that the essays written against the Supreme Court were, in a degree at least, stimulated by that gentleman, and that although the coarseness of the language belongs exclusively to the author, its acerbity has been increased by his communications with the great Lama of the mountains. He may therefore feel himself in some measure required to obtain its republications in some place of distinction. But what does Mr. Hall purpose to do? I do not suppose you would willingly interfere so as to prevent his making the publication, although I really think it is in form & substance totally unfit to be placed in his law journal. I really think a proper reply to the request would be to say that no objection existed to the publication of any law argument against the opinion of the Supreme Court, but that the coarseness of its language, its personal & official abuse & its tedious prolixity constituted objections to the insertion of Algernon Sidney which were insuperable. If, how-

55. Corwin, supra note 1 at 55.
56. Id. at 183.
ever, Mr. Hall determines to comply with this request, I think he
ought, unless he means to make himself a party militant, to say
that he published that piece by particular request, & ought to sub-
join the masterly answer of Mr. Wheaton. I shall wish to know
what course Mr. Hall will pursue.\(^{57}\)

There are a number of references in this letter which are of the
greatest importance and which need explaining. The note about the
Batture referred to a famous 1812 case in which Edward Livingston, of
New York and New Orleans, sued Thomas Jefferson for $100,000
for failure to respect an injunction preventing agents of the former
President from evicting Livingston and his workers, who were in the
process of improving some alluvial land in New Orleans, the title to
which Livingston claimed. The controversy awakened the interest of
the entire country and brought the legal profession to a fever pitch of
excitement.\(^{58}\) Since the suit had been filed in the District Court of
Virginia, and since there was a good chance that Marshall would hear
it on appeals, the stage was set for a renewed conflict between Marshall
and Jefferson. As a result, a number of articles appeared in the press
about the impending case, and particularly in Hall’s *American Law
Journal*. Both Jefferson and Livingston prepared briefs which appeared
there\(^{59}\) as well as other writers, among them, Peter S. Du Ponceau, who
practiced law before the Supreme Court and was therefore known to
Marshall. There cannot be any doubt that Marshall followed the Batture
debate in the *American Law Journal*. His letter to Story, which was
quoted earlier, gives evidence of his familiarity with this journal. In
the second volume (1809), in which appeared the first article on the
Batture, there also appeared a translation of the *Consolato del Mare*,
apparently for the first time in the United States. In the same year, Hall
published his *Practice and Jurisdiction of the Court of Admiralty*,
which included an historical examination of the civil jurisdiction of the
court of admiralty, a translation of the Elizabethan Clerke’s *Praxis*, a
short collection of precedents, and some practical advice on how to

\(^{57}\) XIV MHS *Proceedings* 329-331 (2nd series 1900-1901). The invocation of
Wheaton’s defense of Marshall and the Court is further evidence of the spiritual kinship
between the two men.

\(^{58}\) IV *Beveridge*, supra note 2 at 111.

\(^{59}\) Beveridge’s note (4, p. 114) was mistaken in stating the year of publication of
Jefferson’s article as 1816. The article was actually published in the 5th Volume of the
journal, which appeared in 1814. Livingston published his article in Volume 2, 1809.
draft and file the proper legal papers in an admiralty case. In the third volume of the *American Law Journal* (1810), Hall published Du Ponceau's translation of Bynkershoek's *Treatise on the Law of War*, which included a list of thirty-six European authorities along with explanatory notes of what fields each of them covered; this article was a reprint of the same work, which appeared in book form in 1810. A number of other articles concerning international and admiralty law appeared in Hall's journal from 1808 to 1817. In 1808, there was the report of a Pennsylvania case dealing with letters of marque, capture, and admiralty law as well as a discussion of the French Council of Prizes. In 1813, there was a second article on the *Consolato del Mare*, a report on three British admiralty cases, and a review of the French *Code of Criminal Instruction* and *Ordonnance de la Marine*. The 1814 volume was almost exclusively devoted to the Batture case.

It should be clear, then, that the *American Law Journal* was a veritable mine of information about international law and European admiralty practice, that Marshall was well acquainted with the work of John Hall, its editor, and that he read the journal regularly to follow the articles on the Batture case, with which he was so greatly concerned. Furthermore, it should be pointed out that these articles appeared before the deluge of prize cases descended upon the Supreme Court and John Marshall in 1814.

A final word should be added about the legal sources which were available to Marshall. On August 2, 1832, Marshall wrote to Story that:

> Congress has passed an act to increase and improve its law library, a copy of which has just been transmitted to me by the librarian. It appropriates 5000 $ for the present year, to be expended in the purchase of law books by the librarian, in pursuance of such catalogue as shall be furnished by the Chief Justice of The United States. I wish it had been "as shall be furnished by Mr. Justice Story." 

Marshall then asked Story to provide him with his recommendations for additions to the library, and Story obviously complied with this request, since Marshall, in his letter of September 22, 1832, advised:

60. John E. Hall, *The Practice and Jurisdiction of the Court of the Court of Admiralty* (1809).


62. XIV MHS Proceedings 349 (2nd series 1900-1901).
I have curtailed your list of books very much for two reasons. One, that by far the greater number you have mentioned are already in the library.

Apparently, the Library of Congress was well stocked with law books; and John Marshall was well acquainted with its contents.

**Conclusion**

The inescapable conclusion with regard to Marshall's contributions to the development of an American neutrality doctrine is that these were founded upon a clear knowledge and understanding of the classical writings in international law; on the other hand, his knowledge of case law was of necessity limited, in spite of the fact that some British law reports were available in the United States. Considering the fact that cases decided in European courts inevitably bore the mark of political interest, in which the dictates of law were frequently overshadowed by political necessity, this gap in Marshall's legal knowledge forced him into a greater reliance on the writings of publicists. Most of these appeared in American editions at a relatively early stage, indicating thereby that the American legal community shared Marshall's interest in founding American jurisprudence on a base wider than that provided by British precedent.

One of the results of this independence was the free ships free goods doctrine. This doctrine, which in substance recapitulated the principles of the Armed Neutralties, differed from these in that it was not tainted by any obvious political connection with the old European rivalries which pitted British naval supremacy against other European maritime states. The fundamental appeal of the American doctrine, as it was enunciated by Marshall, was due to the claim that it was founded on principles of natural justice. Its universality, reflecting the writings of the natural law of the Eighteenth Century, made it widely acceptable where a similar doctrine was rejected because of its political inspiration.

To a large degree, Marshall's technique of opinion writing was responsible for the wide acceptance of this doctrine. His moderation in rejecting only those precedents which clearly reflected political motivation of a nationalistic sort, as well as his citation of authorities not mentioned in the briefs in order to make a telling point in enlarging

63. *Id.* at 351.
the rights of neutrals served to make these principles widely accepted. Portions of his opinions were used verbatim in international law texts, and only during the Civil War was the doctrine abandoned by the United States, and then only on political grounds.

---