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## NOTES

### INTERNATIONAL NORMS AND POLITICS IN THE MARSHALL COURT'S SLAVE TRADE CASES

Ten years ago, an essay in *The American Historical Review* suggested that renewed attention to the Founding's international context presaged a "paradigm shift in early American history."<sup>1</sup> A decade of scholarship exploring the Founding's reliance on international law and its concerns about national security and international recognition have gone a ways toward fulfilling this prophecy.<sup>2</sup> Yet the international legal history of the pivotal period that followed the Founding — when the country emerged as an Atlantic power — continues to rest uneasily on the trope of a blunt transition between the supposedly naïve universalism of the eighteenth-century Enlightenment and the apparently shrewd realism of the late nineteenth century.<sup>3</sup>

Two cases have stood as emblems of this transition: *United States v. La Jeune Eugenie*<sup>4</sup> (1822) and *The Antelope*<sup>5</sup> (1825). Both were leading U.S. cases on the international law of the slave trade, which was in flux in the early nineteenth century.<sup>6</sup> Both Britain and the United States passed acts in 1807 that outlawed the trade as a matter of domestic law in 1807 and 1808 respectively.<sup>7</sup> Britain then campaigned to outlaw the trade internationally, beginning with agreements at the post-Napoleonic conferences.<sup>8</sup> By the early 1820s, when the capture of foreign slavers by U.S. vessels on the ground that they had violated in-

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<sup>1</sup> Drew R. McCoy, Book Review, 109 AM. HIST. REV. 897, 897 (2004).

<sup>2</sup> See Tom Cutterham, *The International Dimension of the Federal Constitution*, 48 J. AM. STUD. 501 (2014) (surveying literature); Robbie J. Totten, *Security, Two Diplomacies, and the Formation of the U.S. Constitution: Review, Interpretation, and New Directions for the Study of the Early American Period*, 36 DIPLOMATIC HIST. 77 (2012) (same).

<sup>3</sup> See, e.g., MARK WESTON JANIS, AMERICA AND THE LAW OF NATIONS 1776–1939, at 61–69 (2010); PETER ONUF & NICHOLAS ONUF, FEDERAL UNION, MODERN WORLD 3 (1993); Eileen P. Scully, *The United States and International Affairs, 1789–1919*, in 2 THE CAMBRIDGE HISTORY OF LAW IN AMERICA 604, 613–16 (Michael Grossberg & Christopher Tomlins eds., 2008); David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT 7, 35 (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

<sup>4</sup> 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551).

<sup>5</sup> 23 U.S. (10 Wheat.) 66 (1825).

<sup>6</sup> See generally Jean Allain, *The Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade*, 78 BRIT. Y.B. INT'L L. 342 (2008).

<sup>7</sup> See W.E. BURGHARDT DU BOIS, THE SUPPRESSION OF THE AFRICAN SLAVE-TRADE TO THE UNITED STATES OF AMERICA, 1638–1870, at 94–108, 131–33 (1896). The U.S. Constitution forbade Congress from prohibiting the foreign slave trade until 1808. U.S. CONST. art. I, § 9, cl. 1. The Act of March 2, 1807, ch. 22, 2 Stat. 426, accordingly barred the foreign slave trade beginning January 1, 1808.

<sup>8</sup> See DU BOIS, *supra* note 7, at 133–36.

international law presented the question of the foreign slave trade's international legal status to the federal courts, the answer was far from certain. In *La Jeune Eugenie*, Justice Joseph Story, riding circuit, ruled that the slave trade violated the law of nations, whereas Chief Justice John Marshall held in *The Antelope* that international law permitted the trade. Scholars have conventionally read these cases to represent a shift from the Enlightenment's reliance on natural law — that is, universal principles deducible by reason — to the late nineteenth century's focus on positive law, the view that only the command of the sovereign was law.<sup>9</sup> By implication, the move from natural law to positive law mapped onto a parallel move from universalism to parochialism because Story's natural-law position suggested that both municipal and international law were part of a universal legal order, whereas Marshall's positive-law approach allowed for as many distinct legal orders as there were sovereigns.<sup>10</sup>

However, this understanding of the Marshall Court's slave trade cases overlooks not only Story's and Marshall's mixed reliance on natural law and positive law but also the outcomes of the cases and, crucially, their political context. Although Story condemned the slave trade under international law, he ultimately transferred the French slaver in the case to the French king out of comity, rather than confiscate it according to his theory of international law. And while Marshall condoned the slave trade under international law, he ended up releasing more Africans aboard the captured slaver than the lower courts had by viewing the evidence establishing title to the Africans in the light least favorable to the alleged owners.

This Note recovers the political context from the correspondence and papers of the primary actors to show that, despite their differences over international law's nature, Story and Marshall ultimately adopted similar strategies toward international law that neutralized the implications of their theoretical differences. Both Justices resolved the spe-

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<sup>9</sup> See DAVID J. BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW* 6–7 (2002); MARK E. BRANDON, *FREE IN THE WORLD* 93–94 (1998); DON E. FEHRENBACHER, *THE SLAVEHOLDING REPUBLIC* 192–93 (2001); Scully, *supra* note 3, at 615–16; Sloss, Ramsey & Dodge, *supra* note 3, at 35–36; see also GERALD T. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* 243 (1970); CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE 167–70* (1996); JANIS, *supra* note 3, at 42–43; 2 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 44–46 (1922); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE*, 1815–35, at 678 (*The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States*, Vols. 3–4, 1988).

<sup>10</sup> Cf. Andreas L. Paulus, *The Emergence of the International Community and the Divide Between International and Domestic Law*, in *NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW* 216, 217 (Janne Nijman & André Nollkaemper eds., 2007) (“Traditionally, the relationship between international and domestic law was conceptualized either as inter-relationship of two distinct legal orders (dualism) or as the offspring of one universal legal order (monism).”).

cific disputes before them in ways that offset their opining on international norms, which allowed them to appeal to audiences with conflicting interests. Story gave the international community a progressive anti-slave trade case while simultaneously protecting the Monroe Administration in its delicate relations with France. Marshall, writing after the international legal status of the slave trade had become more politically toxic, guarded against provoking the South with an anti-slavery decision based in international law, but he deftly handled the resolution of the case in order to protect his Court from appearing brazenly proslavery to elites in the Atlantic world.

This revisionist study of the Marshall Court's adjudication of international law thus moves beyond the dichotomy between natural law and universalism on the one hand and positive law and parochialism on the other to show how the Justices' similar strategic approaches to international law blurred these equations. Story's universalist theory accompanied a sovereigntist outcome, and Marshall's insular theory paired with relief that advanced the antislavery goals of the emerging international legal regime. Their decisions are thus best understood not solely through theoretical change but also through the opposing political constraints they faced and their efforts to satisfy audiences with conflicting interests.

## I. THE CASES

On May 17, 1821, Lieutenant Robert Stockton's *Alligator* captured *La Jeune Eugenie* off the West African coast.<sup>11</sup> Stockton had naval orders to seize slavers flying the American flag, yet his mission was easily defeated so long as American slave traders could raise a foreign flag as a shield.<sup>12</sup> For this reason, he controversially decided to capture *La Jeune Eugenie* on suspicion of its being an American slaver, even though it flew French colors.<sup>13</sup>

Stockton brought *La Jeune Eugenie* to Boston, where the U.S. District Attorney and Daniel Webster, Stockton's attorney, filed a libel for the vessel's forfeiture based on its alleged violation of U.S., international, and French laws prohibiting the slave trade.<sup>14</sup> The French consul claimed the vessel on behalf of its alleged owners and, on the French government's own behalf, separately objected to the court's jurisdiction.<sup>15</sup> After the district court ruled in favor of the French

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<sup>11</sup> *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 833 (C.C.D. Mass. 1822) (No. 15,551).

<sup>12</sup> SAMUEL J. BAYARD, A SKETCH OF THE LIFE OF COM. ROBERT F. STOCKTON 51 (1856).

<sup>13</sup> See R. JOHN BROCKMANN, COMMODORE ROBERT F. STOCKTON, 1795–1866, at 46–48 (2009).

<sup>14</sup> *La Jeune Eugenie*, 26 F. Cas. at 833, 840.

<sup>15</sup> *Id.* at 840.

claimants, the United States appealed to the Circuit Court for the District of Massachusetts, where Story heard the case in autumn 1821.<sup>16</sup>

Story first found that *La Jeune Eugenie* had been slave trading — even though it had no captured Africans on board — because it was equipped for the slave trade.<sup>17</sup> If the vessel had been American, it would have been an easy case because the vessel would have clearly been subject to forfeiture on this ground alone without any inquiry into international and French laws.<sup>18</sup> But the slaver's nationality was uncertain. *La Jeune Eugenie* was built in the United States and was recently American-owned, yet it had a French flag and French papers, which Story explained in “ordinary cases”<sup>19</sup> would suffice to establish ownership.<sup>20</sup> However, he was familiar with “the artifices of fraud” used by American slave traders who would “conceal their interests under a foreign flag and passports.”<sup>21</sup> Accordingly, Story declined to resolve the nationality question without “something more” as evidence of ownership.<sup>22</sup>

Nevertheless, Story proceeded to the merits of whether *La Jeune Eugenie* violated international and French law, “supposing the vessel . . . to be French.”<sup>23</sup> He first concluded that the slave trade violated the law of nations.<sup>24</sup> But the remedy was limited because of “the equality and sovereignty of nations, which admit no common superior.”<sup>25</sup> Story adopted the rule announced by Sir William Grant in the English admiralty case *The Amedie*<sup>26</sup> (1810), whereby a slaver was subject to capture by any country unless its owners proved that the municipal laws of their own country permitted the slave trade.<sup>27</sup> Sir William Scott had seemingly contradicted *The Amedie* seven years later in *Le Louis*<sup>28</sup> (1817), which held that the slave trade did not violate the law of nations.<sup>29</sup> Although Story tried to distinguish *Le Louis*, he ultimately conceded that *The Amedie* and *Le Louis* simply stood as

<sup>16</sup> *Id.* at 834.

<sup>17</sup> *Id.* at 840.

<sup>18</sup> See Act of Apr. 20, 1818, ch. 91, § 2, 3 Stat. 450, 451.

<sup>19</sup> *La Jeune Eugenie*, 26 F. Cas. at 840.

<sup>20</sup> *Id.* at 833, 840–41.

<sup>21</sup> *Id.* at 841. On the evasion of U.S. slave trade laws and their lax enforcement, see generally DU BOIS, *supra* note 7, at 123–30.

<sup>22</sup> *La Jeune Eugenie*, 26 F. Cas. at 841.

<sup>23</sup> *Id.* at 842.

<sup>24</sup> *Id.* at 847.

<sup>25</sup> *Id.*

<sup>26</sup> (1810) 12 Eng. Rep. 92 (P.C.).

<sup>27</sup> *La Jeune Eugenie*, 26 F. Cas. at 847–48. Although *The Amedie* suggested that there would be no legal violation if a slaver's home country permitted the trade, see 12 Eng. Rep. at 96, Story interpreted the rule to mean that there was still a violation but it would be “a wrong without a remedy,” *La Jeune Eugenie*, 26 F. Cas. at 847.

<sup>28</sup> (1817) 165 Eng. Rep. 1464 (Adm. Ct.).

<sup>29</sup> *Id.* at 1477–78.

a “conflict of authority.”<sup>30</sup> Story also concluded that the slave trade violated French law.<sup>31</sup> If *La Jeune Eugenie* had been French, he explained, the French claimants would forfeit title,<sup>32</sup> in which case “[t]he property, then, must either be condemned to the United States generally . . . or it must . . . be delivered up to the sovereign of France.”<sup>33</sup>

Ultimately, at the end of his lengthy discussion of the merits, Story abruptly declined jurisdiction and handed the vessel over to the French king.<sup>34</sup> His legal basis was unclear. He cited no legal authority for his claim that he had the power to give the vessel to France.<sup>35</sup> The legal ground could not have been a violation of U.S. or international law, either of which would have required forfeiture.<sup>36</sup> Story had said that the surrender of the vessel to France was a possible remedy for violating French law,<sup>37</sup> but he never resolved whether *La Jeune Eugenie* was French and hence subject to French law.<sup>38</sup> Thus, the most plausible reading is that Story simply declined jurisdiction out of comity.<sup>39</sup> As he wrote at his opinion’s conclusion: “[T]he American courts of

<sup>30</sup> *La Jeune Eugenie*, 26 F. Cas. at 849. Story suggested that *Le Louis* was consistent with *The Amedie* primarily because, in *Le Louis*, the captured slaver’s municipal law permitted the slave trade, and it was “perfectly clear” under *The Amedie* “that it was necessary, that a prohibitory [municipal] law . . . should concur with the public law of nations, before a foreign tribunal could apply the penalty of confiscation.” *Id.* But Story could not distinguish Scott’s holding that the law of nations permitted the slave trade.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 850.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 851.

<sup>35</sup> *Cf. id.* at 850 (reasoning by inverse corollary where he was “not aware of any obstacle in the constitution of a court of admiralty, proceeding in rem, to the adoption of such a practice” of delivering up the vessel to France). Notably, he did *not* rely on a proposed tortured reading of *The Schooner Exchange v. M’Faddon*, 11 U.S. (7 Cranch) 116 (1812). The French Minister to the United States had proposed *The Schooner Exchange* to Secretary of State John Quincy Adams as a possible ground for declining jurisdiction. See 5 MEMOIRS OF JOHN QUINCY ADAMS 378 (Charles Francis Adams ed., 1875) [hereinafter ADAMS MEMOIRS]. And the Monroe Administration adopted this proposal in its official position. See Executive Practice in Certain Cases, 1 Op. Att’y Gen. 504, 505 (1821). Story likely recognized that *The Schooner Exchange* was not on point, given that its holding declining jurisdiction over a foreign naval vessel visiting a U.S. port rested on the fact that it was a *public* ship. See 5 ADAMS MEMOIRS, *supra*, at 380–81 (noting that Attorney General William Wirt privately objected to the Administration’s reliance on *The Schooner Exchange* because it involved a public vessel).

<sup>36</sup> Act of Apr. 20, 1818, ch. 91, § 2, 3 Stat. 450, 451 (U.S. forfeiture requirement); *La Jeune Eugenie*, 26 F. Cas. at 845 (noting that if *La Jeune Eugenie* violated the law of nations by slave trading, “confiscation of the property ought to follow”).

<sup>37</sup> *La Jeune Eugenie*, 26 F. Cas. at 850.

<sup>38</sup> *Cf. id.* at 842 (“But supposing the vessel to be established to be French . . .”).

<sup>39</sup> Story’s opinion had previously found that the court had the power to hear the case, which further suggests that his decision to decline jurisdiction turned on comity rather than legal authority. The opinion asserted that “the court certainly ha[d] jurisdiction” over alleged violations of “our laws.” *Id.* at 850. As for the alleged violations of international and French laws, Story explained that once a vessel was in an admiralty court’s custody, the court could deliver the vessel only to a party that had established title to it. *Id.* at 842. Accordingly, even if *La Jeune Eugenie*

judicature are not hungry after jurisdiction in foreign causes, or desirous to plunge into the endless perplexities of foreign jurisprudence."<sup>40</sup>

Marshall decided *The Antelope* three years later, but the events leading to that case occurred one year before *La Jeune Eugenie*'s capture.<sup>41</sup> The *Arraganta* was an American-outfitted privateer with a commission from the Uruguayan revolutionary José Artigas to capture Spanish and Portuguese merchant ships.<sup>42</sup> The privateers raided an American vessel, several Portuguese ships, and, on March 23, 1820, a Spanish ship named the *Antelope* off the coast of Africa for the enslaved Africans on board.<sup>43</sup> The *Arraganta* also kept the *Antelope*, and after the *Arraganta* later wrecked, the privateers transferred the roughly 280 Africans captured from the various ships to the *Antelope*.<sup>44</sup> By June the privateers had sailed the *Antelope* to the coast of Florida, where a U.S. Treasury ship captured the vessel after a half-day chase and brought it to Savannah.<sup>45</sup>

The Spanish and Portuguese vice consuls sought restitution of the Africans taken from the Spanish and Portuguese vessels.<sup>46</sup> The United States, represented by its District Attorney in Georgia, sought forfeiture of the Africans under U.S. slave trade law.<sup>47</sup> The federal district court ruled that the Africans should be restored to Spain and Portugal, except for those taken from the American vessel, who were to be released from slavery.<sup>48</sup> On appeal, Justice William Johnson, riding circuit, affirmed.<sup>49</sup> On his view, the slave trade was permitted by the law of nations, and thus only the Africans taken from the American vessel were to be released from slavery under U.S. law.<sup>50</sup> There were no records of which Africans came from which ship, however, so Johnson ruled that a lottery was to determine their fate.<sup>51</sup>

The only issue appealed to the Supreme Court was the restitution of Africans taken from the Spanish and Portuguese vessels to Spain

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had been French and not subject to "our municipal laws," *id.*, the court would still have had jurisdiction over the alleged violations of international and French laws because the court would have needed to establish whether the claimants had proper title, *id.* at 842, 850.

<sup>40</sup> *Id.* at 851.

<sup>41</sup> On *The Antelope*, see generally JOHN T. NOONAN, JR., *THE ANTELOPE* (1977).

<sup>42</sup> *The Antelope*, 23 U.S. (10 Wheat.) 66, 67 (1825); NOONAN, *supra* note 41, at 26–27.

<sup>43</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 67–68; NOONAN, *supra* note 41, at 26–29.

<sup>44</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 68; NOONAN, *supra* note 41, at 29–30.

<sup>45</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 68; NOONAN, *supra* note 41, at 30–32.

<sup>46</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 68. Although both countries had agreed with Britain to ban the slave trade north of the equator, see DU BOIS, *supra* note 7, at 134–35, the slave trading in this case had occurred below the equator, NOONAN, *supra* note 41, at 28.

<sup>47</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 68; NOONAN, *supra* note 41, at 40, 44.

<sup>48</sup> NOONAN, *supra* note 41, at 57–59.

<sup>49</sup> *Id.* at 62.

<sup>50</sup> DONALD G. MORGAN, *JUSTICE WILLIAM JOHNSON* 136–37 (1954); NOONAN, *supra* note 41, at 62–63.

<sup>51</sup> NOONAN, *supra* note 41, at 64–65.

and Portugal.<sup>52</sup> Marshall's opinion for the Court began with a discussion of whether the slave trade violated the law of nations and, relying on *Le Louis*, concluded that it did not.<sup>53</sup> "It follows," Marshall wrote, "that a foreign vessel engaged in the African slave trade, captured on the high-seas in time of peace, by an American cruiser, and brought in for adjudication, would be restored."<sup>54</sup> Story did not dissent, but he probably disagreed internally. He confided in a friend several years later that "[he] always thought that [he] was right, and continue[d] to think so."<sup>55</sup>

With "[t]he general question being disposed of," Marshall transitioned to "the circumstances of the particular case" — that is, the fate of the Africans taken from the Spanish and Portuguese vessels.<sup>56</sup> Marshall observed that the United States was obligated by Pinckney's Treaty with Spain to restore "property" rescued from pirates.<sup>57</sup> (He was silent as to Portugal.) But who carried the burden of proof regarding whether the Africans were property or free persons, and was "former possession" sufficient proof of property ownership?<sup>58</sup> The Court was split three to three on these evidentiary questions, so it affirmed the restitution of the Africans from the Spanish and Portuguese ships to Spain and Portugal respectively.<sup>59</sup> Marshall, however, clarified that "no principle is settled."<sup>60</sup>

Next, Marshall reviewed the precise number of Africans to be restored to Spain and Portugal,<sup>61</sup> even though their counsel had protested that the question of how many Africans came from the Spanish and Portuguese ships had not been appealed.<sup>62</sup> Estimates by witnesses of the number of Africans taken from the Spanish vessel ranged from "ninety odd" to 166.<sup>63</sup> In the lower court, Johnson had allotted 166 Africans (to be prorated to account for deaths) to Spain,<sup>64</sup> but the Court reduced this number to ninety-three — the smallest number supported

<sup>52</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 81.

<sup>53</sup> *Id.* at 118–22.

<sup>54</sup> *Id.* at 123.

<sup>55</sup> Letter from Joseph Story to Ezekiel Bacon (Nov. 19, 1842), in 2 LIFE AND LETTERS OF JOSEPH STORY 430, 431 (William W. Story ed., 1851) [hereinafter STORY].

<sup>56</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 123.

<sup>57</sup> *Id.* at 126; Treaty of Friendship, Limits and Navigation, U.S.-Spain, art. IX, Oct. 27, 1795, 8 Stat. 138, 142.

<sup>58</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 126; see also *id.* at 123–26.

<sup>59</sup> *Id.* at 126–27. Justice Thomas Todd did not participate due to illness. NOONAN, *supra* note 41, at 105.

<sup>60</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 126.

<sup>61</sup> *Id.* at 127–28.

<sup>62</sup> *Id.* at 88.

<sup>63</sup> *Id.* at 127–28.

<sup>64</sup> Decree of William Johnson, Dec. 28, 1821, *The Antelope*, microformed on U.S. Supreme Court Appellate Case Files, Feb. 11–Aug. 5, 1822, roll no. 59 (Nat'l Archives Microfilm Publ'ns).

by testimony.<sup>65</sup> The Court also reversed Johnson's allotment of 130 Africans to Portugal in its entirety on the ground that no Portuguese owner had claimed them,<sup>66</sup> even though the Portuguese vice consul tried to claim them on the absent owner's behalf.<sup>67</sup> Because five years had passed without the owner coming forward, Marshall was suspicious that "the real owner belong[ed] to some other nation," perhaps the United States, "and fe[lt] the necessity of concealment."<sup>68</sup> The Africans whom Marshall redirected to U.S. custody were eventually released from slavery and transported to Liberia.<sup>69</sup>

## II. THEORIES OF INTERNATIONAL LAW

The conventional understanding of the cases as reflecting a transition from the Enlightenment's natural law universalism to the late nineteenth century's parochial emphasis on positive law draws from their discussions of the slave trade's status under the law of nations.<sup>70</sup> Story's exegesis of that issue resonated with natural law. He wrote that the law of nations "rests" on "the eternal law of nature" and that "the law of nations may be deduced, first, from the general principles of right and justice."<sup>71</sup> He explained that "it may be unequivocally affirmed, that every doctrine, that may be fairly deduced by correct reasoning from the rights and duties of nations, and the nature of moral obligation, may theoretically be said to exist in the law of nations."<sup>72</sup> This description of law's deducibility from "right reason" was consistent with classical expositions of natural law.<sup>73</sup> From there, Story described the moral principles the slave trade violated before declaring it "an offence against the universal law of society," even though some countries had not expressly banned it.<sup>74</sup>

Marshall, in contrast, wrote that the law of nations was based in positive law. He conceded "[t]hat [the slave trade] is contrary to the law of nature will scarcely be denied."<sup>75</sup> But "[w]hatever might be the answer of a moralist to this question," he asserted, "a jurist must

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<sup>65</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 132.

<sup>66</sup> Decree of William Johnson, Dec. 28, 1821, *The Antelope*, *supra* note 64.

<sup>67</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 129–30, 132–33.

<sup>68</sup> *Id.* at 130.

<sup>69</sup> See NOONAN, *supra* note 41, at 134–36.

<sup>70</sup> See sources cited *supra* note 9.

<sup>71</sup> *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551).

<sup>72</sup> *Id.*

<sup>73</sup> MARCUS TULLIUS CICERO, *On the Commonwealth*, in ON THE COMMONWEALTH AND ON THE LAWS 1, 71 (James E.G. Zetzel ed. & trans., Cambridge Univ. Press 1999) (n.d.); see also JAMES MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 79 (1971) (describing Cicero as a major influence on Story's understanding of natural law).

<sup>74</sup> *La Jeune Eugenie*, 26 F. Cas. at 847; see also *id.* at 846–47.

<sup>75</sup> *The Antelope*, 23 U.S. (10 Wheat.) 66, 120 (1825).

search for its legal solution, in those principles of action which are sanctioned by *the usages, the national acts, and the general assent*, of that portion of the world of which he considers himself as a part, and to whose law the appeal is made.”<sup>76</sup> Marshall called this inquiry into the practices of nations “the test of international law.”<sup>77</sup> On Marshall’s view, there was a “perfect equality of nations,” whereby one nation could not bind another, so unanimity was required to change the law of nations.<sup>78</sup> It followed then that because the slave trade’s illegality was “not admitted by all,” it could not violate the law of nations.<sup>79</sup>

However, the differences in the Justices’ views about natural law should not be overstated.<sup>80</sup> To start with, both Justices variously invoked natural law and positive law, albeit to different degrees.<sup>81</sup> In *La Jeune Eugenie*, although Story treated natural law as international law’s primary foundation, he also described “the customary observances and recognitions of civilized nations” and “the conventional or positive law” as additional bases.<sup>82</sup> “What, therefore, the law of nations is, *does not rest upon mere theory*,” he explained, “but may be considered as modified by practice, or ascertained by the treaties of nations at different periods.”<sup>83</sup> Thus, in concluding that the slave trade violated the law of nations, he pointed to not only its “violation of some of the first principles, which ought to govern nations” but also the “conferences, acts, or treaties” of European nations condemning the slave trade — what he described as “the sense of Europe upon this point.”<sup>84</sup> Moreover, Story’s theory of natural law had substantial practical limits. Although natural law imposed obligations, other nations often lacked the right to enforce them.<sup>85</sup> As Story wrote: “No nation has ever yet pretended to be the *custos morum* of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.”<sup>86</sup> As for Marshall, although he did not acknowledge natural law

<sup>76</sup> *Id.* at 121 (emphasis added).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 122.

<sup>79</sup> *Id.* at 116.

<sup>80</sup> See ROBERT M. COVER, *JUSTICE ACCUSED* 102 (1975); R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY* 349 (1985).

<sup>81</sup> See John Fabian Witt, *A Social History of International Law: Historical Commentary, 1861–1900*, in *INTERNATIONAL LAW IN THE U.S. SUPREME COURT*, *supra* note 3, at 164, 171 (calling Story and Marshall “situational natural lawyers and situational positivists”).

<sup>82</sup> *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C.D. Mass. 1822) (No. 15,551).

<sup>83</sup> *Id.* (emphasis added); see also Joseph Story, *Law of Nations*, in 9 *ENCYCLOPAEDIA AMERICANA* 141, 141–42 (Francis Lieber ed., 1843).

<sup>84</sup> *La Jeune Eugenie*, 26 F. Cas. at 846.

<sup>85</sup> *Id.* at 847.

<sup>86</sup> *Id.* Story drew from Vattel, who distinguished “the *natural* or *necessary* law of nations” from “the *positive law of nations*,” where the former, as “*internal law*,” was “always obligatory in

as a ground for decision in *The Antelope*, he was hardly an opponent of natural law there or elsewhere. *The Antelope* still denounced the slave trade under natural law.<sup>87</sup> And in other cases, particularly those concerning the Contract Clause, Marshall readily made use of natural law theory.<sup>88</sup>

Finally, it is hazardous to draw conclusions from the Justices' theories of international law because the outcomes of the cases were at odds with those theories. As much as Story condemned the slave trade under natural law, he ultimately delivered the French slaver to France even though his theory of international law stipulated that the captor's government should keep a slaver where, as was the case here, the slaver's domestic laws forbade the trade.<sup>89</sup> His declining to adjudicate a slaver's case solely because the crew had raised a foreign flag was a major setback for opponents of slavery who wanted U.S. courts and the U.S. Navy to assert a more active role in combating the slave trade. The discussion of international law's nature and stance on the slave trade was therefore dicta. Story claimed he had "reluctantly to travel over the whole merits of the cause" to ensure that the alleged owners did not have title, but the violation of French law alone provided such assurance.<sup>90</sup> He could have simply begun his opinion where he ended it: by declining jurisdiction and giving the ship to France.<sup>91</sup> Per Story's own description of the case, the opinion had only "abstractly considered" that the slave trade violated international law.<sup>92</sup> And although Marshall held that international law permitted the slave trade in light of the practices of certain nations, he redirected hundreds more of *The Antelope's* captives to U.S. custody and eventual release from slavery than the lower courts had.

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point of conscience" only and thus "the decisions of that law must be modified by the voluntary law" in order to be made "external law, which [nations] are to observe towards each other." EMER DE Vattel, *THE LAW OF NATIONS* 78 (Béla Kaposy & Richard Whatmore eds., Liberty Fund 2008) (1758); see also Story, *supra* note 83, at 141.

<sup>87</sup> 23 U.S. (10 Wheat.) 66, 120 (1825).

<sup>88</sup> See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810) (leaving it ambiguous whether its holding that the Georgia legislature could not rescind fraudulent land grants was grounded in "general principles" or "particular provisions of the constitution"); see also Nathan Isaacs, *John Marshall on Contracts: A Study in Early American Juristic Theory*, 7 VA. L. REV. 413, 420-26 (1921); T.M., No. 10. — *Obligation of Contracts*, 24 AM. JURIST & L. MAG. 257, 261-63 (1841).

<sup>89</sup> *La Jeune Eugenie*, 26 F. Cas. at 845, 851.

<sup>90</sup> *Id.* at 851.

<sup>91</sup> By stating lots of dicta only to ultimately decline jurisdiction, Story thus adopted a similar strategy to Marshall's opinion in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>92</sup> Letter from Joseph Story to Ezekiel Bacon, *supra* note 55, at 431 (emphasis added).

## III. OFFSETTING NORMS AND POLITICS

A problem with the conventional reading of these cases is that it overlooks the political constraints on the Justices' decisionmaking. What the political context reveals is that the Justices' approaches to adjudicating international law were, surprisingly, more similar than different. Both Story and Marshall appealed to multiple audiences by writing opinions whose conclusions about international norms were offset by the specific resolutions of the cases. Thus, although they certainly disagreed over international law's nature, the significance of this difference was undercut by their similar efforts to neutralize the political implications of their theories.

Indeed, *La Jeune Eugenie* was more a product of compromise than of natural law. Story found a way to appease antislavery groups by concluding that the slave trade violated the law of nations while simultaneously defusing the Monroe Administration's anxiety about its delicate relations with France by resolving the case in France's favor. It was a vigilant move in a case that had a high profile, even though it was only a lower court decision. Webster wrote Story from Philadelphia to report that "[e]verybody is in expectation here of receiving your opinion in the case of 'The Young Eugenie.' It must come out, and that soon."<sup>93</sup> Southern newspapers, too, covered the incident.<sup>94</sup> Story managed the close attention by writing an opinion that could mean different things to different groups.<sup>95</sup>

On one hand, Story and other opponents of slavery described the opinion as a denunciation of the slave trade under international law. Story actively promoted this reading of his opinion. Shortly after writing it, he sent a copy to Sir William Scott, the author of *Le Louis*, with a note highlighting the international legality issue as "[t]he great question" in the case and pointing out that his view differed from Scott's.<sup>96</sup> For the rest of his life, Story would proudly remind opponents of slav-

<sup>93</sup> Letter from Daniel Webster to Joseph Story (Jan. 3, 1821), in 1 THE PRIVATE CORRESPONDENCE OF DANIEL WEBSTER 313, 314 (Fletcher Webster ed., 1857).

<sup>94</sup> See, e.g., Francis B. Faures, *Ship News*, CITY GAZETTE (South Carolina), Aug. 8, 1821, at 3.

<sup>95</sup> Story's strategy was particularly effective because of the case's hybrid nature. *La Jeune Eugenie* contributed to both international law and American law, but it had different meanings within each legal system. Any discussion of international norms by a court was a source of international law. See, e.g., 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 18 (1826); 1 HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 48 (1836). But only discussion essential to the case's outcome was binding American law (within the District of Massachusetts). See, e.g., *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821). Under international law, *La Jeune Eugenie* stood for the illegality of the slave trade and authorized the surrender of a foreign slaver to the captor's government, unless the slave trade was expressly permitted by the slaver's domestic laws. Under U.S. law, however, Story's opinion suggested differently that a U.S. court should simply not adjudicate captures of foreign slavers.

<sup>96</sup> Letter from Joseph Story to Lord Stowell (Jan. 2, 1822), in 1 STORY, *supra* note 55, at 357, 358.

ery that he had once ruled that the slave trade violated the law of nations.<sup>97</sup> And Story's targeted audience on this point read the opinion as he had hoped. One contemporary abolitionist wrote in a Boston newspaper that if only the Supreme Court would sanction Story's decision, "it[] would certainly do more towards the abolition of the slave trade than any municipal regulations, however severe."<sup>98</sup> Webster pushed for the opinion's publication as an antislavery pamphlet,<sup>99</sup> and another Northerner praised the decision for "do[ing] much towards destroying this horrible traffic in human flesh."<sup>100</sup> Although Story's decision stopped short of resolving the case based on its denunciation of the slave trade, opponents of slavery could find satisfaction in the rhetorical denunciation alone given their low expectations. As Lieutenant Stockton's father observed before the case was decided, "as long as the General Govt is under absolute Southern influence there can be no bona fide wish to put an end to the Slave trade," and thus he hoped merely that his son could get "out of this scrape, at least without costs and damages."<sup>101</sup> *La Jeune Eugenie's* dicta on international law allowed Story to exceed these expectations — and perhaps to calm his own conscience as a sincere opponent of the slave trade and slavery's expansion (albeit not an abolitionist).<sup>102</sup>

At the same time, for those concerned about *La Jeune Eugenie's* implications for international and sectional politics, the decision could stand for a sovereign country's right to be free from interference with its regulation of slavery because Story's opinion suggested that courts should not adjudicate captures of foreign slavers. Secretary of State John Quincy Adams reported to France that "the *Jeune Eugénie* was at your request delivered over to the consul of France at Boston."<sup>103</sup> After a brief explanation of the decision, a draft of Adams's letter elaborated on the international norm France sought to protect: "The government of the United States is fully sensible that no officer of theirs can by authority from them assume to act as the High Justiciar

<sup>97</sup> See, e.g., Letter from Joseph Story to Ezekiel Bacon, *supra* note 55, at 431.

<sup>98</sup> Letter to the Editor, *La Jeune Eugenie*, BOS. DAILY ADVERTISER, Jan. 29, 1822, at 2.

<sup>99</sup> See Letter from Daniel Webster to Joseph Story, *supra* note 93, at 314.

<sup>100</sup> Letter from Jeremiah Mason to Joseph Story (Feb. 5, 1822), in 1 STORY, *supra* note 55, at 359, 359; see also Letter from Jeremiah Mason to Joseph Story (Jan. 8, 1822), in JEREMIAH MASON, MEMOIR, AUTOBIOGRAPHY AND CORRESPONDENCE OF JEREMIAH MASON 253, 253 (Lawyers' Int'l Publ'g Co. 1917) (1873).

<sup>101</sup> Letter from Commodore R.F. Stockton to Daniel Webster (Nov. 5, 1821), in 15 DANIEL WEBSTER, THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 278 n.2, 279 n.2 (1903).

<sup>102</sup> See Paul Finkelman, *Joseph Story and the Problem of Slavery: A New Englander's Nationalist Dilemma*, 8 MASS. LEGAL HIST. 65, 69–84 (2002); see also NEWMYER, *supra* note 80, at 351.

<sup>103</sup> Letter from John Quincy Adams to Baron Hyde de Neuville (Feb. 22, 1822), in 7 WRITINGS OF JOHN QUINCY ADAMS 210, 210 (Worthington Chauncey Ford ed., 1917) [hereinafter ADAMS WRITINGS].

of the seas."<sup>104</sup> And one month after Story decided the case, Attorney General William Wirt, in recommending to President James Monroe that he honor France's similar request to deliver up "the Africans found on board the French brig *La Pensée*, on her recapture from the pirates,"<sup>105</sup> was able to write that "it was determined in the case of the 'Jeune Eugénie' that we had no right to meddle with the flag of France."<sup>106</sup>

The Monroe Administration had put heavy pressure on Story to honor the flag's sovereignty. Late in the litigation,<sup>107</sup> Adams sent the Administration's views to the District Attorney,<sup>108</sup> who then passed on to Story the "suggestion . . . to yield up the vessel to the French government."<sup>109</sup> Thus, in *La Jeune Eugenie*, Story wrote that he was aware that the case had "become the subject of diplomatic intercourse between our government and that of France."<sup>110</sup> His opinion publicly protested that "[the court] cannot seek shelter under the wings of executive authority."<sup>111</sup> But he conceded privately that he was "aware that some difficulties have been suggested by the American Government on this subject, and it would certainly ill become me to censure or doubt the policy it has seen fit to adopt."<sup>112</sup> The "difficulties" to which Story alluded reflected both foreign and sectional politics.

The Monroe Administration was mostly concerned about upsetting France. The French Minister to the United States, Baron Hyde de Neuville, wrote Adams twice to "demand" the return of *La Jeune Eugenie* to France.<sup>113</sup> And Neuville visited Adams's office, unhappily, after the case's argument to again press his case.<sup>114</sup> Albert Gallatin, the U.S. Minister to France, reported from Paris during the litigation that a recent conversation with the French Minister for Foreign Affairs

turned principally on the cases of the French vessels taken on the coast of Africa by the Alligator, Captain Stockton, and sent to the United States for adjudication on the pretence of their being concerned in the slave-

<sup>104</sup> *Id.* at 212. However, Adams struck this line from the final version. *Id.* at 212 n.1.

<sup>105</sup> Restoration of Africans Recaptured from Pirates, 1 Op. Att'y Gen. 534, 534 (1822).

<sup>106</sup> *Id.* at 535.

<sup>107</sup> United States v. La Jeune Eugenie, 26 F. Cas. 832, 850 (C.C.D. Mass. 1822) (No. 15,551) ("at a late period in this cause").

<sup>108</sup> 5 ADAMS MEMOIRS, *supra* note 35, at 398.

<sup>109</sup> *La Jeune Eugenie*, 26 F. Cas. at 850.

<sup>110</sup> *Id.* at 840.

<sup>111</sup> *Id.*

<sup>112</sup> Letter from Joseph Story to Lord Stowell, *supra* note 96, at 357.

<sup>113</sup> 5 ADAMS MEMOIRS, *supra* note 35, at 360, 378; *see also* BROCKMANN, *supra* note 13, at 47 (quoting a letter from the French consul to Adams that complained of "[t]he unheard of violence of the Commandant of the Alligator who had in no case nor under any pretence whatever the right of arresting and visiting any French vessel").

<sup>114</sup> 5 ADAMS MEMOIRS, *supra* note 35, at 377-78.

trade. . . . He . . . expressed himself with uncommon warmth on the cases in question. The seizure of vessels under the French flag at a time of general peace was, he said, a flagrant and intolerable violation of the law of nations. Such pretension, if insisted upon by the United States, must necessarily be resisted.<sup>115</sup>

President Monroe was “embarrassed” by the situation,<sup>116</sup> and he called two lengthy cabinet meetings to discuss the emerging diplomatic crisis.<sup>117</sup> His cabinet was splintered. Secretary of Treasury William Crawford and Secretary of War John Calhoun, both Southerners, and Monroe himself, a Virginian, thought that the President should order the court to deliver the vessel to France under his foreign affairs powers.<sup>118</sup> However, Attorney General Wirt, also from Virginia, and Secretary of the Navy Smith Thompson, from New York, argued that the President should not interfere with the judicial process,<sup>119</sup> particularly out of their concern not to let a foreign flag “shield” slavers from U.S. law.<sup>120</sup> After some initial waffling,<sup>121</sup> Adams, a New Englander, took a middle position by proposing that the Administration send Story a “suggestion” that the court should give France the vessel.<sup>122</sup> This position eventually won. In his formal advisory opinion on the matter, Wirt advised the Administration to “disclose”<sup>123</sup> to the court the President’s view “that the seizure of ‘*La Jeune Eugénie*’ by the United States schooner *Alligator* . . . was a violation of the sovereignty of the King of France.”<sup>124</sup> He asserted that doing so would constitute “no interference with judicial authority and independence,”<sup>125</sup> as it would be

<sup>115</sup> Letter from Albert Gallatin to John Quincy Adams (Nov. 16, 1821), in 2 THE WRITINGS OF ALBERT GALLATIN 212, 213 (Henry Adams ed., 1879).

<sup>116</sup> 5 ADAMS MEMOIRS, *supra* note 35, at 366; *see also id.* at 378.

<sup>117</sup> *See id.* at 380–81, 389.

<sup>118</sup> *Id.* at 380, 391; *see also* Letter from James Monroe to Daniel Brent (Sept. 15, 1821), in 6 JAMES MONROE, THE WRITINGS OF JAMES MONROE 193, 193–94 (Stanislaus Murray Hamilton ed., 1902) (indicating that his “first impression” of the case, *id.* at 193, was that “we ought to give the vessel to the Consul of France,” *id.* at 194); Letter from James Monroe to Daniel Brent (Sept. 17, 1821), in 6 MONROE, *supra*, at 195, 195 (reaffirming his first impression); Letter from James Monroe to John C. Calhoun (Sept. 24, 1821), in 6 MONROE, *supra*, at 198, 199 (“Had we not better surrender her to the French consul, according to the request of the French Minister, altho’ she might have been navigated by American citizens, and owned by them also?”).

<sup>119</sup> *See* 5 ADAMS MEMOIRS, *supra* note 35, at 380–81, 389–90.

<sup>120</sup> *See id.* at 381, 388.

<sup>121</sup> After Adams had met privately with Stockton, he had initially supported not interfering with the court. *See* Letter from John Quincy Adams to Daniel Brent (Sept. 19, 1821), in 7 ADAMS WRITINGS, *supra* note 103, at 178, 178. But he changed his mind within a few days. *See* Letter from John Quincy Adams to Daniel Brent (Sept. 22, 1821), in 7 ADAMS WRITINGS, *supra* note 103, at 179, 179.

<sup>122</sup> 5 ADAMS MEMOIRS, *supra* note 35, at 381.

<sup>123</sup> Executive Practice in Certain Cases, 1 Op. Att’y Gen. 504, 505 (1821).

<sup>124</sup> *Id.* at 504–05.

<sup>125</sup> *Id.* at 505.

“a mere suggestion.”<sup>126</sup> It was this “suggestion” that Story invoked in *La Jeune Eugenie* upon declining jurisdiction.<sup>127</sup>

Three key foreign policy priorities were at the heart of the Monroe Administration’s troubles. As Adams wrote in his diary, although *La Jeune Eugenie* was “of very insignificant import in [it]sel[f],” it was “very important from circumstances and principles connected with [it].”<sup>128</sup> Most significantly, the Administration was determined to avoid any suggestion that the right to search vessels on the high seas during wartime might extend to peacetime, too — an extension that Britain was then seeking by treaty.<sup>129</sup> From the U.S. perspective, Britain had abused the wartime right of search during the recent Napoleonic Wars, which was a cause of the War of 1812.<sup>130</sup> Although Americans had recognized that the Royal Navy had a right to board neutral vessels during wartime, they objected to the British practice — rooted in the British view that royal subjects could not acquire a new citizenship — of searching U.S. ships for British-born Americans to impress them into the Royal Navy.<sup>131</sup> Americans were thus deeply suspicious of any extension of that right’s scope in what they perceived to be an effort to become “the policeman of the seas.”<sup>132</sup> When Monroe discussed *La Jeune Eugenie*, he consistently brought up its possible implications for a peacetime right of search.<sup>133</sup> Adams, too, saw this issue as the most significant aspect of the crisis.<sup>134</sup> He reassured the French Minister to the United States that he “presumed the vessel would ultimately be delivered up, as we utterly disclaimed the right of searching French vessels in time of peace, and were resisting to the utmost the effort of

<sup>126</sup> *Id.* at 506.

<sup>127</sup> *United States v. La Jeune Eugenie*, 26 F. Cas. 832, 850 (C.C.D. Mass. 1822) (No. 15,551).

<sup>128</sup> 5 ADAMS MEMOIRS, *supra* note 35, at 366.

<sup>129</sup> See HUGH G. SOULSBY, *THE RIGHT OF SEARCH AND THE SLAVE TRADE IN ANGLO-AMERICAN RELATIONS, 1814–1862*, at 14–19 (1933).

<sup>130</sup> See DONALD R. HICKEY, *THE WAR OF 1812*, at 11–12, 40–41, 43–44 (2012); ALAN TAYLOR, *THE CIVIL WAR OF 1812*, at 411 (2010).

<sup>131</sup> TAYLOR, *supra* note 130, at 102–06.

<sup>132</sup> DU BOIS, *supra* note 7, at 136; see also BRADFORD PERKINS, CASTLEREAGH AND ADAMS 275–76 (1964); SOULSBY, *supra* note 129, at 17–19; Allain, *supra* note 6, at 357.

<sup>133</sup> See, e.g., Letter from James Monroe to Daniel Brent (Sept. 15, 1821), *supra* note 118, at 193 (“[W]e should disclaim all right to seize foreign vessels, of any & every nation, engaged in the slave trade & forbear to seize those sailing under foreign flags, untill an arrangement on that point is made with foreign powers. It is not so much a question of what our law will sanction, as of what policy dictates in support of our general principles respecting search &c.”); Letter from James Monroe to Daniel Brent (Sept. 17, 1821), *supra* note 118, at 196 (“We should be guarded, in the pursuit of this object, to give no countenance by any act of ours to the right of search, which may be applied to other purposes.”); *id.* at 196–97 (warning that the American seizure of foreign ships “might give some countenance to the practice of impressment,” *id.* at 197); Letter from James Monroe to Daniel Brent (Sept. 24, 1821), in 6 MONROE, *supra* note 118, at 202, 202 (mentioning his “anxiety to avoid countenancing in any manner, the British doctrine respecting the right of search”).

<sup>134</sup> See 5 ADAMS MEMOIRS, *supra* note 35, at 388.

Great Britain to obtain such a right by treaty.”<sup>135</sup> In fact, it was only because Wirt did not share Adams and Monroe’s view that the case implicated the right of search that he took a hard line against France in the Administration’s internal deliberations.<sup>136</sup> For Wirt, the right to capture a slaver was similar to the right to capture a vessel for piracy, where anyone could make the capture but did so at one’s own risk of trespass if the vessel turned out not to be a pirate ship.<sup>137</sup> In other words, the right of search authorized a navy vessel to search as many ships as it liked with impunity while it looked for international law violations. However, without a right of search, although a navy vessel had authority to capture a pirate ship, it would be liable for trespass every time it boarded a ship that ultimately did not shelter pirates. The legal distinction was fine, but the practical consequences were enormous. In *La Jeune Eugenie*, Story was careful to adopt reasoning analogous to Wirt’s in order to avoid any implication that the United States recognized a peacetime right of search.<sup>138</sup>

A second foreign policy priority jeopardized by *La Jeune Eugenie* pertained to ongoing U.S.-French negotiations over tariffs. France had adopted high tariffs on goods imported from foreign merchant vessels to help restore the French carrying trade after the Napoleonic Wars. Yet it insisted that the United States honor Article VIII of the 1803 Louisiana Purchase treaty, which guaranteed French ships most-favored nation status in Louisiana ports “forever”<sup>139</sup> — meaning France wanted the same generous trading terms for French merchant ships that British ships received. The United States was willing to lower its own tariffs against goods imported from French ships, but only in exchange for reciprocity.<sup>140</sup> The ensuing negotiations were so tense that in the month of *La Jeune Eugenie*’s argument, the French Minister to the United States personally threatened the Secretary of State that France would declare war over the issue.<sup>141</sup> By the end of 1821, when Story decided *La Jeune Eugenie*,<sup>142</sup> the two sides still could not reach an agreement. In Monroe’s annual message to Congress in December he warned that “in consequence the restrictive regu-

<sup>135</sup> *Id.* at 378.

<sup>136</sup> *See id.* at 387.

<sup>137</sup> *See id.* at 390.

<sup>138</sup> *See* United States v. *La Jeune Eugenie*, 26 F. Cas. 832, 842–45 (C.C.D. Mass. 1822) (No. 15,551).

<sup>139</sup> Treaty Between the United States of America and the French Republic, Apr. 30, 1803, art. VIII, 8 Stat. 200, 204.

<sup>140</sup> SAMUEL FLAGG BEMIS, JOHN QUINCY ADAMS AND THE FOUNDATIONS OF AMERICAN FOREIGN POLICY 450–57 (1981 ed.).

<sup>141</sup> 5 ADAMS MEMOIRS, *supra* note 35, at 416.

<sup>142</sup> Although William Mason, the court reporter, published the decision in 1822, Story issued it in December 1821. *See* WILLIAM P. MASON, REPORT OF THE CASE OF *THE JEUNE EUGENIE* (1822) (noting, at its title page, that the case was “[d]etermined” in “December, 1821”).

lations which had been adopted on [France's] part, being counter-vailed on the part of the United States, the direct commerce between the two countries in the vessels of each party has been in a great measure suspended."<sup>143</sup> The *La Jeune Eugenie* episode only fanned the fire. While writing to the Secretary of State on the tariff negotiations, the French Minister to the United States demanded that *La Jeune Eugenie* be delivered to France.<sup>144</sup> And the French Minister for Foreign Affairs complained to the U.S. Minister in Paris that "there was a fatality attached to our affairs, which tended perpetually to impede an arrangement [on tariffs] by throwing in the way incidents of the most irritating nature."<sup>145</sup>

Finally, there was the specter of French intervention in the Americas. This threat was partly responsible for inspiring the Monroe Doctrine — announced soon after in 1823 — that declared the United States's resistance to further European intervention in the Americas.<sup>146</sup> Of the European powers in the early 1820s, France posed one of the most credible threats of intervention, either for its own ends or to squash insurrection in Latin America on behalf of Spain — where it would intervene in 1823 to prop up Ferdinand VII.<sup>147</sup> (The perceived threat, however, was probably never that real.<sup>148</sup>) In the winter of 1821 to 1822, faced with the threat of renewed French colonial activity in the Americas, during a high-stakes trade war, while scrupulously guarding against an expansion of the right of search, the United States was not eager to provoke France over a slaver. Thus, Story could get away with a rhetorical scolding of the slave trade under international law, but only provided that French interests were protected in his resolution of the case's outcome.

The sectional politics of slavery also weighed on the litigation, albeit less significantly. France's counsel subtly reminded Story of the case's sectional hazard in his argument's conclusion: "As to slavery, generally, it is a subject to be touched with some tenderness in this country. In our Northern clime, we do not want, and cannot use slaves. . . . It is far otherwise in the South."<sup>149</sup> Story did not need a reminder, and his opinion mostly sought to avoid any attack on slavery itself. As he wrote to Justice Bushrod Washington shortly after deciding *La Jeune Eugenie*, "I have not meddled at all with the question of the right of

<sup>143</sup> Fifth Annual Message (Dec. 3, 1821), in 6 MONROE, *supra* note 118, at 203, 205.

<sup>144</sup> See 5 ADAMS MEMOIRS, *supra* note 35, at 360.

<sup>145</sup> Letter from Albert Gallatin to John Quincy Adams, *supra* note 115, at 213.

<sup>146</sup> See DEXTER PERKINS, A HISTORY OF THE MONROE DOCTRINE 50–51 (rev. ed., 1955); see also BEMIS, *supra* note 140, at 538 (noting France's "ambitions in Latin America").

<sup>147</sup> See PERKINS, *supra* note 146, at 50–51.

<sup>148</sup> See *id.* at 51–53.

<sup>149</sup> United States v. La Jeune Eugenie, 26 F. Cas. 832, 839 (C.C.D. Mass. 1822) (No. 15,551).

slavery in general.”<sup>150</sup> Like in many of his slavery cases, Story was willing to privilege his commitment to nationalism — that is, the survival of the Union — over his antislavery sympathies.<sup>151</sup> In any event, Story’s rebuke to the slave trade would have been understood as distinct from an attack on slavery because the distinction between slavery and the slave trade was a safe one in the winter of 1821 to 1822. After all, many Southerners outside the Deep South championed slavery yet had supported closing the foreign slave trade in order to decrease the risk of slave insurrection by reducing the black population and to increase the economic value of the Upper South’s surplus slaves.<sup>152</sup>

A lot changed, however, in the few years between *La Jeune Eugenie* and *The Antelope*. An open judicial attack on the slave trade under international law became less politically palatable in the United States, but a very different matrix of foreign-policy priorities gave Marshall flexibility to nevertheless find something to offer antislavery groups in his resolution of the case.

Most significantly, this short interim witnessed a radicalization of the proslavery movement in response to a succession of slave uprisings along the Atlantic rim. The 1822 Denmark Vesey slave revolt in Charleston and the 1823 slave rebellion in British Demerara intensified Southerners’ fears about abolitionists’ influence on their black populations.<sup>153</sup> Although slave insurrections continued to rouse disquiet over the growing size of the black population, which might suggest disapproval of the foreign slave trade, Southerners blamed these insurrections on (foreign) abolitionists, like those behind Britain’s effort to suppress the slave trade.<sup>154</sup> They believed such foreign meddling was inspiring slave resistance and feared that foreign cooperation against the slave trade could be a stepping stone to foreign cooperation against slavery itself. Finally, those in the Deep South who had consistently opposed the domestic regulation of the slave trade had special reason to be opposed to its international regulation, given that international enforcement was proving less lax than the American variety.<sup>155</sup>

Amid this fear, the Senate killed a treaty with Britain that would have included the slave trade within the international definition of piracy and permitted the capture of slavers on the coasts of Africa, the

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<sup>150</sup> Letter from Joseph Story to Bushrod Washington (Dec. 21, 1821), <http://historical.ha.com/itm/autographs/u.s.-presidents/-george-washington-washington-family-archive-/a/6060-38004.s> [<http://perma.cc/B968-NS8X>].

<sup>151</sup> See generally Finkelman, *supra* note 102.

<sup>152</sup> See DU BOIS, *supra* note 7, at 94; PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS* 175 n.82 (1996).

<sup>153</sup> See EDWARD BARTLETT RUGEMER, *THE PROBLEM OF EMANCIPATION* 57–67, 78–91 (2008).

<sup>154</sup> See *id.*

<sup>155</sup> See DU BOIS, *supra* note 7, at 129–30.

United States, and the West Indies.<sup>156</sup> Under pressure from the House of Representatives, Secretary of State Adams and the Monroe Administration had reluctantly come to terms in early 1824 on this treaty, which they rationalized as a modest expansion of the right to capture pirates without introducing an unacceptable right to search *all* vessels during peace.<sup>157</sup> However, supporters in the Senate of one of Adams's rivals in the 1824 presidential election, Treasury Secretary William Crawford from Georgia, sought to discredit Adams by stirring up a "panic" over the treaty's possible implications for slavery and the right of search.<sup>158</sup> They managed to amend the treaty in a manner unacceptable to Britain by striking the right of search along the U.S. coast.<sup>159</sup> In their argument in *The Antelope*, Spain and Portugal were quick to remind the Supreme Court of this turn of events, noting that "[n]o treaty has yet been ratified with any foreign power, by which they engage to co-operate with the United States in the prohibition" of the slave trade.<sup>160</sup>

Marshall was tuned in to the sectional politics of slavery in *The Antelope*. In discussing the slave trade's standing under international law, he chose not to provoke the South on an issue that had become more politically explosive since *La Jeune Eugenie*, even though his holding that the slave trade did not violate the law of nations might have gone against his own initial convictions.<sup>161</sup> In late 1823, Marshall wrote to Story that he believed Justice William Johnson had recently "hung himself"<sup>162</sup> with his (widely reported<sup>163</sup>) circuit court decision in *Elkison v. Deliesseline*<sup>164</sup> (1823). The decision enraged proslavery Southerners by voiding a South Carolina law passed after the Vesey revolt<sup>165</sup> that imprisoned all visiting blacks, whether free or not, while their vessels docked at South Carolina ports.<sup>166</sup> Marshall's letter included a candid account of his anxiety over Southern hostility to the Court. He noted his surprise at the amount of "irritation" the

<sup>156</sup> See 2 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 922-27 (1906); SOULSBY, *supra* note 129, at 27-38.

<sup>157</sup> SOULSBY, *supra* note 129, at 27, 35.

<sup>158</sup> *Id.* at 35-36.

<sup>159</sup> See *id.* at 37.

<sup>160</sup> *The Antelope*, 23 U.S. (10 Wheat.) 66, 105 (1825).

<sup>161</sup> Story reported to a friend after *La Jeune Eugenie* that Marshall "thinks I am right, but the questions are new to his mind." Letter from Joseph Story to Jeremiah Mason (Feb. 21, 1822), in MASON, *supra* note 100, at 256, 256.

<sup>162</sup> Letter from John Marshall to Joseph Story (Sept. 26, 1823), in 9 THE PAPERS OF JOHN MARSHALL 338, 338 (Charles F. Hobson ed., 1998) [hereinafter MARSHALL].

<sup>163</sup> See Scott Wallace Stucky, *Elkison v. Deliesseline: Race and the Constitution of South Carolina*, 1823, 14 N.C. CENT. L.J. 361, 386-92 (1984).

<sup>164</sup> 8 F. Cas. 493 (C.C.D.S.C. 1823) (No. 4,366).

<sup>165</sup> See Stucky, *supra* note 163, at 373-75.

<sup>166</sup> *Elkison*, 8 F. Cas. at 496.

decision produced and told Story that “fuel is continually adding to the fire at which the *exaltées* are about to roast the judicial department.”<sup>167</sup> Virginia had a similar seaman’s law that had been challenged before Marshall’s circuit court, about which Marshall wrote: “[A]s I am not fond of butting against a wall in sport, I escaped on the construction of the act.”<sup>168</sup> Marshall was cognizant of the risk of butting against the wall, if not hanging himself, in *The Antelope*. Indeed, Marshall feared precisely the type of trap into which Attorney General Wirt fell when Georgia Governor George Troup seized on Wirt’s oral argument for the United States in *The Antelope* to attack Wirt and the Monroe Administration as being against slavery.<sup>169</sup> Wirt had to write to each Justice to confirm that he never suggested in his argument that the federal government should abolish or otherwise interfere with slavery.<sup>170</sup> Marshall knew what line to toe, writing back immediately that he had “no recollection of your having uttered, in any form, the sentiment imputed to you.”<sup>171</sup>

Yet although Marshall guarded against openly provoking the South on slavery, he still managed to offer something to those opposed to slavery’s expansion. An entirely proslavery decision might have inflamed the North, which had only recently reached a (temporary) truce with the South on the slavery issue in the 1820 Missouri Compromise. Moreover, the antislavery position had become morally prestigious in the Atlantic world by the early nineteenth century,<sup>172</sup> and Marshall might have believed that his fledgling Court could dodge international scorn — especially from elite, antislavery British judges — by showing its capacity to restrain the country’s proslavery forces. Finally, the case had the attention of the (moderate) American Colonization Society, which sought to reduce the number of enslaved persons in the United States by encouraging gradual manumission contingent on removal to Africa.<sup>173</sup> The organization’s members included many elites from the Upper South.<sup>174</sup> Marshall was the president of the Virginia

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<sup>167</sup> Letter from John Marshall to Joseph Story, *supra* note 162, at 338. Fuel already in the fire included the Court’s unpopular (in the South) decisions in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (reaffirming the Supreme Court’s appellate jurisdiction over state courts), and *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (interpreting the federal government’s implied powers expansively).

<sup>168</sup> Letter from John Marshall to Joseph Story, *supra* note 162, at 338; see *Brig Wilson v. United States*, 30 F. Cas. 239, 242–45 (C.C.D. Va. 1820) (No. 17,846).

<sup>169</sup> See NOONAN, *supra* note 41, at 118.

<sup>170</sup> *Id.* at 119; Letter from William Wirt to John Marshall (July 2, 1825), in 10 MARSHALL, *supra* note 162, at 192, 192.

<sup>171</sup> Letter from John Marshall to William Wirt (July 6, 1825), in 10 MARSHALL, *supra* note 162, at 193, 193.

<sup>172</sup> See generally CHRISTOPHER LESLIE BROWN, *MORAL CAPITAL* (2006).

<sup>173</sup> See ROBIN BLACKBURN, *THE AMERICAN CRUCIBLE* 245 (2011).

<sup>174</sup> *Id.*

branch,<sup>175</sup> and Francis Scott Key, who argued *The Antelope* for the United States before Marshall's Court,<sup>176</sup> was also an active member.<sup>177</sup>

In *The Antelope*, Marshall reached for the opportunity to release more Africans from slavery than the lower courts had. The United States had committed only a few lines to the reapportionment of the Africans as an afterthought at the very end of its argument, and Spain and Portugal contended that the issue was not even properly before the Court because the United States had not appealed it.<sup>178</sup> After Marshall reached for this issue, he then not only lowered the number of Africans to be restored to Spain, but he also took away all of Portugal's Africans on the mere ground that no owner had come forward to claim them, even though precedent strongly supported the Portuguese vice consul's right to claim them on the absent owner's behalf.<sup>179</sup> Moreover, in light of the Court's equal split on which party carried the burden of proof to establish ownership and how that burden could be fulfilled, he wrote that "no principle is settled."<sup>180</sup> He thus avoided locking in the lower court's positions, which were adverse to the Africans. *The Antelope* was one of the earliest cases with an equally divided Court, and it was not clear that an affirmance in light of a tie would not establish precedent.<sup>181</sup> Marshall thus courted antislavery observers with the case's resolution at the same time that he appealed to a proslavery audience through his discussion of international norms. Indeed, the year after *The Antelope*, Marshall wrote the Secretary of the Navy to ask for an update on the "considerable number of Africans to be delivered up to the United States . . . . As the annual meeting of the Auxiliary colonization society at this place approaches some interest will be felt in this augmentation of the colony & I shall be gratified at being enabled to communicate the fact."<sup>182</sup>

Marshall had flexibility to snub Spain and Portugal because a very different international political situation faced *The Antelope* Court than had confronted Story in *La Jeune Eugenie*. Spain and Portugal in 1825, in the midst of the breakup of their American empires, were not nearly as powerful as France in 1821. From General Andrew

<sup>175</sup> R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 328, 391 (2001).

<sup>176</sup> *The Antelope*, 23 U.S. (10 Wheat.) 66, 70, 105 (1825).

<sup>177</sup> NOONAN, *supra* note 41, at 15–16.

<sup>178</sup> See *The Antelope*, 23 U.S. (10 Wheat.) at 81–82, 88.

<sup>179</sup> See *The Bello Corrunes*, 19 U.S. (6 Wheat.) 152 (1821); see also Kevin Arlyck, *Plaintiffs v. Privateers: Litigation and Foreign Affairs in the Federal Courts, 1816–1822*, 30 LAW & HIST. REV. 245 (2012) (discussing cases where consuls exercised this right).

<sup>180</sup> *The Antelope*, 23 U.S. (10 Wheat.) at 126.

<sup>181</sup> See Ryan Black & Lee Epstein, *Recusals and the "Problem" of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 81 (2005).

<sup>182</sup> Letter from John Marshall to Samuel L. Southard (Jan. 1, 1826), in 10 MARSHALL, *supra* note 162, at 262, 262.

Jackson's rogue invasion of Spanish Florida in 1818 to the acquisition of Florida in the Transcontinental Treaty, whose protracted ratification negotiations lasted until 1821, the Florida question had consumed not only Anglo-Spanish relations but also American foreign policy at large.<sup>183</sup> But after Adams secured Florida, Spain no longer had leverage with the United States, as shown by a more confident United States' willingness to recognize the independence of Spain's former Latin American colonies starting in 1822 and, in 1823, to assert the Monroe Doctrine.<sup>184</sup> Even before the Transcontinental Treaty was secured, the federal government repelled Spain's and Portugal's repeated entreaties to stop Americans from privateering for Latin American revolutionaries.<sup>185</sup> For these reasons, in contrast with Washington's fixation on *La Jeune Eugenie*, the federal government took no interest in *The Antelope* until the District Attorney appealed the case to the Supreme Court.<sup>186</sup>

### CONCLUSION

In the 1820s slave trade cases, Story and Marshall approached international law similarly. The Justices commented on international norms and resolved the specific cases in offsetting directions, thereby giving each case multiple meanings that could satisfy audiences with conflicting interests. The weakest branch of the federal government proved as politically adroit in its international jurisprudence as in its domestic jurisprudence.<sup>187</sup> We should put to rest the Whiggish dichotomy between eighteenth-century natural law's universalism and late-nineteenth-century's parochialism as a central paradigm of the Marshall Court's adjudication of international law. A more useful framework would appreciate that a case's particular theory of international law did not necessarily align with a universalist or insular approach to international legal order because the Justices used the specific outcomes of cases to neutralize the political implications of their theories. In short, the Marshall Court's adjudication of international law was less a story about natural law giving way to positive law and more one of judges who had their cake and ate it, too.

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<sup>183</sup> See BEMIS, *supra* note 140, at 300–40; DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT 97–111 (2007).

<sup>184</sup> BEMIS, *supra* note 140, at 353; HOWE, *supra* note 183, at 111; Arlyck, *supra* note 179, at 276.

<sup>185</sup> See Arlyck, *supra* note 179, at 254–58; Richard Beale Davis, *The Abbé Correa in America, 1812–1820*, 45 TRANSACTIONS AM. PHIL. SOC'Y 87, 105–07 (1955).

<sup>186</sup> See NOONAN, *supra* note 41, at 40, 68. When *The Antelope* reached the Court, the federal government delayed argument for three years until after the 1824 presidential election. See *id.* at 74–92.

<sup>187</sup> See generally Mark A. Graber, *The Passive-Aggressive Virtues: Cohens v. Virginia and the Problematic Establishment of Judicial Power*, 12 CONST. COMMENT. 67 (1995); Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111 (2001).