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Alfred W. Blumrosen

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THE PROFOUND INFLUENCE IN AMERICA OF LORD MANSFIELD'S DECISION IN *SOMERSET V. STUART*

Alfred W. Blumrosen†

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I. INTRODUCTION

Lord Mansfield's influence on slavery in America began on June 22, 1772, when he decided the case that freed James Somerset and declared slavery “so odious” that it could not be enforced in Britain by sending a slave out of the country against his will. It continues into the present through work such as the University of Michigan's successful defense of affirmative action before our Supreme Court.¹ My focus today is on six episodes showing the influence of Mansfield's decision in *Somerset v. Stuart* in America.

The initial episode took place in August and September 1772 when news of his decision reached the colonies. James Somerset had been

† Thomas A. Cowan Professor Emeritus, Rutgers Law School, NJ, USA. Copyright, Alfred W. Blumrosen, 2006. Biography at <http://law.newark.rutgers.edu/blumrosen.html>. This article is based on Alfred W. Blumrosen and Ruth G. Blumrosen, *SLAVE NATION: HOW SLAVERY UNITED THE COLONIES AND SPARKED THE AMERICAN REVOLUTION*, (Sourcebooks, Inc., Naperville, Illinois (2005), hereafter cited as SN. This article relies on *SLAVE NATION* for detailed and more nuanced references. Available through Amazon, Barnes and Noble. Reviews on slavenation.us. Ruth died shortly before this book was published. It was a work of love between us.

1. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

born in Africa, captured and sent to Virginia where he was purchased by Charles Stuart who became chief tax collector for the colonies. Stuart took his slave, Somerset, with him to London in 1769. By 1771, Somerset had associated with free Blacks and Quakers, some of whom were connected with Glanville Sharp, the first British abolitionist. Somerset decided to seek his freedom by leaving Stuart. Stuart captured him and placed him aboard a ship bound for Jamaica and an assuredly short life in the sugar fields. Glanville Sharp assisted in getting Somerset's case heard before Lord Mansfield on a writ of habeas corpus.

Mansfield tried to settle the case by persuading Stuart to free Somerset, but West Indian planters had taken over the case and wanted a decision that slavery was lawful in England. Mansfield warned that if they did not settle, justice would be done "though the Heavens fall."² When word reached America that the institution on which the southern colonists depended for their economic, social, and political influence was called "odious" by the most important judge in Britain, Virginia worriedly began consultations with the other colonies that led to the First Continental Congress in Philadelphia in 1774.³

The second phase of the influence of *Somerset* came when the southern delegates to the Congress asked the northern leader from Massachusetts, John Adams, whether he would support and protect slavery if the South joined in the revolution. He agreed that he would "never vote against their interests."⁴ This Congress adopted a declaration of independence from Parliament that led directly to the American Revolution.⁵

The third phase of *Somerset's* influence came in 1787 when the Constitutional Convention became deadlocked over the South's demand that slaves be counted as three-fifths of a person to give whites more representation in the House of Representatives. Northern leaders threatened to split the nation in two; southerners weakened by the desertion of a quarter of their slaves to the British, agreed to a new compromise that changed the original understanding between the North and South. The southern states agreed at the Continental Congress in New York to create the largest slave-free area in the western world.⁶

The fourth phase where *Somerset* played a major role in American history was in connection with the Civil War and the abolition of formal slavery. In the fifth phase, his influence helped shape the Civil Rights Acts of the 1960s. In the present phase, enforcement of those Acts is facilitated by what we now call affirmative action.

2. ALFRED W. BLUMROSEN & RUTH G. BLUMROSEN, *SLAVE NATION* 9 (2005).

3. *Id.* at 35; *see also id.* at 33–55.

4. *See id.* at 73–97.

5. *See id.* at 99–119.

6. *See id.* at 203–24.

II. THE DIRECT IMPACT OF *SOMERSET* IN THE COLONIES: 1772–1773

Lord Mansfield lived in a time as much in turmoil as our own. The Industrial Revolution was just beginning, generating new ideas and creating new problems in life and in the law. In our own generation, computer technology has globalized the economy and upset traditional behaviors. On some matters, Mansfield was conservative: a part of the “old guard” that supported the revolution of 1688 that made Parliament supreme over the King. To support parliamentary power, he opposed independence for the colonies. On other matters, he was a reformer. He stabilized commercial law to facilitate commerce, incorporated restitution into the common law, and clarified a 100 year confusion in the law by declaring that slavery was “so odious” that slave James Somerset could not be forced to be sent to Jamaica.

From the southern colonial point of view, this decision was the last straw in seven years of British arrogance that had begun in 1765. Then, fresh from victory in the French and Indian War, the British government imposed on the colonies a stamp tax on legal and other documents. A colonial boycott tempered governmental arrogance when British merchants objected to the Stamp Act policy. The repeal of the stamp act was followed by the Declaratory Act stating that Parliament controlled the colonies in “all cases whatsoever.” In 1767, the government instituted a new tax on the import of several products. This led to a new colonial boycott that led to the repeal of the new tax, except for a symbolic tax on tea. With the repeal of these taxes, hostilities with the colonies declined; business as usual revived. By 1770, a “calm” had descended on British-colonial relations.⁷

British arrogance from 1765 to 1770 was based on its “superpower status” just as American presidential arrogance after the murderous attacks of September 11, 2001 was based on a similar “superpower status.” The British power base was its navy and its ground force that fought in traditional massed formations. In the end, they were no match for the more flexible guerilla style of the colonists. Today, the United States military seems ineffective against urban guerillas in Iraq, as it was with rural guerillas in Vietnam. Whether the United States will maintain its superpower status after the enormous number of post 9-11 blunders will be determined in part by forthcoming elections in the United States.

Against this background of British arrogance, in the fall of 1772, the colonists learned that Lord Mansfield had declared “odious” the institution on which the prosperity and position of Southern—particularly Virginian—slave owner - planter - lawyer - political - leaders depended. They reacted thoughtfully. In March 1773, five months after news of

7. *Id.* at 20; see also *id.* at 18–27.

Somerset reached the colonies, the Virginia House of Burgesses moved to create committees of correspondence among the colonies concerning British misdeeds that affected them all. The British government considered this call to have a “most dangerous tendency and effect.” The colonies applauded Virginia and signed on.⁸

III. BOSTON TEA PARTY AND THE FIRST CONTINENTAL CONGRESS DECLARES INDEPENDENCE FROM PARLIAMENT: 1773–1774

Emboldened by the support for Committees of Correspondence, the colonists resisted an attempt by the British to impose 17 shiploads of tea on them to “bail out” the East India Company in the fall of 1773. The shipments faced colonial resistance in four major ports, and none of the tea was sold in America. In Boston, lightly disguised colonists dumped three shiploads of tea into the harbor. When the citizens refused to pay for the tea, the British closed the port of Boston; imposed a military governor; occupied the city; and in effect, suspended the local government.⁹ These actions demonstrated to the colonists that they had no “rights as Englishmen” beyond those that Parliament chose to recognize. The colonists then moved to rely on natural law instead of English rights that could readily be dissolved. The colonies agreed to meet in Philadelphia in September 1774.

Most of the northern and southern delegates had never met before. The southerners needed to know how northerners would treat slavery before they would join in revolution. John Adams of Massachusetts gave the North’s answer: “I must leave it to you. I will vote for no measure against your judgments.”¹⁰ With assurance that slavery would be protected by the North, the South was prepared to move toward revolution. Congress declared its independence from Parliament.¹¹ In the process, a proposal by John Galloway of Pennsylvania for a joint British-American Parliament to address concerns of the colonies was brushed aside.¹² After that meeting, war became inevitable. Legal historian John Phillip Reid explains, “American liberty—the right to be free of arbitrary power—could not be secured under parliamentary supremacy. British liberty—the representative legislature over the crown—could not be secured without parliamentary supremacy.”¹³

IV. SLAVERY AND THE DECLARATION OF INDEPENDENCE: 1776

Thomas Jefferson drafted the famous second paragraph of the Declaration of Independence, which was adopted substantially unchanged

8. *See id.* at 33–66.

9. *Id.* at 68.

10. *Id.* at 88.

11. *See id.* at 101–11. A nominal relationship with the King was retained.

12. *See id.* at 111–15.

13. *Id.* at 110–11.

by the Second Continental Congress, only after he had learned that the Virginia legislature had filibustered against the adoption of the Lockean trilogy of life, liberty, and property in its own Bill of Rights. The legislature had eliminated the concept that men were "born free," because that might provide a basis to challenge slavery. It also watered down the "natural rights" of all men, so that they attached only when men had "enter[ed] a state of society," a condition to be determined by the ruling elite that would exclude slaves.¹⁴

Jefferson's task was to produce a consensus document stating reasons for independence, not to create the hostile crisis that took place at the Virginia Convention. In a brilliant feat of literary lawyering, he replaced the word "born" with "created," eliminated the conditional quality of "natural rights," and, most importantly, replaced the Lockean "property" with "the pursuit of happiness."¹⁵ Because slaves were "property" to southerners, this change was necessary to prevent the Declaration from supporting slavery. Rather than denying that slaves had any "natural rights," Jefferson created the immortal ambiguity that has infused American culture and inspired the world ever since: "'We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these rights are Life, Liberty and the Pursuit of Happiness'"¹⁶

V. *SOMERSET* REJECTED IN ARTICLES OF CONFEDERATION: 1777–1781

But this effort to encompass slaves within the concept of natural rights was the only clause that might have been used to oppose slavery adopted by the American government for 11 years.¹⁷ In the fall of 1776, after adopting the Declaration of Independence, the Continental Congress began work on Articles of Confederation between the colonies. Beginning with a draft that gave general powers to a central government, the Congress shifted to the narrowest central government it could conceive with no power to tax and no president of the nation to shape governmental activities. Each state had one vote, and the Articles could be amended only by a unanimous vote.¹⁸

Because the states were not seriously restricted by federal powers, the Articles had to address the rights of citizens of one state when they moved to or through another state. By November 1777, the draft articles provided: (1) that a state could not reduce the existing rights

14. *Id.* at 129.

15. *See id.* at 121–43.

16. *Id.* at 138–39 (citing the Declaration of Independence).

17. Jefferson had added a condemnation of the King for waging "cruel war" in seeking slaves from Africa and imposing them on the colonies. *Id.* at 140. The Congress deleted the clause altogether. *See id.* at 139–42.

18. *See id.* at 145–55.

of inhabitants of another state and (2) that the inhabitants of one state entering another would have equal rights as the citizens of that state with respect to commercial activities and movement.¹⁹ The draft did not mention slavery.

On November 1, Henry Laurens, a wealthy South Carolina planter, became President of the Continental Congress. From November 10 to 14, several amendments to the draft were adopted. They limited movement between states to *free* inhabitants and *free* citizens, and protected the rights of property owners to move their property into “any other state of which the owner is an inhabitant.” As slaves were considered “property,” this amendment would permit a slave owner from Virginia to take his slave to Rhode Island and then back to Virginia, even if Rhode Island declared slavery illegal. This was a direct repudiation of Lord Mansfield’s decision in *Somerset* that the law of the place where a slave was held would determine the enforceability of slavery.²⁰

If a state had abolished slavery—and by 1780, this process was beginning—a slave could not become free by escaping into it, or entering the state with his master. Every state was required to recognize slave “property” created by other states. *States Rights* were recognized to prevent interference with slavery, but *slave owners’ rights* were protected even in states that might reject slavery altogether. State autonomy was subordinated to slave owners’ rights.

The Articles were submitted to the states in 1777 but did not become effective until the last state had ratified them. This was in 1781.²¹ The delay was caused by the concern of states that did not have claims on western lands held by the British as did Virginia and the other slave states. Under those claims, slavery was lawful. By 1781, all these claims had been surrendered to the federal government. That surrender did not alter the pro-slavery laws in areas that had been claimed by the southern states.²²

The Treaty of Paris ending the Revolutionary War was signed in 1783, two years after the American-French victory at Yorktown.²³ Britain surrendered all its territory south of Canada and east of the Mississippi to the United States. This increased the size of the United States from 325,000 to 865,000 square miles. The southern states where slavery had been lawful had claims to most of that territory. It was understood that slavery remained lawful in all of that territory until the United States changed the law for the territory.²⁴

19. *Id.* at 150.

20. *See id.* at 151–53.

21. *See id.* at 154.

22. *See id.* at 154–55.

23. *See id.* at 155. The Treaty was ratified by Britain in early 1784. *Id.* at 159.

24. *See id.* at 157–59, 162–67; *id.* at 145 (referencing insert maps on preceding two pages).

VI. THE SOUTHERN DEFENSE OF SLAVERY IN THE TERRITORY ACQUIRED FROM BRITAIN: 1784–1787

In 1783, Thomas Pickering of Massachusetts, a distinguished veteran of the Revolution, proposed a slave-free area along the Ohio River for veterans of the war. The proposal went nowhere. In 1784, Jefferson proposed that there be no slavery in the territory of the United States after the year 1800. The proposal failed in the Continental Congress by one vote. A similar proposal by Rufus King from Massachusetts in 1785 was approved for consideration of the Congress by an eight to four vote, with the slave states of Virginia, North Carolina, South Carolina, and Georgia opposed to discussing the issue.²⁵ King, counting votes at the Congress, decided not to present his motion. The southern slave owners had won. There was no further discussion about slavery in the Continental Congress until the Constitutional Convention of 1787.

By 1786, it was clear to many political leaders in both the North and South that the Articles of Confederation were inadequate to the needs of the new nation. But amending the Articles required the unanimous approval of all thirteen states. That could not be obtained. The leaders did secure an agreement to consider amendments at a convention called for May 1787 that we know as the Constitutional Convention. At the Convention, Virginia presented a plan for a government with a president, a two-house congress based on the single principle of population and a supreme court. In the debate, southern delegates demanded that slaves count as three-fifths of a person in allocating representatives by population in the House of Representatives. The larger states continued to press for the single principle of representation by population. The smaller states sought to maintain the equality of votes as in the Articles, but were ultimately willing to accept equality of representation only in the Senate. But the northern states were not willing to accept the three-fifths principle in the House.²⁶

VII. *SOMERSET* ACCEPTED AS CONSTITUTIONAL COMPROMISE IN NORTHWEST ORDINANCE OF 1787

On June 29, Oliver Ellsworth of Connecticut threatened a northern walk-out from the Convention unless the states had equal votes in the Senate. On June 30, James Madison of Virginia, the note taker of the Convention and considered one of the most thoughtful of the delegates, said, “The States were divided into different interests not by . . . size . . . but principally from . . . their having or not having slaves.”²⁷

25. *See id.* at 164–65, 301 n.35.

26. *See id.* at 171–78 (describing early phases of the debate).

27. *Id.* at 178–89; *see also id.* at 179–82.

This comment forced the Convention to face the prospect that the union of the colonies could be broken at the convention. Madison went on to propose that the two houses of Congress might be based in different principles of representation, a sharp departure from the original Virginia plan. But his proposal would have one house based on free inhabitants, and the other on all inhabitants counting slaves as if they were free, thus increasing the slave owner representation beyond the three-fifths proposal already on the table. Ben Franklin of Pennsylvania pounced on the idea of different principles of representation in each house, by proposing that states have “equal representation” on certain issues. These exchanges generated a search for a compromise that would take account of the future growth of the nation and of slavery.²⁸

On July 2, the delegates were deadlocked over Ellsworth’s motion to provide states with equal votes in the Senate.²⁹ They created another committee to seek a compromise. On July 3, that committee recommended equal votes for states in the Senate, and population, counting slaves as three-fifths of a person in the House. The North rejected the proposal even though it provided equal votes in the Senate, because the three-fifths rule would inevitably lead to southern domination of the House as the population moved westward.³⁰ The deadlock continued through Saturday, July 14.³¹ Meanwhile, the business of the nation would be conducted in New York.

On July 2 or 3, the discussion of the slavery issue generated a simple and elegant compromise that was to be carried out by the Continental Congress then sitting in New York, inactive for want of a quorum. Congress could divide the territory of the United States in two, along the Ohio River, prohibiting slavery in the North, remaining silent concerning the South where it was already legal. This solution would allow northerners to expand north of the Ohio, and reduce the importance of the three-fifths rule, which would not apply in that area.³² But would the southern delegates to the Congress actually embrace ending slavery north of the Ohio River, where slavery was already planted by Virginians and Kentuckians?

On July 3 or 4, the four delegates to the Convention from North Carolina and Georgia left Philadelphia for New York, where they were also members of the Continental Congress. The next day Richard Henry Lee, one of Virginia’s most important political figures, also a delegate to Congress, followed them.³³ When the five men arrived

28. *See id.* at 182–84.

29. *Id.* at 185–87.

30. *See id.* at 185–88.

31. *See id.* at 188–202.

32. *See id.* at 190–92. We think Franklin may have conceived the solution, but was too infirm to implement it, and may have involved Richard Henry Lee in the plan, even though they were not friends. *See id.*

33. *Id.* at 193.

in New York, their presence created a quorum. Congress swiftly created a new committee to consider the territorial ordinance that had lingered before it for some years. The new committee, which included Lee, reported back after two days. Its first step was to limit the previous proposals for territorial government to the territory north of the Ohio including the future states of Illinois, Indiana, Ohio, Michigan, Wisconsin and part of Minnesota.³⁴ It then adopted provisions to divide the territory into between three and five states and to move toward "equal footing" statehood as population increased.

The committee also proposed at the end of the Ordinance to prohibit slavery in the Northwest, effective immediately. Nathan Dane of Massachusetts, the draftsman for the committee had not planned to introduce this provision because he saw that four of the southern states were present among the eight states in attendance, and knew that the southerners had been unified in their opposition to such amendments in previous years. When the rest of the proposed Ordinance had been approved by the Congress, "I had no idea the states would agree to [the prohibition on slavery] as only Massachusetts of the eastern states was present . . . but finding the House favorably disposed on this subject, after we had completed the other parts, I moved the article, which was agreed to without opposition."³⁵

The sharp about face of the southern states is illuminated by the chart in *Slave Nation* which shows the changes in state votes from previous decisions of the Congress rejecting any limits on slavery. It shows that Richard Henry Lee personally changed his vote from the position he held in 1785 when he opposed consideration of Rufus King's antislavery plan.³⁶

When news of the adoption of the Ordinance reached the Constitutional Convention in Philadelphia, northern opposition to the committee proposal of July 3 ended abruptly without recorded discussion. This signified that the North had accepted the division of the nation between slave and free states just adopted by the Congress in New York. The July 3 plan became known as the "Connecticut compromise." It provided for states equally represented in the Senate. The House would be represented by population counting slaves as three-fifths of a person. The plan was accepted and the Constitution was adopted. The North had won a major slave-free area that was the largest in the western world.

Why did the South, after protecting slavery from the first meeting with the northerners through every step of national development until mid 1787, suddenly agree to the creation of this slave-free area? There are several plausible reasons. First, in 1787 the South was

34. *See id.* at 145 (referencing insert maps on preceding two pages).

35. *Id.* at 206 (quoting Nathan Dane).

36. *See id.* at 210.

weaker compared to the North than it had been in 1774. This was due to the defection of a significant proportion of slaves to the British after Lord Dunmore had offered them freedom if they would help suppress the colonial rebellion. Thus the South had to take seriously the North's threat to cut the union in two. The South was not in a good position to defend itself against hostile forces to its south and west.

Secondly, the South had gained the three-fifths rule assuring that no short-term attack on slavery would be feasible under the new Constitution. Third, the South would avoid competition from slave owners in the Northwest Territory, an important matter since slave owners from Virginia had already occupied some lands north of the Ohio. Fourth, channeling antislavery whites north of the Ohio would reduce their presence in the South where they might agitate against slavery.

Why was the North prepared to give up its objection to the three-fifths rule which would and did give the South a long-term political advantage in the House of Representatives? First, antislavery sentiment in the South, while emerging, was not solid; slavery was less used there than in the North, but only two states had made serious efforts to restrict it. Secondly, white labor in the North was worth twice what it was worth in the South where slavery prevailed. Therefore, gaining a slave-free area was of major political and economic importance to northerners. Third, northern political leaders understood that in slave states, the political, social and economic power flowed almost exclusively to the slave owner-planter-lawyer class, and they did not want to be surrounded or overwhelmed if slavery flourished north of the Ohio. Northerners and southerners both may have believed that their section of the country would grow faster than the other section. In fact, the southern sector did grow more quickly at first, but was overtaken by the North well before the Civil War. One major reason for this outcome was slavery. Southern slave holders had to continually invest their capital in slaves to work newly cleared lands. Northerners invested their capital in equipment and transportation. When the war came, the industrialized North confronted a largely agricultural South. Other reasons for the judgments made on both sides are suggested in *Slave Nation*.³⁷

These various reasons converged in the actions of the Continental Congress and the Constitutional Convention that amended the North-South bargain reached with John Adams in 1774 to protect slavery throughout the nation. This new bargain split the nation between slave and free areas. This bargain was confirmed by the Virginia Legislature in 1788, by the first Congress under the new Constitution in 1789 and again in 1790.³⁸ This amended bargain was kept by both

37. See *id.* at 204–24.

38. *Id.* at 239; see also *id.* at 239–43.

parties in the Missouri Compromise of 1820, and by the practice of Congress in admitting new free and slave states until 1854.

In 1857, the Supreme Court ignored the understanding of 1787. It declared the Northwest Ordinance unconstitutional and permitted slavery everywhere in the United States.³⁹ By this time, generations had grown up in the “clear air” of a Northwest in which slavery had diminished and its immorality had become clearer. The new Republican Party had found Lincoln. He was born in Kentucky, but moved to Indiana as a boy, then to Illinois. Both of these states had been part of the old Northwest Territory.

VIII. THE “SOLDIERS OF THE NORTHWEST ORDINANCE” ASSURE THE END OF SLAVERY IN THE CIVIL WAR AND THEIR DESCENDANTS ASSURE THE ADOPTION AND IMPLEMENTATION OF THE CIVIL RIGHTS ACT OF 1964

As a part of the process of achieving statehood, each new state in the territory had to incorporate the Northwest Ordinance into its constitution, including the “no slavery” clause. About one-third of the Union Army came from the five states that had been carved out of the Northwest Territory. Efforts by slave owners in these states to get Congress to repeal that requirement or to get the state constitutional provision repealed were unsuccessful. By the end of the war, 10% of the Union forces were black, most of whom had been slaves. Both the soldiers of the Northwest Territory and the black soldiers made major contributions to winning the Civil War.

The decisive battles in the war were fought in early July 1863 at Gettysburg, Pennsylvania and Vicksburg, Mississippi. At Gettysburg, the Iron Brigade from Wisconsin, Ohio, Indiana, and Michigan prevented Confederate forces from occupying Cemetery Ridge on the first day of battle. On the second day, the First Minnesota Regiment of 262 men blocked 1,600 Alabamians from breaking through the Cemetery Ridge line. On the third day, the Michigan cavalry prevented Stuart's Confederate cavalry from supporting Picket's ill-fated charge.

At about the same time, Vicksburg surrendered to troops of General Ulysses S. Grant. Grant, a descendant of a Scot who had settled in Massachusetts in 1630, had been born in Ohio after it was the first state carved out of the Northwest Territory.

In April 1865, as Grant was forcing Robert E. Lee's army toward Appomattox Court House, three United States Colored Infantry Regiments from the Twenty-Fifth United States Army Corps, the first army corps made up of black soldiers, were among the troops that prevented Lee's army from escaping to the west.⁴⁰

39. *See id.* at 249–59.

40. *Id.* at 251.

While formal slavery was abolished by the Civil War amendments, the fruits of victory soured in 1883 when the Supreme Court narrowly interpreted those amendments, leaving blacks in the South in inferior segregated conditions for nearly 100 years.⁴¹ The first break in the power of the Democratic Party in the “solid South” after World War II occurred in 1948 when Hubert Humphrey of Minnesota told the southern delegates to “‘get out of the shadow of states’ rights and walk forthrightly into the sunshine of human rights.’”⁴²

Thus we observe the judgment of Lord Mansfield in *Somerset’s* case echoing across nearly two hundred years of American history. The South seceded, for the third time, leaving the Democratic Party in order to perpetuate the inferior position of blacks. “But their efforts to maintain the remnants of slavery were frustrated in 1964 by two other political figures from the old Northwest Territory, Congressman William McCullough of Ohio and Senator Everett Dirksen of Illinois, who led conservative Republicans to support the Civil Rights Act of 1964.”⁴³ That act was given important substantive meaning by yet another descendant of the Northwest Territory, Chief Justice Warren Burger of the United States Supreme Court. His opinion in an employment discrimination case meant that the narrow approaches taken by judges to the Civil War amendments to the Constitution would not be followed for a second time.⁴⁴

In 2002, my late wife Ruth and I compared the occupational distribution of minority and female employment opportunity between 1975 and 1999. We demonstrated genuine improvement in the life situation of an estimated twenty-five million minorities and women. While this study showed that two million minorities and women continued to be victims of intentional job discrimination in 1999, it also showed that since 1975, eight million minority and female workers were in higher occupational categories than they would have held if the occupational distribution of 1975 had continued.⁴⁵ One can assess this result in many ways, but its social and economic importance cannot be denied.

One of the mechanisms that accomplished this result was the adoption of programs of affirmative action to improve opportunities for minorities and women, in the same spirit in which Lord Mansfield enabled *Somerset* and many other blacks in England to walk away from their masters. In America, such a program was designed by Benjamin Franklin as his last contribution to the expansion of freedom.⁴⁶ While such programs have been challenged in recent years, they have also

41. ALFRED W. BLUMROSEN, *MODERN LAW: THE LAW TRANSMISSION SYSTEM AND EQUAL EMPLOYMENT OPPORTUNITY*, 17–20 (1993).

42. BLUMROSEN & BLUMROSEN, *supra* note 2, at 252.

43. *Id.*

44. *See id.*

45. *Id.* at 328 n.33.

46. *See id.* at 252–54.

been staunchly defended as necessary to provide for equal opportunity.

The University of Michigan—in one of the states carved out of the Northwest Territory—succeeded in arguing this position in the United States Supreme Court in 2003, carrying forward into the 21st century, the abhorrence of racial subordination expressed pointedly by Lord Mansfield on June 22, 1772.⁴⁷

IX. REFLECTIONS ON HISTORY

The information on which *SLAVE NATION* is based has long been available; its interpretation on five points is new.

(1) The connection between the *Somerset* Decision and the end of the “calm” between Britain and the colonies has been obscured because of a reference to the Gaspee incident in Virginia’s call for committees of correspondence. But that reference was only a propaganda device.⁴⁸

(2) The importance of John Adams’s late-in-life confession to Jefferson that he agreed to support slavery has not been recognized by the historians.⁴⁹ This may be due to the assumption by some historians that the southerners had the same agenda as the North concerning the revolution.

(3) The deadlock at the Constitutional Convention in July 1787 is clearly outlined in Madison’s notes, but the breaking of that deadlock by adoption of the Northwest Ordinance, while implied by Staughton Lynd, has not been followed up, perhaps because of overemphasis on the “Connecticut Compromise” or because the inconclusive debate at the Convention between July 2 and July 14 has been taken too seriously. The sudden dissolution of northern objections after the news of the adoption of the Northwest Ordinance should have raised more eyebrows than it did.⁵⁰

(4) The ratifications of the Northwest Ordinance by Virginia and the first Congress were conveniently ignored by southern jurists and political figures in the pre-civil war period because they undercut the supporters of slavery.

(5) The Ordinance itself has been underrated because it generated little enforcement activity, although Lincoln noted it had important effects in channeling slave supporters to the south of the Ohio River.⁵¹

47. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

48. See BLUMROSEN & BLUMROSEN, *supra* note 2, at 61–64.

49. See *id.* at 83–97.

50. See *id.* at 226–27.

51. See *id.* at 221, 246–50.