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SOMERSET'S CASE AT THE BAR: SECURING THE "PURE AIR" OF ENGLISH JURISDICTION WITHIN THE BRITISH EMPIRE

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I. *SOMERSET* AND THE HISTORY OF LIBERTY

How do we measure the importance of *Somerset's Case*—or any single legal decision? The answer will depend on why we ask the question. Thirty years ago in an important article, William Wiecek showed how American abolitionists embraced *Somerset*, and papers throughout this conference have demonstrated that the case reverberated throughout the United States for almost a century after Lord Mansfield uttered his cryptic opinion in Westminster Hall in 1772.[1] Mansfield did not say anything about England's air quality, but James Somerset's counsel did exclaim that England's air was too pure for a slave to breathe. This line was at least two centuries old, dating back to a hazily recorded case involving a Russian master who whipped his serf in England in the 1560s. Because England had too pure an air for a slave to breathe, the master could not beat his serf. The line was revived at the outset of the English Civil War, when the House of Commons impeached the judges of Star Chamber for whipping and imprisoning John Lilburne for having published unlicensed books on Puritanism. In fact, these civil war debates constitute the first written reference to the Russian slave's case.[2] The inference was that Star Chamber had treated Lilburne like a slave. Parliament soon abolished the court, which was a subcommittee of the King's Privy Council. By the time Somerset's lawyers made their appearance at the bar of King's Bench in 1772, English schoolboys had for a long time been taught, among other lessons of Whig history—or English history as

† Professor, New York University School of Law. The Author thanks the participants at the conference, especially Cheryl Harris and William Wiecek, for their comments and questions. Part of this essay is derived and excerpted from Daniel J. Hulsebosch, Comment, *Nothing But Liberty*: Somerset's Case *and the British Empire*, 24 LAW & HIST. REV. 647 (2006).

1. *See generally* Ruth Paley, *After* Somerset*: Mansfield, Slavery and the Law in England, 1772–1830*, *in* LAW, CRIME AND ENGLISH SOCIETY, 1660–1830, at 184 (Norma Landau ed., 2002) (discussing interpretations of *Somerset* in North America before the Civil War); William M. Wiecek, Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974–75) (discussing the reception of *Somerset* in North America).

2. The Lilburne case, along with the legend of the Russian slave case, was memorialized in 2 JOHN RUSHWORTH, HISTORICAL COLLECTIONS FROM THE YEAR 1628 TO THE YEAR 1638, at 344 (1706).

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the story of the progress of freedom—that their kingdom had too pure an air for a slave to breathe.[3]

This essay explores what this environmental conceit meant as a legal fact to the legal professionals involved in the case in 1772. It *was* important to them. Many of us are also legal professionals, and the case remains important to us. But the case meant something different for them, who could not see the future, than it does today for us, who see their future as our history. It is a mistake, then, to attribute too much weight to this one legal decision—to read into Mansfield's opinion the whole history of liberation.

One reason it is wrong is that it gives new legs to an old conviction about what Justice Felix Frankfurter liked to call "the notions of justice of English-speaking peoples," a group that Winston Churchill was at the same time giving a history.[4] At its most grand, tracing the abolition of slavery to Lord Mansfield's decision in Westminster in 1772 makes liberty seem like the peculiar property of Anglophones, which—even if we could agree on the meaning of "liberty"—is counterfactual. At the least, it makes Anglo-American liberty seem the most perfect of its kind. But, historically, many nations have trumpeted their abolitionist traditions.[5] Some did so to gain moral leverage over other nations, and collectively that international contest among nations to present themselves as bastions of freedom might be called "competitive liberty." The competitive liberty dynamic helped spread abolitionism throughout the western world.[6]

Second, interpreting *Somerset's Case* as the germ of abolition does not do justice to the actual legacies of English legal culture for the former colonies of the British Empire. History lies in details rather than in summary propositions, and the details cut in many directions because there were so many people in so many places who made claims under the banner of "the liberties of Englishmen." The focus in *Somerset's Case*, as elsewhere, should be on how historical actors used the discourse of liberty, instead of accepting the discourse as revealing something essential about a legal tradition or even this single decision.

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3. *See generally* H. BUTTERFIELD, THE WHIG INTERPRETATION OF HISTORY (1951) (discussing Whig history).

4. *See, e.g.*, Malinski v. New York, 324 U.S. 401, 417 (1945) (Frankfurter, J.) (invoking "those canons of decency and fairness which express the notions of justice of English-speaking peoples" to define the content of due process in criminal proceedings); *see also* WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES, 4 VOLS. (1956–58).

5. The French tradition is captured in SUE PEABODY, "THERE ARE NO SLAVES IN FRANCE": THE POLITICAL CULTURE OF RACE AND SLAVERY IN THE ANCIEN RÉGIME (1996).

6. *See also* CHRISTOPHER LESLIE BROWN, MORAL CAPITAL: FOUNDATIONS OF BRITISH ABOLITIONISM (2006) (discussing a similar form of argument about British abolitionism).

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Sometimes, of course, there are good reasons for decontextualizing a powerful utterance and then abstracting it into a general principle. Again, Anglo-American abolitionism is a good example: The "pure air" remark helped galvanize the movement. For abolitionists, lifting that remark out of the context of the decision made it seem like the principle of purity applied everywhere in the Anglophone world. Almost immediately, slaves and abolitionists throughout the British Empire interpreted the *Somerset* decision as abolishing slavery in England and, possibly, as endangering slavery across the Empire. That, however, is not how the legal professionals understood the proceedings in King's Bench in 1772. Instead, that expansive interpretation was the value added that antislavery advocates contributed to the legal product that came to be known as *Somerset's Case*.[7] We discount the agency of those who came after *Somerset's Case*, as well as the agency of the people involved in it, if we see them all as performing a prescripted drama of liberty.

The focus here is on the meaning of the case for the legal professionals who argued and decided it. For example, in the years after *Somerset*, Mansfield repeatedly stated that his decision did not end the servitude of slaves in England and did not affect slavery anywhere else in the British Empire. In *Rex v. The Inhabitants of Thames Ditton*,[8] Mansfield held that slaves could not benefit from parish poor relief because they were not hirelings, as the Poor Law required. When counsel for the claimant raised *Somerset's Case* to support the argument that the pauper had been a servant rather than a slave, Mansfield interjected that the case went "no further than that the master cannot by force compel him to go out of the country."[9] In the infamous 1783 case of the slave ship *Zong*,[10] Mansfield and the rest of King's Bench assumed that slaves were insurable goods for purposes of an insurance contract sued on in London. In that case, a ship captain jettisoned slaves into the ocean, allegedly to save a leaky ship and its crew. Faced with a large claim for lost slaves, the London insurers objected that "[t]here is no instance in which the mortality of slaves falls upon the underwriters, except in the cases of perils of the seas and of enemies."[11] Mansfield's decision allowed the slaveholders to sue on the claim—to recover for the slaves as lost goods—and held that under the contract they could be thrown off the ship if in fact it was necessary to do so to save the ship. However, the court doubted the necessity of jettisoning the slaves under the facts presented, and

7. Professor Wiecek long ago distinguished the decision in *Somerset's Case* from its reception in antislavery circles (i.e., circles that he called "neo-Somerset"). *See* Wiecek, *supra* note 1.

8. R. v. Inhabitants of Thames Ditton, (1785) 99 Eng. Rep. 891 (K.B.).

9. *Id.* at 892; *see* 2 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 1236 (1992).

10. Gregson v. Gilbert, (1783) 99 Eng. Rep. 629 (K.B.).

11. *Id.* at 629.

the case was sent for retrial on the issue of necessity.[12] Still the myth of Mansfield the liberator persists.

In addition, Somerset's own lawyers stated during argument that slavery was "necessary" and was legal in the colonies. That fact was central to their arguments for why it should not be recognized in England. As Edmund Morgan—and Hegel—saw long ago, slavery can help define freedom.[13] English freedom was juxtaposed against colonial slavery, and the contrast was supposed to show more than a difference in labor systems. It also highlighted the balance of governmental powers *within* England that preserved liberty, in contrast to the unbalanced executive and discretionary governments that, English residents believed, characterized the colonies. Violent slaveholders, arbitrary colonial governments, and an unrestrained king: this trinity of prerogative government was the dreaded specter that James Somerset's attorneys raised when arguing that slavery could not exist in England, at least not without the consent of Englishmen in Parliament. Since at least the Lilburne trial, slavery had been intertwined with the specter of discretionary government. That connection was central to the arguments at King's Bench in 1772.

Therefore, contrary to Whig or progressive interpretations of *Somerset's Case*, my claim is that the legal arguments in the case more closely tracked an old discourse of English supremacy within the British Empire than the emerging language of natural or human rights.[14] Like most discourses, it reflected the past more than it controlled the future and resonated primarily with its local audience: those in England in 1772 who were ambivalent about colonial slavery. Many there probably found it "odious," as Mansfield called it, while at the same time, like Mansfield, understood that it was essential for the imperial economy. The participants in *Somerset's Case* were most concerned to reconcile this tension: to keep slavery in the Empire while keeping it out of England. They were engaged in Whig constitutionalism, to be sure, but it was not twenty-first century Whig constitutionalism.

For almost two centuries before the case, the English constitution had been constructed by contrasting English legal liberties to those available elsewhere, including in other jurisdictions in the Empire.[15] This intra-imperial politics of comparison was related to the competitive liberty between kingdoms and can be called "constitutional alter-

12. *Id.* at 630. The case led to a legislative backlash, as the British Parliament soon declared that slaves were not goods for this purpose. *See* F.O. SHYLLON, BLACK SLAVES IN BRITAIN 205 (1974).

13. *See* G.W.F. HEGEL, PHENOMENOLOGY OF SPIRIT 111–19 (A.V. Miller trans., 1977); EDMUND S. MORGAN, AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA (1975).

14. This paragraph is excerpted and derived from Hulsebosch, *supra* note †, at 648.

15. This paragraph is derived from Hulsebosch, *supra* note †, at 648. 702

ity." This juxtaposition emerged among people who wanted the gains and glory of imperial expansion but also feared that royal dominions abroad would be training grounds for arbitrary government—royal executive government—that might travel back home.[16] The tragic endpoint of this reverse migration was called "slavery." From the beginning of colonization, this was a popular fear. Executive officials might bring back royalist innovations in their mental baggage of colonial administration; plantation masters might bring it back physically, with their slaves. Returning planters created a problem—the practice of slavery in England—and were symbols of a greater problem—they personified despotism in their treatment of slaves and the way the powerful West India lobby used its wealth to obtain the king's support for that oppression.

Therefore, when the lawyers and judges in *Somerset's Case* spoke of slavery, they spoke not only about the liberty of James Somerset and others who looked like him; they also expressed concern for the liberties of Englishmen.[17] Seen in this light, the decision left the institution of colonial slavery almost untouched while at the same time insulating England from slavery, the power of returning West Indian planters, and despotism.

II. IMPERIAL CONFLICT-OF-LAWS

The lawyers' arguments in the case—which are voluminous, especially when compared to Mansfield's telegraphic opinion—demonstrate that Somerset's lawyers distinguished between colonial and English law. The argument that there was a single law of slavery throughout the Empire rarely got traction. Counsel for Stewart, the slave holder, invoked a 1729 opinion of the king's attorney general and solicitor general, known as the Yorke-Talbot opinion, which was obtained by the West Indian lobby. The opinion stated that Christian conversion did not emancipate slaves and that planters could bring slaves from the colonies to England and still hold them as slaves.[18] Mansfield, however, thought that this opinion had little authority in *Somerset's Case* because it was designed primarily to negate the claim that Christian conversion sufficed to liberate a slave, an assertion long settled in the negative by 1772. In addition, it was procured "after dinner" at the inns.[19] It was not part of a legal case or part of the formal proceedings of the inn. Instead, Mansfield told the lawyers for the slaveholder that only the British Parliament could legislate such law for the Empire. Meanwhile, English air was breathed in England

16. *See* DAVID ARMITAGE, THE IDEOLOGICAL ORIGINS OF THE BRITISH EMPIRE 125–45 (2000).

17. This paragraph is excerpted from Hulsebosch, *supra* note †, at 648.

18. Edward Fiddes, *Lord Mansfield and the Sommersett Case*, 50 L.Q. REV. 499, 501–02 (1934).

19. *Id.* at 502.

alone; Virginian air in Virginia. So the lawyers were dealing with what we now call the conflict of laws: how courts in the forum of dispute decide cases that turn on rights created under another jurisdiction's law.

The dialogue about this problem shows consensus on the general rule, derived from the law of nations, of *lex loci*: The forum court should recognize a person's status created under the law of the jurisdiction where the legal relation at issue arose.[20] They assumed that a status like servitude translated from one legal system to another. But the court also "approved" of a conventional limitation on this rule: While a forum's court should recognize a status created in foreign jurisdictions, it need not recognize municipal regulations of the incidents of that status that were considered "inconvenient" or penal in the forum jurisdiction. Mansfield raised the case of marriage, which remains the classic example of how the conflict of laws operates. A marriage was recognized everywhere, but the incidents of marriage, such as parent's power to discipline children, varied.[21] Under the limited decision in this case, Stewart remained Somerset's master. But the incidents of that relationship, like the power to command and discipline, were different in England than in Virginia. As Mansfield said, "So high an act of dominion"—meaning detention and deportation that characterized slavery rather than servitude itself—"must be recognized by the law of the country where it is used."[22] Nothing but "positive law" could support those "odious" practices.[23] Consequently, King's Bench was prepared to recognize the status of servitude but not the full power of control that marked colonial slavery.[24]

The law of nations, Somerset's counsel argued, gave the Court another way out: It could disregard the colonial status altogether as being "inconvenient" under English law.[25] The Court refused to do so. Mansfield seems to have felt that he could not disregard that status *because* it arose in a royal dominion rather than a truly "foreign" country. A conflict between the law of two kingdoms was different from a conflict between two royal territories loyal to the same king.[26] This distinction helped neutralize the comparative law examples that

20. This paragraph is excerpted and derived from Hulsebosch, *supra* note †, at 650–51.

21. Somerset v. Sterwart, (1772) 98 Eng. Rep. 499, 504 (K.B.).

22. *Id.* at 510.

23. *Id.*

24. The continuation of servitude followed from the limited decision itself. Mansfield clarified this part of the decision afterward. *See* OLDHAM, *supra* note 9, at 1238.

25. This paragraph is excerpted and derived from Hulsebosch, *supra* note †, at 652–53.

26. Mansfield distinguished the French case from this one: there, "France was not bound to judge by the municipal laws of Spain; nor was to take cognizance of the offences supposed against that law." *Somerset*, 98 Eng. Rep. at 502. Here, by contrast, there was a closer relationship between the laws of England and those of the colonies.

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Somerset's attorneys raised of slaves being emancipated when brought from one kingdom to another that did not recognize slavery. In a remark that was *not* repeated often in the nineteenth century, Mansfield doubted whether the mere relocation of a master and his slave from one royal territory to another was enough to emancipate the slave fully.[27] He also spoke of British parliamentary legislation that protected slave masters when they transferred their slaves from one place to another within the British Empire.[28] Parliament could pass any law about slavery. So far, it had protected the transportation of slaves across the Empire but had not legalized all the incidents of slavery in England.

If colonies were different from foreign kingdoms, why not recognize the incidents of their master-servant relations too? For Somerset's lawyers, the answer turned on England's place in the Empire and the nature of English government.

In his argument, Francis Hargrave warned that the full incidents of slavery in England would "revive" the other "mischiefs" connected to "utter servitude."[29] Those mischiefs were governmental and threatened what he called England's "mild and just" constitution. Driving home the point, Hargrave asked, "In England, where freedom is the grand object of the laws, and dispensed to the meanest individual, shall the laws of an infant colony, Virginia, or of a barbarous nation, Africa, prevail?"[30] His colleague John Alleyne picked up the theme, asking the court to "*preserve* that liberty by which we are distinguished by all the earth."[31] Allowance of slavery was an evil in itself, but he expressed even more fear of what might follow in its train: "The horrid cruelties, scarce credible in recital, perpetrated in America, might, by the allowance of slaves amongst us, be introduced here."[32] He used the example of corporal punishment. Social historians know, as these lawyers must have known, that physical discipline was still central to labor relations in England. But some kinds of punishment separated the slave from the servant. Whipping was one bright line. Alleyne conjured the specter of masters whipping slaves in the fields of London. What would happen if Englishmen got used to that sort of violence? He warned of gradual political slavery in England, as the incidents of the institution, he said, "might by time

27. He used the example of a slave leaving Virginia to "the adjacent country, where there are no slaves, if change to a place of contrary custom was sufficient," and implied that this was not sufficient. *Id.* at 504.

28. *Id.*

29. This paragraph is excerpted and derived from Hulsebosch, *supra* note †, at 655–56.

30. *Somerset*, 98 Eng. Rep. at 501 (Hargrave).

31. *Id.* at 503 (Alleyne) (emphasis added).

32. *Id.* (Alleyne).

become familiar, [and] become unheeded by this nation."[33] Denying the West Indians of their colonial prerogatives while in England would fortify the barrier against a despotic government.

It appears that Mansfield agreed. His decision offered a modus vivendi that kept slavery alive but abroad, while also signaling to Parliament that legislation was needed.

That signal was important not because Parliament responded: In the short run, it did not. But instead, it was important because this signal—along with other cases decided about the same time—reflected Mansfield's desire to make the House of Commons and the common-law courts the center of imperial governance at the expense of the king and Privy Council, colonial governors, and the West India lobby. Call this fuller program "Westminster Hall Supremacy."[34]

Most of us have heard of parliamentary supremacy. Mansfield was a vocal proponent of it.[35] There is little doubt that Mansfield would have enforced a parliamentary statute that recognized black slavery in England. The polestar of eighteenth-century Whig constitutionalism was parliamentary government. The modern American polestar is individual rights. The English Whigs feared executive despotism; many liberal lawyers now fear legislative despotism—though old fears of executive government are being revived on both sides of the Atlantic.

My argument is that the fear of executive power that drove the House of Commons to its central place in the English constitution also animated lawyers at the other end of Westminster Hall. If we were to fit *Somerset* in with other cases of the same era, it would not find much abolitionist company. Instead, *Somerset* fits better with a handful of other cases either arising in the colonies or involving the status of colonial law in England. Arguments in those decisions, and Mansfield's handling of them, reflected a fear of unrestrained royal or executive power and a corresponding jealous protection of both common law and parliamentary jurisdiction.

III. MANSFIELD'S IMPERIAL JURISPRUDENCE

By definition, the jurisdiction of the common-law courts of England was restricted to the realm of England. The power to review Irish decisions was a statutory exception. The common lawyers, however, had gradually reached out to grab some maritime actions and foreign transitory contract cases. Using a pleading fiction that a case arising

33. *Id.* at 503 (Alleyne). For social histories of master-servant relationships in the British world, see MASTERS, SERVANTS, AND MAGISTRATES IN BRITAIN AND THE EMPIRE, 1562–1955 (Douglas Hay & Paul Craven eds., 2004).

34. The Author is developing this argument in a paper entitled "Westminster Hall Supremacy" (copy on file with author).

35. *See* DANIEL J. HULSEBOSCH, CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830, at 138 (2005).

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on the high seas or, for example, in Paris actually arose in Cheapside London, the courts handled such cases whenever it had personal jurisdiction over both parties. This procedure had long helped Mansfield incorporate the law merchant into the common law. The innovation in the 1770s was to extend this jurisdictional fiction beyond these private commercial cases to tort cases with public-law dimensions.

Lord Mansfield never clearly articulated the jurisdictional elements necessary for a case arising in the colonies to be heard in King's Bench. As far as personal jurisdiction, it appears that the parties had to be located in England when the suit commenced.[36] As for subject matter jurisdiction, it appears that such a case had to possess a public-law dimension, such as suits by royal subjects against royal governors. In sum, the status of being a subject of the king and present in England gave the English court jurisdiction, while the fact that the action arose from the malfeasance of the king's representatives in an overseas dominion made the case one that warranted jurisdiction. But this jurisdictional analysis remains a surmise based on only two cases decided in the two years after *Somerset's Case*: *Fabrigas v. Mostyn* (K.B. 1773)[37] and *Campbell v. Hall* (K.B. 1774).[38]

Fabrigas v. Mostyn was a tort suit by a royal subject for assault and unlawful detention against the colonial governor-general of the island of Minorca. The banished Minorquin made his way to London and sued the governor for damages in the court of Common Pleas. A jury awarded him an astounding 3,000 pounds in damages, along with costs.[39]

On review, the governor's attorney argued that King's Bench had no jurisdiction over injuries sustained abroad. Mansfield vigorously defended his Court's jurisdiction: if it did not have jurisdiction, then the plaintiff could not get a remedy:

> [T]o lay down in an English Court of Justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the Great Seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect His Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.[40]

The only alternative was the Privy Council, which Mansfield claimed had only the power to fire the governor, not to grant damages—which, generally, was not accurate.[41] Mansfield argued that the Privy

36. Mostyn v. Fabrigas, (1773) 96 Eng. Rep. 1021 (K.B.).

37. *Id.*

38. Campbell v. Hall, (1774) 98 Eng. Rep. 1045 (K.B.).

39. *Mostyn*, 96 Eng. Rep. at 1022.

40. *Id.* at 1029.

41. *Id.*; *see also* JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (1950) (discussing the Privy Council review of colonial cases where the colony had an established court system).

Council offered no adequate remedy because the governor was essentially the agent of the Privy Council. It was, therefore, not a disinterested judge of the governor's behavior. This logic undermined the whole basis of imperial administration, which historically flowed from the Privy Council. It also previewed metropolitan debates in the next decade over civil service reform that gradually led to greater parliamentary regulation over the colonies—again, giving more power to Westminster Hall.[42]

The second issue in *Fabrigas* was whether the governor's action should be judged under Minorquin law or English law. The answer was Minorquin law, which had to be proved as a question of fact to the jury.[43] In practice, this meant that the jury would decide what duty the governor owed the private subject. Apparently they decided that the governor could not banish the plaintiff without trial.

The next case, *Campbell v. Hall*, involved a trespass action in which a taxpayer sought the return of a tax paid to the royal governor of Grenada. The case turned on the legality of a tax levied by the governor without the consent of Grenada's assembly. The governor levied the tax just after the colony had been taken from France and before there was a Grenadian assembly. Again, a subject sued the colonial governor in Westminster. This time there was little need to discuss the jurisdictional question, which seemed settled in *Fabrigas*. On the merits, Mansfield held that in two royal proclamations, the King had pledged to rule Granada with the consent of the governed[44]—therefore, no taxation without representation. However, Mansfield also said that taxation by the British Parliament was also permissible. In other words, he subscribed to the idea of virtual representation. The point, again, was to restrain the King and his Privy Council rather than offer individual overseas freeholders the right to veto taxes.

In sum, these cases, decided along with *Somerset* during the 1770s, appear to be part of a constitutional agenda to vault Westminster Hall to the top of imperial government. The loser was less the colonists in the abstract—about whom Mansfield worried little—than King George III and his ministers.

IV. CONCLUSION

There is no question that James Somerset's habeas corpus proceedings reflected hostility to chattel slavery. But the arguments aired in King's Bench reflected at least as much hostility to unrestrained exec-

42. *See* C.A. BAYLY, IMPERIAL MERIDIAN: THE BRITISH EMPIRE AND THE WORLD 1780–1830 (1989); ELIGA H. GOULD, THE PERSISTENCE OF EMPIRE (2000) (discussing Parliamentary reform of imperial administration in the late eighteenth century).

43. The trial judge pointed out that a defense under Minorquin law should have been pleaded specially, but was not. *Mostyn*, 98 Eng. Rep. at 1027.

44. Campbell v. Hall, (1774) 98 Eng. Rep. 1045, 1045–47, 1050 (K.B.). 708

utive government. In those arguments and in the decision, the legal professionals were leveraging their constitutional identity as Englishmen against what they saw as the despotic legal cultures of the overseas royal territories. This leveraging of identity was related to, but not just in the service of, the claim of one slave in London not to be sent to the deadly sugar plantations of Jamaica and the desire of abolitionists like Granville Sharp to get the courts involved in the struggle against slavery. As throughout the constitutionalism of the English-speaking peoples, interests converged: The Whiggish aspirations of common lawyers served the partial liberation of black slaves in England.

What then was the importance of *Somerset's Case*? Instead of seeing it as a key source of the law of liberty, perhaps we can see it, historically, as a product of a complicated constitutional structure in which claims of authority were always uncertain and contested. In that morass of conflicting jurisdictions called the British Empire, some institutions were always seeking supremacy but almost none ever wanted to make the whole space subject to one uniform law. This jostling for supremacy, while leaving diversity, created much room in which legal professionals and others could negotiate their identity. People in the twenty-first century are not being anachronistic when they read this case as a drama of identity politics. But the identity politics of the 1770s were not modern identity politics. Then, identity politics turned on jurisdictional lines within an empire.

Perhaps they still do. Where are the lines legal professionals try to draw today? What are lawyers and historians doing when they locate the germ of abolitionism in the stray remarks of lawyers and judges in Westminster Hall in 1772? What are they trying to say about their constitutional tradition, and what are they claiming for their profession?

Whatever *Somerset's Case* reveals about the history of liberty, it does offer a good example of a prominent tradition of the English-speaking peoples: the deft alternation between jurisdictional and jurisprudential conceptions of liberty. Historically, some Anglo-Americans have slipped effortlessly between describing a rule or practice in one particular place and abstracting it as a rule that should guide behavior in many places. They rarely declare a rule to be "universal" or "natural." They are more comfortable with an intermediate level of generalization, such as calling a rule part of a constitutional principle or essential to constitutionalism, terms that shift between place and placelessness, history and timelessness. Alternatively, others have struggled to defend those jurisdictional lines—to separate a province from a nation, for example, and a nation from an empire. Either strategy—abstraction on the one hand or delineation and specification on the other—can be used to further interests and ideas, to decide cases and to create identity. Many people engage in both moves at the

same time. Placing the arguments of legal professionals, such as those who argued *Somerset's Case*, in historical context can help us see which moves were occurring where, when, and why. Perhaps that historical understanding can, in turn, supply comparative perspective that will help illuminate the work that legal arguments do today, including the work accomplished by arguments about legal history.

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