

After the Revolution: *Somerset* and the Antislavery Tradition in Anglo-American Constitutional Development

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Lord Chief Justice Mansfield declared in Somerset v. Stewart (1772) that the nature of slavery is “so odious . . . nothing can be suffered to support it but positive law.” In this essay, I trace the principle laid down in Somerset through several cases that occurred during the first quarter of the nineteenth century, and I pay particular attention to two conservative judicial opinions in the 1820’s: Chief Justice John Marshall’s opinion in The Antelope (1825) and Lord Stowell’s opinion in The Slave Grace (1827). In each of these cases, practical considerations trump the antislavery constitutional tradition emanating from the Somerset decision. Rather than reflecting the triumph of illiberal constitutional theories, I argue that these cases demonstrate the ongoing tension between normative constitutional principles and practical political considerations.

By declaring in *Somerset v. Stewart* (1772) that the nature of slavery is “so odious . . . nothing can be suffered to support it but positive law,” Lord Chief Justice Mansfield placed himself firmly in that jurisprudential tradition that distinguishes between the law of nature and the law posited in any particular jurisdiction.¹ Despite Mansfield’s declaration, “*fiat justitia ruat caelum*,”² however, the judgment in *Somerset* merely maintained that slaves brought to England could not be forcibly removed from the Island without *habeas corpus* review. As the Chief Justice recognized, “The setting 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable in the effects it threatens,” and the Court’s judgment in *Somerset* was tempered by a due regard for political expedience.

Whatever the limited holding of the case, the *Somerset* judgment did seem to imply that the master-slave relationship rested on a dubious legal foundation because of slavery’s contrariness both to natural law and to the substantive principles of the English Constitution. After the American Revolution, moreover, the “decision took on a life of its own and

entered the mainstream of American constitutional discourse,” playing a particularly important role in American antislavery constitutionalism (Wiecek 1977, 21). As Don Fehrenbacher notes, *Somerset* “became a major weapon in the arsenal of abolitionism, lending support to the argument that slavery was contrary to natural law and without legal status beyond the boundaries of the jurisdiction establishing it by positive law” (1981, 28). At the dawn of the nineteenth century, the legislative criminalization of the transatlantic slave trades by the United Kingdom and the United States gave renewed energy to legal attacks on slavery based on this jurisprudential distinction between the law of nature and the local positive law in force.³

Although Mansfield’s rhetorical attack on the nature of slavery in *Somerset* was subsequently treated as *dictum* that did not decide any specific point of law, the particularities of the newly suppressed slave trade and the ambiguities of international law brought forth cases in the early nineteenth century in which judges were invited to consider whether anything but positive law could be suffered to support the legal

¹William Murray, Lord Mansfield, served as Chief Justice of the Court of King’s Bench, the highest common-law tribunal in England.

²“Let justice be done though the heavens may fall.”

³See 2 U.S. Statutes at Large 426–430 (March 2, 1807) and 47 Georgii III, Session 1, Cap. XXXVI (March 25, 1807).

status of slavery. One type of novel legal case that was brought before judges in England and the United States involved slaves asserting their own claim to freedom by virtue of their temporary residence in jurisdictions that did not explicitly protect or sanction slavery through positive legislation. Absorbing the premise in *Somerset* that the status of slavery depends on local law, these individuals petitioned for their own freedom. “Once free for an hour, free forever” became the rallying cry of the Anglo-American abolitionist movement. As freemen, they claimed, any reintroduction into a state of slavery constituted an illegal assault subject to *habeas corpus* review and judicial redress.

In the following sections of this essay, I compare the theoretical bases of English and American constitutionalism, respectively, and I trace the principle posited in *Somerset* through a variety of cases occurring in the first quarter of the nineteenth century. In contrast to the linear constitutional narratives of what sometimes is pejoratively called “Whig history,” I attempt to situate this study within a more convoluted political and historical context.⁴ As Ken Kersch notes in the introduction to his revisionist account of the development of post-New Deal civil liberties jurisprudence,

To the extent that political practice implicates important creedal principles . . . it also entails both contestation over the meanings of those principles and the perpetual imperative of making tragic choices between those principles—such as liberty and equality or privacy and publicity—when, as is commonly the case, one conflicts with another. The meanings are defined and choices made in concrete political circumstances and institutional contexts, with the decision in each case shot through with pull of specific, historically situated goals, aversions, hopes, and fears. (2004, 11)

The development of Anglo-American antislavery constitutionalism in the early nineteenth century is particularly amenable to an analysis that emphasizes the influence of creedal principles on the tragic constitutional choices made within concrete political and historical contexts. Antislavery jurists often invoked political and moral ideals to challenge contradictory institutional and social practices, but, as historically situated actors, they seldom were faced with simple, unidimensional choices between, for example, free-

dom and slavery or egalitarianism and ascriptive hierarchism.

In several cases that involved slaves asserting their own claims to freedom, the lack of explicit, controlling legislative provisions further brought to the fray questions of higher background rules and fundamental constitutional commitments implicit in each tradition, including considerations of natural law. As I argue, there was often a certain tension between the universal and the particular elements at play in these cases, and this tension was brought to light by a judicial consideration of the relationship between the particular requirements of the positive law (as well as other prudential or strategic considerations) and the universal principles of liberty thought by judges to be embodied in the natural law. Following scholars such as Samuel Huntington (1981) and Gary Jacobsohn (2008a, 2008b), I describe this tension between the universal and the particular elements in the constitutional orders as a kind of constitutional disharmony. Indeed, Jacobsohn, from a comparative perspective, argues that the problem of disharmony is a “universal constitutional condition” (2008a, 1), and Huntington, within the American context, notes that the “gap between promise and performance creates an inherent disharmony, at times latent, at times manifest, in American society” (1981, 12).

The practice of slavery in the Anglo-American world during the early nineteenth century provides what perhaps is the starkest example of discord between normative constitutional principles and existential realities, a disharmony John Quincy Adams later characterized as a great “conflict between the principle of liberty and the fact of slavery” (1838, 39). The notion that American ideals have been at odds with American practice, however, is a contested premise. Scholars associated with Critical Race Theory, in particular, have challenged the thesis that liberal ideals are necessarily opposed to slavery and other forms of racially ascriptive hierarchies (Franklin 1989; Hochschild 1984; Mills 1997). In addition, the empirical claim that the ideals (as opposed to the practices) of Americans have predominately been liberal (Hartz 1955; Myrdal 1944; see also Ericson 2000) has itself been challenged by scholars such as Rogers Smith, who argue that “American politics is best seen as expressing the interaction of multiple political traditions, including *liberalism*, *republicanism*, and *ascriptive forms of Americanism*, which have collectively comprised American political culture, without any constituting it as a whole” (1993, 550; see also Smith 1999b).

⁴See, for example, Kersch (2004). Quoting the historian Herbert Butterfield, Kersch describes Whig history as the “endeavor to cut ‘a clean path through . . . complexity’ through ‘an overdramatization of the historical story’ that pits the forces of progress against the forces of reaction” (2004, 2).

Mark Graber's recent revisionist account of the Supreme Court's proslavery ruling in *Dred Scott v. Sandford* (1857) highlights some of the normative questions that emerge from viewing American constitutional development through a multiple traditions paradigm (2006). American antislavery constitutionalism in the nineteenth century rested on the premise that even the slavery-related clauses in the Constitution aspired toward a certain liberal constitutional vision that was not yet a reality. One specific interpretive difficulty attending such a theory of constitutional aspiration is the claim that, with respect to slavery, illiberal as well as liberal principles animated the antebellum constitutional order. This is the charge leveled by Graber at aspirational theories generally: "The racist and proslavery principles [the Court] relied on" in *Dred Scott*, Graber argues, "had strong roots in both the Constitution and the American political tradition" (2006, 76). Aspirational arguments could not guarantee substantively just results, because

Racist and other ascriptive ideologies are as rooted in the American political tradition as liberal, democratic, and republican ideals. Americans cherished white supremacy. Policies preserving racial hegemony were means to valued ends, not temporary expedients. (2006, 77)

Yet many of the revisionist accounts—whether stemming from some variation of a consensus view or from a multiple traditions approach—focus on the Jacksonian, Civil War, or Reconstruction eras.

The defense of slavery as a positive good as well as an entrenched constitutional value, rather than a necessary evil temporarily protected by constitutional compromise, was, however, much more prevalent after 1830. Even a young Roger Taney, author of the Court's notorious proslavery opinion in *Dred Scott*, assented to the tenants of the antislavery constitutional tradition while working as a lawyer in 1819. "A hard necessity," Taney argued,

... compels us to endure the evil of slavery for a time. It was imposed upon us by another nation, while we were yet in a state of colonial vassalage. It cannot be easily or suddenly removed. Yet while it continues it is a blot on our national character, and every real lover of freedom confidently hopes that it will be effectually, though it must be gradually, wiped away; and earnestly looks for the means, by which this necessary object may best be attained. And until it shall be accomplished: until the time shall come when we can point without a blush, to the language of the Declaration of Independence, every friend of humanity will seek to lighten the galling chain of slavery, and better, to the utmost of his power, the wretched condition of the slave. (Eaton 1940, 131)

Only later did Taney adopt the position, which informed his *Dred Scott* opinion, that "it is too clear for dispute, that the enslaved African race were not intended to be included" under the egalitarian principles of the Declaration of Independence (1857).

By focusing on the influence of *Somerset* on Anglo-American constitutional development during the first quarter of the nineteenth century, I seek to supplement and challenge both the traditional "Whiggish" constitutional narratives of inevitable liberal progress and the various revisionist accounts that suggest proslavery principles are *as rooted* in the Anglo-American constitutional tradition as antislavery principles. The early nineteenth-century trend of judicially extending the general principles of liberty implicit in *Somerset* was halted by conservative decisions in the American case of *The Antelope* (1825) and the English case of *The Slave Grace* (1827), which are remarkably similar in principle despite their emergence in different constitutional contexts.⁵ Rather than reflecting the vindication of proslavery aspirations, equally rooted in the constitutional tradition, I argue that these conservative opinions represent misguided judicial efforts to hold together increasingly disharmonic constitutional orders. As an interpretive paradigm, the concept of constitutional disharmony is helpful in explaining the ways in which the English and American constitutions contained internally discordant elements while nonetheless emphasizing the "primacy of particular aspirations within an ongoing dynamic of disharmonic contestation" (Jacobsohn 2008a, 9). The increasing disharmony in the constitutional orders did, of course, reflect competing constitutional visions, but it would be a mistake to treat all constitutional visions as equal or to fail to discriminate between those principles which are fundamental and those which are aberrational to the foundations of Anglo-American constitutionalism. In fact, the fundamental principles undergirding both the English and American claims to constitutional liberty offered a

⁵In depicting this early nineteenth-century contest over constitutional principles and the practice of human bondage, I employ the term "liberal"—as distinguished from *liberalism*—in a very broad sense to connote a partisanship for liberty as opposed to slavery. I use the term "conservative," on the other hand, as a relative term that connotes the conservation of the *status quo* with respect to slavery. In any historical work, the terms "liberal" and "conservative" are potentially anachronistic, not least because of the association of those terms with contemporary politics or political theory. As Rogers Smith notes, "the term *liberalism* (as opposed to *liberty* or *liberal*) was in fact infrequently used in English-speaking countries until the last half of the nineteenth century" (1999a, 15).

strong normative challenge to the existing institution of chattel slavery.

Constitutionalism and the Challenge of African Slavery

At the beginning of the Revolution of 1776, Americans claimed an inheritance of liberty that was secured to them by the English Constitution, which was “the constituted—that is, existing—arrangement of governmental institutions, laws, and customs together with the principles and goals that animated them” (Bailyn 1992, 68). As the colonists began enumerating grievances against those very English laws and institutions (often invoking the authority of natural law), it soon became evident that it would be politically foolish and perhaps theoretically misguided to ground their claim to rights in the English Constitution itself. As Gordon Wood notes, “By 1776, the Americans had produced out of the polemic of the previous decade a notion of a constitution very different from what eighteenth century Englishmen were used to—a notion of a constitution that has come to characterize the very distinctiveness of American political thought” (1998, 260). In their rhetorical battle with the Crown, Americans attempted to separate “principles from government, constitutional from legal,” and this new understanding is what modern commentators have broadly come to call “constitutionalism” as opposed to the older understanding, which merely connotes an experiential constitution—or institutional arrangement—of government (Wood 1998, 267).

Englishmen, of course, took pride in their own particular constitution. It was through the English Constitution, after all, that the principles of Magna Carta were continually reaffirmed. Blackstone had observed that “The absolute rights of every Englishman . . . are coeval with our form of government,” and the liberties of Englishmen were associated principally with “that great charter of liberties” (Blackstone [1765–69] 1899, 66). Indeed, that charter of liberties inculcated principles that were identical with the principles undergirding the new American constitutionalism: limited government, supremacy of the rule of law, and condemnation of arbitrary power. But the “security of rights under the old constitutional system had been custom,” and when Parliament began to move against ancient custom the American colonists perceived that their rights were not secured by any fundamental restraint on the will of Parliament (Reid 1986, 9).

That narrative, at least, informed the polemic issued against the English Constitution by the Americans. James Wilson, that early expounder of American law, summarized this position when he wrote, “The order of things in Britain is exactly the reverse of things in the United States. Here, the people are masters of the government. There, the government is master of the people” (1804, 425). In his opinion in *Chisholm v. Georgia* (1794), Wilson explained that the new American science of jurisprudence rested on a fundamentally different foundation than had the jurisprudence of the mother country: “To the Constitution of the United States the term SOVEREIGN, is totally unknown.” In England, it was said that “the King or sovereign is the fountain of Justice,” but “another principle, very different in its nature” was operative in America. That principle, according to Wilson, was that “The sovereign, when traced to his source, must be found in the man.”

Despite the American parry against the doctrine of Parliamentary sovereignty, however, the substantive principles of the English Constitution were still understood by Englishmen to consist of those same principles undergirding American constitutional thought. The mode of government operation was different, to be sure: in England, “Every act of Parliament was in a sense a part of the constitution, and all law, customary and statutory, was thus constitutional” (Wood 1998, 261). Yet the rights of Englishmen, established and secured by Parliament, were nevertheless understood to be “founded on nature and reason” even if they were at times existentially denied and left insecure, “their establishment, excellent as it is, still being human” (Blackstone [1765–69] 1899, 66). The principal disagreement between the American and English jurists, then, was a disagreement on how effectively to secure those rights, founded on nature and reason, through the creation and maintenance of a constitutional order.

For both Americans and Englishmen, the existence of legal slavery provided a challenge to the fundamentals of their own constitutional thought. The principles of African slavery, as it was found in the English colonies, including the American colonies, were diametrically opposed to Anglo-American constitutional principles. This particular system of chattel slavery established the private despotism of one man over another, the rule of private human will instead of the rule of law, and the expansion and enlargement of arbitrary power. If a system of chattel slavery was to subsist under a regime of liberty, then the questions properly arose: Are the rights to liberty merely conventional rights, inhering in Englishmen

qua Englishmen (or Americans *qua* Americans) or do some fundamental rights inhere in man *qua* man? Further, if there are rights that inhere in man *qua* man, do these rights apply to Africans, and, if so, are these rights justiciable in courts of law? These questions uncover a tension between universal and particular elements at work in the English and American claim to liberty. In order to maintain a system of chattel slavery and simultaneously assert a constitutional right to be free from arbitrary exercises of force, one had to either deny the humanity of the slave or deny the relevance of human status to the claim of liberty under the Constitution. In this respect, one could deny the Africans' participation in the universal rights of man, altogether deny the existence of any such universal rights, or concede that universal rights do apply to the Africans while nevertheless asserting that such rights are not secured by the particular constitution in question.

It is this tension between the universal and the particular that Blackstone attempted to navigate in that section of his *Commentaries* titled "Of Master and Servant." "The principle aim of society," Blackstone wrote, "is to protect individuals in the enjoyment of those absolute rights, which were invested in them by the immutable laws of nature." Those absolute rights inhering in man by nature served to underpin that spirit of liberty, which, Blackstone declared, "is so deeply implanted in our constitution, and rooted even in our very own soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a freeman, though the master's right to his services may *possibly* still continue" ([1765–69] 1899, 63, 65–66).

In the American context, Wilson had asserted that the entire basis of American law rested on an understanding that "man, fearfully and wonderfully made, is the workmanship of his all perfect Creator" and that arbitrary power degrades "man from the prime rank, which he ought to hold in human affairs" (*Chisolm v. Georgia*, 1794). Wilson also understood the inconsistency of the primacy of man in the constitutional order with the existence of African slavery, having approvingly quoted the abolitionist French statesman Jacques Necker in the Pennsylvania Ratifying Convention, saying to his fellow legislators that "we pride ourselves on the superiority of man, and it is with reason that we discover this superiority in the wonderful and mysterious unfolding of the intellectual faculties; and yet the trifling difference in the hair of the head, or in the color of the epidermis, is sufficient to change our respect into contempt" (Elliot 1888). Like Blackstone, however, Wilson per-

ceived his own Constitution as a repudiation of the principles upon which the institution of slavery rested: the various clauses in the Constitution dealing with representation, the importation of persons, etc., Wilson asserted, lay "the foundation for banishing slavery out of this country" (Elliot 1888).

The antislavery sentiments of eminent and formative jurists such as Blackstone and Wilson notwithstanding, the fact remained that the rights of a master over his slave had long been customarily recognized in the British Empire and compromises with the slave interest were imbedded—as scaffolding perhaps, but imbedded nonetheless—in the fundamental law of the American regime.⁶ Moreover, after the legislative criminalization of the transatlantic slave trades in the United Kingdom and the United States in the early nineteenth century, the tension between the universal rights of man and the conventional rights of particular men became quite pronounced through legal battles over the status of captured or imported slaves.⁷ In several cases, lawyers for plaintiffs suing for their own freedom urged the courts to consider Mansfield's judgment in *Somerset* as establishing the principle upon which the slaves asserted their claim to liberty. In the following sections, I explore the principle posited in *Somerset* along with two subsequent judicial opinions in *The Antelope* (1825) and *The Slave Grace* (1827). In both of these cases, judges recognized that there was a tension between the conventional rights of the master and the natural rights of the slave, but nevertheless asserted that they were compelled by "the path of duty"—to use a phrase from Marshall's opinion in *The Antelope*—to vindicate the conventional rights of the slave owners.

The Somerset Judgment

James Somerset was an African-born Virginia plantation slave who was brought to England by his master in the late 1760's. After a foiled runaway attempt, Somerset was bound and held on board an

⁶Abolitionists such as Frederick Douglass argued that "the Federal Government was never, in its essence, anything but an anti-slavery government . . . It was purposely so framed as to give no claim, no sanction to the claim of property in man. If in its origin slavery had any relation to the government, it was only as the scaffolding to the magnificent structure, to be removed as soon as the building was completed" ([1863] 1952, 365).

⁷During the first quarter of the nineteenth century, judges in the South as well as the North interpreted the principle of *Somerset* as declaring that slaves were effectively manumitted by their residence in free jurisdictions (Finkelman 1981, 187–234).

English vessel that was scheduled to set sail for Jamaica, where he was to be sold as punishment for his conduct. After hearing of Somerset's situation, Granville Sharp along with several other antislavery leaders successfully petitioned Lord Mansfield to issue a writ of *habeas corpus* to review the legality of Somerset's detention. Sharp's friend, Francis Hargrave, served as counsel for Somerset, and Hargrave's argument—developed in collaboration with Sharp—rested on several key premises that had gained acceptance in England's nascent antislavery societies.

In his argument before the Court, Hargrave first asserted that a master's claim over his slave was "opposite to natural justice." Next, he suggested that "the genius and spirit of the constitution" forbade the existence of slavery in England, because the perpetuation of slavery depended on slave codes that established "arbitrary maxims and practices" which were repugnant to the rule of law under the English Constitution (2). Because slavery was contrary to the law of nature, moreover, Hargrave argued that the legal claim of a master over a slave depended on the local law in force (instead of some abstract property right in a slave), and the law of England did "not invest another man with despotism" (3). In this way, Somerset's attorneys initiated a two pronged assault on slavery in England by arguing that it was repugnant to the "natural rights of mankind" as well as contrary to the particular genius of the English Constitution.

Mansfield was favorably inclined to the arguments put forward by Hargrave, though he recognized the danger of positing a principle that would effectively free the 14,000–15,000 slaves being held in England. The counsel for Somerset's master had warned that "There are very strong and particular grounds of apprehension, if the relation in which [the slaves] stand to their masters is utterly to be dissolved on the instant of their coming into *England*" (10). While noting "the disagreeable effects" that such a situation threatened, including "the many thousands of pounds" that would be lost by slave owners, Mansfield maintained that practical considerations could not alter his judicial duty: "Compassion will not, on the one hand, nor inconvenience on the other, be to decide; but the law" (8, 17). And in interpreting the law, Mansfield reiterated many of the arguments put forward by Hargrave:

The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political; but only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory; It's so

odious, that nothing can be suffered to support it but positive law. Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged. (19)

Mansfield's judgment said nothing of slavery in the English colonies; neither did it hint at any legal implications for the colonial slave trade. The Chief Justice also specifically asserted that a limited right of a master to the services of his slave does and may indeed exist in England. It was the particular act of binding Somerset in order to sell him abroad that Mansfield declared to be "so high an act of dominion" that "it must be recognized by the law of the country where it is used" (19). In its direct application, then, the famous *Somerset* decision merely established that slaves held in England could challenge their detention or treatment on grounds of *habeas corpus*—not an unsubstantial ruling but also not the ruling that abolitionists like Sharp and Hargrave were looking for. Nonetheless, Mansfield's teaching that slavery was contrary to natural law—and correlatively that nothing could establish slavery except positive law—had a reverberating influence on Anglo-American antislavery constitutionalism.

Antislavery Constitutionalism after the Closing of the Slave Trades

In the 50 or so years that had passed since Mansfield issued his decision in *Somerset*, there was a clear line of legislative and judicial activity in England and the United States tending toward an expansion of liberty for human beings as such. In March of 1807, both the British Parliament and the United States Congress passed legislation that criminalized the transatlantic slave trades.⁸ The earliest judicial decision coming out of this legislation was the English case of *The Amedie* in 1810.⁹ Following the logic of *Somerset*, Sir William Grant wrote for the high court of admiralty that the slave trade—because of its contrariness to natural law—"cannot, abstractedly speaking, be said to have a legitimate existence." Trafficking in slaves was thus held to be *prima facie* illegal unless the claimant could prove that his title or right to property in a certain slave was expressly declared by

⁸*Supra* n. 3. See U.S. Constitution, Art. I § 9, prohibiting the abolition of the slave trade by the national legislature until 1808.

⁹The "Amedie" was sailing under the flag of the United States with a cargo of 105 slaves. A British cruiser confiscated the ship and cargo and brought the cargo, including the slaves, into a vice-admiralty court for adjudication.

the “particular law of his own country.” According to Grant, then, the judicial posture on claims for the “restoration of human beings” was to be in favor of liberty unless it could be unequivocally shown that the individuals were being held as slaves under some expressly decreed provision of local municipal law (251). This principle was then reiterated by Sir William Scott, Lord Stowell, in *The Fortuna* (1811) and *The Donna Marianna* (1812) before entering American constitutional jurisprudence through Joseph Story’s opinion in *La Jeune Eugenie* (1822).¹⁰

Justice Story’s antislavery views were well known long before his hearing of this case. Before a Boston Grand Jury in 1819, Story had proclaimed,

Our constitutions of government have declared, that all men are born free and equal, and have certain unalienable rights, among which are the right of enjoying their lives, liberties, and property, and of seeking and obtaining their own safety and happiness. May not the miserable African ask, ‘Am I not a man and a brother?’ We boast of our noble struggle against the encroachments of tyranny, but do we forget that it assumed the mildest form in which authority ever assailed the rights of its subjects; and yet there are men among us who think it no wrong to condemn the shivering negro to perpetual slavery? (Story 1851, 340–41)

It perhaps is not surprising, then, that Story condemned the nature of the slave trade with forceful rhetoric in his *La Jeune Eugenie* opinion. The slave trade, Story asserted,

. . . begins in corruption, and plunder, and kidnapping. It creates and stimulates unholy wars for the purpose of making captives. It desolates whole villages and provinces for the purpose of seizing the young, the feeble, the defenceless, and the innocent. It breaks down all the ties of parent, and children, and family, and country. It shuts up all sympathy for human suffering and sorrows. It manacles the inoffensive females and the starving infants. It forces the brave to untimely death in defence of their humble homes and firesides, or drives them to despair and self-immolation. It stirs up the worst passions of the human soul, darkening the spirit of revenge, sharpening the greediness of avarice, brutalizing the selfish, envenoming the cruel, famishing the weak, and crushing to death the broken-hearted. This is but the beginning of the evils . . . All the wars, that have desolated Africa for the last three centuries, have had their origin in the slave trade. The blood of thousands of her miserable children has stained her shores, or quenched the dying embers of her desolated towns, to glut the appetite of slave dealers. (845)

This litany of evils was relevant precisely because Story assumed the premise of Mansfield’s judgment that a practice contrary to natural law could not obtain a lawful existence unless it was established by positive legislation. In this case, Story was urged by the defendant’s counsel to look to “the law of nations” for guidance in his decision. In an application of *Somerset’s* principle to international law, moreover, Story argued that the law of nations rested on “the eternal law of nature” and found its bearings from “the general principles of right and justice.” Whatever might have been “deduced from the nature of moral obligation” was part of international law unless those moral obligations were “relaxed or waived by the consent of nations.” In other words, the judicial consideration with respect to international law and slavery remained the same as it was with respect to domestic slavery: nothing could be suffered to support it except positive legislation. Story’s diatribe against the evils of slavery was all by way of showing that slavery was inconsistent with the “nature of moral obligation” under the “eternal laws of nature” (846) such that it could not be said to be countenanced by international law in the absence of some expressed treaty provision.

As a constitutional matter, Story’s argument in *La Jeune Eugenie* was consistent with the teachings of other antislavery American jurists such as James Wilson. The classical understanding of the foundation of American constitutional government was that the people at large grant to the government certain limited and enumerated powers. To use Jefferson’s language from the Declaration of Independence, governments derive their just powers from the consent of the governed, and any legitimate exercise of government power ultimately rests on a normative understanding of man’s equality under “Nature and Nature’s God.” For Wilson, this constitutional teaching marked the beginning of an entirely new science of jurisprudence, which rested on an understanding that “States and Government were made for man,” and correlatively that a State “derives all its acquired importance” from man’s “native dignity” (*Chisolm v. Georgia* 1794). The principles of this new science of jurisprudence challenged the very existence of a system of chattel slavery. As long as slavery was given a legal basis by the slave codes of local municipalities under the Constitution, it was to be judicially tolerated, but, according to Wilson, the presuppositions underpinning the Constitution presented “the pleasing prospect that the rights of mankind will be acknowledged and established throughout the Union” (Elliot 1888).

¹⁰“*La Juene Eugenie*” was an American-made vessel flying under a French flag that was captured by an American schooner off the coast of Africa on suspicion of engaging in the slave trade.

While England's Constitution rested on the disparate foundation of parliamentary sovereignty, there, too, in conjunction with legislative provisions circumscribing the slave trade, was a development of constitutional claims based on native human dignity. Sir William Grant, in *The Amedie*, reflected:

The slave trade has . . . been totally abolished in this country, and our legislature has declared, that the African slave trade is contrary to the principles of justice and humanity. Whatever opinion, as private individuals, we before might have entertained upon the nature of this trade, no court of justice could with propriety have assumed such a position, as the basis of any of its decisions, whilst it was permitted by our own laws. But we do now lay down as a principle, that this is a trade, which cannot, abstractedly speaking, have a legitimate existence. I say, abstractedly speaking, because we cannot legislate for other countries. (251)

Grant reiterated the logic of *Somerset* that a right to ownership of or traffic in another human being was illegitimate when considered in the abstract even though it nevertheless could have been sanctioned by positive legislation. Therefore, consistent with this doctrine, a claimant applying for the restoration of "human beings . . . carried unjustly to another country for the purpose of disposing of them as slaves" bore the burden of showing "that by the particular law of his own country he is entitled to carry on this traffic" (251). The burden of proof, now, rested on the slave master, and the judicial presumption was a presumption in favor of liberty.

The Conservative Impulse of the 1820s

The logic of the principle posited by Mansfield in the *Somerset* decision had taken such shape by 1824 that Justice Best, writing in *Forbes v. Cochrane and Cockburn*, could assert somewhat uncontroversially that *Somerset* had established "on the high ground of natural right" that "slavery is inconsistent with the English constitution." In the American context, as well, it was generally recognized that slavery was—as Justice Story wrote in *La Jeune Eugenie*—a practice that blunted "the interests of universal justice" (850). It was also telling that the lawyer's argument for the claimants was not at odds with Story's assertion:

. . . a justification of slavery, or the slave trade, is not intended. I concur entirely in the views of the libellant's counsel on these subjects; and readily acknowledge, that at no time, nor at any occasion, have the noble and honorable sentiments, which spring up in cultivated minds, been more eloquently and ably impressed, than in this case.

But, he went on to admonish, "In deciding new and unprecedented cases, some consideration is due to expediency and convenience . . . By the judgment which the libellants desire to have given, in the present state of the world, the progress of assent to effect abolition may be seriously retarded" (839). The argument put to Justice Story against judicially extending the logic of the principles growing out of the *Somerset* decision was thus an argument of expediency—a desire not to halt the progress of humanity by pouring the new wine of abolition too quickly into the old wineskin of constitutional compromise. Perhaps abstract constitutional principles had advanced in cultivated minds, but the actual constitution of at least one part of society was nevertheless very much committed to preserving the institution of slavery. Indeed, the proper maintenance of constitutional order amid such bifurcated interests was a real consideration, and, if moving the principles of liberty forward too quickly at the judicial level was a serious danger to the constitutional order, given the present state of the world in the early 1820s, then a judicial remedy to the danger of progress was initiated by Chief Justice Marshall's opinion in *The Antelope*.

The case of *The Antelope* involved a pirate ship carrying 280 Africans previously captured from American, Portuguese, and Spanish vessels, which was found off the coast of the United States and brought into Savannah for adjudication. Portuguese and Spanish claimants initiated the suit under a treaty provision in which the United States agreed to return property rescued from pirates. When oral arguments began before the Supreme Court, Francis Scott Key, the government lawyer appointed to represent the Africans, laid out an argument that had become familiar in similar cases. Key argued that there was a substantive difference between the *onus* required for proving legal ownership of things, on the one hand, and proving legal ownership of men, on the other. "In some particular and excepted cases, depending upon the local law and usage, [men] may be the subjects of property and ownership; but by the law of nature all men are free" (73). In order to legally claim title to the Africans, then, the claimants had to demonstrate more than "mere possession"; that is, they had to "show a law, making such persons property, and that they acquired them under such law" (74). After referencing the opinions in *The Amedie*, *The Fortuna*, *The Donna Marianna*, and *La Jeune Eugenie*, Key asserted that where the determinative law suffered from any ambiguity, "the fair abstract question arises, and their claim may well be repudiated as founded in injustice and illegality" (77).

John Berrien, the sitting United States Senator from Georgia who served as the lawyer representing the Spanish and Portuguese claimants, attacked Key's claims by offering a constitutional argument that protected the right to property in a slave as fundamental, denied the existence of universal rights, and denied the competence of a court to consider arguments based on private notions of morality. "For more than twenty years this traffic was protected by your constitution, exempted from the whole force of your legislative power; its fruits yet lay at the foundation of that compact . . . Paradoxical as it may appear," Berrien asserted, the slaves "constitute the very bond of your union" (86). Whatever one's "peculiar notions of morality," a court was to be guided by the law, and, in a reversal of the principle in *Somerset*, Berrien maintained that the slave trade was "not contrary to the positive law of nations; because there [was] no general compact inhibiting it" (90). Rather than taking a stance *in favorem libertatis*, the legal presumption, according to Berrien, tended in favor of slavery unless the right to slavery was specifically circumscribed by positive legislation.

Of course, the right in question was not construed as a right to slavery as such but rather as a right to property. As Marshall articulated in the opening lines of his opinion, this was a case in which "the sacred rights of liberty and property come in conflict with each other" (114). But in so depicting the point of conflict, Marshall assumed an answer to the very question in controversy; for the argument made on behalf of the Africans was that a human being, by his very nature, was not a legitimate species of property (whereas he was the bearer of rights, including, presumably, the right himself to own property). United States Attorney General William Wirt, arguing along side Key on behalf of the Africans, asserted "that no legitimate right can grow out of a violation" of the principles of "justice and humanity," and, foreshadowing an argument later made by Abraham Lincoln, Wirt summarily declared that it was impossible to "derive a right, founded upon wrong" (112–13). Under this construction, any alleged conflict between these two rights seemed chimerical at best.

Marshall as well conceded that "every man has a natural right to the fruits of his own labour . . . and that no other person can rightfully deprive him of those fruits, and appropriate them against his will, seems to be the necessary result of this admission" (120). Yet by admitting that slavery had no rightful basis in the abstract, the conflict between the two "sacred" rights articulated by Marshall appeared to be a conflict between the universal rights of the slaves,

on the one hand, and the conventional rights of the slave owners, on the other. The word *sacred*—with all of its religious connotations—was perhaps not an appropriate adjective for the rights in question; yet there was a manner in which the universal and the particular elements at play conjured sentiments of a religious fervor, and, according to Marshall, any judicial resolution of a case involving these competing claims had to be founded on established custom. "Whatever might be the answer of a moralist to this question," Marshall proclaimed, "a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and general assent, of that portion of the world in which he considers himself as a part, and to whose law the appeal is made" (121).

By making custom the sole standard of international law, moreover, Marshall jettisoned that part of Story's *La Jeune Eugenie* opinion which had argued that custom was determinative only "in things indifferent or questionable" that were not in contravention of "the general principles of right and justice"—unless those principles of right and justice were specifically relaxed by international statute (i.e., by treaty) (846). No one involved in *The Antelope* claimed that the Spanish ought not to have been able to reclaim their property under the explicit treaty provision, however. What was central to this case was the question, what types of things legitimately count as property? Under international custom, Marshall declared, slaves were a legitimate species of property because ownership in slaves was not yet universally proscribed. Accordingly, Marshall approved the Circuit Court's decision and seemingly approved the Circuit Court's remedy, which treated the individual Africans as fungible goods—dividing them up by the proportion claimed by Spain (93/280) while making adjustments for the 114 who had died while in legal custody in Georgia.¹¹

James Kent, in his *Commentaries on American Law*, later described the progression from the English slave trade cases in the early nineteenth century to the American cases heard by Story and Marshall in the

¹¹"Read literally," John Noonan notes, "Marshall's decree approved the lottery." There was, however, sufficient ambiguity in the opinion to require interpretation by the lower courts. A year after its original decision, the Supreme Court then issued a directive clarifying that the slaves would "be designated by proof made to the satisfaction of that court." Under this formula, the lower court eventually eschewed a lottery system and "without discussion of the admissibility of the evidence, without analysis of its ambiguities, without explication of the standard of proof which they were employing . . . held that 39 Africans had been designated by proof to their satisfaction as Spanish property" (Noonan 1977, 117; 121; 127–28).

1820s. “In the case of *La Jeune Eugenie*,” Kent concluded,

... it was decided in the Circuit Court of the United States, in Massachusetts, after a masterly discussion, that the slave trade was prohibited by universal law. But, subsequently, in the case of the *Antelope*, the Supreme Court of the United States declared that the slave trade had been sanctioned, in modern times, by the laws of all nations who possessed distant colonies; and a trade could not be considered contrary to the law of nations, which had been authorized and protected by the usages and laws of all commercial nations. ([1826] 1987)

The English correlate of the *Antelope* decision had been handed down by Lord Stowell several years previously in a case involving a French vessel captured by a British cruiser off the coast of Africa. Limiting and modifying his own precedent in *The Fortuna* and *The Donna Marianna*, Stowell declared in the case of *Le Louis* (1817) that the law of nations rested on a “legal standard of morality” which was “fixed and evidenced by general and ancient and admitted practice.” Still, wishing not to be “misunderstood or misrepresented,” Stowell insisted that he was no “professed apologist for this practice.” Yet, to “press forward to a great principle by breaking through every other great principle that stands in the way of its establishment . . . in short, to procure an eminent good by means that are unlawful; is as little consonant to private morality as to public justice” (249–50). As Henry Wheaton later reported, Stowell’s decision in *Le Louis* rested on the principle that “no one nation had a right to force the way to the liberation of Africa, by trampling on the independence of other states” (1836, 116). The search of foreign vessels on the high seas threatened to strain relations among European nations, and Stowell was cautious about applying natural principles of justice to foreign citizens in British courts of admiralty.

Beyond the difficult questions of international relations implicated by the regulation of the slave trade, the criminalization of the practice also brought forth novel questions of jurisprudence, directly touching upon the principle laid down in *Somerset*. In a letter to Joseph Story, Stowell reflected on one such case:

The fact is, I have been, at this late hour of my time, very much engaged in an undertaking perfectly novel to me, and which has occasioned me great trouble and anxiety, and that was the examination of a new question, namely—whether the emancipation of a slave, brought to England, insured a complete emancipation to him upon return to his own country, or whether it only operated as a suspension of slavery in this country, and his original character devolved upon him again, upon his return to his native Island. ([1828a] 1851)

A similar scenario had confronted Stowell in a case decided the previous year when Grace, a domestic slave under the laws of Antigua who had nonetheless resided with her master in England for 11 years, was confiscated by customs authorities upon her return to Antigua for having been illegally imported in contravention of the Slave Trade Act of 1807. The claim made on behalf of Grace’s freedom was that the laws of England did not protect slavery; that Grace therefore had been divested of her status as a slave when she moved to England; and that as a freeperson she could not be imported into any jurisdiction for the purposes of dealing with her as a slave. The question of this case, again, was essentially whether anything could be suffered to support slavery but positive law, and Grace’s lawyers urged the court to consider the principle posited in *Somerset*, in conjunction with the legislative abolition of the slave trade, as protecting Grace’s freedom under the laws of England.

As Stowell recognized in his judicial opinion, “. . . this notion of a right to freedom by virtue of a residence in England is universally held out as a matter which is not to be denied.” But, Stowell contended, the nature and extent of that freedom was at issue, and it had been established by custom and usage that “residence in England conveys only the character so designated during the time of that residence, and continues no longer than the period of such residence” (103–04). In other words, the laws of England offered a dispensation of freedom that was temporarily sustained, only because the means of maintaining chatteldom were not “practicable” on the Island, and this understanding was corroborated by the fact that colonial masters actually did bring their slaves with them to England when they traveled, and they frequently returned home with the master-slave relationship intact.

In order to maintain this position, Stowell dismissed Mansfield’s claim regarding the odious nature of slavery as a mere “*obiter dictum* that fell from that great man.” Additionally, rather than undertaking a consideration of those universal principles posited by Mansfield, he asserted that “ancient custom is generally recognized as the just foundation of all law” and that those principles undergirding the English claims to liberty were conventional principles that applied only to particular people (107). “This cry of ‘Once free for an hour, free forever!’” Stowell wrote, “. . . is mentioned as a peculiar cry of Englishmen as against those two species of property [i.e., villenage and slavery]. It could interest none but the people of this country: and of these only the masters” (115). In other words, “It may be a misfortune that she was a

slave”—a sentiment that would have been seconded by Marshall—“but being so, she in the present constitution of society had no right to be treated otherwise” (100).

Constitutionalism amidst “What is Passing in the World”

From a comparative perspective, both Marshall’s and Stowell’s opinions appear to represent a stark limitation on the efficacy of universal principles in constitutional adjudication. Neither opinion, for example, denied the validity of the principle cited by Marshall that “every man has a natural right to the fruits of his own labour,” and Stowell went so far as to declare himself a “friend of abolition generally.” While the substance of Stowell’s opinion would seem markedly inconsistent with such rhetoric, a conservative decision in such a novel case is perhaps consistent with some of the principles undergirding the English Constitution, particularly the principle of Parliamentary sovereignty and the high regard for English custom. Indeed, Stowell’s opinion in *The Slave Grace* was soon rendered irrelevant by the 1833 Parliamentary act abolishing slavery throughout the British Empire. However, the judicial remedy seemingly approved by Marshall—a simple lottery system—was particularly inconsistent with the logic of American constitutionalism and the American constitutional emphasis on, as Wilson put it, “the prime rank of man in human affairs.” That two similar cases limiting the applicability of universal principles—after a series of cases tending in the opposite direction—would emerge in different constitutional contexts also reinforces the notion that there are important extra-constitutional factors involved in the construction and application of legal rules and principles. Nevertheless, the articulation of constitutional principles at the judicial level plays a formative role in constitutional maintenance and constitutional change, and considerations of this sort led Stowell and Marshall to render decisions tending toward the maintenance of a tension implicit in a fragile constitutional order.

In his argument before Marshall in *The Antelope*, Attorney General Wirt urged the Court not to “shut their eyes to what is passing in the world,” and he asserted that the “Africans stand before the Court as if brought up before it upon a habeas corpus” (108, 110). In so doing, Wirt brought the logic of Anglo-American constitutionalism full circle by drawing upon the principles behind *habeas corpus* review. If

the Africans were able to “stand before the Court as if brought up . . . upon a habeas corpus,” the only reason was because judicial protection from arbitrary force was a protection that ought not to have depended on one’s status as an Englishman or an American but simply on one’s status as a man. What evidence, then, should have been required to prove that a man was held by the law of the land and not by mere arbitrary force? As Key took up this argument, he suggested that it was surely not “mere possession” that made one’s claim over another rightful. For other goods and chattels, he conceded, mere possession may have been all that was required to demonstrate ownership, “[b]ut these are men . . . and by the law of nature all men are free” (73). In so linking the plight of the Africans with the logic of Anglo-American constitutionalism, Wirt and Key sought constitutional recognition of the principles at work in “the great moral and legal revolution which is now going on in the world” (75).

Such a revolution, however, was not the only thing going on in the world. The Americans were undergoing a heated domestic debate over the institution of slavery, and there was much anxiety about its final resolution. The opposing factions had been quieted, for a moment, by Henry Clay’s Missouri Compromise, but Thomas Jefferson acknowledged the residual tension in the bisecting arrangement when he wrote,

This momentous question, like a fire bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union . . . A geographical line, coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated; and every new irritation will mark it deeper and deeper. (1820)

The Missouri Compromise held together a tenuous union of desultory commitments within a larger constitutional order, and from one perspective, “any cause which focused feelings on the rights of slaves could be seen as inflammatory” (Noonan 1977, 76).

Moreover, the cause in the world that particularly focused feelings on the rights of slaves was legislation passed in America and England that heightened penalties for slave trading and declared the slave trade itself to be piracy—a crime that carried with it a sentence of death. The 1820s was also the era of the Monroe Doctrine, and any case dealing with the slave trade involved “difficult issues of visitation and search of foreign vessels in time of peace” (Cover 1975, 103). On the English side, antislavery legislators had turned their attention to the abolition of slavery in the English colonies, and there were powerful

factions and vested interests opposing any such move. It is within these contexts, that the decisions in *The Antelope* and *The Slave Grace* emerge not as manifestations of illiberal constitutional theories—valuing slavery for its own sake—but as conservative judicial attempts to preserve increasingly weakened constitutional orders.

In a letter to Joseph Story, which was written as a sort of apology for his opinion in *The Slave Grace*, Lord Stowell explained that English politics were “in a very uncomfortable state, our revenue deficient, our people discontented, and a strong spirit of insubordination prevailing in the country, and the sense of religious obligation very much diminished” ([1828b] 1851, 571). While Stowell proclaimed himself to be a “friend of abolition generally,” he emphasized practical considerations in effecting abolition. The principles behind the argument that would have *Grace* declared free, Stowell worried, might have induced other slaves

... to try the success of various combinations to procure a conveyance to England for such purpose; and, by returning to the colony in their newly acquired state of freedom, if permitted, might establish a numerous population of free persons, not only extremely burdensome to the colony, but, from their sudden transition from slavery to freedom, highly dangerous to its peace and security. (*The Slave Grace* 1827, 116)

As Stowell rightly recognized, the logic of a Court’s opinion—whatever that opinion may be—will rest on principles that ultimately travel far beyond the particular case at hand.

While these decisions in some sense demonstrate the limitations of abstract constitutional principles in overcoming concrete, practical considerations, they also demonstrate the importance of the ways in which interpreters construct those very constitutional principles. In his response to Berrien’s accusation that slavery was at the very foundation of the American Constitution, Key asserted,

Free America did not introduce it. She led the way in measures for prohibiting the slave trade. The revolution which made us an independent nation, found slavery existing among us. It is a calamity entailed upon us, by the commercial policy of the parent country. There is no nation which has a right to reproach us with the supposed inconsistency of our endeavoring to extirpate the slave trade as carried on between Africa and America, whilst at the same time we are compelled to tolerate the existence of domestic slavery under our own municipal laws. (*The Antelope* 1825, 112).

America’s relationship with slavery was more convoluted than Key admitted, but by recognizing

competing forces within the American constitutional tradition, Key was able to emphasize those constitutional principles working against the slave interest.

While it may have been ill-conceived for a nineteenth-century jurist to let the heavens fall for the sake of justice, judges did serve as guardians and tutors in the constitutional order, and, inasmuch as those principles working against the slave interest coincided with the fundamental principles of Anglo-American constitutional thought, a judicial posture tending toward the establishment and preservation of universal liberty was necessary for the maintenance of that particular constitutional heritage which finds its expression in the rule of law. As the conservative decisions in the 1820s confirm, however, there were deep tensions, first noted by Mansfield, between the universal principle of liberty and the institution of slavery. The interpretation of these early slavery related cases through the paradigm of a disharmonic interplay between universal principles and particular existential realities provides both historical and normative challenges to contemporary students of American constitutionalism. While recognizing the injustices committed in America’s past, this interpretive paradigm cuts against what Barack Obama has characterized as “a profoundly distorted view of this country—a view that sees white racism as endemic, and that elevates what is wrong with America above all that we know is right with America” (2008). Normatively, it also reinforces the continued vitality of what Obama’s predecessor, in his address to the United Nations on the lingering problems of modern slavery and human trafficking, characterized as the “moral law that stands above men and nations, which must be defended and enforced by men and nations” (Bush 2003). If disharmony indeed is a universal constitutional condition, then this interaction between the normative order and the less pristine realm of politics will continue to play out—seldom linearly, often tragically—in the ongoing development of modern constitutionalism.

Manuscript submitted 4 June 2008

Manuscript accepted for publication 25 November 2008

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