and 2 respectively, might serve to guarantee the power of the slaveowner to exercise his rights in free states. Justice Henry Baldwin, in a concurring opinion in *Groves v. Slaughter*,[216] had already stated that the privileges and immunities clause protected the rights of slaveowners in this way, though it was not clear that he had considered the problem of slaves in a free state.

Though no one outside the United States Supreme Court could have known it at the time, two of its members, Taney and Campbell, seemed to be moving in the direction suggested by Taney's *Strader* dictum. Justice Campbell, in the final printed draft copy of his *Dred Scott* opinion, found it necessary to alter a sentence—"Wherever the master is entitled to go, the slave may accompany him, unless prohibited by restrictive state or municipal legislation"—in favor of a lamer revision that omitted the qualification after the word "unless". Perhaps Justice Campbell concluded that the states did not have the restrictive power he had been about to reaffirm.[217]

The Chief Justice, in one of the several antiabolition memoranda that he drew up in his last years,[218] fervently denounced the antislavery attitudes prevalent in the northern states and asserted that both European nations and free states had an obligation to respect the de jure existence of slavery in the Southern states, and "to render up such a slave found in their territory to his owner in a suit instituted for the purpose of recovering him as property."[219] This remark may be an indication of the way Taney would have been inclined to dispose of the *Lemmon* appeal.[220]

The second event suggesting that the proslavery repudiation of *Somerset* might destroy the power of the free states to exclude slavery began with the repeal of the Missouri Compromise by the Kansas-Nebraska Act of 1854.[221] The sponsor of repeal, Senator Stephen A. Douglas, later stated in defining his doctrine of squatter sovereignty (the people of the territories should decide

216. 40 U.S. (15 Pet.) 449, 515-16 (1841).

217. Campbell's corrected draft is in U.S. National Archives, R.G. 267, appellate case file 3230 (*Scott v. Sandford*).

218. Swisher, *Mr. Chief Justice Taney*, in MR. JUSTICE 56 (A. Dunham & P. Kurland eds. 1964).

219. This unpublished (and in parts illegible) draft, which according to internal evidence was written in 1860, can be found in the "Oddments" file, Roger B. Taney Papers, Library of Congress.

220. *See* text and notes at notes 203-04 *supra*.

221. Act of May 30, 1854, ch. 59, 10 Stat. 277.

whether slavery should be admitted, not the federal government or the states) that he cared not whether slavery "be voted up or voted down." Abraham Lincoln, in the Lincoln-Douglas debates of 1858, pounced on this careless assertion, and on Douglas's role in pushing repeal of the Missouri Compromise. He attempted to link Douglas to a supposed conspiracy with President James Buchanan and Chief Justice Taney to push slavery, not only into all the territories, but into the free states as well. At Springfield, Illinois, on June 16, 1858, Lincoln stated that the *Dred Scott* majority omitted "to declare whether or not the same Constitution permits a State, or the people of a state, to exclude [slavery]. Possibly, this is a mere omission, but . . . who can be quite sure that it would not have been voted down in the one case as it had been in the other?" Emphasizing Justice Nelson's reiteration of the *Strader v. Graham* dictum, Lincoln went on: "Put this and that together, and we have another nice little niche, which we may, ere long, see filled with another Supreme Court decision, declaring that the Constitution of the United States does not permit a State to exclude slavery from its limits."[222] At Galesburg on October 7, 1858, he repeated the anticipated rule as a syllogism, relying on the supremacy clause of article VI:

> Nothing in the Constitution or laws of any State can destroy a right distinctly and expressly affirmed in the Constitution of the United States. The right of property in a slave is distinctly and expressly affirmed in the Constitution of the United States. Therefore, nothing in the Constitution or laws of any State can destroy the right of property in a slave.[223]

The appeal of the *Lemmon* case to the United States Supreme Court seemed to abolitionists just the vehicle that Lincoln and others had predicted would be used to force slavery into the free states. Though the case was never decided, Lincoln and the abolitionists were not in the grip of hysteria when they voiced their warning. Taney and his pro-slavery colleagues might well have resolved the conflicts debate engendered by *Somerset* by annihilating the entire antislavery position.

222. DEBATES, *supra* note 152, at 19. *Accord*, CONG. GLOBE, 35th Cong., 2d Sess. 1249-51 (1859) (remarks of Senator Pugh). *See* V. HOPKINS, DRED SCOTT'S CASE 172 (1951); H. JAFFA, THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES 280-93 (1959).

223. DEBATES, *supra* note 152, at 230-31.

Conclusion

On the eve of the Civil War, Lord Mansfield's musings on the odiousness of slavery and its requisite base in positive law had caused unanticipated controversies that American judges were not able to resolve. The *Somerset* opinion, in its American adaptations, was the doctrinal basis both for the radical contention that slavery was everywhere illegitimate per se, existing in defiance of the American Constitution, and for the moderate abolitionist effort to deprive slavery of the protection of the federal government. Together with Blackstone's dicta, the Declaration of Independence, and the Declarations of Right in the state constitutions, *Somerset* became a basic text of antislavery constitutionalism. Its force proved so compelling that slave-state jurists and commentators were obliged to reverse their earlier acceptance of its premises and repudiate it altogether.

Somerset's attractiveness extended well beyond abolitionist circles. As Northern judges in the state supreme courts adopted neo-*Somerset* implications destroying the extraterritorial force of slave status, Southern jurists, including a majority of the United States Supreme Court, mounted a counteroffensive that, to many reasonable men on the eve of the Civil War, forced slavery into all the territories and boded the destruction of Northern states' antislavery policies. Thus, *Somerset* principles not only deranged the relationships of the states among themselves; they also affected the posture of the federal government vis-à-vis the states.

The issues raised by Mansfield in *Somerset* were laid to rest peaceably for England by parliamentary emancipation in 1833; but in the United States, it took nothing less than the bloodiest war in our history and a consequent revision of the American federal and state constitutions to affirm a long dead English judge's saturnine reflection that "slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political."

Appendix: Variant *Somerset* Reports

Cases decided by King's Bench in the late eighteenth century were not officially reported. The justices delivered their opinions orally, and whether their words survived depended on the accident of whether a lawyer or other person was present to take notes. *Somerset* was preserved in this way. To my knowledge, four

variant reports purport to be, or may have been, taken down by a person present when Mansfield delivered his judgment on June 22, 1772. Because they contain significant textual variations, a controversy has arisen among scholars over which should be accepted as the most authentic version. The four are:

1. *Lofft* 1, 18-19 (1772), quoted in pertinent part at the beginning of this article.
2. An account in the (London) *Gentleman's Magazine* 293-94 (June 1772).[224] It was reprinted verbatim at page 110 in *The Annual Register . . . for the year 1772* (T. Davison, 1800).
3. An account in 34 *Scots Magazine* 297 (June 1772).[225] It was reprinted in Granville Sharp, *The Just Limitation of Slavery, in the Laws of God, Compared with the Unbounded Claims of the African Traders and British American Slaveholders,* app. 8 (1776), with variations in punctuation and with two insertions that, according to Sharp, were taken from the notes of an unnamed lawyer present at the judgment. This version is also conveniently reprinted in F. Shyllon, *Black Slaves in Britain* 108-10.[226]
4. An unsigned handwritten document in the Granville Sharp transcripts, New-York Historical Society, captioned

224. "The only question before us is, Is the cause returned sufficient for remanding the slave? If not, he must be discharged. The cause returned is, the slave absented himself, and departed from his master's service, and refused to return and serve him during his stay in England; whereupon, by his master's orders, he was put on board the ship by force, and there detained in secure custody, to be carried out of the kingdom, and sold. So high an act of dominion was never in use here; no master ever was allowed here to take a slave by force to be sold abroad, because he had deserted from his service, or for any other reason whatever. We cannot say the cause set forth by this return is allowed or approved of by the laws of this kingdom; therefore, the man must be discharged."

225. "The only question then is, Is the cause returned sufficient for remanding him? If not, he must be discharged. . . . So high an act of dominion must derive its authority, if any such it has, from the law of the kingdom where executed. A foreigner cannot be imprisoned here on the authority of any law existing in his own country: the power of a master over his servant is different in all countries, more or less limited or extensive; the exercise of it therefore must always be regulated by the laws of the place where exercised. The state of slavery is of such a nature, that it is incapable of being now introduced by courts of justice upon mere reasoning or inference from any principles, natural or political; it must take its rise from positive law; the origin of it can in no country or age be traced back to any other source; immemorial usage preserved the memory of positive law long after all traces of the occasion, reason, authority, and time of its introduction are lost; and, in a case so odious as the condition of slaves, must be taken strictly: the power claimed by this return was never in use here; no master ever was allowed here to take a slave by force to be sold abroad, because he had deserted from his service, or for any other reason whatever; we cannot say the cause set forth by this return is allowed or approved of by the laws of this kingdom, therefore the man must be discharged."

226. *See also* note 4 *supra*.

"Trinity Term 1772 On Monday 22 June 1772 In Banco Regis."[227] This document was reprinted, with minor variations in punctuation in Prince Hoare, *Memoirs of Granville Sharp, Esq.* 89-91 (1820).

There are also two other reports, 98 Eng. Rep. 499 and 20 *Howell's State Trials* 2, both of which are verbatim copies of the report in *Lofft* with minor variations in spelling and/or punctuation. Finally, there is an undocumented version in Lord Campbell's *Lives of the Chief Justices* that is so widely variant from all other versions, and so much at variance with Mansfield's ascertainable sentiments on the subject of slavery, that it must be viewed as spurious.[228]

The modern controversy over which of the four reports is authentic began with the 1966 publication of Jerome Nadelhaft's *The Sommersett Case and Slavery: Myth, Reality, and Repercussions.*[229] Opting for the *Gentleman's Magazine* version, Nadelhaft maintained that Capel Lofft attributed to Mansfield arguments that had been made by Hargrave and Sharp. He concluded that all subsequent antislavery readings of Somerset were based on the distorted Lofft version rather than the actual judgment in the case. Nadelhaft's view is supported by the low opinion of Lofft held by John William Wallace, the bibliographer-historian of the English reporters, who dismissed it as a "book of bad reputation."[230] James Walvin, a recent scholarly investigator of slavery in Britain, also endorses Nadelhaft's position.[231]

David Brion Davis and F. O. Shyllon suggest that the *Scot's Magazine* version may be more authentic than Lofft's. Davis has argued in an unpublished paper[232] that "it is the most detailed and

227. "The question is, whether the Captain has returned a sufficient Cause for the detainer of Somerset? The Cause returned is, that he had kept him by order of his Master with an intent to send him abroad to Jamaica, there will be Sold, So high an Act of Dominion must derive its force from the Laws of the Country; and, if to be justified here, must be justified by the laws of England.—Slavery has been different in different Ages and States: the exercise of the power of a Master over his Slave must be supported by the Laws of particular Countries; but no foreigner can in England claim a right over a Man: such a Claim is not known to the Laws of England. Immemorial Usage preserves positive Law after the occasion or accident which gave rise to it has been forgotten. And, tracing the subject to natural principles the claim of Slavery never can be supported—The power claimed was never in use here, or acknowledged by the Law. Upon the whole we cannot say the Cause returned is sufficient by the Law, and therefore the Man must be discharged."

228. 3 Lord Campbell, The Lives of the Chief Justices of England 316-18 (1873).

229. 51 J. Negro Hist. 193 (1966).

230. J. Wallace, *supra* note 28, at 452.

231. J. Walvin, *supra* note 31, at 127.

232. Davis, *Antislavery and the Conflict of Laws*, to be published in 1975 as ch. X of D. Davis, The Problem of Slavery in the Age of Revolution, 1770-1823. Quoted by permission of Professor Davis.

the most consistent with Mansfield's known views (Mansfield, or William Murray, was the son of a Scottish peer; at a time when Scots were less than popular in England, it is conceivable that a Scottish reporter would pay closer attention to the actual words of a countryman who had risen to such an exalted station). In short, the phrases in Howell and in the NYHS manuscript may be a somewhat garbled version of the text in *The Scots Magazine.*" Furthermore, Shyllon champions this version because it was the one that Sharp chose to reprint in his *Just Limitation,* because it "is identical with the report of Mansfield's speech which appeared in the newspapers a day or two after judgment was given," and because Sharp employed a shorthand reporter to take down Mansfield's words.[233]

None of these scholars prove that their choice is the probable one; they prove only possibility, which they support by the inferences already noted. Their inferences are offset, however, by several countervailing considerations. The newspaper and magazine reports are unsigned. A historian must be cautious about relying on anonymous documents, especially when the document conflicts with an alternate account by an identified witness (Lofft) who was a trained expert in the subject he was reporting on.

And more can be said for the Lofft version. Lofft claimed that if he erred in reporting, it was on the side of inclusiveness rather than abbreviation; that he often tried to report verbatim in the interests of verisimilitude; and that his version could be checked against the recollection of contemporaries. He used shorthand for most of his notes and stated that in his reports "you will find the judgments exact in form, the reasons and principles entire, their force, dependence, and connexion preserved . . . ."[234] Admittedly, these claims are self-serving and cannot be accepted without collateral support. But several somewhat persuasive bits of collateral support do exist.

One confirmation of Lofft's accuracy, though qualified, was provided by a person who was in a position to check on what Mansfield had stated, and whose credibility is enhanced by his deep hostility to the statements. Samuel Estwick wrote his *Considerations on the Negroe Cause* (1772)[235] as a public legal argument on behalf

233. F. Shyllon, *supra* note 4, at 110. Shyllon does not document his implication that a shorthand reporter actually did take down Mansfield's judgment.

234. *Preface* to Lofft at ix-x.

235. *See* text and note at note 61 *supra.*

of the West India Interest. In his third edition (1788) he reprinted the *Somerset* opinion in full as reported by Lofft and stated that it was "said to be the substance of Lord Mansfield's speech."[236] Had he wished to controvert the accuracy of Lofft's report, with its harsh condemnation of slavery, we may assume that he would have done so there.

Another oblique endorsement of Lofft was offered by Mansfield himself, who had occasion to comment on contemporaneous interpretations of *Somerset* thirteen years after it was delivered. Lofft's first edition, a folio, was published in 1776; an octavo edition was brought out in 1790. In 1785, when the folio edition had been in circulation for nine years, Mansfield heard arguments in the case of *Rex v. Inhabitants of Thames Ditton,* discussed in the body of this paper.[237] In the course of dialogue with counsel, Mansfield corrected what he thought were two misinterpretations of the *Somerset* holding, but did not claim that Lofft had misquoted him. Here too we may assume that Mansfield would have taken the opportunity to set the record straight if he thought that Lofft had misrepresented his oral opinion.

None of this proves conclusively that Lofft wrote down Mansfield's words verbatim. Barring the unexpected appearance of a holograph or other manuscript of Mansfield's orally delivered opinion,[238] the question of what Mansfield really said will never be resolved. But on the basis of presently available evidence, Lofft's version is more acceptable to the historian than its competitors. Justice Brandeis once remarked that "in most matters it is more important that the applicable rule of law be settled than

236. S. Estwick, *supra* note 61, at vii (3d ed. 1788). Estwick, however, seems to have changed his mind. Sharp said that Estwick in his second edition, published in 1773, reprinted the *Scots Magazine* version rather than the Lofft version. *See* G. Sharp, The Just Limitation of Slavery in the Laws of God, Compared with the Unbounded Claims of the African Traders and British American Slaveholders 65 (1776). I refer to Estwick's third edition in the text because I assume it represents his final opinion.

237. *See* text and note at note 79 *infra.*

238. Such a manuscript may once have existed. F. Shyllon, *supra* note 4, at 108, *quoted,* The Morning Chronicle, June 23, 1772, as reporting that Mansfield spoke from "a written speech, as guarded, cautious, and concise, as it could possibly be drawn up." Nearly all Mansfield's personal papers, however, were destroyed by the Gordon rioters in 1780. Correspondence with English archivists has failed to turn up such a manuscript or record of a manuscript in the following: 1) Granville Sharp papers, Hardwicke Court, Gloucester (letter from Col. Arthur B. Lloyd-Baker to the author, March 22, 1974); 2) Lincoln's Inn Library, London (letter from R. Walker to the author, May 16, 1974); 3) National Register of Archives, Scotland (letter from Barbara Horn to the author, May 14, 1974); 4) Royal Commission on Historical Manuscripts, London (letter from Elizabeth Danbury to the author, May 1, 1974); 5) Granville Sharp Letterbook, Minster Library, York (letter from James Walvin to the author, March 27, 1974).

that it be settled right,"[239] and something of the spirit of this remark is pertinent here.

Finally, the whole dispute is of only limited relevance. There were after all, really two *Somerset* opinions: Mansfield's actual words, whatever they were, which may have been preserved in the variant newspaper and legal reports; and the "abolitionists' *Somerset,*" the opinion as understood by Justice Best, the poet Cowper, and the American abolitionists. The latter version, though fictive, proved more influential, especially as the American neo-*Somerset.* It took on an existence of its own. It is pointless, even if correct, to maintain, as Nadelhaft, Walvin, and Shyllon have, that this neo-*Somerset* does not correspond to the real opinion. Never was the old English maxim more true: *Communis error facit jus*—common error makes the law. Men believed that Mansfield had held slavery inconsistent with the British constitution, and they acted on that belief. In this sense, William Holdsworth's judgment,[240] pronouncing the abolitionist reading of *Somerset* to be "substantially correct," is still valid.

239. Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

240. *See* text and note at note 85 *supra.*