Conservative jurists who felt a need to ground interpretive flights like Best's were cheered by an opinion from Lord Stowell, who presided over the High Court of Admiralty. This decision, known variously as *The Slave Grace* or as *Rex v. Allan,*[86] was considered by some contemporaries, including so eminent an authority as Justice Joseph Story of the United States Supreme Court,[87] to be the definitive interpretation of *Somerset.* But these authorities exaggerated the influence of the case. It was actually an effort by an elderly and conservative admiralty judge, who did not have the power to modify a decision of King's Bench in any way, to redirect and restrict the implications of Mansfield's words. The effort proved to be fruitless in America.

The circumstances of Grace's case were almost perfect for a test of the implications of *Somerset.* The slave had been brought by her mistress from Antigua to England, where they resided for a year. They then went back to Antigua, where the slave was seized by admiralty officials as illegally imported. The officials' assumption was that she had become free in England and thus was a free person being brought into slavery. Stowell affirmed a judgment for the mistress, on the ground that the slave, on her return to Antigua, reassumed her status as a slave, which had only been suspended, not terminated, during her stay in England.

Most of Stowell's long and elaborate opinion was an effort to prune the luxuriant growth of antislavery interpretation stimulated by *Somerset.* He insisted that slavery had a legitimate origin in "ancient custom," which was "generally recognized as a just foundation of all law." Though it did not exist in England, slavery did have a legal existence in the colonies; it was incompatible only with English law, and even in England the incompatibility extended no further than to confer on the slave a "sort of limited liberty" that evaporated upon his return to a slave jurisdiction. Stowell expressed this idea in a striking metaphor: for slaves coming into the realm, English laws "put their liberty, as it were, into a sort of parenthesis."

Shortly thereafter, in the Abolition Act of 1833,[88] Parliament removed the supposed parentheses and granted liberty to the slaves in the colonies. Colonial emancipation provoked considerable constitutional debate, but in the end few doubted Parliament's power to bind the colonies. That theoretical consensus was a considerable advance over the intellectual climate of sixty years earlier. But what was settled in 1833 had still been inchoate in 1772; before the American Revolution, one of the most unsettling implications of Mansfield's opinion had been the suspicion that slavery, being incompatible with the English constitution, might be illegitimate in the colonies as well. The Americans' struggles with that reasoning will be canvassed next.

86. 2 Hagg. 94, 166 Eng. Rep. 179 (Adm. 1827).

87. Letter from Joseph Story to Lord Stowell, Sept. 22, 1828, *reprinted in* 1 LIFE AND LETTERS OF JOSEPH STORY 558 (W. Story ed. 1851). *See also* J. STORY, *supra* note 68, § 96a.

88. 3 & 4 Will. 4, c. 73.

V

Before 1776, the English constitution could not adequately structure the relations between Britain and an individual mainland colony; nor could the individual colony constitutions do so. To understand the workings of the imperial federation, let us assume that these two constitutional systems interacted in a way that produced a relationship we can denominate the "imperial constitution," a set of arrangements more inchoate, more fluid than either of the recognized constitutions.[89] For a relationship that in 1772 was itself hazy and unsettled, *Somerset* was a troublesome diversion that raised portentous questions. If, as some inferred from Mansfield's language, slavery was incompatible with the English constitution, what was its status in the English colonies? Did the common law exist there in full force, and, if so, was slavery equally out of place there? What effect should be given to colonial statutes that, if enacted by Parliament for England, would be in derogation of the common law? Did a colonial statute or custom recognizing slavery acquire any greater validity by the enactment of parliamentary statutes encouraging the slave trade or creating the Royal African Company? In *Somerset,* Mansfield had only begun to treat issues arising under the English constitution; he did not even arrive at the threshold of imperial constitutional problems.

With the advantage of two hundred years' hindsight, we can see the problem in a clearer outline than was possible for Mansfield and Sharp. It is certain that the eighteenth century imperial constitution would have permitted the Privy Council to disallow colonial statutes contrary to the common law. Furthermore, several attorneys general (including Mansfield himself, before his

89. The notion of an imperial constitution may be debatable. But if we view a constitution as the set of written and unwritten principles that guide the workings of any polity's government, then by definition the British empire had a constitution. *See generally* A.B. KEITH, CONSTITUTIONAL HISTORY OF THE FIRST BRITISH EMPIRE 165 *passim* (1930).

elevation to the peerage, when he was simply William Murray, K. C.) had rendered opinions casting doubt on the binding effect of colonial laws repugnant to the principles of the English common law.[90] By the middle of the nineteenth century, things had changed considerably; the new order was recognized by the Colonial Laws Validity Act of 1865,[91] which provided that no colonial law should be deemed repugnant to the laws of England unless it was in explicit conflict with an act of Parliament or an order or regulation having the effect of an act of Parliament. Thus, antislavery theorists of the 1840s who argued that slavery, because of its repugnance to the common law, never had a legitimate origin in America (and hence had no legal existence subsequently) were thinking anachronistically by almost a century; but if Sharp or Hargrave had made the same argument, it might have had some force.

This is not to say that colonial black laws were void in the eighteenth century; that problem had still not been reached, much less worked out, when the American Revolution mooted the question for the mainland colonies. Had the issue been forced to a decision, it is unlikely that Parliament, the Privy Council, or any of the courts would have illegitimated slavery by a simple assertion that colonial statutes in derogation of the common law were void. Some statutes probably would have been voided, but which ones would have depended on a variety of considerations, such as whose ox was being gored. Supporters of the colonial black laws had little to fear from the defenders of the common law, given the political pull of the West India Interest in Parliament, and the Crown's substantial interest in the well-being of the navy, which until around 1790 was a mainstay of the slave system.[92]

The decision and the arguments in *Somerset* became known almost immediately in the mainland colonies. Extracts from

90. *See* the opinions of William Murray (1755), Yorke & Talbot (1730), and Barbados Attorney General Rawlin (1717), *reprinted in* G. CHALMERS, OPINIONS OF EMINENT LAWYERS ON VARIOUS POINTS OF ENGLISH JURISPRUDENCE, CHIEFLY CONCERNING THE COLONIES, FISHERIES, AND COMMERCE OF GREAT BRITAIN 341, 333, 373 (1858). General discussions on this subject are found in 11 W. HOLDSWORTH, *supra* note 85, at 56, and in A.B. KEITH, *supra* note 89, at 182-86.

91. 28 & 29 Vict., c. 63.

92. Some idea of the direction and content of this hypothetical debate can be derived from the actual discussions that took place between West Indian assemblies and the metropolitan government during the controversy over emancipation in the 1820s and 1830s. The constitutional arguments of this debate are summarized in R. SCHUYLER, PARLIAMENT AND THE BRITISH EMPIRE: SOME CONSTITUTIONAL CONTROVERSIES CONCERNING IMPERIAL LEGISLATIVE JURISDICTION 117-193 (1929).

Sharp's *Representation* and Hargrave's *Argument* were reprinted in Philadelphia and Boston in 1773 and 1774 respectively. Of course, they did not fall on an American mind that was *tabula rasa* where antislavery ideas were concerned. Rather, they were just one added element in a ferment of antislavery activity in the northern colonies. Judge Samuel Sewall had attacked slavery in the Bay colony as early as 1700 in his tract *The Selling of Joseph.*[93] Quakers in the middle colonies, including John Hepburn, Elihu Coleman, Ralph Sandiford, Benjamin Lay, John Woolman, and Anthony Benezet, had borne witness against slavery, agitated against it among Friends, and published the bulk of the pre-Revolution antislavery tracts. James Otis denounced slavery twice shortly before the beginning of the Revolution, first in his argument in the *Writs of Assistance Cases* (1761)[94] and then at greater length in *The Rights of the British Colonies Asserted and Proved,*[95] where he insisted that all Americans, "white or black", "are by the law of nature freeborn." Otis's efforts were followed by an outpouring of antislavery agitation from Boston that scored white Americans for their efforts to overthrow the comparatively mild form of "slavery" imposed on them by Britain, while forcing the real thing on their black fellow-countrymen.[96] These activists were supported by the New England clergy, who preached Biblical antislavery messages to congregations in Boston, Newburyport, and Hartford.[97] So widespread was antislavery sentiment in the Boston area that the topic assigned for the formal debate at the Harvard College commencement exercises in 1773 was whether slavery was "agreable [*sic*] to the law of nature" even though sanctioned by

93. S. SEWALL, THE SELLING OF JOSEPH: A MEMORIAL (1700).

94. *See* 10 WORKS OF JOHN ADAMS 314-16 (C.F. Adams ed. 1856). This is a letter from John Adams to William Tudor, June 1, 1818, which includes Adams' recollection of the speech.

95. *See* 1 PAMPHLETS OF THE AMERICAN REVOLUTION 1750-1776, at 408 (B. Bailyn ed. 1965). This particular pamphlet was printed in 1764.

96. *See* J. ALLEN, AN ORATION ON THE BEAUTIES OF LIBERTY; OR THE ESSENTIAL RIGHT OF THE AMERICANS (1773); J. ALLEN, THE WATCHMAN'S ALARM TO LORD N—H (1774); THE APPENDIX: OR, SOME OBSERVATIONS ON THE EXPEDIENCY OF THE PETITION OF THE AFRICANS, LIVING IN BOSTON, &C. (1773) [hereinafter cited as THE APPENDIX]; N. APPLETON, CONSIDERATIONS ON SLAVERY. IN A LETTER TO A FRIEND (1767); B. RUSH, A VINDICATION OF THE ADDRESS, TO THE INHABITANTS OF THE BRITISH SETTLEMENTS, ON THE SLAVERY OF THE NEGROES IN AMERICA 30 (Philadelphia ed.) (1773); J. SWAN, A DISSUASION TO GREAT BRITAIN AND THE COLONIES FROM THE SLAVE TRADE TO AFRICA. SHEWING THE INJUSTICE THEREOF, &C. (1773).

97. S. COOKE, A SERMON PREACHED AT CAMBRIDGE, IN THE AUDIENCE OF HIS HONOR THOMAS HUTCHINSON ESQ. (1770); J. EDWARDS, THE INJUSTICE AND IMPOLICY OF THE SLAVE TRADE, AND THE SLAVERY OF AFRICANS 27 (2d ed. 1822); L. HART, LIBERTY DESCRIBED AND RECOMMENDED; IN A SERMON (1775); N. NILES, TWO DISCOURSES ON LIBERTY;

positive law.[98] The same subject had been canvassed earlier (1768) in a commencement debate at the College of Philadelphia (the predecessor of the University of Pennsylvania).[99]

The impact of *Somerset* in the colonies, and particularly in Massachusetts, took various forms. Some of the most revealing reactions came from blacks. Whether enslaved or free, blacks were not indifferent to the rhetoric of liberty they heard about them daily. As a group of black slaves in Massachusetts wrote, possibly through a white amanuensis, in a petition to the General Court, "the efforts made by the Legislature of the province in their last sessions to free themselves from Slavery, gave us, who are in that deplorable state, a high degree of satisfaction."[100] Thus attentive to the whites' notions of liberty, blacks hearing of *Somerset* brought suit in the Massachusetts courts against their masters, seeking not only freedom but also recovery on *quantum meruit*.[101] In these freedom suits, the blacks contended that they could not be enslaved because there was no positive law permitting anyone to hold a human in slavery, and that slavery was contrary to the common law.[102] These suits, according to a contemporary account, were uniformly successful.[103] The oral tradition of these arguments and suits later led Lemuel Shaw, antebellum Chief Justice of the Massachusetts Supreme Judicial Court, to speculate that *Somerset*, of its own force, may have abolished slavery in Massachusetts.[104] In this opinion he was clearly wrong, as the historian of Massachusetts slavery, George Moore, maintained a century ago: "[T]he institution of slavery continued to be recognized by law in Massachusetts, defying all direct attempts to destroy it."[105]

White friends of slaves made still different uses of *Somerset*. Doctor Benjamin Rush in 1773 proposed the relatively moderate

DELIVERED AT THE NORTH CHURCH, IN NEWBURY-PORT (1774); S. WEBSTER, A SERMON PREACHED BEFORE THE HONORABLE COUNCIL (1777).

98. *See* T. PARSONS & F. PEARSON, A FORENSIC DISPUTE ON THE LEGALITY OF ENSLAVING THE AFRICANS, HELD AT THE PUBLIC COMMENCEMENT IN CAMBRIDGE (1773).

99. 2 PENNSYLVANIA CHRONICLE AND UNIVERSAL ADVERTISER, Dec. 5, 1768, at 394.

100. *Reprinted in* J. ALLEN, AN ORATION, *supra* note 97.

101. Belknap, *Queries Respecting the Slavery and Emancipation of Negroes in Massachusetts, Proposed by the Hon. Judge Tucker of Virginia, and Answered by the Rev. Dr. Belknap*, 4 COLLECTIONS OF THE MASS. HIST. SOC., 1st ser., 191, 202 (1795).

102. Letter from E.A. Holyoke to Jeremy Belknap, *quoted in* Belknap, *Letters and Documents Relating to Slavery in Massachusetts*, 3 COLLECTIONS OF THE MASS. HIST. SOC. 5th ser., 374, 400 (1877) [hereinafter cited as Belknap, *Letters*].

103. *Id.* at 386, *quoting* a letter from Samuel Dexter to Jeremy Belknap, Feb. 23, 1795.

104. Commonwealth v. Aves, 35 Mass. (18 Pick.) 193, 209 (1836).

105. G.H. MOORE, NOTES ON THE HISTORY OF SLAVERY IN MASSACHUSETTS 124 (1866). Other slaves acted on their interpretation of *Somerset* differently. Gabriel Jones, a Virginian,

course of petitioning the King to disband that "incorporated band of robbers," the Royal African Company, because "we have more reason to expect relief from (such) an application at this juncture, as, by a late decision in favor of a Virginia slave at Westminster-Hall, the Clamors of the whole nation are raised against [the African slavers]".[106]

The most extreme use of *Somerset* was made in 1773 by an anonymous American editor of Granville Sharp's *Essay on Slavery*.[107] Reading *Somerset* to have held that "slavery is not consistent with the English constitution, nor admissable [*sic*] in Great-Britain," the editor asked why it should be "continued" in the colonies. Since slavery, even as tolerated by Parliamentary legislation, might be void for inconsistency with "natural rights" or "natural liberty," and since American settlers had brought with them all the "rights, liberties, and privileges" of the British constitution, "why is it that the poor sooty African meets with so different a measure of justice in England and America, as to be adjudged free in the one, and in the other held in the most abject Slavery?" Making a remarkable leap that linked the Sharp-Mansfield doctrines with the problem of the imperial constitution, the editor declared that the colonists were forbidden to make laws inconsistent with the laws of England. Because slavery is inconsistent with "the principles of the [English] constitution, neither in England or any of the Colonies, is there one law directly in favour of, or enacting Slavery, but by a kind of side-wind,[108] admitting its existence, (though only founded on a barbarous custom, originated by foreigners) attempt its regulation" [*sic*]. Then, forsaking this advanced position, the author concluded rather lamely that he hoped the principles of *Somerset* would be received in the colonial courts.

advertised for his runaway slave Bacchus in 1774, advising potential captors that Bacchus might try "to get on Board some vessel bound for Great Britain, from the Knowledge he has of the late Determination of *Somerset's* Case." Virginia Gazette, June 30, 1774, at 3, col. 1 (Purdie & Dixon ed.).

106. B. RUSH, AN ADDRESS TO THE INHABITANTS OF THE BRITISH SETTLEMENTS IN AMERICA, UPON SLAVE-KEEPING 21-22 (1773).

107. G. SHARP, AN ESSAY ON SLAVERY, PROVING FROM SCRIPTURE ITS INCONSISTENCY WITH HUMANITY AND RELIGION (1773). The edition was published by Isaac Collins of Burlington, New Jersey. Thomas E. Drake attributes the introduction, from which quotations in text are taken, to Samuel Allinson. T. DRAKE, QUAKERS AND SLAVERY IN AMERICA 222 (1950). Joseph Smith attributes it to Allinson and William Dillwyn jointly. 1 J. SMITH, A DESCRIPTIVE CATALOGUE OF FRIENDS' BOOKS 533 (1867).

108. That is, "[a]n indirect means, method, or manner." OXFORD ENGLISH DICTIONARY (1933).