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"TOO PURE AN AIR:" *SOMERSET'S* LEGACY FROM ANTI-SLAVERY TO COLORBLINDNESS

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I. INTRODUCTION

Canonical cases like *Somerset v. Stewart*[1] resonate beyond their particular historical context because they change or crystallize critical legal and political debates.[2] Analyzing the legacy of such cases is a complex task, fraught not only with the difficulties attendant to knowing history, but also with the conundrum of reading the past through the present.[3] *Somerset's Case* has left particularly complicated legacies, partly because of its influence on both sides of the Atlantic. Of course, English law has always shaped American legal doctrine. But because the question at the heart of the case entailed the status of a slave—James Somerset—whose master had brought him to England from the Americas, the transatlantic character and significance of the decision was embedded within the facts of the case itself. Adjudicating the controversy in *Somerset* required negotiating slavery as a transnational enterprise immersed in multiple bodies of law. Part of the challenge in assessing *Somerset* then is, that from its inception, it was a case that had multiple audiences and legal trajectories—speaking both directly and implicitly to the issue of slavery and freedom, in England and in the colonies. Given this complex history, it is fair to say that there never was a singular legacy of the case, and certainly not one that can be articulated now. Rather, there are multiple and con-

1. The case was a habeas petition brought against the ship's captain to whom James Somerset had been delivered for sale to the West Indies as punishment for running away from his prior owner, Charles Stewart. The case is sometimes officially reported as R. v. Knowles, *ex parte* Somerset, (1772) Lofft 1, 98 Eng. Rep. 499 (K.B. 1772), *reprinted in* 20 Howell's State Trials 1 (1909). It is more commonly reported as Somerset v. Stewart, (1772) 98 Eng. Rep. 499 (K.B.).

2. On the notion of a "canon" as knowledge required for cultural literacy, see J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 964, 975–76 (1998).

3. As Justice Brennan noted, "[O]ur distance of two centuries cannot but work as a prism refracting all we perceive." William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 435 (1986).

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flicting trajectories which culminate in the case, becoming one of the most significant in both American and English law.

Ironically, the powerful impact of *Somerset* is not proportionate to its relatively narrow holding. As has been frequently noted, the case was commonly misread for the proposition that slavery was unlawful in England and that a slave entering England was thereby rendered free.[4] In fact, the case held for neither proposition. Lord Mansfield's decision was simply that once Somerset's owner voluntarily brought him from America to England, he could not seize Somerset extrajudicially and sell him off to the West Indies because coercion of a slave in England could not be based on American law.[5] Notwithstanding the fact that colonial law might authorize Somerset's recapture and conveyance, Somerset could not be seized in England and forcibly expelled absent clear *English* legal authority. Thus, *Somerset's Case* did not decide the question of whether slavery was lawful in England[6] nor did it establish the principle that a slave was freed upon entering free territory,[7] although the latter became the principle associated with the decision.[8] Mansfield expressly sidestepped the broad holding attrib-

4. *See* WILLIAM M. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848, at 33–34 (1977) (noting that despite efforts to focus on the limited nature of the ruling, courts and the general public read the opinion as standing for the abolition of slavery in England and that slaves were liberated upon touching free soil).

5. Lord Mansfield was clear about the matter. Thirteen years after *Somerset*, in another case, he stated that *Somerset* had gone "no further than that the master cannot by force compel [a slave brought to England] to go out of the kingdom." R. v. Inhabitants of Thames Ditton, (1785) 99 Eng. Rep 891, 892 (K.B). In this decision, Mansfield ruled that Charlotte Howe, a former slave, had no right to support under parish poor laws. WIECEK, *supra* note 4, at 34.

6. Indeed, Lord Mansfield noted that the court should not decide the question: "[T]he setting [of] 14,000 or 15,000 men at once free loose by a solemn opinion, is much disagreeable in the effects it threatens." *Somerset*, 98 Eng. Rep. at 509.

7. That principle had been articulated in earlier cases and notably in the 1765 *Commentaries* of William Blackstone which stated that "this spirit of liberty is so deeply implicated in our constitution, and rooted even in our very 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." WILLIAM BLACKSTONE, 2 COMMENTARIES *127, *quoted in* SIMON SCHAMA, ROUGH CROSSINGS: BRITAIN, THE SLAVES AND THE AMERICAN REVOLUTION 39 (2005). However, this principle was vitiated by contradictory authority. In 1729 two prominent jurists, Lord Chancelor Yorke and Solicitor General Talbot, opined that persons brought to England as slaves remained so. *See* SCHAMA, *supra* note 7, at 35–36. This opinion held force even though it had been initially rendered extrajudicially—specifically over a late night dinner. *See id.* at 38. Moreover, the principle that slaves were freed upon entering free territory was undercut further by Blackstone's decision to modify the passage in subsequent editions of the commentaries and to later disavow any intent to judge the question of a master's rights with regard to a slave. *See id.* at 39.

8. The radical interpretation of the case emerged almost immediately after it was decided and was particularly prevalent in America. *See* Jerome Nadelhart, *The Somersett Case and Slavery: Myth, Reality and Repercussions*, 51 J. NEGRO HIST. 193 (1966) (noting that important American newspapers like the *Boston Gazette* and the *Middlesex Journal* mistakenly reported that Lord Mansfield had declared that all

uted to the case because of political considerations. His decision attempted to negotiate the difficult space between outlawing colonial slavery and thereby inflaming resistance to the Crown, and on the other hand, affirming the right of an owner to seize a slave on British soil absent the authority of English law, thereby undermining British imperial power.[9] In this respect Mansfield's narrow holding that freed Somerset, but left intact slavery in the colonies, successfully avoided difficult questions like the status of slavery in England by leaving the matter ambiguous.[10] And of course, on the issue of the lucrative transatlantic trade, the decision had nothing whatsoever to say.

Nevertheless, the considerable distance between the actual holding and a declaration that there could be no slavery in England, and hence no slaves, was virtually invisible from the outset, particularly in the Americas.[11] Unsurprisingly, abolitionists on both sides of the Atlantic

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slaves brought to England were freed). Not all were deluded however. As Nadelhart points out, at the time of the trial, Benjamin Franklin denounced England's hypocrisy in praising itself "on its virtue, love of liberty, and the equity of its courts, in setting free a single negro," while simultaneously engaging in and facilitating the slave trade. *Id.* at 195.

9. *See* Ruth Paley, Comment, *Imperial Politics and English Law: The Many Contexts of Somerset*, 24 LAW & HIST. REV. 659, 662–63 (2006) (describing the difficult political considerations facing Mansfield in ruling on the case).

10. More recently, contrary to the prevailing view that Mansfield decided the case as narrowly as possible, one historian has suggested that Lord Mansfield ruled in a way that made the decision available for broader and more radical applications. George Van Cleve, Somerset's Case *and Its Antecedents in Imperial Perspective*, 24 LAW & HIST. REV. 601 (2006). Van Cleve's article on *Somerset's Case* argues that Mansfield's holding that positive law had to authorize slavery was a "transformative decision," even as it avoided the difficult question of the precise relationship between imperial authority and colonial rule on slavery. *Id.* at 604–05. Van Cleve suggests that while "seemingly supportive of the status quo, [the decision was] deliberately subversive of both metropolitan and colonial slavery." *Id.* at 605. This interpretation is disputed by Daniel Hulsebosch, who cautions against "conflating intent with consequences," noting that Mansfield, like many of the English, sought to negotiate the tension between an "odious" yet economically crucial institution by "keep[ing] slavery in the empire while keeping it out of England." Daniel J. Hulsebosch, Comment, *Nothing but Liberty:* Somerset's Case *and the British Empire*, 24 LAW & HIST. REV. 647, 648 (2006). Ruth Paley similarly differs with the contention that Mansfield intended to provide fodder for the abolitionists: She notes that when Mansfield was unable to get the parties to settle, the matter became one of "damage limitation" with the decision being an "ingenious" middle ground. *See* Paley, *supra* note 9, at 662–63.

11. One intriguing question then is why was the case read as affirming the broad principle that its author later explicitly disavowed? Van Cleve's argument would suggest that at least in *Somerset*—a prominent test case—Mansfield's opinion was strategically ambivalent, facilitating a reading of the case that would undermine slavery both in England and in the colonies. *See* Van Cleve, *supra* note 10, at 636–37. On the other hand, Nadelhart contends that the misinterpretation of the case flowed from how it had initially been framed in the press and public discourse. *See* Nadelhart, *supra* note 8, at 196 (noting that the case had been "built up as one involving a central issue—slavery or freedom for all England's slaves, not simply for one—which could not be dodged by legal subtleties"). In response to Van Cleve, Ruth Paley argues that the case was not read in a uniform way but that interpretation varied by context. *See* Paley, *supra* note 9, at 664. The fact that the case involved a conflict of laws problem

seized on the decision.[12] Most importantly, Blacks read *Somerset* as a liberatory text that removed the shackles of slavery from anyone who could enter free territory, and they began implementing their own emancipation and forging their own interpretation.[13]

Thus, despite its conservative limitations, the case fuelled abolitionist aspirations because, at least implicitly, it posited slavery as inconsistent with both natural and common law principles and thus undermined the presumption that slavery was legitimate.[14] *Somerset's Case* underscored, though it did not inaugurate, the critical point that slavery was an institution constrained by law. Proceeding from *Somerset*, anti-slavery arguments could be grounded in law, as distinct from moral or normative appeals. Whatever Mansfield's intent, the broad conflicts of law principle derived from (and one might say constructed around) the case—that voluntarily bringing a slave into the jurisdiction might render her free—worked to destabilize slavery as a system.

The countervailing position—that slavery was perfectly legal under appropriately enacted authority—was also buttressed by *Somerset's* holding that slavery could only be supported by positive law. While the wealthy West Indian planters were in no way pleased with Mansfield's decision, they were certain that it had not spoken to the status of colonial slavery. In jurisdictions like the West Indies and the North American colonies where slavery was codified, the assertion was that *Somerset* had affirmed the legality of the institution.[15] Thus, Mansfield's admonition that slavery was so odious that it could exist only

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helps explain the differential impact of the decision in America as distinct from England. *See id.* at 663. She contends that in England where the black population was relatively small, the status of slaves was not a burning issue even as the slave trade itself was important. *See id.* In America, however, slavery "was part of everyday life" and thus "it was an economic, moral, and legal issue that could neither be ignored nor fudged." *Id.*

12. *See* WIECEK, *supra* note 4, at 33–36, 38.

13. There were reports of "Negro frolicks" in London celebrating the decision. *See* SCHAMA, *supra* note 7, at 25. And in America, the word spread quickly amongst Black people that the court had ruled slavery illegal in England and that slaves entering free territory were free. *See id.* Indeed, one of the remaining slaves of Charles Stewart, Somerset's owner, informed Stewart that "he had rec'd a letter from his Uncle Sommerset acquainting him that Lord Mansfield had given them their freedom & he was determined to leave me as soon as I had returned from London which he did without even speaking to me." *Id.* at 63. In the ensuing months, many slaves fled, emboldened by news of the decision. *See id.* at 25. John Adams marvelled at the speed with which the news was conveyed, noting that "the negroes have a wonderful art of communicating intelligence among themselves; it will run several hundreds of miles in a week or fortnight." *Id.* at 71.

14. *See* ROBERT COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 98 (1975).

15. *See* WIECEK, *supra* note 4, at 36 (noting that "it was the clear consensus among English authorities that the opinion, and the whole sweep of the metropolitan law of personal liberty, left slavery in the islands intact"). The decision affirmed further that contracts for the sale of a slave were legal in England. *Id.* at 31.

under positive law was simultaneously an act of condemnation and legitimization that denounced and facilitated slavery.

Equally ambivalent is another part of *Somerset's Case*—or perhaps more accurately, that part of the case lore that is invoked by the phrase selected for the conference theme—"England was too pure an air for a slave to breathe in." Notably, this phrase did not appear in Mansfield's opinion; it was part of the argument and was the holding of a prior case.[16] Nevertheless, the idea that "England was too pure an air for a slave to breathe in" became deeply associated with *Somerset's Case*, in part, because Somerset's habeas petition was granted on the grounds that English law did not authorize his rendition. In that sense, England and English "air" proved to be inhospitable to a notion that slavery, and particularly colonial slavery, could establish total dominion anywhere. Yet, just as the holding of the case itself was ambivalent on the issue of slavery, the interpretation and legacy of this phrase is complex and conflicted.

At one level it is worth noting that the idea that "England was too pure an air for slaves to breathe in" invoked an ideal that was belied by the reality on the ground. After all, slavery did not formally end in England until 1833 when Parliament finally abolished it.[17] In this sense, declaring that the air of England was incompatible with slavery effaced the existence of slavery in England and obscured the intricate economic, social, and legal entanglement between the empire and slavery. Of course, *Somerset* was surely neither the first nor the last legal decision to invoke abstractions that were contradicted by social realities.[18]

What I find intriguing is the powerful discursive framework reflected in the phrase. To say that "England is too pure an air for a slave to breathe in" speaks to a particular understanding of both "En-

16. The phrase first appeared in a 1569 case, *Cartwright's Case*, involving a Russian slave who was brought to England and opposed his master's effort to "scourge him." In ruling that the master did not have authority to punish him, the court stated that "England was too pure an air for Slaves to breathe in." F.O. SHYLLON, BLACK SLAVES IN BRITAIN 92 (1974) (internal quotations omitted) (emphasis in original); *see also* WIECEK, *supra* note 4, at 34 n.37 (citing a report of the case in 1 JUDICIAL CASES CONCERNING AMERICAN SLAVERY AND THE NEGRO 9 (Helen T. Catterall ed., 1926–36)).

17. Slavery Abolition Act, 1833, 3 & 4 Will. 4, c. 73 (Eng.).

18. *See, e.g.*, Lochner v. New York, 198 U.S. 45, 57–58 (1905) (The Court characterized New York's wage and hour law as an intrusion into the freedom of contract of the workers, when, apart from whether such laws would benefit workers in the long term, the background assumption that employment agreements were determined by freely bargaining agents in an open market was completely contradicted by reality.). The dissent in *Lochner* argued that the notion that bakers were able to adequately negotiate for the sale of their labor was belied by the atrocious working conditions and high mortality rate. *See id.* at 68–71. Moreover, as one influential text in constitutional law describes it, by the mid-1930s "the economic realities of the Depression . . . seemed to undermine *Lochner's* central premises." GEOFFREY R. STONE ET. AL., CONSTITUTIONAL LAW, 757 (4th ed. 2001).

gland" and "slaves" and the relationship between them that both revealed and partly determined the terms of one strand of the debate around slavery. The structure of the metaphor that centers on the idea of the "pure air of England" and the concept of purity suggests not only that slavery is inconsistent with the English idea of freedom, but also that slavery itself is a contaminating or polluting influence.

The status of slaves within this discursive terrain is highly ambiguous. While on the one hand, one can read this phrase as pregnant with liberatory possibilities—that is that the air of England caused the shackles of slavery to fall away. Another trajectory suggests and foreshadows another version of the anti-slavery argument in which the free air of England had to be protected not only from the contamination of slavery but also from slaves who were themselves signs of and marked by that contamination. In this reading, not only is slavery an institution that degrades and fouls the nation, but also slaves themselves are marked by the contamination: He has internalized the effects of the institution. The idea that England is too pure an air for slaves to breathe compels attention to the inherent tension between the purity of England and the polluting presence of Blacks—who are presumptively slaves—in the metropole.

The metaphor is generative of a particular strand of the anti-slavery argument: Eradication of the evils of slavery is best effectuated by containing the spread of the institution and by eradicating slaves. Thus, opposition to slavery could be entirely consistent with antipathy, not simply to the institution, but to the black bodies that are marked by its evil. Black people then—as presumptively enslaved or enslaveable—had a diminished capacity that rendered them unfit for freedom. That is why, consistent with the notion that slavery was an odious institution, slaves and former slaves became objects of degradation rather than subjects worthy of empathy.

The phrase metaphorically represents a different (and I contend a countervailing) legacy to the emancipatory impulse that is generally subscribed to *Somerset's Case*. Embedded in the notion that "England is too pure an air for a slave to breathe in" is a conceptualization of remediation of slavery and successive regimes of racial inequality that collapses the distinction between antipathy to flawed social institutions and antipathy to its victims. This peculiar conflation influenced anti-racist discourse and politics in at least three distinct contexts. First, a particular strand of the anti-slavery argument in England undergirded a system in which Blacks could simultaneously be protected from forcible seizure and rendition, and subjected to extreme forms of social control. The regulation and subjugation of Blacks as an enslaveable class was linked to the rights accorded Englishmen, forging critical connections between Black racial subordination and citizenship. Second, the notion of anti-slavery as anti-contamination had an impact across the Atlantic in the former colo-

nies during eighteenth and nineteenth century debates over the issue of slavery, particularly with regard to the issue of expansion into the western territories. Finally, this idea of anti-contamination has influenced contemporary racial discourses in which opposition to racial discrimination and inequality at the normative level comfortably coexists with racial bias. This tension is negotiated ideologically through certain conceptions of colorblindness that focus on race as a contaminating influence in an otherwise neutral landscape. Just as opposition to slavery was conflated with opposition to slaves, under some conceptions of colorblindness, opposition to racism is conflated with opposition to the concept of race itself. To the extent that legal claims for equality articulate through race, they run up against hostility to the very concept of race because race pollutes or taints the "pure air" of the national terrain. *Somerset*'s framing of anti-slavery discourse within the metaphor of purity and contamination left its traces in present understandings of race and racism.

II. THE LEGACY IN ENGLAND

From the time of the arrival of black slaves in England in the mid-sixteenth century,[19] the Black presence in England was controversial. The numbers of black slaves grew from a relatively small number brought by English slavers to be servants to a substantial presence after 1713 when Britain became the beneficiary of a contract with Spain—the *Asiento*, Under the *Asiento*, Spain granted Britain a monopoly over the Spanish colonial slave trade for 30 years. England committed to supply the colonies with 144,000 slaves over the period of the agreement and became what one historian called, "the great slave trader of the world."[20]

Although a robust and influential anti-slavery movement ultimately came into being, initial objections to black slaves in England were not framed in terms of moral objections to the institution, but rather were expressed as concerns about contamination. As F.O. Shyllon described it, "It was thought that these Africans threatened the purity of the English blood and the livelihood of English servants."[21] Notwithstanding these concerns, which were reflected in acts of the privy council in the late 1500s calling for the deportation of "blackamoors,"[22] by 1655 and the capture of Jamaica from Spain, English

19. In 1555, an English captain brought back with his cargo five Blacks. While described in some reports as slaves, they served as translators and returned to Africa once they had become fluent in English. SHYLLON, *supra* note 16, at 2. A later expedition in 1562 returned with 300 Africans, and shortly thereafter, the numbers increased significantly. *Id.* at 3.

20. *Id.* at 3.

21. *Id.* at 2.

22. *See* GRETCHEN GERZINA, BLACK LONDON: LIFE BEFORE EMANCIPATION 3 (1995). Reflecting concerns about the impact of slave labor and the erosion of religious culture by the presence of "infidels," Queen Elizabeth I issued two edicts, one in

slavers and West Indian planters began to bring their slaves into England and, with them, an open and well-entrenched domestic market in the sale of slaves.[23]

England's rise as a world empire was tied in part to its role in the slave trade: Its ascendance as a mercantile power was due to its dominance in this and other lucrative areas of transatlantic commerce. It is estimated that between 1700 and 1808, over 3 million slaves were transported by English traders from Africa to the Americas.[24] As the slave trade increased so too did the number of Black slaves in Britain. While initially Black servants were seen as fashionable symbols of exotica, and were status objects displayed by the wealthy,[25] by the time of *Somerset*, Blacks were sufficiently organized as a community and were represented at different levels of society that there were increasing levels of anxiety about the Black presence.[26]

At the same time, Black people had become an entrenched part of British culture and society. The term "blackamoor" had become part of everyday discourse, and the representation of Blacks in dramatic works of the time, as well as in other art forms, was prevalent. This cultural incorporation of Blacks reflected "the intricate weaving of Africans into a developing sense of [an] English identity,"[27] through which the opposition of blackness helped define that which was English. Freedom and "Englishness" were defined by contrasting them with their opposite—enslaved Blacks. Indeed, "[t]he English only began to see themselves as 'white' when they discovered 'black' people."[28]

The end of the war with the American colonies by 1783 produced a rapid influx of Blacks into England,[29] many of whom had joined British forces in response to Lord Dunsmore's offer of freedom to those who ran away from their masters.[30] Nearly 14,000 Blacks left America with the British, and while many were sent to Nova Scotia and to British colonies in the West Indies, significant numbers ended up in En-

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1596 and the second in 1601, seeking to expel all Blacks. *Id.* Both were equally ineffective. *Id.* at 3–4.

23. *See* SHYLLON, *supra* note 16, at 2.

24. HERBERT S. KLEIN, THE ATLANTIC SLAVE TRADE 33 (1999).

25. *See* GERZINA, *supra* note 22, at 4 (describing the prevalence of Black livery, entertainers, and in particular Black boys in the courts as "fashion accessories").

26. *See id.* at 24 (citing various writers at the time who lamented the increasingly visible and mobilized Black presence).

27. *Id.* at 5.

28. *Id.*

29. *See id.* at 136.

30. In 1775, at the height of the British conflict with the colonies, Lord Dunsmore, in a precarious military situation and fearful that he would remain without reinforcements, issued a proclamation declaring "all indented Servants, Negroes or others . . . free that are able and willing to bear Arms." SCHAMA, *supra* note 7, at 80.

gland, resulting in various emigration plans and schemes "to rid [the] country of a dreadful infestation."[31]

From the introduction of slavery to the *Somerset* decision in 1772 and after, the persistent presence of Blacks in England provoked a host of vexing legal questions. Historian William Wiecek has aptly summarized the principle issues: What incidents of slavery would be recognized in England? What rights did ownership entail, and upon what precise legal authority was slavery grounded?[32] British courts expounded vague and conflicting answers, at one stage affirming property rights in slaves while later holding that "as soon as a negro comes into England, he becomes free; one may be a villein in England, but not a slave."[33] This was a product of the inherent contradiction between a broader political discourse that simultaneously embraced liberty and inherent rights and a lucrative slave trade upon which the empire had been built.

While the lawyers representing Somerset differed widely in background and political orientation,[34] they united around the central idea of emphasizing the danger to British sovereignty of permitting a slave to be seized on English soil and shipped to another jurisdiction. As Professor Daniel Hulsebosch explains, "Somerset's lawyers were certainly trying to protect, even liberate, black servants in England. It is possible that they wished to abolish the slave trade or slavery itself across the empire. Their primary goal at King's Bench, though, was to keep slavery an ocean away."[35] Ultimately Lord Mansfield's decision granting the habeus corpus petition affirmed the notion that Somerset's status as a slave elsewhere did not provide authority to forcibly remove him from England. As a human being, he was entitled to the protection of law against extrajudicial rendition.

However, at the same time, as much as James Somerset could in fact lay claim to the basic protection of access to the courts, the expanding notion of English freedom remained tethered to the degraded status of Blacks. In England, both before and after *Somerset*, subordination

31. GERZINA, *supra* note 22, at 142 (describing one particularly ill-conceived plan to convey the black poor to Sierra Leone, where they faced insurmountable obstacles from, among other things, an extremely hostile climate and the presence of slave traders).

32. *See* WIECEK, *supra* note 4, at 21–22.

33. *Id.* at 23 (noting the conflict between a 1677 decision, *Butts v. Penny*, which upheld the notion of property rights in slaves, and a 1701 decision by Chief Justice Sir John Holt, who found that a slave was emancipated upon touching free soil). Contradictory rulings continued up to the time of *Somerset's Case*, and indeed, given the ambiguity of the opinion, persisted afterwards. *Id.* at 23–24, 33–34.

34. *See* SCHAMA, *supra* note 7, at 53–54 (describing the varied backgrounds of Somerset's five advocates who ranged from young abolitionist to a radical member of Parliament); SHYLLON, *supra* note 16, at 82–90.

35. Hulsebosch, *supra* note 10, at 656.

of Blacks as a racial caste persisted[36] and served to further distinguish and define the English subject and the development and recognition of his rights. This intertwined relationship between British freedom and Black slavery are reflected in the idea of that slavery and the air of England are inherently incompatible. Moreover, although many forms of unfree labor existed at the time, within the metaphor "too pure an air" lies a potential distinction between the status of Blacks and other forms of unfree labor. The polluting effects of slavery required social control over slaves.

This was not simply an argument of proponents of slavery; the portrayal of slaves as a contaminating presence appeared within anti-slavery discourse more broadly and within the body of *Somerset* itself. According to one report of the decision, Sergeant Davy, one of Somerset's lawyers, put the matter this way:

> I apprehend, my Lord, the honour of England, the honour of the laws of every Englishman, here or abroad, is now concerned. [Stewart's lawyer] observes, the number of 14,000 or 15,000; if so, high time to put an end to the practice; more especially, since they must be sent back as slaves, tho' servants here. The increase of such inhabitants, not interested in the prosperity of a country, is very pernicious; in an island, which can, as such, not extend its limits, nor consequently maintain more than a certain number of inhabitants, dangerous in excess. . . . Thus, foreign superfluous inhabitants augmenting perpetually, are ill to be allowed; a nation of enemies in the heart of a State, still worse.[37]

This denunciation of Blacks as "foreign" and "superfluous"—a subnational group constituting a "nation of enemies"—articulated an argument for Somerset's freedom within, and not in opposition to, racialized difference. The Black presence and not simply slavery itself was identified as problematic. Whether Davy was expressing a view he personally espoused or whether it was a strategic flourish—a discursive reassurance that finding for Somerset need not entail the abolition of slavery or nor a statement of Black equality—Davy's argument that the Black presence was troublesome and inherently injurious to the public well-being was reflected in actual social practices. The polluting effects of slavery required containment, effacement, and

36. Even after 1772, kidnapping and the buying and selling of slaves continued. SHYLLON, *supra* note 16, at 174. Historian George Van Cleve makes the point that, over time, the status of Blacks evolved from slaves to "slavish servants" or "near slavery," the distinction turning on the prohibition of the use of unlimited physical brutality as a form of disciplining slaves. *See* Van Cleve, *supra* note 10, at 623. However, because of conflicting legal authority as well as different contexts, the difference between these forms of servitude and slavery are somewhat elusive. *Id.* For example, even if the level of permissible force used against a slave under chattel slavery was more severe than that used against Blacks in England who occupied the status of near slaves, in actuality the more salient distinction may have been that Blacks, unlike the "English," "were properly enslaveable." *Id.*

37. Somerset v. Stewart, (1772) 98 Eng. Rep. 499, 507–08 (K.B.).

ultimately extreme forms of social control over black bodies because by their mere presence they endanger freedom. These methods of constraint included putting unremovable neck collars on children,[38] selling slaves in the open market,[39] treating them as a form of property under law,[40] and imposing an obligation of perpetual involuntary servitude.[41] While arguably the colonial system had a more punitive and comprehensive regulatory scheme, the status of Blacks in England bore familiar markings of the system imposed elsewhere in the empire. Primarily, the core similarity rested in the racial distinction drawn between those who were enslaveable and those who were not: Those who were inherently English were not subject to enslavement.[42] Thus, even as the concept of the inherent rights of man took hold, Blacks as the enslaved or enslaveable were a contaminating presence. Slavery was the "colonial contagion" from which the pure air of England had to be insulated.[43]

III. IN THE FORMER COLONIES

Slavery in America was significantly different than in England. The sheer number of slaves as well as the complete and visible dependence of certain states on the slave economy intensified the debate over slavery. Within that battle, *Somerset's Case* occupied a uniquely important and contradictory position. On the one hand, *Somerset's Case* was read and asserted by Blacks in the colonies as evidence of the immorality of slavery and of the proposition that reaching free soil would guarantee freedom. During the Revolutionary War, Blacks escaping to British lines—a practice encouraged by the British through Lord Dunsmore's proclamation—cleaved to *Somerset*'s logic.[44] Radi-

38. *See* SHYLLON, *supra* note 16, at 9. The use of the collars was such as to provide the basis of a thriving business for English craftsmen. *See* JAMES WALVIN, BLACK AND WHITE: THE NEGRO AND ENGLISH SOCIETY 1555–1945, at 60 (1973).

39. *See* SHYLLON, *supra* note 16, at 5 (quoting from an 1827 case involving the slave Grace, in which the judge described the slave trade in England "as public . . . as in any of our West Indian islands"). Shyllon notes that subsequent to *Somerset*, hunting and kidnapping of Blacks in Britain continued as did the open trade in human beings. *Id.* at 174.

40. Black people were deemed to be goods under various legislative acts, as well as property under routine contracts and insurance policies. *See* Van Cleve, *supra* note 10, at 612–13.

41. *See id.* at 609 (describing the form of slavery imposed on Blacks in England as including "wageless compelled perpetual service").

42. While there were many forms of unfree labor at the time, only Blacks were openly sold in public markets, forced to wear collars as indicia of their status as property, excluded from baptism, or sent out of the country as punishment. *See id.* at 608 n.24. This facilitated a racial delineation of English identity and freedom. *See id.* at 607. This pattern repeated itself in America, where "'black' racial identity marked who was subject to enslavement; 'white' racial identity marked who was 'free' or, at a minimum, not a slave." Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1718 (1993).

43. Hulsebosch, *supra* note 10, at 657 n.4.

44. SCHAMA, *supra* note 7, at 24–25.

cal abolitionists were emboldened by the idea that British courts had rejected the idea that slavery had any validity under natural law.[45]

Subsequent to the Revolutionary War, and after independence, key ambiguities persisted regarding various sectors of the movement against slavery in the new nation. One strand of the anti-slavery argument, particularly evident within the Free Soil movement in the western states, denounced the harm of slavery not as a violent injury posed on another group of humans, but as an imposition on the cause of free labor. Echoing the concern of the British centuries before, slaves were seen as a contaminating and polluting influence on the rights of white workers.

The traces of this notion of contamination and pollution help explain how the opposition to slavery, particularly in the western territories, could be entirely consistent with a hatred of Blacks who were seen as slaves and former slaves. For one sector of the Republican Party, anti-slavery was defined by a policy of containment of slavery as a corrosive influence. From this vantage point, the evils of slavery were best addressed not by abolition but by eradicating slaves who were marked by contamination and were themselves the mark of contamination. They constituted an unstable and ultimately degraded and degrading presence. As Wiecek argues, moderates who sought to contain the institution of slavery were in a sense descendants of *Somerset* as much as were the radical abolitionists.[46]

Opposition to slavery was then easily conflated with opposition to the presence of slaves. Eric Foner points out that the Free Soil argument against the extension of slavery contained a crucial ambiguity:

> Was it the institution of slavery, or the presence of the Negro, which degraded the white laborer? . . . Republicans clearly stated that the institution itself, not the race of the slave, was to blame. . . . More often, however, Republicans indicated that they made little distinction between free Negroes and slaves, and felt that association with any black degraded the white race.[47]

This attitude did not represent the entirety of the Republican Party, but it was an influential voice. The conceptual framing of *Somerset*—the inherent ambiguity regarding what precisely about slavery was unacceptable—infused the debate over the extension of slavery into the West. State legislatures were in a panic that their territories would be overrun by free Blacks and so moved expeditiously to enact legisla-

45. WIECEK, *supra* note 4, at 34.

46. Wiecek contends, "*Somerset* thus passed into constitutional thought not only of radical abolitionists, but into that of the moderates who first controlled the Liberty party, and who later adopted Free Soil doctrines and went on to constitute one of the nuclei of the Republican party." *Id.* at 39.

47. ERIC FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 266 (1970).

tion that would discourage immigration and explicitly or effectively exclude them from the state.[48]

Politicians were then both anti-slavery and anti-slave in the most explicit terms. In the late 1840s, Pennsylvania Congressman David Wilmot campaigned for support of his proviso barring expansion of slavery into the territories acquired during the Mexican War by warning, "the negro race already occup[ies] enough of this fair continent; let us keep what remains for ourselves, and our children . . . for the free white laborer."[49] His frequent allusions to the distinctions between black labor and free labor appeared to indict Blacks and not slavery as the source of labor's denigration.[50] As in *Somerset*, the polluting effects of slavery demanded punitive control over the bodies of slaves as the mark of contamination.

IV. THE CONTEMPORARY LEGACY OF *SOMERSET*

Given that slavery ended more than a century ago in the United States, what is the contemporary significance or relevance of *Somerset's* metaphor "too pure an air"? On one hand, the idea that a free society cannot tolerate racial subjugation—that there are higher values of equality and liberty that supersede tradition—is tied to the understanding that *Somerset* came to embody. At the same time, if as past anti-slavery debates reveal, eradicating the evils of slavery is consistent with and to some extent dependent on the containment of slaves as representative of that evil; then that suggests that a responsible racial project can be built around the notion of anti-contamination. I contend that colorblindness is such a project.

The core idea of colorblindness is that if we simply ignore race, particularly in making decisions in which the state is implicated, we will eliminate racism and its pernicious effects. Simply put, the best way to eradicate racism and persistent racial inequality is to erase race. On this view, racism is not the polluting force or the contamination; rather it is race itself. To the extent then that colorblindness is grounded in the notion that thinking and speaking about race is the evil that must be stamped out (rather than racism, racial subjugation, racial bias, or white privilege), it reproduces *Somerset's* logic of purity and contamination. Under the colorblind view, societal "race problems" pertain to people who are Black, or Latino or Asian; race is something that whites do not have.[51] In this sense, then assertions

48. EUGENE H. BERWANGER, THE FRONTIER AGAINST SLAVERY: WESTERN ANTI-NEGRO PREJUDICE AND THE SLAVERY EXTENSION CONTROVERSY 1 (1967).

49. HAROLD HYMAN & WILLIAM M. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875, at 129 (1982).

50. FONER, *supra* note 47, at 267.

51. On the invisibility of whiteness, Barbara Flagg notes, "The most striking characteristic of whites' consciousness of whiteness is that most of the time we don't have any. I call this the transparency phenomenon: the tendency of whites not to think

of Black identity (or any identity that is non-white) are inherently problematic or in tension with prevailing norms that embrace racelessness. Normatively preferred racial discourse is based on the notion that race is not relevant.[52] Moreover, to the extent that race is named or advanced in discourse or in action, it contaminates otherwise fair and democratic processes.

Modern legal and political discourse is suffused with this idea. It is particularly prominent in legal arguments advanced by advocates of colorblindness—arguments that have come to wield considerable influence in equal protection doctrine. Claims that erasing race itself is key to eradicating racial effects have shaped the contours of law. While it is certainly true that as a matter of current law, not all forms of race consciousness are deemed constitutionally impermissible,[53] it is also clear that attending to race is almost always constitutionally suspect, and more specifically, deemed to be so precisely because of the toxic character of race itself. Even allowing for broad differences in how we might define racial inequality and bias, it would be difficult to deny that race has at least some salience in shaping the world in which we live. Epic events like Hurricane Katrina serve as painful reminders of the racialized and deeply inequitable present that we might like to ignore.[54] But the question of how we traverse the distance between the present and a society where race is irrelevant appears to be largely dependent on resisting the very idea of race itself. In this sense, colorblind opposition to racism that is predicated on opposition to race conceptually reproduces the logic in which opposition to slavery became conflated with opposition to slaves. *Somerset's* legacy facilitates a contemporary understanding of anti-racism as anti-contamination. To illustrate the point consider two modern manifestations of the argument that the way to eradicate racism is to excise race. The first comes from Supreme Court doctrine and the second comes from the political arena.

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about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific." Barbara J. Flagg, , *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

52. *Id.* at 953 (noting that prevailing notions of the autonomous individual who should be not be judged based on personal characteristics, combined with the reaction to the country's history of white supremacy that was enacted through race-specific laws has led to a tendency to "equate racial justice with the disavowal of race-conscious criteria of classification.").

53. Grutter v. Bollinger, 539 U.S. 306, 326–27 (2003) (noting that "[a]lthough all governmental uses of race are subject to strict scrutiny, not all are invalidated by it").

54. *See* Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CAL. L. REV. 907, 907–09 (2006) (noting that the tragic suffering in New Orleans in particular, which disclosed deep racial inequality, challenged the view that race was no longer significant in American life).

A. *Supreme Court Doctrine and Anti-Contamination*

For the past several decades, the Supreme Court has been engaged in a dialogue about the proper way to address the national legacy of racial oppression and contemporary racial disadvantage. During the tenure of the Rehnquist Court, for the most part this debate has been grounded in a particular understanding about race and racism that valorizes the idea of colorblindness. While the Court has not disapproved all uses of race,[55] it has largely exhibited the view that legislative enactments or state policies that rely in any measure on race must be subjected to the most rigorous review, regardless of whether they are part of a remediation program or whether they are part of a regime of racial subordination.[56] The result of this single-minded approach is that even those state policies undertaken as part of statutory or other legal obligations to take account of race have now come under attack. Until a little over a decade ago, it had been the case that the contentious legal debate over voluntary affirmative action had been in a different conceptual frame than race conscious remediation policies that were imposed pursuant to a statutory scheme or school desegregation decrees.[57] This is not to suggest that the decisions in these respective arenas did not influence each other; conceptions of discrimination and remedy in the arena of voting rights influenced the scope of anti-discrimination law more broadly. The point is that by the late 1980s and certainly by the 1990s courts began to insist that strict scrutiny be applied to all state policies that invoked race, even where such state actions were part of a broader, legally imposed remedial scheme. The turn from subject remedial policies, like redistricting and school desegregation,[58] to strict scrutiny was in

55. *Grutter*, 539 U.S. at 327 (noting that "[n]ot every decision influenced by race is equally objectionable"). During oral argument Justice O'Conner responded to the assertion by Grutter's lawyer that race could not be a factor in choosing students: "[Y]ou are speaking in absolutes and it isn't quite that. I think we have given recognition to the use of race in a variety of settings." Transcript of Oral Argument at 5, *id.* (No. 02-241), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-241/pdf.

56. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that "all racial classifications, imposed by [government], must be analyzed by a reviewing court under strict scrutiny").

57. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1514 (2004) (noting that during the 1960s and up to the 1970s, federal courts sanctioned race-conscious policies adopted by states and local governments to address school segregation based on the accepted view that equal protection did not proscribe such remedies).

58. The move to subject voluntary school desegregation plans to strict scrutiny is a topic worthy of consideration on its own and is particularly salient given that the issue is currently before the Supreme Court and was argued during the October 2006 term. *See* Meredith v. Jefferson Cty. Bd. of Educ., No. 05-915 (U.S. argued Dec. 4, 2006); Parents Involved in Cmty Sch. v. Seattle Sch. Dist. No.1, No. 05-908 (U.S. argued Dec. 4, 2006).

large measure justified by a concern about the deleterious effects of race itself. Specifically, the problem was that considerations of race infected race neutral and fair procedures.

The paradigm case here is *Shaw v. Reno*,[59] decided by the United States Supreme Court in 1993.[60] The case concerned the constitutionality of a state redistricting plan drawn up by North Carolina—a state that was required under the Voting Rights Act ("VRA") to submit all proposed changes to its voting practices for prior review by the Attorney General.[61] This "preclearance" provision of the VRA was designed to deal with the fact that particular jurisdictions had been known to be ruthlessly efficient in devising ways to suppress minority voting in general and black voting in particular.[62] To ensure that history did not repeat itself, all proposed changes were reviewed to determine if they had either the purpose or the effect of denying or abridging the right to vote on account of race or color.[63] North Carolina's initial map was rejected because the Attorney General asserted that an alternative districting plan would create a second majority-minority district and thereby enhance minority voting power and increase the chances of electing a representative of their choice.[64] The state revised its plan to comply and drew a district that concentrated black voting power in accordance with the Attorney General's direction.[65] This plan was challenged by five North Carolina voters, including members of the Duke Law School faculty who alleged that the new districts constituted an unconstitutional racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment.[66] Notably, they did not contend that white voting strength was somehow diluted by the new plan, or that their right to choose a representative of their choice had been compromised.[67] "Gerrymandering" is the time honoured practice of drawing voting district boundaries to secure a particular outcome.[68] It is often done by political parties to ensure that the existing balance of power remains.[69] It is the favored technique of incumbents to ensure that they will win. It is said that rather than the voters picking the candidates, the candidates pick the voters. While there is much to criticize about the practice, the challengers here targeted not gerrymandering but the use of race in the gerrymandering process.[70] The contention was that race had

59. Shaw v. Reno, 509 US 630 (1993).
60. *Id.* at 630.
61. *Id.* at 633–34.
62. *See id.* at 637.
63. *Id.* at 634.
64. *Id.* at 635.
65. *Id.*
66. *Id.* at 636–37.
67. *Id.* at 641.
68. *See id.* at 640.
69. *See id.*
70. *Id.* at 637.

somehow infected the democratic process, which is otherwise race neutral.[71]

In a five to four decision authored by Justice O'Conner, the Court agreed that the challengers had stated a viable claim.[72] While noting that not all race-conscious decision making is impermissible in all circumstances,[73] the majority found that the shape of the district was so bizarre and irrational on its face that it could be understood only as an effort to segregate voters into separate districts on the basis of race.[74] The Court stressed the dangers of focusing on race: "A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one other but the color of their skin, bears an uncomfortable resemblance to political apartheid."[75] The decision further stated:

> Racial classifications of any sort pose the risk of lasting harm to our society. . . . Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters . . . ."[76]

The majority's uneasiness with racial classifications—the notion that this attention to race is the source of potential harm—conceptualizes the problem as an otherwise fair electoral process being infected or contaminated by considerations of race. The way in which racial inequality had been structured into the electoral process was rendered invisible in the analysis of the case. Preexisting district lines were drawn and qualifications were set to exclude black voters so efficiently that prior to the creation of the district at issue in *Shaw*, no Black had been elected to the United States Congress from the state of North Carolina since Reconstruction.[77] As a result, all efforts to remedy the egregious patterns of racial exclusion of Blacks from political power were subjected to the same level of review as the underlying violations that gave rise to the remedy. This result was tied to the notion that present-day repudiation of racial domination rests upon the repudiation of race itself as dangerous, toxic and ultimately corrosive. The issue was not how the processes had been distorted to effectively lock out Black political power and whether the remedy was commensurate

71. *Id.* at 641.
72. *See id.* at 652.
73. *Id.* at 642.
74. *Id.*
75. *Id.* at 647.
76. *Id.* at 657.
77. *Id.* at 659 (White, J., dissenting) (rejecting the idea that the state's plan in which whites remained a majority in many congressional districts and under which the first black representatives were elected to Congress since Reconstruction somehow violated the challenger's constitutional rights).

with the injury. The issue was how the current colorblind process had been contaminated by considerations of race.

B. *Popular Politics, Initiatives, and Anti-Contamination*

The second example of what might be called anti-contamination rhetoric comes from California where the logic of colorblindness has been active and prominent. Over the past ten years there have been two ballot initiatives, one of which passed—Proposition 209[78]—the so-called "California Civil Rights Initiative" and one of which did not—Proposition 54[79]—the so called "Racial Privacy Initiative" that reflect the colorblind principle. My analysis here is not so much grounded in the assessment of why one lost and the other did not.[80] Rather my question is what is the conception of race that underpins both?

California's "Civil Rights Initiative" (CCRI) amended the California Constitution as follows: "The state shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education or public contracting."[81] The effect of this proposition was to write a ban on affirmative action into the state Constitution that extends farther than current Supreme Court doctrine. Thus while *Grutter v. Bollinger*[82] upheld the use of race conscious admissions policies in higher education under certain limited circumstances,[83] the California Constitution bans it based on the claim that it is preferential treatment.

Inherent in the logic of CCRI is the notion that fairness requires race neutrality or race blindness in order to avoid both discrimination and preferential treatment. Attention to race, not racism, is the harm. Some seven years later, this principle laid the groundwork for another initiative called Proposition 54—the "Racial Privacy Initiative"

78. Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities, California Ballot Proposition 209 (ratified Nov. 5, 1996) (codified as CAL. CONST. art I, § 31).

79. Racial Privacy Initiative, California Ballot Proposition 54 (defeated Oct. 7, 2003).

80. The defeat of the Racial Privacy Initiative could be read as a rejection of the most extreme extension of the colorblind principle, although the general consensus is that the defeat occurred because the opponents were well-organized and had successfully mobilized an argument that implementing the provision would inhibit the ability of public health researchers to collect necessary data for tracking the spread of disease. *See* Suzy Khimm, *Avalanche Against Prop 54*, ALTERNET, Oct. 17, 2003, http://www/alternet.org/story/16972 (reporting that the threat to public health motivated voters to oppose the proposal).

81. Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities, California Ballot Proposition 209 (ratified Nov. 5, 1996) (codified as CAL. CONST. art I, § 31).

82. Grutter v. Bollinger, 539 U.S. 306 (2003).

83. *Id.* at 343.

(RPI).[84] In seeking to ban any governmental classification on the basis of race or skin color, this proposition perhaps most clearly presents the colorblind anti-contamination logic. Its provisions were stark: "The state shall not classify any individual by race, ethnicity or color unless the Legislature specifically determines that such classification serves a compelling governmental interest and approves said classification by a two-thirds majority of both houses of the legislature, and said classification is approved by the Governor."[85] Ward Connerly, the major proponent of both CCRI and RPI, offered the following simple and straight forward rationale:

> If our nation has any expectation of solving the riddle of race, the historical practice of categorizing the American people according to skin color and origin of one's ancestors must end. . . . In short, a clean break from race is essential if America is to realize its promise of "one nation, indivisible."[86]

This logic is a descendant of *Somerset*: The way to fight slavery is to exclude slaves, and the way to fight racism is to exise race.

Were it not so serious in terms of its consequences, the proposition to "eradicate racism" by "erasing race" is almost whimsical. It presumes that it is possible to ignore race: Common sense as well as cognitive science tell us that it is not. As Neil Gotanda's article pointed out some time ago, what we really mean when we say that, "We paid no attention to race in making this decision" is that, "We noticed your race, and now are going to act as though we did not."[87] Colorblindness represents an act of faith that we will be able to ignore that which we have already seen. What cognitive science tells us is that information about race is a complex social category that is deeply wired in our brains. Moreover, science tells us that it affects the way we react and evaluate. Some of this is actually measurable by looking at how our brain reacts, and others are measured by testing our implicit biases and our reaction time to various stimuli.[88] At both the conceptual and empirical level, the presumption that one cannot see race is repudiated by the evidence. The fact that the erasure of race is undertaken as a legitimate and serious political project is telling, par-

84. *See* Racial Privacy Initiative, California Ballot Proposition 54 (defeated Oct. 7, 2003).

85. Language of the Racial Privacy Initiative, http://www.adversity.net/RPI/RPI_pages/2_language.htm (last visited Feb. 24, 2007).

86. Ward Connerly, *Not a Chance: The Electoral Journey of Proposition 54*, NAT'L REV. ONLINE, Oct. 15, 2003, http://www.nationalreview.com/comment/connerly2003 10150818.asp.

87. *See* Neal Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 16–18 (1991) (explaining the technique and impossibility of racial non-recognition).

88. *See* Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1505–06 (2005) (describing how "racial schemas" operate "automatically—*without conscious intention* and *outside of our awareness*" because of how the brain responds to racial stimuli).

ticularly with reference to what is deemed to be legitimate anti-racist advocacy. Grounding resistance to racial subordination in opposition to race itself can only seem rational if one perceives race in a particular way—the source of contamination.

V. Conclusion

We cannot erase racism by erasing race any more than our eighteenth and nineteenth century predecessors could eradicate the evils of slavery by seeking to eradicate slaves. *Somerset* remains open to different, and at times contradictory, understandings. One of its trajectories was to propel the abolitionist argument forward into a conception of basic freedoms that inhered in all human beings. Another more troubled legacy relates to the ambivalence regarding how anti-slavery might be articulated. "Too pure an air" surely remains a powerful image. But to the extent that evoking the image of purity invites concern over contamination, we should remain vigilant that we not make the same mistake and conflate our opposition to racism with an aversion to attending to race.