of the slavery relation, and a hypothetical act that would have stated: "There is hereby established a relation among men known as slavery, by which one person may own the body or a right to the services of another. This relation is lifelong, alienable, and hereditable through the status of the mother." In the minds of some radicals, only such a statute could have been the positive law that Mansfield had referred to. Theodore Dwight, a revolutionary era Connecticut lawyer, in a formal oration before the old Connecticut Abolition Society in 1794, emphasized the point, which some slave state jurists later conceded: no American jurisdiction had ever formally created slavery by municipal regulation. "Search the statute books of Connecticut, from the date of its Charter to the present moment, and tell me where is the law which establishes such an inhuman privilege."[135]

This argument nearly succeeded in Connecticut a generation later. In *Jackson v. Bulloch*,[136] the Connecticut Supreme Court of Errors mused: "Did [slavery] depend entirely upon custom or usage, perhaps it would not be too late to enquire, whether a custom so utterly repugnant to the great principles of liberty, justice and natural right, was that *reasonable* custom, which could claim the sanction of law."[137] Unlike Dwight, though, the Connecticut judges accepted the regulatory statutes as a legitimating source of slavery.

Radicals further maintained that, even if slavery were somehow legitimated by custom or prescription, a positive law of liberty would override any mere "toleration" of slavery. They looked to the Declaration of Rights in the early state constitutions, such as the first article of Virginia's Bill of Rights, drafted by George Mason, which stated "[t]hat all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."[138] In an opinion leaning towards antislavery, Virginia's venerable Chancellor George Wythe (Thomas Jefferson's law teacher) ruled "that

135. T. Dwight, An Oration, Spoken Before the Connecticut Society, for the Promotion of Freedom and the Relief of Persons Unlawfully Holden in Bondage 10 (1794).

136. 12 Conn. 38 (1837).

137. *Id.* at 42 (emphasis in original).

138. 7 The Federal and State Constitutions 3818 (F. Thorpe, comp. 1909). This provision was widely imitated in subsequent state constitutions.

freedom is the birth-right of every human being, which sentiment is strongly inculcated by the first article of our 'political catechism,' the bill of rights . . . ."[139] This argument ultimately failed in Virginia, at least as applied to blacks,[140] but in Massachusetts it carried the day in the famous "case" of Quock Walker.

The Quock Walker story can be seen as an American counterpart of *Somerset*, especially in its ambiguity and in the resultant misunderstanding about its impact. There were actually three cases involving the alleged slave status of this black; only one, *Commonwealth v. Jennison* (1781),[141] is of concern to us here.[142] At the trial of Walker's purported master, Nathaniel Jennison, for an assault on Walker, Chief Justice William Cushing of the Supreme Judicial Court of Massachusetts charged the jury that "whatever usages formerly prevailed or slid in upon us by the examples of others on the subject, they can no longer exist."[143] Rather, he continued, "sentiments more favorable to the natural rights of mankind, and to that innate desire for liberty which heaven, without regard to complexion or shape, has planted in the human breast—have prevailed since the glorious struggle for our rights [the Revolution] began."[144] These sentiments had led to the adoption of Article I of the Massachusetts Declaration of Rights (1780), which provided:

> All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.[145]

From his reading of this provision, Cushing concluded that "slavery is in my judgment as effectively abolished as it can be by the

139. Hudgins v. Wrights, 11 Va. (1 Hen & M.) 133, 134 (1806). This is not a quote from Chancellor Wythe, but the Supreme Court of Appeals' summary of the Chancery holding. This decision affirmed the Chancery judgment, but the language quoted in the text was expressly disapproved insofar as it pertained to blacks, who were called an exception to the constitutional provisions. *Id.* at 141.

140. *See* note 139 *supra*.

141. The Quock Walker cases are unreported. *But cf.* note 142 *infra*.

142. For a discussion of these cases, see: G.H. Moore, *supra* note 105, at 211-13; Cushing, *The Cushing Court and the Abolition of Slavery in Massachusetts: More Notes on the 'Quock Walker Case,'* 5 Am. J. Legal Hist. 118 (1961); O'Brien, *Did the Jennison Case Outlaw Slavery in Massachusetts?* 17 Wm. & Mary Q. (3d ser.) 219 (1960); Zilversmit, *Quock Walker, Mumbet, and the Abolition of Slavery in Massachusetts*, 25 Wm. & Mary Q. (3d ser.) 614 (1968).

143. Cushing, *supra* note 142, at 133; *cf.* text and note at note 136 *supra*.

144. Cushing, *supra* note 142, at 133.

145. 3 The Federal and State Constitutions, *supra* note 138, at 1889.

granting of rights and privileges wholly incompatible and repugnant to its existence."[146] Jennison was convicted, though on what grounds is uncertain. This case did not of itself abolish slavery in Massachusetts, but it was one of several post-Revolutionary freedom suits of various kinds that either shaped or reflected public sentiment favorable to abolition.[147]

Later radicals who adopted the approach of Cushing and Wythe maintained that, because of state constitutional provisions similar to those in the Massachusetts and Virginia declarations, state legislatures lacked power to establish slavery.[148] It was on this point that the moderates disagreed with them. Moderates conceded the legitimacy of slavery in the states; they accepted the purported compromises of the Constitution, under which slavery was to be fostered or abolished by the states alone, with no interference from the national government.

In the Free Soil platform of 1848, the moderates declared: "Resolved, that slavery in the several States of this Union which recognize its existence, depends upon the State laws alone, which cannot be repealed or modified by the Federal Government, and for which laws that government is not responsible. We therefore propose no interference by Congress with Slavery within the limits of any state."[149] This doctrine had a libertarian potential as well. Led by Salmon P. Chase, moderates concluded that the national government could neither create nor protect slavery in the territories, the District of Columbia, or on the high seas, and could not constitutionally enact the Fugitive Slave Act of 1793.[150]

Joshua Giddings, Whig congressman from the Western Reserve of Ohio, summed up this part of the moderate theory in his "Creole Resolutions" of 1842. Denying the federal government's au-

146. Cushing, *supra* note 142, at 133.

147. Dean, *Judge Lowell and the Massachusetts Declaration of Rights*, 13 PROCEEDINGS OF THE MASS. HIST. SOC. 299, 304 (1875). *See also* Belknap, *Letters*, *supra* note 102, at 375-442. In particular, see the letters from John Eliot, *id.* at 383; Samuel Dexter, *id.* at 385; Thomas Pemberton, *id.* at 393, E.A. Holyoke, *id.* at 400. *Contra*, the letter from James Sullivan, *id.* at 403.

148. *Has Slavery in the United States a Legal Basis?* 1 MASS. Q. REV. 273, 277-79 (1848).

149. K. PORTER & D. JOHNSON, NATIONAL PARTY PLATFORMS 1840-1860, at 13 (1960). *See also id.* at 5 (Liberty Party platform of 1844), and the resolutions of the 1841 Liberty Party Convention of Ohio drafted by Salmon P. Chase, *quoted in* J. SCHUCKERS, THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 48-49 (1874).

150. S. CHASE, RECLAMATION OF FUGITIVES FROM SERVICE: AN ARGUMENT FOR THE DEFENDANT . . . IN THE CASE OF . . . JONES VS. . . . VANZANDT 81-82 (1847); A. KRADITOR, *supra* note 116, at 188-89, *quoting* Letter from Salmon Chase to Gerrit Smith, May 14, 1842; J. SCHUCKERS, *supra* note 149, at 74-77, *quoting* Justice Read's opinion in an unreported fugitive slave case. *See generally* C. CLEVELAND, ANTI-SLAVERY ADDRESSES OF 1844 AND 1845 (1867).

thority to reclaim certain slaves who, while on a vessel in the coastal slave trade, had mutinied and escaped to a free jurisdiction, Giddings insisted that "slavery . . . is necessarily confined to the territorial jurisdiction of the power creating it" and that, once out of that jurisdiction, the slave relationship dissolved permanently.[151] This doctrine, undergoing numerous variations during the controversy over slavery in the territories, even won over antiabolitionist Democrats like Senator Stephen A. Douglas. Douglas's "Freeport Doctrine," enunciated in 1858, maintained that the federal government could effectively exclude slavery from the territories simply by not enacting a slave code for them.[152] Another Democrat, Judge Greene C. Bronson of the New York Court of Errors, had anticipated this view by a decade. Since slavery could not exist where no "positive law" established it, he had said in 1848, "[i]f the owner of slaves removes with, or sends them into a country, state, or territory, where slavery does not exist by law, they will from that moment become free men."[153]

This premise led moderates of the 1840s to formulate the "divorce" doctrine, calling for a total divorce of the federal government from the support of slavery.[154] In addition to the points just noted, divorce implied nonadmission of new slave states, possibly the abolition of the interstate slave trade, and the establishment of political programs hostile to the welfare of slavery in the states. The latter might have included, for example, refusing to hire slave labor on federal projects and denying State Department assistance to those pursuing claims for slaves lost through the actions of foreign powers. "Divorce" gave way in time to the slogan-doctrine "Freedom national, slavery sectional," a sort of moderate summing-up of neo-*Somerset*. "Freedom national" became an element of the Republican constitutional posture of the 1850s, as the party's rebuttal to proslavery efforts to extend the federal government's protection for slavery into the territories.

Antiabolitionists, Garrisonians, and defenders of slavery responded to each point in these moderate and radical arguments. Reasoning from a proto-positivist conception of the law as the command of a human sovereign, they denigrated the place of natural law in earthy courts. Law is, according to the Garrisonian

151. CONG. GLOBE, 27th Cong., 2d Sess. 342 (1842).

152. THE LINCOLN-DOUGLAS DEBATES OF 1858, at 88 (R. Johannsen ed. 1965) [hereinafter cited as DEBATES].

153. J. RAYBACK, FREE SOIL: THE ELECTION OF 1848, at 253 (1970).

154. E. FONER, FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR 75-80 (1970).

lawyer Wendell Phillips, "a rule of civil conduct prescribed by the supreme power of a state, commanding what its subjects are to do, and prohibiting what they are to forbear [*sic*]."[155] The opponents of neo-*Somerset* agreed with Justice Levi Woodbury of the United States Supreme Court in his concept of the judicial role:

> Whatever may be the theoretical opinions of any as to the expediency of some of these [proslavery] compromises, or of the right of property in persons which they recognize, this court has no alternative, while they exist, but to stand by the Constitution and the laws with fidelity to their duties and their oaths.[156]

Accordingly, they argued that a judge must take the law as given and apply it without reference to the postulates of morality.[157]

In their view, natural law and the odiousness of slavery were irrelevant to the workaday world of the law. In modern terms, they considered the challenge to slavery on natural law grounds nonjusticiable. The Reverend Nathaniel Bouton, an antiabolitionist New Hampshire Congregational minister, even denied the claim of natural law upon private individuals. He asserted that citizens had to obey all temporal laws, irrespective of personal opinions about the dictates of higher law. Squaring statutes with higher law was exclusively for legislators.[158]

In the South, jurists and legal commentators were divided on the question of slavery's origins. Some, like the justices of the Georgia Supreme Court, maintained that parliamentary statutes were the legal basis for slavery.[159] Others cited the colonial black codes.[160] Those who did not feel a need to ground slavery in specific statutes[161] argued that it was justified by "prescriptive right,"[162] or insisted, as did the Garrisonians, that "custom" or "usage" had established slavery.[163] Thus, slavery and Mansfield's

155. W. Phillips, Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery 7 (1847). *See also Constitutionality of Slavery*, 1 Mass. Q. Rev. 463, 464 (1848).

156. Jones v. Van Zandt, 46 U.S. (5 How.) 215, 231 (1847).

157. Chandler, *The Latimer Case*, Law Reporter 481-94 (1843).

158. N. Bouton, The Good Land in Which We Live: A Discourse Preached . . . on the Day of Public Thanksgiving (1850).

159. Neal v. Farmer, 9 Ga. 555 (1851). This decision was widely received in the South as authoritative on the legitimacy of slavery's origins.

160. Mahoney v. Ashton, 4 Md. (4 Har. & McH.) 295 (1799).

161. *See, e.g.*, G. Sawyer, Southern Institutes; or, an Inquiry into the Origin and Early Prevalence of Slavery and the Slave Trade 308, 329 (1858).

162. R. Dabney, A Defense of Virginia 69 (1867) (this is a post-Civil War text).

163. *Constitutionality of Slavery*, *supra* note 155, at 470, 477 (1848).

utterance were reconciled: "by positive law, in this connection," a Garrisonian maintained, "may well be understood customary law as the enactment of a statute."[164]

Slavery's apologists were finally driven to repudiating *Somerset* completely. Though as early as 1797 Maryland Attorney General Luther Martin had condemned Mansfield's opinion as "bending to the policy of the times—Wilks [*sic*] and Liberty,"[165] the principal Southern rejection of *Somerset* took place late in the antebellum period. Proslavery commentators dismissed it as of little weight upon any principle whatever and as "vacillating, doubting, unusual and . . . discreditable."[166] Then, with *Somerset* out of the way, they developed a reverse "Freedom national" argument. They maintained that "what is local and municipal is the abolition of slavery. The states that are now non-slaveholding have been made so by positive statute. Slavery exists, of course, in every nation in which it is not prohibited."[167] Because slavery existed everywhere except where it was abolished by positive law, deriving its legitimacy from "prevalent views of universal jurisprudence,"[168] the status of free and enslaved blacks depended exclusively on municipal legislation.

VII

Mansfield said in *Somerset* that the power of a master to seize a slave and transport him for sale out of the realm "must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries." This statement touched on multifarious questions for conflict of laws doctrine and affected the antislavery debate as much as Mansfield's statement about positive law did. The underlying problem was difficult enough in the context of international public and private law; but it caused even greater complications for the mutual relations of quasi-sovereign states in the American union.

Conflict of laws issues in slavery cases derived from positive law problems, and were at first resolved on the basis of positive law concepts. In the supreme courts of Mississippi, Kentucky, and Louisiana, this trend became evident in cases involving the status

164. *Id.* at 466-67. *See also* W. Phillips, *supra* note 155, at 85.

165. 4 H. Catterall, *supra* note 8, at 54, *quoting* Martin's argument in Mahoney v. Ashton, 4 Md. (4 Har. & McH.) 295 (1799).

166. T. Cobb, *supra* note 117, at 170; G. Sawyer, *supra* note 161, at 321-22.

167. J. Thornwell, The State of the Country 12 (1861).

168. R. Dabney, *supra* note 162, at 68; J. Hurd, *supra* note 117, at 225.