This New Jersey Quaker was seconded by pamphleteers and lawyers in Massachusetts, who attempted to show that slavery, or at least the slave trade, was "repugnant to the Charter of this Province, which must be deemed the great Bulwark and Support of our *Liberty*."[109] The charter provision referred to (in the Massachusetts royal charter of 1691, which in this respect repeated phraseology found in the other colonial charters) provided that all American migrants or natives "shall have and enjoy all Liberties and Immunities of free and natural subjects within any of the Dominions of Us . . . as if they . . . were born within this Our Realm of England." An anonymous correspondent in the Boston *Massachusetts Spy* asserted that this provision, of its own force, nullified all provincial slave laws.[110] In contemporary freedom suits, this argument was amplified to include the claim that, under English law, "no man could be deprived of his liberty but by the judgment of his peers."[111]

Even before the Declaration of Independence, therefore, two persistent strains of later antislavery argument had been articulated: the appeal to the privileges and immunities of Americans, and resort to natural law concepts incorporated into constitutional due process guarantees. When linked with *Somerset*, these principles were thought by some contemporaries to accomplish a positive emancipation of every slave setting foot on American colonial territory. This point was suggested by the Philadelphian Richard Wells, who contended that "by the laws of the English constitution, and by our own declaration, the instant a Negro sets his foot in America, he is as free as if he had landed in England."[112]

Sharp and other English antislaverymen, such as Thomas Clarkson,[113] had a surer sense of the limitations of *Somerset* than these American slaves, lawyers, and propagandists. If slavery existed only by virtue of positive municipal law, then the body having power to enact local laws could decide whether to retain slavery or not. Sharp, acutely sensitive to metropolitan infringements of colonial rights, perceived this fact clearly and warned his American coadjutor Anthony Benezet that "*with respect to the toler-*

109. THE APPENDIX, *supra* note 96, at 5.

110. MASSACHUSETTS SPY, Jan. 28, 1773, vol. II, at 199, col. 1.

111. Belknap, *supra* note 101, at 202.

112. *See* R. WELLS, A FEW POLITICAL REFLECTIONS SUBMITTED TO THE CONSIDERATION OF THE BRITISH COLONIES 82 (1774). The pamphlet is signed "A Citizen of Philadelphia"; the attribution to Wells appears in T.R. ADAMS, AMERICAN INDEPENDENCE: THE GROWTH OF AN IDEA 115 (1965).

113. 1 T. CLARKSON, *supra* note 50, at 287.

ation of slavery in the colonies, I apprehend the British Parliament has no right to interfere."[114]

To restate and expand Sharp's analysis, there are several reasons why *Somerset* did not disestablish slavery in the American colonies: (1) it did not disestablish slavery even in the metropolis; (2) its sweeping generalizations were paradoxically a source of weakness, for they were neither conceptually hard-edged nor specifically applicable in any jurisdiction outside England; (3) even a lucid opinion disestablishing slavery in Britain would have had only a problematical impact in the colonies, since the imperial constitution was an attenuated arrangement on the eve of the War for American Independence; (4) even if *Somerset* had explicitly held slavery incompatible with the common law, the question of how far the common law carried over into the colonies was as unsettled as the constitutional structure was. The question of *Somerset's* force under the imperial constitution became academic with the Declaration of Independence. Even if British courts or Parliament had been inclined to, they could not make policy for the independent American states. Yet *Somerset* would not down; indeed, its influence in the new American nation remained long after its arguably binding authority had disappeared.

VI

Mansfield had said that slavery was "so odious, that nothing can be suffered to support it but positive law." In the United States, opponents of slavery interpreted and elaborated on this statement so extensively that they created a quite distinct doctrine, which might be called "neo-*Somerset*". The new doctrine argued that slavery was so contrary to natural law that it could not legitimately exist unless explicitly established by positive law. Some abolitionists went further, denying that even positive law could establish slavery. Faced with these doctrines, pro-slavery southern jurists were driven first to argue around neo-*Somerset*, and then to repudiate it altogether. The tension between slavery and natural law was one of the two chief legacies of Mansfield to the American law of slavery.[115]

To trace the constitutional dialogue that engendered neo-*Somerset*, it might be helpful first to outline differing positions in

114. G. BROOKES, FRIEND ANTHONY BENEZET 420 (1937). *See also* Letter from Granville Sharp to Anthony Benezet, April 21, 1772, *quoted in* A. ZILVERSMIT, THE FIRST EMANCIPATION: THE ABOLITION OF SLAVERY IN THE NORTH 89 (1967).

115. The other, the impact of slavery on conflict of laws doctrine, will be examined in the next section.

the controversy over slavery. After 1839, the anti-slavery movement split into three more or less mutually hostile groups, which we shall call the Garrisonians, the moderate constitutionalists, and the radical constitutionalists.[116] The Garrisonians maintained after 1844 that the United States Constitution supported slavery, and they therefore called on abolitionists to repudiate their allegiance to it and to the American union. From this perspective, they developed a perversely effective defense of slavery's legitimacy in America—in fact, theirs were the most telling proslavery legal and constitutional arguments until the works of John Codman Hurd and Thomas R. R. Cobb appeared in 1858.[117] Both the moderate and radical constitutionalists asserted that slavery should be opposed on constitutional grounds and by political means. The radicals, believing that slavery was everywhere illegitimate, argued that the federal government should abolish slavery throughout the union. The moderates, on the other hand, sought only to divorce the federal government from support of slavery and to persuade the states to abolish slavery within their jurisdictions. Moderates denied that the federal government even could interfere with slavery in the states. The defenders of slavery did not suffer from similar fundamental divisions. Over time they moved towards an increasingly militant and comprehensive defense of the universal legitimacy of slavery. These basic positions provided the dynamic of the constitutional controversy over slavery.

The jurisprudential basis of antislavery constitutionalism was a posited distinction between mundane law, that is, law based on human will, and natural law, which was of superior obligation because it was promulgated by God or was a part of the natural order. Drawing on a vigorous though rudimentary philosophy

116. No adequate review of this three-sided debate yet exists. I am preparing a study, tentatively titled *The Origins of American Antislavery Constitutionalism, 1760-1846*, which hopefully will fill this gap. In the meantime, consult the following for introductions: on the Garrisonians, A. KRADITOR, MEANS AND ENDS IN AMERICAN ABOLITIONISM 185-217 (1969), and Stewart, *The Aims and Impact of Garrisonian Abolitionism, 1840-1860*, 15 CIVIL WAR HIST. 197 (1969); on the moderate constitutionalists, D. DUMOND, *supra* note 4, and H. GRAHAM, EVERYMAN'S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE "CONSPIRACY THEORY", AND AMERICAN CONSTITUTIONALISM 152-294 (1968); and on the radicals, J. TENBROEK, EQUAL UNDER LAW 41-131 (1951).

117. *See* T. COBB, AN INQUIRY INTO THE LAW OF NEGRO SLAVERY IN THE UNITED STATES OF AMERICA. TO WHICH IS PREFIXED, AN HISTORICAL SKETCH OF SLAVERY (Philadelphia ed. 1858); J. HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES (1858). The *Congressional Globe* from 1833 on is, of course, crammed with arguments by Southern spokesmen, but they did not systematically develop a comprehensive proslavery constitutionalism comparable to Cobb's and Hurd's.

developed by antislaverymen during the Revolutionary era,[118] antislavery constitutionalists claimed that any human ordinance inconsistent with the "natural foundation of rights" lacked "moral binding force" and was not obligatory unless expressed "with irresistible clearness" by the legislative authority.[119]

The radicals, including the New York editor William Goodell,[120] the Massachusetts lawyer Lysander Spooner,[121] and Gerrit Smith,[122] an upstate New York philanthropist, lawyer, and congressman, insisted that slavery had never been established in America by positive legislation: "[S]lavery in this country had no legal origin, and has continued to exist without law."[123] All purported statutory recognition of slavery (in, for instance, the Royal African Company charter and the American colonial and state black codes) was too indefinite to overcome the common law guarantees of individual liberty, such as the writ of habeas corpus and the right to jury trial.[124]

Radical antislaverymen considered slavery no more compatible with the common law than with natural law, partly because they assumed the common law embodied the principles of natural justice. In the *Representation* Granville Sharp had stressed an old common law maxim, *Debile fundamentum fallit opus*, which in this context might best be translated as "the foundation being defective, the superstructure collapses." Sharp had used it to attack slavery for its origins in kidnapping and rapine.[125] His American successors, however, regarded slavery's status under common law

118. *See* LETTER FROM GRANVILLE SHARP, ESQ. OF LONDON, TO THE MARYLAND SOCIETY FOR PROMOTING THE ABOLITION OF SLAVERY (1793). *See also* T. DAY, FRAGMENT OF AN ORIGINAL LETTER ON THE SLAVERY OF NEGROES; WRITTEN IN THE YEAR 1776, at 32 (1784); E. HICKS, OBSERVATIONS ON THE SLAVERY OF AFRICANS AND THEIR DESCENDANTS 5, 8-9 (1811).

119. *Has Slavery in the United States a Legal Basis?* 1 MASS. Q. REV. 145, 146, 149 (1848), *citing* Chief Justice Marshall in United States v. Fisher, 6 U.S. (2 Cranch) 358, 390 (1804): "Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects." Lysander Spooner has been identified as the author of this essay. C. HAAR, THE GOLDEN AGE OF AMERICAN LAW 271 (1965). *See also* Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 528-32 (1974), for a discussion of the strand of antislavery jurisprudence found in eighteenth century traditions about human rights.

120. W. GOODELL, THE AMERICAN SLAVE CODE (1853).

121. L. SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1860).

122. Letter from Gerrit Smith to Edmund Quincy, Nov. 23, 1846, *quoted in* O. FROTHINGHAM, GERRIT SMITH: A BIOGRAPHY 201-08 (1878).

123. W. GOODELL, *supra* note 120, at 268.

124. L. SPOONER, *supra* note 121, at 21-32.

125. SHARP, REPRESENTATION, at 145.

as the defective *fundamentum* that rendered the whole structure of slavery unsound.

William Goodell noted that every mainland colonial charter provided in one form or another that the colony's legislative authority did not extend to enacting laws repugnant to the laws of England. Since the common law was a "law" of England, and since (as Goodell read *Somerset)* Mansfield had held slavery to be contrary to the common law, the colonies could not legally enact slave codes, and slavery could thus have no legitimate origin.[126]

Others pursued a similar analysis. In remarks before a committee of the Massachusetts House of Representatives, Henry B. Stanton, a Bay State lawyer, claimed that "[o]n the principles of the common law, slavery is everywhere null and void. Common law operates as an abolition act whenever it comes in contact with slavery. By it, every slave is free."[127] And in *The Power of Congress Over the District of Columbia,* the first systematic antislavery constitutional treatise, Theodore Dwight Weld maintained that slavery exists "only by positive legislative act, forcibly setting aside the law of nature, the common law, and the principles of universal justice and right between man and man—principles paramount to all law, and from which alone, law derives its intrinsic authoritative sanction."[128]

In arguing this common law point, radical antislaverymen seemingly had the advantage of precedent on their side. The First Continental Congress, in the fifth of its Declarations and Resolves, had stated that "the respective colonies are entitled to the common law of England;"[129] and Chief Justice John Marshall, in a dictum in one of his Circuit Court opinions, had improved on the idea by declaiming: "When our ancestors migrated to America, they brought with them the common law of their native country, so far as it was applicable to their new situation; and I do not conceive that the Revolution would, in any degree, have changed the relations of man to man, or the law which regulated those condi-

126. W. Goodell, *supra* note 120, at 269-70. *See also* W. Goodell, Views of American Constitutional Law, In Its Bearing Upon American Slavery 97-102, 142-43 (2d ed. 1845); R. Hildreth, Despotism in America: or, An Inquiry into the Nature, Results, and Legal Basis of the Slave-Holding System in the United States 193, 203 (1854); L. Spooner, *supra* note 121, at 21-31. *See generally* J. Chickering, *"An American Citizen"*—Letter Addressed to the President of the United States on Slavery 4 (1855).

127. *Remarks of Henry B. Stanton . . . Before the Committee of the House of Representatives of Massachusetts* 12 (1837).

128. T. Weld, The Power of Congress Over the District of Columbia 13 (1838).

129. I Journals of the Continental Congress 1774-1789, at 69 (1904).

tions."[130] His colleague Joseph Story claimed that the neo-*Somerset* principle—a slave coming into a free jurisdiction "becomes ipso facto a freeman, and discharged from the state of servitude"—"pervades the common law" of the northern states.[131]

The radical common law argument, which of course ignored Marshall's proviso "so far as it was applicable to their new situation," was farfetched. Even in the late eighteenth century, Americans recognized that not all of the common law had carried over. In a somewhat ambiguous opinion, the South Carolina Supreme Court stated that though slavery may have existed in derogation of common law, "there is a proviso or exception as to all those parts of [the common law] *which were inconsistent with the particular constitutions,* CUSTOMS *and* LAWS *of this (then) province,* which left an opening for this part of the provincial constitution and custom of tolerating slavery . . . ."[132] In 1834, the United States Supreme Court, speaking through Justice McLean, agreed: "[The common law] was adopted, so far only as its principles were suited to the condition of the colonies; and from this circumstance we see, what is common law in one state, is not so considered in another."[133] Finally, Mansfield himself had spoken to this point. "It is absurd that in the colonies they should carry all the laws of England with them. They carry such only as are applicable to their situation."[134]

Colonial laws, though derived from the same matrix as England's, tended to reflect local social circumstances more than original, unified legal precedents. Different portions of the common law prevailed in different settlements, and there was no effective central expositor of the imperial constitution to harmonize or unify them. Thus, whereas the problem of the carryover of the common law was complex, the antislavery common law argument was so simplistic as to be a parody.

Even if positive law could establish slavery, radicals argued, no positive law had ever purported to do so. They saw a difference between the American black codes, which regulated the incidents

130. Livingston v. Jefferson, 15 Fed. Cas. 660, 665 (No. 8411) (C.C.D. Va. 1811).

131. J. Story, *supra* note 68, § 96.

132. White v. Chambers, 2 S. Car. 70, 74 (1796) (emphasis in original).

133. Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 659 (1834) (copyright case); *accord,* Town of Pawlet v. Clark, 13 U.S. (9 Cranch) 292, 333 (1834). Zephaniah Swift, in an influential legal treatise, likewise observed that the common law was applicable in American states only "so far as it corresponds with our circumstances and situation." Z. Swift, A System of the Laws of the State of Connecticut 1-2 (1795). *See also id.* at 40-44.

134. Ewing, *The Constitution and The Empire—from Bacon to Blackstone,* in I The Cambridge History of the British Empire: The Old Empire, From the Beginnings to 1783, at 615 (J. Rose *et al.* eds. 1929).