The *Somerset* Effect: Parsing Lord Mansfield's Words on Slavery in Nineteenth Century America

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In his 1950 movie *Rashomon*, the famed Japanese director Akira Kurosowa presented a tale of a deadly crime that took place in a grove, which was witnessed by four individuals. Each of these individuals then proceeded to report what they saw in mutually contradictory ways. The movie has since received the ultimate honor of having a phrase coined in popular culture to describe its central message. The "Rashomon effect" is used to describe those occasions when a single event is perceived in contradictory, although perhaps equally plausible, ways by the different witnesses on hand, telling us at least as much about the internal dynamics within the witnesses to the event as about the event itself.

In 1772, the Court of King's Bench in England presided over by Lord Mansfield rendered its decision in the case of *Somerset v. Stewart*. The case involved a slave, James Somerset, who had belonged to his master, Charles Stewart, a customs officer from Virginia who had been sojourning in England. After 2 years in England, Somerset left Stewart, disappearing into the city of London for approximately 2 months. Upon reacquiring

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Somerset, Stewart made plans to forcefully stow Somerset upon a ship called the *Ann and Mary* bound for Jamaica where Somerset would likely have lived out the remainder of his days on a British West Indies sugar plantation. But three Londoners, Thomas Walkin, Elizabeth Cade, and John Marlow, intervened on behalf of Somerset, and applied to Lord Mansfield for a writ of habeas corpus ordering the captain of the ship to produce Somerset before the judge. Mansfield issued the writ, which effectively removed Somerset from the ship and placed him temporarily under the authority of the Court of King's Bench.[1]

Court dates were set, and arguments were made on both sides of the question of whether Somerset could be forcefully returned to Jamaica, but a number of delays and postponements occurred, during which Mansfield hoped that the parties would come to an agreement. The attorneys on both sides, however, eager to make this into a test case for slavery in England, accepted no deals, and pushed forward. Mansfield, resigned to the situation, declared that "if the parties will have judgment, *fiat justitia, ruat coelum*; let justice be done whatever be the consequence." The case presented to Mansfield and the King's Bench a classic conflict of laws question, in which the court had to resolve whether to apply English law, which was the law of the forum of the King's Bench, and which forbade forceful removal of a slave out of the country, or Virginia law, which was the law under which Stewart held Somerset, and which permitted such forceful removal. On June 22, 1772, the court ruled unanimously that they would apply English law, and, therefore, found the attempt to return Somerset to Jamaica illegal, and further ordered that Somerset be discharged. According to the official (although somewhat problematic and highly contested[2]) report, Mansfield said

> The only question before us is, whether the cause on the return is sufficient? If it is, the negro must be discharged. Accordingly, the return states, that the slave departed and refused to serve; whereupon he was kept, to be sold abroad. So high an act of dominion 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. The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political, but only by positive law, which preserves its force long after the reasons,

1. Steven M. Wise, *Though the Heavens May Fall: The Landmark Trial that Led to the End of Human Slavery* (Massachusetts: De Capo Press, 2005).

2. See, generally, F.O. Shyllon, *Black Slaves in Britain* (London: Oxford University Press, 1974); William M. Wiecek, "*Somerset*: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World," *University of Chicago Law Review* 42 (1974–1975): 86–146; and James Oldham, "New Light on Mansfield and Slavery," *The Journal of British Studies* 27 (1988): 45–68.

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> occasion, and time itself from whence it was created, is erased from memory. It is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences, therefore, may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged.[3]

As a practical, short-term consequence, Stewart was thus prevented from forcefully removing Somerset out of the country, and Somerset was pronounced free.

But the ultimate, long-term consequences of the decision for slavery in England and the United States, however, were decidedly unclear. In this article, I trace the impact of Mansfield's decision in *Somerset* in nineteenth century America by looking at how four major schools of thought regarding slavery in antebellum America—the radical abolitionists, Garrisonians, moderate abolitionists, and Southern, pro-slavery apologists—interpreted *Somerset*. Each of these four "witnesses," composed in all four cases of intellectual pamphleteers, Supreme Court Justices, state court judges, United States Senators, and United States Congressmen, gave extensive attention to this case and considered it of great significance. But like the four witnesses in *Rashomon,* each school rendered wildly differing theories about what *Somerset* actually accomplished in England, and what it meant for slavery in America. Each found in *Somerset* a foundational philosophical and legal touchstone for their views on slavery, but each did so by developing a distinct interpretation of it that emphasized its different, somewhat open-ended parts in different ways. Although scholars have paid some attention to *Somerset* and its reception in America, no single piece of scholarship has yet laid out in any systematic or detailed fashion the intricate and diverse ways in which Americans, in both judicial and nonjudicial contexts, variously received, interpreted, and transformed the decision for their own purposes.[4] These interpretive differences thus

3. *Somerset v. Stewart* Lofft 1, 98 ER 499 (1772).

4. Jerome Nadelhaft focused on the ways in which abolitionists as a whole, because of their reliance upon the inaccurate court report produced by Capel Lofft, misread the *Somerset* decision to stand for the general emancipation of all slaves in England. Jerome Nadelhaft, "The Somersett Case and Slavery: Myth, Reality, and Repercussions," *The Journal of Negro History* 51 (1966): 193–208. Robert Cover found in *Somerset* a consistent precedential beacon for abolitionist lawyers and judges throughout the nineteenth century, an authoritative statement of the immorality of slavery used to point out the gap between the law as it was and as it ought to be, and a positive law basis for judges to take into consideration these moral principles in their adjudication of conflict of law cases. Robert Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven: Yale University Press, 1975), 83–99. See also Justin Buckley Dyer, *Natural Law and the Antislavery Constitutional Tradition* (Cambridge: Cambridge University Press, 2012), 37–73. Paul Finkelman focused on the ways in which Northern and Southern courts moved from initially

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underscored the obviously sharp differences of opinion separating these four schools of thought, but also indicated the ways in which Mansfield's opinion, although, as I will explain, technically rather narrow, was sufficiently open-ended to fuel more than 60 years of intense debate among some of America's brightest legal minds.

1. Radical Abolitionists: *Somerset* and "The Unconstitutionality of Slavery"

The radical abolitionists, those nineteenth century Americans for whom slavery's blatant violation of the principles of natural justice and religious law meant that slavery itself was unconstitutional throughout the nation, found in *Somerset* a canonical and highly congenial legal precedent, which they regularly invoked with relish. Radical abolitionists included individuals such as William Goodell, a New York abolitionist who helped found the New York Anti-Slavery Society as well as the American Anti-Slavery Society, and would eventually run for President on the Liberty Party ticket; Gerrit Smith, a New York social reformer and activist

"rejecting *Somerset*" and accepting comity, deferring to other state legal systems in their choice of law cases, to, at least in the North, "accepting *Somerset*" and rejecting comity, summarily freeing slaves who crossed into free states and disregarding other states' laws, while all along according a mostly fixed, stable meaning to the *Somerset* decision. Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (Chapel Hill: University of North Carolina Press, 1981). Alfred W. Blumrosen similarly deployed the "*Somerset* Rejected"–"*Somerset* Accepted" framework in his short work covering the reception of *Somerset* throughout all of American history: "The Profound Influence in America of Lord Mansfield's Decision in *Somerset v. Stuart*," *Texas Wesleyan Law Review* 13 (2006): 645–57. Don Fehrenbacher and Cheryl Harris both observed the ways in which the opinion could be used by both abolitionists and proslavery Southern jurists, prompting Harris to observe that "there never was a singular legacy of the case," but neither explored this in much detail or investigated *Somerset*'s various reception among the different schools of abolitionists. Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (New York: Oxford University Press, 1978), 53–56; and Cheryl Harris, "Too Pure an Air:" *Somerset*'s Legacy from Anti-Slavery to Colorblindness," *Texas Wesleyan Law Review* 13 (2006): 439. And William Wiecek, who has come the closest of any scholar to date to accurately reporting how "*Somerset* burst the confines of Mansfield's judgment," and who was the first to notice the different reception of *Somerset* among the three categories of abolitionists (radical, Garrisonian, and moderate), overlooked numerous interesting state court cases as well as much of the rich nonjudicial literature interpreting *Somerset,* and neglected to critically examine the strikingly complex and nuanced argumentative structure of the different interpretative postures that he canvassed. William Wiecek, "Somerset: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World," *University of Chicago Law Review* 42 (1974): 86–146; and *The Sources of Antislavery Constitutionalism in America, 1760–1848* (Ithaca: Cornell University Press, 1977).

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who helped fund both the Liberty Party and Republican Party; and Lysander Spooner, an early libertarian political theorist whose most famous work, the *Unconstitutionality of Slavery*, was incorporated into the official party platform of the Liberty Party in 1848 and had a profound influence on many prominent abolitionists, including Frederick Douglass. For them, even though they acknowledged that Mansfield had said that slavery could be legal if, and only if, it enjoyed an infrastructure of positive law protection, *Somerset* stood in a general way for the pre-eminence of natural justice over positive law. And as a consequence, they drew two conclusions regarding the implications of the decision for slavery: first, that *Somerset* abolished slavery outright throughout England, and second, that it similarly abolished slavery in the colonies prior to the Revolution.

Regarding the first conclusion, for all these thinkers, *Somerset* stood unambiguously for the legal abolition of slavery in England. They acknowledged that the decision had not, practically speaking, put an end to slavery in England. Slaves still could be found throughout the country, and its slave trade continued apace. But from a legal standpoint, they argued that Mansfield had abolished slavery by definitively applying the profreedom common law principles of England to the institution of slavery. In the *Unconstitutionality of Slavery*, Spooner said that

> It was decided by the Court of King's Bench in England—Lord Mansfield being Chief Justice—before our revolution, and while the English Charters were the fundamental law of the colonies—that the principles of English liberty were so plainly incompatible with slavery, that even if a slaveholder, from another part of the world, brought his slave into England—though only for a temporary purpose, and with no intention of remaining—he nevertheless thereby gave the slave his liberty. Previous to this decision, the privilege of bringing slaves into England, for temporary purposes, and of carrying them away, had long been tolerated.[5]

And in his three volume, 1852 work *Slavery and Anti-Slavery: A History of the Great Struggle in Both Hemispheres*, Goodell cited the full text of Mansfield's decision, and then concluded triumphantly with this exclamation: "Thus was the guilty fiction of legal slavery in England exploded, after having been acted upon as though it were a truth for at least three-fourths of a century, and confirmed by the highest official authority for forty-three years."[6] And to leave no doubt regarding what he thought of the extent of the significance of this decision, he added:

5. Lysander Spooner, *The Unconstitutionality of Slavery* (Boston: Bela Marsh, 1845), 26.

6. William Goodell, *Slavery and Anti-Slavery: A History of the Great Struggle in Both Hemispheres with a View of the Slavery Question in the United States* (New York: William Harned, 1852), 51–52.

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> A similar struggle had resulted in the decision of Lord Mansfield in the Somerset case, in 1772. The illegality of slave *holding* was then fully established, under the fundamental principles of the British Constitution and Common Law, which were not then first brought into existence, but had been the same, from the beginning of the slave *trade.* The decision had labeled "ILLEGALITY" upon the whole procedure, from beginning to end, upon the slave trade as well as slavery, upon the *past* slave trade and slavery as well as present, so far as the *principle* involved was concerned. To have admitted that there *had* been, or then *was,* any legality in the slave *trade,* under that same British Constitution and Common Law, would have been, in effect, to have impugned the decision of Lord Mansfield in the Somerset case, and to have set it aside as erroneous.[7]

For both Spooner and Goodell, Mansfield applied the "principles of English liberty" or the "principles of the British Constitution and Common Law" to the *Somerset* case, and found that once a slave set foot in England, he was given his freedom.

Spooner and Goodell drew their conclusion about the effect of Mansfield's decision on slavery in England from several likely sources. First, the text of the decision itself, particularly its concluding passage in which Mansfield discussed the "odiousness" of the institution of slavery, was ripe for an interpretation that emphasized the significance of the moral law for the legal existence of slavery. According to Mansfield, freedom was the default rule and slavery the positive law exception. The default rule in England according to the "principles of English liberty" and the "principles of the British Constitution and Common Law" had been that all individuals were naturally free. And the positive law in England, although perhaps muddled prior to *Somerset,* for Spooner and Goodell, now was clear: in Mansfield's concluding words, "Whatever inconveniences, therefore, may follow from a decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged." The "legal fiction" of slavery had thereby come to an end in England.

Beyond the text of Mansfield's opinion, several credible English legal commentators provided various glosses on this passage, and the ideas contained within it, that made Spooner and Goodell's conclusions even more plausible. Granville Sharp, the English abolitionist activist who helped bring the case to the King's Bench, and Francis Hargrave, Somerset's counsel who during the case said that England had "a soil whose air is deemed too pure for slaves to breathe in it," helped lead thinkers such as Spooner and Goodell to conclude that *Somerset* had definitively abolished

7. Ibid, 63–64.

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slavery in England. And in addition to these perhaps partisan lawyerly statements, there were other more authoritative statements made by jurists in Great Britain that corroborated Sharp and Hargrave. Even prior to the *Somerset* decision, William Blackstone had written in the first edition of his *Commentaries* that, "this spirit of liberty is so deeply implanted 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 with regard to all natural rights becomes eo instanti a free man."[8] One year after *Somerset,* in the unreported case of *Cay v. Crichton* before the King's Bench, the presiding judge held that by retroactive effect, the *Somerset* decision had rendered all previous slaveholding in England to have been illegal.[9] Similarly in Scotland, the Court of Sessions held in 1778 that, as a consequence of *Somerset,* a master of a slave could not exercise any form of dominion over a slave in Scotland, even though the slave had been purchased in Jamaica where slavery was legal, because such laws were unjust.[10] In light of all this legal commentary, it is not surprising that Somerset himself appears to have drawn the conclusion that Mansfield's decision had liberated all slaves in Great Britain. According to one letter written to Charles Stewart, Somerset's former master, by an acquaintance whose slave had run away, Somerset himself had tried to personally persuade his relatives that by virtue of the decision, they were all now free. The runaway slave "had rec'd a letter from his Uncle Sommerset acquainting him that Lord Mansfield had given them their freedom."[11]

In addition to these reports from England, Spooner and Goodell could also have drawn their conclusions about the effect of *Somerset* on slavery in England from its early reception in many American state courts. For well over 50 years before Spooner and Goodell would pen their important works, the view that *Somerset* had abolished slavery in England had been consistently expressed by many attorneys and judges in state courts, and had evidently permeated a substantial segment of American legal culture, clustered primarily, although not exclusively, in the North.

From as early as 1810 to as late as 1860, in states as far-flung as Massachusetts, Connecticut, Pennsylvania, Delaware, Virginia, Ohio, and New York, lawyers acting in their solemn capacity as counsel for clients, and judges of complicated state cases, expressed the view that *Somerset*

8. William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford: Clarendon, 1765–69), 1:123.

9. Wiecek, 33.

10. Ibid.

11. Oldham, "New Light on Mansfield," 320.

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had indeed freed the slaves in England. In an 1810 Massachusetts case, *Greenwood v. Curtis,* the judge expanded upon *Somerset* in a lengthy and scholarly footnote. He lamented the fact that "Mr. Loft did not make a more able and perspicuous report of this very interesting and important case." But despite the difficulties and limitations of its reporting, the upshot of the case was plain: "At least, since the decision of the case of *Somerset v. Stewart*, it is determined that *negro slavery* can, under no form, nor with any qualification, exist in England."[12] Nearly 20 years later, an attorney arguing a case in Virginia called *Hunter v. Fulcher* made essentially the same argument about *Somerset*.[13] In an 1837 Connecticut case of *Jackson v. Bulloch*, the chief judge of the state court said, "In England, it is well settled, that slavery does not exist in that country; that a slave coming from another country—even their own colonies—was free, the moment he placed his feet upon English ground. Somserset's case, Lofft, 1."[14] In 1849, a Pennsylvania state judged waxed rhapsodic about the example set by Lord Mansfield in *Somerset*, pointing out how the principle that a slave's presence on English soil immediately liberated that slave had "sprung fresh and beautiful and perfect from the mind of Lord Mansfield."[15] In 1856, an Ohio judge writing a concurrence in a case called *Anderson v. Poindexter,* discussed *Somerset* at great length, quoting its entire report, and then observed that as a consequence of the decision, "slavery is of such a nature, and so odious, that it can not exist at all in England, in the absence of any positive law to sanction or sustain it."[16] He then pointed out that Joseph Story had reached the very same conclusion about the liberating effects of *Somerset* for England.[17] And as late as 1860, on the eve of the Civil War, the New York State Supreme Court stated in *Lemmon v. New York*, that in

12. *Greenwood v. Curtis*, 6 Mass. 358, 374 n.2 (1810).

13. In that case, he said, Mansfield "determined, that by the constitution of England, slavery could not exist there; and that, consequently, there was no authority in that kingdom, by which a slave, transported thither, could be compelled to return to a state of bondage. *Hunter v. Fulcher*, 1 Leigh 172, 179 (1829).

14. *Jackson v. Bulloch*, 12 Conn. 38, 42 (1837).

15. *Kauffman v. Oliver,* 10 Pa. 514, 517 (1849).

16. *Anderson v. Poindexter,* 6 Ohio St. 622, 667 (1856).

17. Ibid, "That such was the scope of the decision as understood in this country when Mr. Justice Story wrote his work on the conflict of laws, is also manifest. After stating that there is a uniformity of opinion among foreign jurists and foreign tribunals, that no effect whatever is to be given in one country to the slave system of another, he says: 'This is also the undisputed law of England. It has been solemnly decided, that the law of England abhors and will not endure the existence of slavery within the nation; and, consequently, as soon as a slave lands in England, he becomes ipso facto, a freeman, and discharged from a state of servitude.' Story's Confl. Laws, sec. 99."

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Somerset, "a case of great notoriety, which could not fail to be well known to the cultivated and intelligent men who were the principal actors in framing the Federal Constitution," Mansfield had abolished slavery throughout England and ruled that any slave who set foot on its soil, for however long, was, thereby, freed.[18] Therefore, for a considerable number of lawyers and state court judges throughout the nineteenth century, *Somerset* had come to stand for the complete abolition of slavery in England.

Somerset's impact on America was another, even more complicated question. The second principle of *Somerset* for the radical abolitionists was that, as a legal consequence of the decision, slavery in the colonies prior to the American Revolution had also been abolished. The radical abolitionists thereby attempted to shore up their most vulnerable rhetorical flank with respect to *Somerset*. While they were on more solid interpretive ground when they argued that, according to Mansfield's decision, the principles of natural justice and common law rejected the "odious" practice of slavery, their real challenge was finding a way to show how the "positive law" of the American colonies did not protect slavery. For if the positive law of the American colonies did in fact protect slavery, all the natural law arguments in their rhetorical arsenal would not save them from the fact that Mansfield plainly indicated that slavery could still legitimately exist, despite its "odious" character, if it was protected by a superstructure of positive law.

The radical abolitionists made two distinct legal arguments to show that *Somerset* meant the demise of slavery in the colonies. First, in their (likely questionable) view, prior to the Revolution, the American colonies were constitutionally required to keep their laws in conformity with the laws of the home country. Therefore, as slavery and the slave trade in England post-*Somerset* had been deemed illegal, slavery and the slave trade in England's colonies must also be illegal. Smith made this point squarely: "Mansfield's decision in the Somerset case established the fact, that there was no law for slavery in England in 1772:—and if none in England, then none in America, for, by the terms of their charters, the Colonies could have no laws repugnant to the laws of England."[19]

18. *Lemmon v. New York*, 20 N.Y. 562, 605 (1860). "It was the opinion of the court that a state of slavery could not exist except by force of positive law, and it being considered that there was no law to uphold it in England, the principles of the law respecting the writ of *habeas corpus* immediately applied themselves to the case, and it became impossible to continue the imprisonment of the negro. The case was decided in 1772, and from that time it became a maxim that slaves could not exist in England. The idea was reiterated in the popular literature of the language, and fixed in the public mind by a striking metaphor which attributed to the atmosphere of the British Islands a quality which caused the shackles of the slave to fall off."

19. Gerrit Smith, Speech on the Nebraska Bill (April 6, 1854), in *Speeches of Gerrit Smith in Congress* (New York: Mason Brothers, 1856), 128.

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Spooner's reasoning upon this had been even more expansive than Smith's:

> The conclusion of the whole matter is, that until some reason appears against them, we are bound by the decision of the King's Bench in 1772, and the colonial charters. That decision declared that there was, at that time, in England, no right of property in man, (notwithstanding the English government had for a long time connived at the slave trade.)—The colonial charters required the legislation of the colonies to be "consonant to reason, and not repugnant or contrary, but conformable, or agreeable, as nearly as circumstances would allow, to the laws, statutes and rights of the realm of England." That decision, then, if correct, settled the law both for England and the colonies. And if so, there was no constitutional slavery in the colonies up to the time of the revolution.[20]

And Goodell cited Granville Sharp's efforts to encourage British officials to faithfully apply *Somerset* to the American colonies as evidence of the true legal implications of Mansfield's decision.

> Mr. Sharp felt it his duty, immediately after this trial, to write [again] to Lord North, then principal minister of State, warning him, in the most earnest manner, to abolish, *immediately*, both the slave *trade* and the *slavery* of the human species, IN ALL THE BRITISH DOMINIONS, *as utterly irreconcilable with the principles of the* BRITISH CONSTITUTION, and the established religion of the land." The measure here insisted on by Granville Sharp, was evidently required by the decision of the Somerset case, and had it been carried into effect, at that time, there would have been no slavery now in the United States.[21]

Thus, as a matter of law within the "imperial Constitution" of Great Britain and her colonies, under which the colonies were legally required to make their laws comply with the body of principles, laws, customs, and case law that made up the British Constitution, the radical abolitionists argued that Mansfield's revolutionary decision in *Somerset* served as binding precedent for the American colonies, and thereby invalidated all colonial laws that protected slavery and the slave trade to the contrary.[22]

This view of the binding significance of *Somerset* for the colonies was reflected in some state court judgments as well. In the 1849 Pennsylvania case of *Kauffman v. Oliver*, immediately after praising Mansfield for recognizing the "fresh," "beautiful," and "perfect" common law principle that slaves were freed upon setting foot on English soil, Judge Coulter went

20. Spooner, *The Unconstitutionality of Slavery,* 30–35.

21. Goodell, *Slavery and Anti-Slavery*, 51.

22. George Van Cleve, "*Somerset's* Case and Its Antecedents in Imperial Perspective," *Law and History Review* 24 (2006): 601–45.

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on to observe that Mansfield's decision also enjoyed binding authority for Pennsylvania. "This case [*Somerset*] was decided before the Revolution, and became the common law of this state… But by the principles of that law, the fugitives were free the moment when they touched the soil of Pennsylvania."[23] Coulter's judgment did not go as far as Spooner's thesis that all the colonies were necessarily free under *Somerset*, and did acknowledge federal constitutional protections of slavery, but it went about as far as could be expected from a judge ruling on a case that involved only Pennsylvania law. By virtue of the fact that *Somerset* had been decided prior to the Revolution, Coulter reasoned, it had precedential value at least for the colony, and then eventually for the state, of Pennsylvania. Because English soil had been ruled in 1772 to be too pure to permit slavery, Pennsylvania soil in 1849 was similarly unfit for slaves.

The radical abolitionists' second argument was that, regardless of the precedential authority of *Somerset* for the colonies, there was no domestic "positive law" whatsoever in the colonies that explicitly provided for the protection of slavery. Surveying the legal landscape of the colonies that had permitted slavery prior to the Revolution, Spooner concluded that, at best, all that supported the institution of slavery was not "positive law," but mere inchoate custom and habitual practice. But according to *Somerset* itself, only "positive law," or as Spooner glossed this (and arguably narrowed it), "positive legislation," not mere custom, could permit slavery. "Slavery, if it can be legalized at all, can be legalized only by positive legislation. Natural law gives it no aid. Custom imparts to it no legal sanction. This was the doctrine of the King's Bench in Somerset's case, as it is the doctrine of common sense."[24]

The radical abolitionists further maintained that what "positive legislation" there was in the colonies was insufficiently precise to identify who could be a slave. This legislative imprecision was damning, because the background default rule of liberty, ratified in *Somerset,* required that the positive law "carve out" for slavery be explicit and clear. "Slavery, then, being the creature of positive legislation alone, can be created only by legislation that shall so particularly describe the persons to be made slaves, that they may be distinguished from all others. If there be any doubt left by the *letter* of the law, as to the persons to be made slaves, the efficacy of all other slave legislation is defeated simply by that uncertainty."[25] *Somerset*, therefore, stood for the principle that the burden of

23. *Kauffman v. Oliver*, 10 Pa. 514, 517 (1849).
24. Spooner, *Unconstitutionality of Slavery*, 36.
25. Ibid, 36–37.

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proof rested squarely upon those colonies or states that claimed that certain, specific individuals could be held as slaves. But in Spooner's judgment, none of the Southern colonies or states could meet that burden:

> In several of the colonies, including some of those where slaves were most numerous, there were either no laws at all defining the persons who might be made slaves, or the laws, which attempted to define them, were so loosely framed that it cannot now be known who are the descendants of those designated as slaves, and who of those held in slavery without any color of law. As the presumption must—*under the United States constitution*—and indeed under the state constitutions also—be always in favor of liberty, it would probably now be impossible for a slaveholder to prove, in one case in an hundred, that his slave was descended, (through the maternal line, according to the slave code,) from any one who was originally a slave within the description given by the statutes.[26]

The radical abolitionists such as Spooner concluded that the principles of *Somerset* required that "positive law" protections of slavery be legislative rather than merely customary, and explicit and clear rather than vague. But as the colonial "positive law" protections of slavery were mostly customary and, when legislative, not explicit or clear, they failed to rise to the level of legitimate "positive law," and were, therefore, insufficient to rebut the "presumption of liberty" established by Mansfield in *Somerset*.

A close approximation of this view can be seen in a 1796 Delaware case called *Phillis v. Lewis.* In response to a claim for freedom from an Asian woman held in slavery, whose grandmother had herself been a slave in Asia, the chief judge of the Court of Common Pleas of Delaware granted her freedom on the ground that what positive law protections for slavery existed in Delaware expressly limited slavery to Africans. And, he added, "It cannot be expected that at this day we should extend the principle of slavery beyond the limits of positive law or usage *clearly and certainly ascertained*. In this case there is no such law or usage."[27] Although conceding (contra Spooner) that Delaware's existing positive law protections were explicit for Africans, the broader point Chief Judge Basset made here was the same one made by Spooner and the other radical

26. Ibid, 36–37.

27. *Phillis v. Lewis,* 1 Del. Cas. 417 (1796). (emphasis added). "Slavery in this state does not extend, nor has it ever been held to extend, to other persons than Negroes and mulattoes descended from a female Negro. There is no law which recognizes slaves of any other description, nor any custom which has allowed others to be held in slavery. The law would warrant us to say that a Negro or mulatto might be a slave, but we know of no authority which would justify us in expressing the same opinion as to any other description of people."

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abolitionists: only positive law that was "clearly and certainly ascertained" could justify the enslavement of another.

For the radical abolitionists, and for a host of Northern state court judges and attorneys working throughout the nineteenth century, *Somerset* represented a revolutionary moment in slavery jurisprudence. It not only expressed moral disapproval of slavery, it also made that disapproval the ultimate basis for its legal abolition in England, and abolished it in the colonies as well, through both its status as binding legal precedent for the colonies and as an authoritative guide to determining when a "positive law" protection of slavery could ever really exist.

2. Garrisonians: *Somerset* and the "Covenant with Death"

The Garrisonians were a collection of nineteenth century thinkers, writers, and radical abolitionist activists who followed William Lloyd Garrison in viewing the United States Constitution to be a thoroughly compromised, proslavery document that was on the order of a "covenant with death" and an "agreement with hell." Although they shared with the radical abolitionists the view that slavery was immoral, they disagreed sharply with them over the constitutional status of slavery. Radical abolitionists such as Spooner, Smith, and Goodell argued that slavery was unconstitutional, not only in the free states and the territories, but in the Southern states as well. The Garrisonians, by contrast, argued that slavery was fully part of America's constitutional order and given considerable special protections throughout the nation not accorded any other form of "property." One particularly hot flashpoint in their dispute over the constitutionality of slavery was over how to best interpret Lord Mansfield's *Somerset* decision. It is not an exaggeration to say that at nearly every major interpretative fork in the road, where the radical abolitionists went one way in their take on the *Somerset* decision, the Garrisonians went in the opposite direction.

Where Lysander Spooner, for example, viewed the *Somerset* decision as leading to the wholesale abolition of slavery in England, Wendell Phillips, an articulate Garrisonian and Harvard Law School educated attorney from Massachusetts, argued that the decision had been considerably narrower than that. In his 1847 *Review of Spooner's Essay on the Unconstitutionality of Slavery*, Phillips argued that Mansfield's decision amounted to no more than that "a person held as a slave abroad, if once landed in England, could not be taken thence against his will."[28] Whereas this might suggest

28. Wendell Phillips, *Review of Lysander Spooner's Essay on the Unconstitutionality of Slavery* (Bedford: Applewood Books, 1847), 81.

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the more sweeping consequence of full-scale abolition of slavery in England, as suggested by Spooner, it need not. It could rather mean, as Phillips suggested, that slaves could continue to be held in England in a qualified manner when brought there from another country, but could not be forced against their will to return to their former country.

Phillips' reading of the decision accords well with Mansfield's own description of his decision. Soon after *Somerset,* several English and Scottish judges took the case to stand for the principle that a slave was freed upon landing on free soil. Mansfield was apparently vexed by this trend, and attempted to narrow the meaning of his decision. In *Rex v. Inhabitants of Thomas Ditton*, he pointed out that "the determination got no further than that the master cannot by force compel him to go out of the kingdom" and later observed that "The case of Somerset is the only one on this subject. Where slaves have been brought here, and have commenced actions for their wages, I have always non-suited the plaintiff."[29] Although some of the sweeping and forceful language with which he expressed himself in the *Somerset* decision may have led to the sorts of interpretations made by the various judges in England and Scotland and the radical abolitionists in America, in Mansfield's mind, as in Phillips', the *Somerset* decision did not abolish slavery in England.

This narrower construction of the effects of *Somerset* on slavery in England was embraced by a number of state court judges as well, particularly, and perhaps not too surprisingly, in the South. In the 1860 South Carolina case of *Willis v. Jolliffee*, for example, Judge Wardlaw observed that although much had been made of the "wise saw" that "as soon as a man sets foot on English ground, he is free," Mansfield himself "used no such phrase." By contrast, Mansfield's ruling had been considerably narrower. "Now, the mandatory judgment in this case—the *ideo consideratum est*—is simply that so high an act of dominion as the keeping in irons and sending abroad a slave for sale, to a country different from the master's domicil, could not be supported by the law of England."[30] And responding directly to those Northern judges who had drawn a more sweeping holding from Mansfield's opinion, Wardlaw wrote, "It cannot be ingenuously questioned that Lord Mansfield intended to discredit negro slavery in England; but some of the inferences from his opinion, drawn by Judge Story, Chief Justice Shaw, and others, may be fairly disputed."[31] This was a point

29. *Rex v. Inhabitants of Thames Ditton*, 4 Doug. 300 (1785); see James Oldham, *English Common Law in the Age of Mansfield* (Chapel Hill: University of North Carolina Press, 2004), 314, 318.

30. *Willis v. Jolliffee*, 11 Rich. Eq. 447, 469 (1860).

31. Ibid.

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repeatedly made in Southern state court decisions throughout the 1850s. But this view was not exclusively reserved to the South. A similar point was made in the 1856 Ohio case of *Anderson v. Poindexter*. Responding to the argument made by Judge Swan that Lord Mansfield's decision freed the slaves in England, Chief Judge Bartley observed in a concurrence, "That some errors have prevailed in regard to the true legal effect of the opinion of Lord Mansfield in this case, is most manifest. He used no such expression as that a slave became free the moment he landed in England."[32]

Whereas the Garrisonians, along with a chorus of Southern state court judges, thus more narrowly, and more accurately, interpreted the significance of the ruling of *Somerset* for England, they similarly interpreted the implications of the decision for the United States in a narrow way. Whereas the radical abolitionists suggested that it led to (or at least should have led to) the abolition of slavery in the colonies, Phillips, et al. argued that, if anything, it only provided further support for the institution where it existed. Implicit in Mansfield's decision was the recognition that Virginia legitimately recognized Somerset as a slave. The specific "conflict of laws" question the Kings' Bench had to answer was whether to apply the proslavery laws of Virginia or the (qualifiedly) profreedom laws of England. But at no point did Mansfield suggest that the proslavery laws of Virginia were somehow illegitimate, or that the question of their legitimacy was even properly before the court. In Phillips' words:

> So far as the case of Sommersett has any reference to the Colonies, it *recognizes the legal existence of Slavery in Virginia.* For the arguments of Counsel and the decision of Mansfield, all proceed on the supposition, that *at home,* in Virginia, Sommersett was a slave. The decision was, that a person held as a slave abroad, if once landed in England, could not be taken thence against his will. Now if Sommersett was not a *slave* in Virginia, the whole case proceeded on a mistake. *As far as this case goes,* therefore, it recognizes the legal existence of Slavery in Virginia.[33]

To say, as the radical abolitionists did, that *Somerset* somehow voided the proslavery laws of the colonies, was to misunderstand the central dilemma of the case itself.

32. *Anderson v. Poindexter*, 6 Ohio St. 622, 709–10 (1856). Chief Judge Bartley added that although some of the confusion regarding Mansfield's opinion may have been attributable to the imperfections of its reporting, this was ultimately no excuse. "While it is to be regretted, that the report of Lord Mansfield's opinion had not been more full and explicit, it is very certain there is nothing in it which sustains the doctrine upon which the decision of the case before us is placed."

33. Phillips, *Review of Lysander Spooner's Essay*, 81.

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The view that the positive law in the colonies regrettably enshrined and protected slavery was shared by even several Northern state court judges. In the 1837, case in Connecticut of *Jackson v. Bulloch,* Chief Judge Williams of the New Jersey State Supreme Court said:

> It cannot be denied, that in this state, we have not been entirely free from the evil of slavery; and a small remnant still remains to remind us of the fact. So far as slavery is sanctioned by law, so far those who are to expound the law, are to give it effect, but no further. How or when it was introduced into this state, we are not informed... But we find, that for nearly a century past, the system of slavery has been, to a certain extent, recognized, by various statutes, designed to modify, to regulate, and, at last, abolish it; and, we think, it has received the implied sanction at least of the legislature.[34]

Williams had argued in this very case that *Somerset* had abolished slavery in England. But in light of what he considered to be overwhelming evidence of positive law protection of slavery in the colonies, he could not agree with the radical abolitionists that *Somerset* somehow liberated all the slaves in America.

However, the Garrisonians did acknowledge that Somerset did have some impact upon America. Phillips, for example, would agree with Spooner that under the terms of the imperial constitution, the laws of the colonies needed to be brought into conformity with the laws of England. The decision in *Somerset,* therefore, had precedential authority for the colonies. However, given Phillips' narrow reading of *Somerset,* the consequences of incorporating it as binding precedent for the colonies was relatively minor. What was ultimately at stake was how free colonies would handle cases in which masters brought their slaves into their jurisdiction and then decided to forcefully remove them. Could they use the laws of the free colony itself or would they be forced to use the laws of the slave colony? Mansfield's decision in *Somerset* was that a free country such as England should appeal to its own laws, and not the laws of a slave colony such as Virginia, when making this determination. Consequently, the precedent established by *Somerset* for the colonies was that free colonies should decide on the basis of their own laws, also. As Phillips stated, "The case of Sommersett was adopted in the Colonies to the exact extent to which it went."[35] In other words, "Those Colonies which abolished Slavery, (Massachusetts, Pennsylvania, Rhode Island, Connecticut, New Hampshire, &c.) either refused, under its authority, to deliver up slaves brought or flying into their limits, or

34. *Jackson v. Bulloch*, 12 Conn. 38 (1837).
35. Phillips, *Review of Lysander Spooner's Essay*, 81.

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specially provided on what conditions masters should be allowed to bring their slaves with them."[36] Far from abolishing slavery in the colonies, then, the *Somerset* decision simply resolved a choice of laws dilemma that could arise between colonies that protected slavery and those that did not.

Finally, Phillips took aim at Spooner's argument that, on the terms of *Somerset,* there was no "positive law" protection for slavery even in those colonies in which slavery was tolerated. Spooner's argument, it will be recalled, was that only positively enacted and precise legislation, not custom or imprecise statutes, could qualify as the kind of "positive law" that Mansfield said could, despite its moral odiousness, justify slavery.

Regarding Spooner's argument that only positively enacted legislation and not custom, could qualify as "positive law," Phillips cleverly pointed out that some of the language Mansfield used in his decision implied that custom could, in fact, qualify as positive law. Mansfield had said that "only positive law, which preserves its force long after the reasons, occasion, and time itself from whence it was created, is erased from memory." But the "occasion" and "dates" of positively enacted statutes are not typically forgotten, given the fact that they are embossed in the statute itself. Therefore, Mansfield likely had in mind something like custom, whose precise origins can over time become murky. In Phillips' words:

> Again; what is meant by *positive law?* Does it refer exclusively to *statutes,* written *acts* of Legislatures, or may it include usages, customs, and rules of Courts also? We answer, it includes all these; the epithet is as often applied to these as to written statutes. This indeed is evident from the very language of Mansfield; "positive law, which preserves its force *long after the reasons, occasion, and time itself, from whence it was created, is erased from the memory.* Now the *time,* date, of a written statute endures as long as the statute itself, and so often of the rest. Lord Mansfield is evidently describing a usage or custom, which insensibly grows up in a country, unmarked and unregarded, until by and by, it is impossible to tell precisely where, when, and how it commenced. . .Such being the meaning of the word *positive,* Mr. Spooner's argument falls to the ground; and we are authorized, in asserting that custom and usage are not only a usual, but a *legal* commencement of Slavery; and that there is nothing in the language of Mansfield opposed to this idea.[37]

As such, Phillips argued that even if there were an absence of enacted laws on slavery in the colonies, as Spooner contended, according to the terms Mansfield chose to express himself in *Somerset,* this would not matter,

36. Ibid.
37. Ibid, 85.

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as "positive law" can form through customary practice just as it can through legislative enactment.

This view that custom could bestow legal sanction on slavery was echoed in various state court cases as well. In 1845, a case came before the Supreme Court of Missouri that required the court to determine whether a jury instruction that "slavery never did exist in Canada" was error. Writing for the court, Judge Scott said that the instruction had indeed been incorrect, because:

> The instruction can only be predicated on the idea that the proof of the existence of slavery can only be established by positive enactment, an idea entirely inconsistent with the history of the introduction of slavery into America. In the colonies owned by European powers on this continent, the existence of slavery was recognized by many enactments, but no legislative memorial has been discovered which expressly authorized the subjecting of the African race to bondage. The kingdoms of Europe possessing colonies in America, from motives of cupidity supplied them with African slaves, and this commerce of the mother country was the foundation, and the right of the colonists to hold the slaves in servitude. Slavery seems to have had no other origin in America.[38]

Customary practice and mere commerce, not positive legislation, were all that were required to legitimately introduce slavery into a territory. Therefore, in the view of the Missouri Supreme Court, as well as the Garrisonians, the absence of any positive legislation in Canada protecting slavery was, by itself, insufficient to prove the absence of legitimate slavery.

Regarding the radical abolitionists' other argument that legislation would need to *precisely* indicate who was and was not a slave, and that Southern slave statutes failed to rise to this standard, Phillips pointed out that the requirement of legislative precision was a "Spoonerian" invention not to be found in the *Somerset* opinion. "We confess we do not see anything of this in the remarks of Lord Mansfield. He says merely that Slavery must be created by positive law, but not a word as to the exactness with which the persons must be pointed out and distinguished. All this is Mr. Spooner's addition."[39] For a constitutional thinker who valued precision in statutes, Spooner, in Phillips's eyes, was curiously inattentive here to the precise words that Mansfield himself chose to use (at least according to the official report available at the time to both Spooner and Phillips), and not use, in his opinion.

38. *Chouteau v. Pierre*, 9 Mo. 3, 8 (1845).
39. Ibid, 84.

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On this final point, however, Phillips may have been mistaken. To begin with, whereas the official published report of the opinion by Capel Lofft may have been susceptible to Phillip's reading, other reports, which at least one contemporary Mansfield scholar has judged to be more reliable than Lofft's report, added language about the nature of the "positive law" that supported Spooner's thesis.[40] In both a report that was published in *Scot's Magazine* and another that was discovered by James Oldham in the Lincoln's Inn Library among the manuscripts of Sergeant Hill, Mansfield is quoted as saying that, in the case of slavery, positive law protections must be construed "strictly."[41] In the version published in the *Scot's Magazine*, the report read, "[I]n a case so odious as the condition of slaves, [positive law] must be taken strictly."[42] And in the report found in the Hill collection, the language was nearly identical: "Slavery is so odious that it must be construed strictly."[43] Either way, according to these reports, contra Phillips, Mansfield did indeed have a word to say about the exactness with which laws establishing slavery must be construed.

But regardless of these additional reports, the principle of statutory interpretation at stake—whether slave statutes should be construed strictly—did not necessarily turn on whether Mansfield expressly provided this, but, rather, on whether it could be reasonably implied from what he *did* say. For Spooner, the chief fact about *Somerset* was that it laid down a "presumption of liberty" that established that a practice as odious as slavery could only exist by positive law. Slavery could exist, but only under certain special and "peculiar" conditions. With the presumption of liberty established, all that remained was to find a rule by which to know whether a "positive law" protection really existed. And given that presumption, the rule should err on the side of being more, rather than less, exacting. Spooner may have been influenced by this line of reasoning developed in Chief Justice Marshall's 1805 opinion in *United States v. Fisher,* in which Marshall wrote that "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."[44] Mansfield *may* not have expressed this "clear

40. Oldham, "New Light on Mansfield and Slavery," 55–56.
41. Ibid.
42. Ibid.
43. Ibid.
44. *United States v. Fisher*, 6 U.S. 358, 390 (1805).

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statement" rule of interpretation for slave statutes, but it could reasonably follow from what he did say about slavery.

This interpretive point aside, the Garrisonians, represented ably by Wendell Phillips, along with a host of state court judges located particularly, though not exclusively, in the South, responded point-for-point to the radical abolitionists' interpretation of *Somerset*. For them, *Somerset* stood for a relatively narrow decision that had relatively minor precedential significance for the colonies. It did not abolish slavery in England and, if anything, acknowledged its legitimacy as an institution in the colonies. Moreover, its perhaps most important contribution was, in the eyes of the Garrisonians, a negative and problematic one: all that was required to shield slavery from the opprobrium of moral principles was that it somehow be encased within a superstructure of positive law, or even mere custom. As such, Mansfield's decision in *Somerset,* like the United States Constitution itself, was part of the problem, not the solution.

3. Moderate Abolitionists: *Somerset* and "Freedom National, Slavery Local"

Although the radical abolitionists and the Garrisonians represented a distinctive and interesting set of opposing pairs within the abolitionist fold, by far the more typical and "mainstream" position among abolitionists was occupied by the moderate abolitionists. From a moral standpoint, the moderate abolitionists were characterized by an equally fierce moral denunciation of the institution of slavery. But from a constitutional standpoint, they occupied a middle ground between the radicals and the Garrisonians. On the one hand, like the Garrisonians and unlike the radicals, they acknowledged that slavery was fully constitutionally protected in the states that had the peculiar institution. But on the other hand, like the radicals and unlike the Garrisonians, they believed that the Constitution was essentially (although with some key explicitly agreed upon black letter exceptions such as the fugitive slave clause) profreedom, protecting slavery where it currently existed, but prohibiting its spread into the free states and the territories. In Eric Foner's phraseology, the moderates were thus committed to a position of "freedom national, slavery local," in which the favored default constitutional position was freedom, but the local exceptional carve-out was slavery.[45] This position attracted a wide

45. Eric Foner, *The Fiery Trial: Abraham Lincoln and American Slavery* (New York: Norton, 2010), 78.

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swath of nineteenth century Americans, including, most famously, Henry Clay and Abraham Lincoln.

Moderate abolitionists, like their radical and Garrisonian counterparts, found in Lord Mansfield's *Somerset* decision a font of constitutional and philosophical insight. In particular, lawyers, politicians, and judges such as Salmon Chase, Joshua Giddings, and Joseph Story found in *Somerset* a source for three of their most central claims. First, they found their belief in freedom as the default constitutional position confirmed by Mansfield's stirring passage on the natural odiousness of slavery. Second, they found in that same passage constitutional protection for slavery in those states where it was protected by positive law. And third, they found in *Somerset* a source of three practical recommendations for navigating the tension between the national and the local, between the law as it ought to be and the law as it was, via the principles of noninterference with the local laws of slave states, nonextension of slavery into the territories, and nonrecognition by judges in free states of slave laws, except in cases in which the positive law clearly required it.

The moderate abolitionists frequently cited *Somerset* as an authority for their crusade on behalf of the "freedom national" principle. In his 1846 legal brief to the Supreme Court in connection with the case of *Jones v. Van Zandt*, published a year later as a pamphlet under the title of "Reclamation of Fugitives from Service," Salmon Chase, the future chief justice of the United States, explicitly cited Mansfield's "celebrated judgment" in *Somerset* as legal authority for the following argument about slavery: "What is a slave? I know no definition, shorter or more complete, than this: A slave is a person held, as property, by legalized force, against natural right."[46] And revealing just how much Chase had breathed in Mansfield's opinion, he added that "the law, which enables one man to hold his fellow man as a slave, making the private force of the individual efficient for that purpose by aid of the public force of the community, must necessarily, be local and municipal in its character."[47] For Chase, the core meaning of *Somerset* was, therefore, that freedom was the default national principle, whereas slavery, as a violation of natural right, could only be a local exception. "The very moment a slave passes beyond the jurisdiction of the state, in which he is held as such, he ceases to be a slave; not because any law or regulation of the state which he enters confers freedom upon him, but because he *continues* to be a man and *leaves behind* him the

46. Salmon P. Chase, *Reclamation of Fugitives from Service: An Argument for the defendant, submitted to the Supreme Court of the United States, at the December Term, 1846, in the case of* Wharton Jones vs. John Vanzandt (Cincinnati: R. P. Donogh & Co, 1846), 83.

47. Ibid.

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law of force, which made him a slave."[48] Only in the presence of such a "law of force" could slavery exist. But beyond the scope of such laws, in the "pure air" of America and her Constitution, freedom was the natural default principle. "The government of the United States, has nothing whatever to do, directly, with slavery. . .It knows no slaves."[49]

More than 10 years after Chase made this argument to the Supreme Court in his written brief, the Republican Party and its leaders would make extensive use of this "freedom national" interpretation of *Somerset* in advancing the abolitionist cause. Abraham Lincoln, who himself never explicitly cited *Somerset* in any of his speeches or writings, would nonetheless refer to this principle in his 1854 speech on the Kansas-Nebraska Act. Lincoln called this *Somerset*-based principle the "negative principle that no law is free law" and said that, as far as "good book law" went, if a slave were to go into the territory of Nebraska, in which no laws on the books currently protected slavery, this would technically (although perhaps not practically) "operate" his freedom.[50] And in 1860, the Republican Party would incorporate this "freedom national" principle into its official party platform when it declared that "the normal condition of all the territory of the United States is that of freedom."[51]

For the moderate abolitionists, *Somerset* thus stood for the principle that the territories, high seas, states, and all other areas ungoverned by expressly proslavery laws were naturally free. But unlike their radical counterparts, they were quick to concede that *Somerset* also stood just as much for the principle that where local proslavery laws prevailed, slavery had a legitimate legal existence. This is nowhere better illustrated than in Joseph Story's 1834 *Commentaries on the Conflict of Laws*. The State of Massachusetts, Story said, had abolished slavery long ago. The precise means by which it had done so were not entirely clear. Whether by "the adoption of an opinion in Somerset's Case, as a declaration and modification of the common law, or by the Declaration of Independence, or by the constitution of 1780, it is not now very easy to determine"[52] how slavery had come to an end in Massachusetts. But however slavery had officially come to an end in Massachusetts, it had not come to an end in

48. Ibid, 84.

49. Ibid,, 83.

50. Abraham Lincoln, Speech on the Kansas–Nebraska Act (October 16, 1854), in *Lincoln: Speeches and Writings 1832–1858* (New York: Library of America, 1989), 324. (hereinafter, Lincoln, Kansas–Nebraska Speech).

51. 1860 Republican Party Platform http://cprr.org/Museum/Ephemera/Republican_Platform_1860.html accessed July 9th, 2014.

52. Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* (Boston: Little, Brown, and Company, 1834), 157.

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other states. Therefore, just as Massachusetts followed *Somerset* in abolishing slavery, it should also follow it in recognizing the legal existence of slavery in other states.

> Somerset's Case, 20 Howell's State Trials, 1, as already cited, decides that slavery, being odious and against natural right, cannot exist except by force of positive law. But it clearly admits that it may exist by force of positive law. And it may be remarked that by positive law, in this connection, may be as well understood customary law, as the enactment of a statute; and the word is used to designate rules established by tacit acquiescence, or by the legislative act of any state, and which derive their force and authority from acquiescence or enactment, and not because they are the dictates of natural justice, and as such of universal obligation.[53]

Story here reminds his readers, perhaps long familiar with the liberating implications of *Somerset*, that the decision also "clearly admits that [slavery] may exist by force of positive law." And by "positive law," Story interprets Mansfield's use of this expression in *Somerset* to include not only express legislative enactment but also, contrary to Spooner's contention, custom and practice.

For the moderates, *Somerset* stood for the proposition that freedom was, therefore, national and natural, whereas slavery was local and conventional. The trick for the moderates was to find ways in which they could remain equally committed to both halves of this proposition. Push too hard on the freedom national principle, and one's commitment to slavery where it legally existed might be undermined. Push too hard in defense of slavery where it was legally protected, and the freedom national principle is perhaps undermined. In the course of thinking through this dilemma, the moderates developed three practical recommendations, each of which had its touchstone in *Somerset* and their interpretation of its principles.

First, they insisted on the principle of noninterference with the autonomous internal orderings of free and slave states alike. What states did within the confines of their own jurisdiction was their own business. Just as Mansfield did not attempt to "void" the proslavery laws of Virginia, the states should not attempt to meddle in the internal affairs of other states. In an 1836 case called *Commonwealth v. Aves,* Chief Justice Shaw of the Supreme Judicial Court of Massachusetts defended this principle of noninterference on the basis of the precedential weight of *Somerset* and the Supreme Court's decision in the case of *The Antelope*,[54] which Shaw judged to be a faithful application of the principles of *Somerset* in the American context. "We may assume that the law of this state

53. Ibid., 159.
54. *The Antelope*, 23 U.S. 10 Wheat. 66 (1825).

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[Massachusetts] is analogous to the law of England in this respect; that, while slavery is considered as unlawful and inadmissible in both, and this because contrary to natural right and to laws designed for the security of personal liberty, yet in both the existence of slavery in other countries is recognized, and the claims of foreigners growing out of that condition are to a certain extent respected." Because the claims of foreigners in *Somerset* were "to a certain extent respected," the individual states were to accord comparable respect to the internal decisions of other states.[55]

> The consequence is, that each independent community, in its intercourse with every other, is bound to act on the principle that such other country has a full and perfect authority to make such laws for the government of its own subjects as its own judgment shall dictate and its own conscience approve, provided the same are consistent with the law of nations; and no independent community has any right to interfere with the acts or conduct of another state, within the territories of such state, or on the high seas, which each has an equal right to use and occupy; and that each sovereign state governed by its own laws, although competent and well authorized to make such laws as it may think most expedient to the extent of its own territorial limits, and for the government of its own subjects, yet beyond those limits, and over those who are not its own subjects, has no authority to enforce its own laws, or to treat the laws of other states as void, although contrary to its own views of morality. This view seems consistent with most of the leading cases on the subject. Somerset's Case, 20 Howell's State Trials, 1, as already cited, decides that slavery, being odious and against natural right, cannot exist except by force of positive law. But it clearly admits that it may exist by force of positive law.[56]

Therefore, for Shaw, a direct implication of the *Somerset* principle that slavery can exist by local positive law was that it should not be interfered with by other states that happened to have moral objections to slavery.

The moderates' second *Somerset*-inspired practical recommendation was that slavery should be legislatively prohibited from spreading beyond where it legally existed, into the territories. Although Lord Mansfield did not say anything about the extension of slavery into formerly free territories or countries, moderate abolitionists such as Lincoln saw positive legislative prohibition on slavery extension as necessitated by what he judged to be the practical inefficacy of the *Somerset* principle. *Somerset* may have been "good book law," but alone, it was not enough to prevent slaveholders from bringing their slaves into free territories. Whereas *Somerset*

55. *Com. v. Aves*, 18 Pick. 193, 211–212 (1836). Quoted in Story, *Commentaries,* at 158–59.

56. Ibid.

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may have come to stand for the principle that "no law is free law," and that therefore slaves who entered territories without positive law protections for slavery would, therefore, be technically free, as a practical matter, this common law principle was unlikely to save any slaves who were brought into the territories. In Lincoln's formulation:

> But it is said, there now is *no* law in Nebraska on the subject of slavery; and that, in such case, taking a slave there, operates his freedom. That is good book-law; but is not the rule of actual practice. Wherever slavery is, it has been first introduced without law. The oldest laws we find concerning it, are not laws introducing it; but regulating it, as an already existing thing. A white man takes his slave to Nebraska now; who will inform the Negro that he is free? Who will take him before court to test the question of his freedom? In ignorance of his legal emancipation, he is kept chopping, splitting and plowing. Others are brought, and move on in the same track. At last, if ever the time for voting comes, on the question of slavery, the institution already in fact exists in the country, and cannot well be removed. The facts of its presence, and the difficulty of its removal will carry the vote in its favor. Keep it out until a vote is taken, and a vote in favor of it, can not be got in any population of forty thousand, on earth, who have been drawn together by the ordinary motives of emigration and settlement. . .The question is asked us, "If slaves will go in, notwithstanding the general principle of law liberates them, why would they not equally go in against positive statute law?—going, even if the Missouri restriction were maintained?" I answer, because it takes a much bolder man to venture in, with his property, in the latter case, than in the former—because the positive congressional enactment is known to, and respected by all, or nearly all; whereas the negative principle that no law is free law, is not much known except among lawyers. We have some experience of this practical difference. In spite of the Ordinance of `87, a few Negroes were brought into Illinois, and held in a state of quasi slavery; not enough, however to carry a vote of the people in favor of the institution when they came to form a constitution. But in the adjoining Missouri country, where there was no ordinance of `87—was no restriction—they were carried ten times, nay a hundred times, as fast, and actually made a slave State. This is fact—naked fact.[57]

As a merely "negative principle," *Somerset* was insufficient to prevent slaveholders from pouring into the territories with their slaves. It was technically "good book law," but by itself it was not enough. What was required, was a supplementary "positive congressional enactment" that put *Somerset* common law principle into black letter law on the order of Congress' Northwest Ordinance of 1787 or the Missouri Compromise of 1824. That such laws were passed in light of the principles of *Somerset*, was

57. Lincoln, Kansas–Nebraska Speech, 324–25.

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for some indisputable. As Judge Swan of the Ohio Supreme Court remarked about the nonextension principles in both the Northwest Ordinance and the Ohio state constitution, "the ordinance of 1787, and the [Ohio] constitutions of 1802 and 1851, were made with a view to what was understood to be decided in the Sommersett case."[58]

The third *Somerset*-inspired recommendation made by the moderates was that free states should recognize the force of slave law beyond the jurisdictional limits of slave states only when there was an express, positive legal stipulation requiring it. Without such a law, *Somerset* implied that slaves removed from the jurisdiction of slave states were automatically freed. Ohio Congressman Joshua Giddings made precisely this argument in his 1842 Creole Case resolutions. The Creole case involved a slave rebellion aboard a ship called the *Creole*, which had been transporting slaves from Virginia to New Orleans. When the owners of the slaves asked the federal government to compensate them for their losses, Giddings argued that the owners were not entitled to any compensation because, once slaves were transported beyond the territorial confines of slave states, the local laws of slavery no longer applied. In the words of his proposed resolution:

> Resolved, that slavery being an abridgment of the natural rights of man, can exist only by force or positive municipal law, and is necessarily confined to the territorial jurisdiction of the power creating it.
> Resolved, that when a ship belonging to the citizens of any State of this Union leaves the waters and territory of such State and enters upon the high seas, the persons on board cease to be subject to the slave laws of such State, and thenceforth are governed in their relations to each other by, and are amenable to, the law of the United States.[59]

Therefore, when slaves were taken upon the high seas of the United States, where no express law required federal or state officials to uphold proslavery laws, the default rule of freedom prevailed.

But where an express law did require such recognition, as in the case of fugitive slaves, local proslavery laws were entitled to, in the words of Story, a "certain respect" beyond the confines of that locality. This was controversial, and not all moderate abolitionists accepted this.[60] But the position advocated by Story was a common one for moderate abolitionists.

58. *Anderson v. Poindexter*, 6 Ohio St. 622, 656 (1856).

59. Cong. Globe, 27th Cong., 2nd Sess. 342 (1842).

60. See Randy Barnett, "Whence Comes Section One: The Abolitionist Origins of the Fourteenth Amendment," *Journal of Legal Analysis* 3 (2011), 189–90 (discussing the objections of some moderate abolitionists such as Chase and Byron Paine to Story's endorsement of the constitutionality of the Fugitive Slave Act because, as articles of treaty, the provisions

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Story saw the Fugitive Slave Clause of Article IV of the United States Constitution, which provided that "No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labor," as an explicitly agreed upon federal exception to the *Somerset* principle. Writing as a Supreme Court justice in his decision in *Prigg v. Pennsylvania*, Story said that

> The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognised in *Somerset's Case*, Lofft 1; s. c. 11 State Trials, by Harg. 340; s. c. 20 How. State Trial 79; which decided before the American revolution. It is manifest, from this consideration, that if the constitution had not contained this clause, every non-slave-holding state in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities, and engendered perpetual strife between the different states. The clause was, therefore, of the last importance to the safety and security of the southern states, and could not have been surrendered by them, without endangering their whole property in slaves. The clause was accordingly adopted into the constitution, by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity.[61]

Therefore, in one respect, the fugitive slave clause was an exception to *Somerset*. Without the clause, *Somerset*'s default rule of freedom would have applied to fugitive slaves and operated their freedom. On this score, Story followed James Madison, who said in the Virginia Ratifying Convention that the Fugitive Slave Clause was necessary because, "At present, if any slave elopes to any of those states where slaves are free, he becomes emancipated by their laws."[62] But in another respect, the fugitive slave clause was in full conformity with *Somerset. Somerset* conceded that positive law shielded slavery where its legal protections existed. The fugitive slave clause was itself just such a positive law protection, albeit a partial one, which applied nationwide. Story seized on this principle of *Somerset* when he explained the legitimacy of the fugitive slave clause. "It has been contended by some over-zealous philanthropists that such an article in the constitution could be of no binding force or validity

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of Article IV were not within Congress's power to enforce, except where expressly authorized, as for example with the Full Faith and Credit clause.)

61. *Prigg v. Pennsylvania*, 41 U.S. 539, 612 (1842).

62. James Madison, June 17, 1788, Virginia Ratifying Convention, *Documentary History of the Ratification of the Constitution*, Volume X: Virginia no. 3, p. 1339.

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because it was a stipulation contrary to natural right. But it is difficult to perceive the force of this objection. It has already been shown that slavery is not contrary to the laws of nations. It would then be the proper subject of treaties among sovereign and independent powers."[63] The fugitive slave clause was, therefore, akin to a treaty provision mutually agreed upon by the free and slave states. Although arguably a violation of natural right, the fugitive slave clause was not, therefore, legally invalid because, as *Somerset* itself held, positive law protections (like treaty provisions) could trump natural law proscriptions.[64]

The moderate abolitionists saw in *Somerset* a legally authoritative guide for navigating the many complicated questions presented by the peculiar institution of slavery. It provided a philosophical guide to understanding slavery in America that distinguished the moderates from all the other dominant schools of thought. Against Garrisonian skeptics, it provided them with an authoritative legal precedent for their view that freedom was the natural—and national—default rule. Against the radical abolitionists, however, it provided them with the authority for their view that slavery was legally protected where it existed in the South. Beyond these general statements, it provided a touchstone for a practical, statesmanlike approach to slavery that emphasized noninterference with slavery where it existed, congressional prohibition of extension of slavery into the territories, and national legal respect for slavery beyond its local jurisdictional confines only when express "positive law" arrangements had been made.

4. Pro-Slavery Democrats: *Somerset* and the "New Cornerstone"

Somerset was naturally an oft-used and well-cited case for the abolitionists, but Southern state courts and proslavery apologists turned to the *Somerset* decision with perhaps even more care and attention than their abolitionist counterparts. Unlike the abolitionists, however, the Southerners appeared to have considerably rethought and revised their opinion of the case as time passed. At first, Southerners seemed to mostly accept the case as authoritatively establishing the terms and conditions for legitimate slave ownership. Slavery may have been "odious" in Mansfield's opinion, but if it were supported by "positive law," it had his approval. However, as abolitionists intensified their rhetoric in the 1840s, and as the Republican Party emerged as a serious contender for national offices in the 1850s, all of them citing the *Somerset* opinion as a font of abolitionist

63. Story, Commentaries, 163–64.
64. But see Barnett, note 60 above.

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constitutional thought, and as, at the same time, an explicitly racialist proslavery ideology began to develop in the South, Southerners eventually responded with a full-scale criticism of both Mansfield and his 1772 opinion.

The state courts of Southern, slaveholding states such as Georgia, Kentucky, Louisiana, Maryland, and Mississippi all displayed a marked willingness to embrace Mansfield's opinion, often extensively discussing the case, and citing in full or at least paraphrasing its most memorable phrase, "It is so odious, that nothing can be suffered to support it but positive law." In 1818, the Mississippi State Supreme court declared that "Slavery is condemned by reason and the laws of nature. It exists and can only exist, through municipal regulations, and in matters of doubt, is it not an unquestioned rule, that courts must lean "in favorem vitae et libertatis."[65]

Typically, these courts would not only invoke this rule but also quickly add that through colonial law, state law, and custom, slavery had the requisite "positive law" protection to qualify as legally valid under *Somerset.* As early as 1799, the Maryland Supreme Court cited *colonial law* as sufficient under *Somerset,* to justify slavery in Maryland. After quoting Mansfield's maxim about positive law, the court observed "By a positive law of this state in 1715, then the province of Maryland, the relation of master and slave is recognized as then existing, and all negro and other slaves, then imported, or thereafter to be imported into this province, and all children then born, or thereafter to be born, of such negroes or slaves, are declared to be slaves during their natural lives."[66] In 1820, the Kentucky Supreme Court, in an opinion that stressed the definitive importance of positive law ("the law as it is") and the irrelevance of natural law (the law "as it ought to be"), argued that the *state laws* of Kentucky were all that was required to justify its presence.

> In deciding this question, we disclaim the influence of the general principles of liberty, which we all admire, and conceive it ought to be decided by the law as it is, and not as it ought to be. Slavery is sanctioned by the laws of this state, and the right to hold them under our municipal regulations is unquestionable. But we view this as a right existing by positive law of a municipal character, without foundation in the law of nature, or the unwritten and common law. If, by their positive provisions in our code, we can and must hold our slaves in the one case, and statutory provisions equally positive decide against that right in the other, and liberate the slave, he must, by an authority equally imperious, be declared free. Every argument which

65. *Harry et. al. v. Decker and Hopkins*, 1 Walker 36, 42 (Miss., 1818).
66. *Mahoney v. Ashton*, 4 MD (4 Har. & McH.) 295 (1799).

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> supports the right of the master on one side, based upon the force of written law, must be equally conclusive in favor of the slaves when he can point out in the statute the clause which secures his freedom.[67]

And in 1824, the Louisiana State Supreme Court similarly emphasized the importance of statutes, but also suggested that custom and long practice, eventually regulated by subsequent statutes, could also make slavery legitimate.

> The relation of owner and slave is, in the states of this union, in which it has a legal existence, a creature of the municipal law. Although, perhaps, in none of them a statute introducing it as to the blacks can be produced, it is believed that, in all: statutes were passed for regulating and dissolving it. The issue of a female slave is held to be born in the condition of the mother, the maxim of the Roman law, partus sequitur ventrem, being universally recognized. Indians taken captives in war, have been declared slaves, and the absolute property of the captor; and a kind of temporary slavery has been made the doom of persons of color guilty of certain breaches of the law. 2 *Martin's revisal of N. C. Laws. 2 Martin's digest of the laws of Louisiana,* 102. In most of the states recognizing slavery, laws have been passed to authorise, regulate, or check the emancipation of slaves. In some, as in Pennsylvania, laws have been made to abolish or modify slavery.[68]

These and other Southern state courts thus embraced the *Somerset* decision as vindicating the claims of slaveholders. In every case, they would concede that the "general principles of liberty" frowned upon slavery. But they would then quickly add that under *Somerset*, all that was required to make slavery legal was "positive law", whether colonial law, state law, or custom.

Some critics of the abolitionist movement would retain this approach to *Somerset* into the 1850s. Illinois Senator Stephen Douglas, in announcing his "Freeport Doctrine" during his second debate with Abraham Lincoln in 1858, would cling to the view earlier announced by the Southern state courts. In response to a question put by Lincoln regarding whether the territorial governments could vote to exclude slaves from their midst, Douglas said that they could, because slavery could only exist where it was protected by positive law. "Slavery cannot exist a day or an hour anywhere, unless it is supported by local police regulations. Those police regulations can only be established by the local legislature; and if the people are opposed to slavery, they will elect representatives to that body who will by unfriendly legislation effectually prevent the introduction of it into their midst."[69]

67. *Rankin v. Lydia,* 2 A. K. Marshall 467, 470 (Ky., 1820).

68. *Lunsford v. Coquillon* 2 Mart. (n.s.) 401, 1824 WL 1649 (La., 1824).

69. Robert W. Johannsen ed., *The Lincoln–Douglas Debates of 1858* (Oxford: Oxford University) (1965), 88.

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But the view on *Somerset* that would eventually come to dominate the South in the 1850s was that it had been wrongly decided. The proslavery criticism of *Somerset* in the 1850s revolved around two basic claims, one directed personally at Lord Mansfield, and the other directed at the merits of the decision itself. The first claim was that Mansfield succumbed to popular pressures and departed from settled legal precedent regarding the presence of slavery in England. The second was that Mansfield had been mistaken to claim that slavery was odious and could only be a creature of positive law.

The first criticism of Mansfield's person ran the gamut, questioning his intelligence, courage, and judicial temperament. A representative indictment came from Senator Judah Benjamin of Louisiana. In response to criticisms of the *Dred Scott* decision from Northern Republicans in Congress, in 1858, Benjamin delivered a 3 hour stem-winder on the floor of the Senate, in which he defended *Dred Scott* and criticized Mansfield's role in the *Somerset* decision. Mansfield had departed from the settled legal precedent in England, announced in the 1729 joint opinion of Sir Phillip York and Lord Talbot, which held that slaves were not freed upon coming to England, and that slave masters retained their right to forcefully remove them. Mansfield, however, in a cowardly fit of judicial activism, had undone all of this. "Things thus stood in England until the year 1771, when the spirit of fanaticism, to which I have adverted, acquiring strength, finally operated upon Lord Mansfield, who, by a judgment rendered in the case known as the celebrated Somersett case, subverted the common law of England by judicial legislation. . . I say this was judicial legislation. I say it subverted the entire previous jurisprudence of Great Britain."[70] Benjamin contrasted Mansfield with Lord Stowell who, in the 1827 *Slave Grace* case before the King's Bench, found that a slave taken to England and then returned to a slave state resumed her status as a slave. Stowell would question the claim, later (although inaccurately) attributed to Mansfied, that English air was "too pure an air to breathe" for a slave. Benjamin declared:

> I make these charges in relation to that judgment [Somerset], because in them I am supported by an intellect greater than Mansfield's; by a judge of resplendent genius and consummate learning. . . I refer to Lord Stowell. . . It was pretended in the argument that the slave Grace was free, because she had been carried to England, and it was said, under the authority of Lord Mansfield's decision in the Sommersett case, that, having once breathed English air, she was free; that the atmosphere of that favored kingdom was too pure to be breathed by a slave. Lord Stowell, in answering that legal argument, said

70. Cong. Globe, 35th Cong., 1st Sess. 1067 (1858).

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> that after painful and laborious research into historical records, he did not find anything touching the peculiar fitness of the English atmosphere for respiration during the ten centuries that slaves had lived in England.[71]

Mansfield, in the opinion of Benjamin and other Southern apologists for slavery, such as John Codman Hurd and Thomas Cobb, thus buckled under the emotional pressures created by the case and, in contravention of settled English precedent (later restored by wiser jurists), and in violation of the limited role of a judge, decreed from the bench several wildly inappropriate statements of abolitionist sentiment.

Not only were Mansfield's statements inappropriate for a judge to make, they were also incorrect. Southern apologists for slavery took direct aim at Mansfield's fateful claim that slavery was "so odious, that nothing can be suffered to support it, but positive law." In particular, they challenged the claim, implicit in Mansfield's opinion and championed by the Republican Party, that freedom was the natural default rule of common law whereas slavery was its conventional and local exception. The Supreme Court of Georgia in 1851 advanced the argument that legal title to property in slaves was indistinguishable from all other forms of property, and did not rely on the introduction of positive law any more than any other kind of property.

> "The title to a slave in Georgia now, and under the Colonial Government, is not and was not derived from positive law. The faculty of holding slaves was derived from the Trustees of the Colony, acting under authority of the British Crown, as a *civil* right, in 1751, by an ordinance of that board. Before that time, their introduction was prohibited. The regulation of slave property is as much the province of municipal law, as the regulation of any other property, and its protection equally its obligation."[72]

Property in slaves had been acquired initially not by statutory law but, essentially, by first possession, just like many other kinds of property. "The property in the slave in the planter, became thus just the property of the original captor."[73] Property in slaves, although confirmed and regulated by positive law, did not, contra Mansfield, depend in some fundamental way upon the existence of positive law for its legitimacy. Rather, its legitimacy was bottomed by the sorts of background common law claims, such as first possession and discovery, upon which many other kinds of property were based.

James Thornwell, a Southern Presbyterian minister and outspoken defender of slavery, would take this one step further and announce that

71. Ibid.
72. *Neal v. Farmer,* 9 Ga 555 (Ga. 1851).
73. Ibid.

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the principle of "freedom national, slavery local" implicit in *Somerset* was the exact reverse of the truth and that slavery was, in fact, the natural default rule whereas freedom and abolition were its local, positive law-based exceptions.

> [W]hat 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. It arose, in the progress of human events, from the operation of moral causes; it has been grounded by philosophers in moral maxims; it has always been held to be moral by the vast majority of the race. No age has been without it. From the first dawn of authentic history, until the present period, it has come down to us through all the course of ages. We find it among the nomadic tribes, barbarian hordes, and civilized States. Whatever communities have been organized, and any rights of property have been recognized at all, there slavery is seen. If, therefore, there be any property which can be said to be founded in the common consent of the human race, it is the property in slaves.[74]

Wherever one turned geographically and historically, slavery, not freedom, was the default rule.

Southern treatise writers in the 1850s argued at great length that slavery had been commonplace throughout history and was, therefore, legally blessed everywhere by the laws of nations. Thomas Dew, a Southern historian and president of the College of William and Mary, argued that "looking to the whole world, we may, even now, with confidence assert, that slaves, or those whose condition is infinitely worse, form by far the largest portion of the human race!"[75] Thomas Cobb, a Georgia legal scholar, opined that slavery "was more universal than marriage and more permanent than liberty."[76] And in his 400 page proslavery tome *Southern Institutes*, George Sawyer similarly pointed out the widespread existence of slavery in the Old and New Testaments, ancient Greece and Rome, medieval Europe, England, and America. He concluded that "slaves have been deemed lawful articles of commerce by the customs and laws of every nation" and that therefore the right to own slaves became "in the eyes of

74. James Henley Thornwell, *The State of the Country, Southern Presbyterian Review* (Columbia: Southern Guardian Steam-Power Press, 1861), 13.

75. Thomas Roderick Dew, "Professor Dew on Slavery", in *The Pro-Slavery Argument, as Maintained by the Most Distinguished Writers of the Southern States* (Philadelphia, 1853), 246.

76. Thomas R. R. 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: T. & J. W. Johnson & Co., 1858), xxxv.

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all nations a vested right, as indefeasible by the force of any subsequent contravening custom, as that to any other species of property."[77] And turning to Mansfield's decision in *Somerset,* Sawyer concluded that the basis for Mansfield's decision had, regrettably, not been law, as the law of nations blessed slavery and the rights of owners to take their property where they wished, but rather the judge's own policy judgment about the justness of that law.[78] In Sawyer's view, if Mansfield had but consulted the extensive historic record of slavery in England, and the law of nations more generally, he would have reached a better decision. But as he had not done so, "this case, as reported, has but little weight of authority upon any principle whatever."[79]

The final step toward attempting to undo the grip Mansfield's decision had on Northern and Southern statesmen was taken by writers and politicians such as Thomas Cobb and Alexander Stephens, who sought to argue that slavery, far from being morally "odious," was in fact a positive good. Cobb, noting the influence Mansfield's opinion had had even on Southern state courts and slaveholders more generally, observed, "That slavery is contrary to the law of nature, has been so confidently and so often asserted, that slaveholders themselves have most generally permitted their own minds to acknowledge its truth unquestioned. Hence, even learned judges in slave-holding States, adopting the language of Lord Mansfield, in Somerset's case, have announced gravely, that slavery being contrary to the law of nature can exist only by force of positive law."[80] Cobb then proceeded to explain in more than fifty pages how and why Mansfield's critical claims about slavery were inapplicable to the American system which, founded upon the mental and moral inferiority of the African race, and designed for the improvement and happiness of the

77. George Sawyer, *Southern Institutes; Or, an Inquiry into the Origin and Early Prevalence of Slavery and the Slave-Trade: With an Analysis of the Laws, History, and Government of the Institution in the Principal Nations, Ancient and Modern, from the Earliest Ages down to the Present Time. with Notes and Comments in Defence of the Southern Institutions* (Philadelphia, J. P. Lippincott & Co., 1858), 28–29.

78. Ibid, 322. "It seems to have been decided, not as a question of right, founded upon law, but either upon some defect in the return or as a question of conscience, good morals, and sound public policy in England. As the case is reported, it is difficult to see the consistency of the reasoning of the court. We submit the question to more experienced jurists, whether it is within the province of the judiciary of any government to decide upon questions of public policy, farther than such policy may be indicated by the spirit of the law, or to decide questions of conscience, farther than their office extends under the law as conservators of public morals; that whenever they overreach these limits, they usurp the legislative power of the government."

79. Ibid, 323.

80. Cobb, *An Inquiry,* 5.

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race, was in fact in accordance with natural law. "The history of the negro race then confirms the conclusion to which an inquiry into the negro character had brought us: that a state of bondage, so far from doing violence to the law of his nature, develops and perfects it; and that, in that state, he enjoys the greatest amount of happiness, and arrives at the greatest degree of perfection of which his nature is capable. And, consequently, that negro slavery, as it exists in the United States, is not contrary to the law of nature."[81] Alexander Stephens as vice president of the new Confederacy would later adopt these sentiments as his own in his famous "Cornerstone Address":

> "Our new government is founded upon exactly the opposite idea; its foundations are laid, its corner-stone rests, upon the great truth that the negro is not equal to the white man; that slavery subordination to the superior race is his natural and normal condition. This, our new government, is the first, in the history of the world, based upon this great physical, philosophical, and moral truth."[82]

Far from being an odious, peculiar institution supported only by positive law, as the Southern state courts had conceded in the 1820s, slavery was, in the judgment of Southern historians, statesmen, and courts in the 1850s, the natural state in which humans had happily lived. Mansfield's dicta, at first used by the South as a source of limited protection for slavery where it existed, had finally been turned on its head.

Conclusion

Lord Mansfield's 1772 *Somerset* opinion received an extraordinary amount of attention in the United States from elite, intellectually oriented activists, federal and state court judges, and United States senators and congressmen throughout the nineteenth century. Behind only the Declaration of Independence and the United States and state constitutions in terms of frequency of citation in this period, *Somerset v. Stewart* was used as a leading authority by all four major schools of thought on the subject of slavery in America.[83] For radical abolitionists, *Somerset* stood for the wholesale abolition of slavery throughout England and the colonies, and an interpretive "presumption of liberty" not easily rebutted by mere custom or imprecise

81. Ibid., 51.

82. Alexander Stephens, Cornerstone Speech (March 21, 1861), in Henry Cleveland, *Alexander H. Stephens, in Public and Private: With Letters and Speeches, Before, During, and Since the War* (Philadelphia: National Publishing Company, 1866), 717–29.

83. Wiecek, *The Sources of Antislavery Constitutionalism in America,* 20.

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legislation. For the Garrisonians, it stood for a narrow decision that provided habeas corpus relief for slaves in danger of being forcefully removed from England, but left intact the scurrilous protection of slavery where it enjoyed even a modicum of "positive law" protection. For the moderate abolitionists, it stood for a complexly balanced regime of "freedom national, slavery local," that implied nonintervention with slavery where it existed, nonextension of slavery into free territories, and nationwide nonrecognition of slavery except in cases of expressly stipulated agreements. And for proslavery Southerners, it stood in the 1820s and 1830s for a protective shield behind which slavery could legitimately exist if rooted in "positive law," but came to stand in the 1850s for a cowardly case of judicial activism that failed to appreciate how slavery was, far from "odious," the natural and default state of mankind.

Tracing the influence of *Somerset* on the course of the slavery debate in nineteenth century America suggests the potent symbolic power that this case held for those concerned with the slavery question. At different times, it stood for the triumph of courageous moral idealism, narrow and careful protection of slavery, balanced statesmanlike resolution of an intricate moral/political puzzle, and weak-kneed, weak-minded capitulation to popular sentiment. Although some scholars have suggested that the arc of *Somerset's* career throughout nineteenth century America is best told in the basic terms of whether its core holding was "accepted" or "rejected" by Northern and Southern state courts, closer analysis reveals that a deeper, richer, and more nuanced story can be told about how four key jurisprudential schools fought tooth and nail over how to understand its very meaning. However variously interpreted, Mansfield's 1772 opinion, although in fact technically narrower and less ambitious than perhaps any of these renderings, had in just a few sentences of dicta, unleashed a wild fury of interpretive creativity that would continue even deep into the Civil War. This is a testament to the power of the sentiments raging over the slavery question in antebellum America. But it is also an indication of the somewhat open-ended quality of the opinion itself, which although technically narrow, had been variously rendered in at least five different, publicly available transcripts, and through its memorable and general phrases, left open to opponents and defenders of slavery alike, the seeds of an intense and furious debate.

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